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PUNITIVE LIABILITY  
OF HEADS OF BUSINESS  
IN THE EU:  
A COMPARATIVE STUDY

*Edited by*  
KATALIN LIGETI AND ANGELO MARLETTA



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## CHAPTER I

### INTRODUCTION

*Prof. Katalin Ligeti and Dr Angelo Marletta \**

SUMMARY: 1. Background. – 2. Structure, objectives and methodology. – 3. Volume overview.

#### **1. Background**

In recent years, the individual liability of senior managers has been rediscovered as an important element in building a multifaceted and effective strategy for fighting economic and financial crime.

Indeed, the commission of corporate-related offences is often framed in a broader context of corporate misconduct, either because they are deliberately conceived, incentivised or even instigated as part of the corporate policy or because they are the result of a reprehensible lack of supervision by the senior management.

Establishing the individual liability of low- and mid-level employees, along with corporate criminal liability, has delivered only partially satisfactory responses to economic and financial crime. Thus, especially in the aftermath of the financial crisis, the emergence of the limits of punitive strategies focused only on the legal entity or the mere material author of the offence has triggered a renewed interest in the individual liability of senior corporate officials.

This renewed interest is currently not mirrored in the protection of the Union's financial interests (PIF) legal framework.

Actually, the very first instrument approximating the definition of the offences against EU financial interests (the 1995 PIF Convention<sup>1</sup>) obliged the Member States 'to take all the necessary measures' to hold

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\* University of Luxembourg.

<sup>1</sup> Convention drawn up on the basis of Article K.3 of the Treaty on the European

criminally liable ‘the heads of business or any persons having power to take decisions or exercise control’ when a PIF offence was committed ‘by a person under their authority acting on behalf of the business’ (Art. 3). The provision was not the object of enthusiastic implementation; on the contrary, most Member States appeared generally reluctant to introduce an *ad hoc* form of responsibility on the matter, objecting that the existing national rules on criminal participation and complicity would have adequately covered the responsibility of corporate owners and directors in similar cases.

Since then, the level of approximation on the issue has remained rather low and the special provision on the liability of company directors has not been recast in the new PIF Directive.<sup>2</sup> This notwithstanding, several policy documents have in the meantime highlighted the potential detrimental effect of such a ‘normative gap’ on coherent PIF enforcement.<sup>3</sup>

Against this background, testing the adequacy of national rules on criminal participation and complicity in regard to heads of business represented the main academic and policy challenge underlying the present study.

## 2. Structure, objectives and methodology

The study was conducted between April 2017 and April 2018, with essential contributions by reputed academics from the selected jurisdictions: Prof. Raimo Lahti (Finland), Prof. Juliette Tricot (France), Prof. Marin Waßmer (Germany), Prof. Michiel Luchtman, Dr Mark Hornman, Dr András Csúri (The Netherlands) and Dr Witold Zontek (Poland).

The overarching objectives of the present study are threefold: analyse and systematise the current punitive liability of heads of business in the selected jurisdictions (Finland, France, Germany, The Netherlands

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Union on the protection of the European Communities’ financial interests, in OJ C 316, 27.11.1995, 49 ff.

<sup>2</sup> Directive (EU) 2017/1371 on the fight against fraud affecting the Union’s financial interests by means of criminal law, in OJ L 198, 28.7.2017, p. 29 ff (hereinafter: ‘PIF Directive’).

<sup>3</sup> See the Report from the Commission Implementation by Member States of the Convention on the Protection of the European Communities’ financial interests and its protocols: COM (2004) 709 final; similarly, the Second Report from the Commission on the Implementation of the Convention on the Protection of the European Communities’ Financial Interests and its Protocols: COM (2008) 77 final and, the Staff Working Document SWD (2012) 195 final accompanying the Proposal for the new ‘PIF Directive’.

and Poland); enhance judicial protection of EU financial interests by promoting comparative reflection; and systematise and design common EU legislative standards on the punitive liability of heads of business.

The study is structured in two parts: comparative and normative.

The comparative part provides an overview of the national rules applicable to establishing the punitive liability of heads of business for offences committed by their employees, with a particular focus on the provisions on perpetration and participation under the general part of criminal law. To this end, five national reports have been drafted on the basis of an extensive questionnaire (Annex I) designed and discussed at the first meeting of the working group.

The normative part delivers a set of policy recommendations on the potential EU legal standards for the establishment of such liability and aspires to initiate a structured debate at policy level.

### **3. Volume overview**

The study's comparative part includes the national reports (Chapters 2-6), the comparative report (Chapter 8) and a transversal report specifically focused on the safeguards and the judicial protection of the head of business (Chapter 7).

The national reports, following the scheme of the annexed questionnaire, provide a mapping of the national frameworks under six conceptual clusters: the criteria and the justification for the criminal law responsibility of the heads of business, the relationship of such responsibility with the general principles of criminal law, its concept and scope, the possible defences, the applicable sanctions and finally the relationship with punitive administrative law.

The outcome of such analysis, synthesised and tested in the comparative report, highlighted the existence of rather different approaches that may lead to significant disparities from one Member State to another and to a 'deterrence gap' potentially detrimental to the protection of EU financial interests. Such conclusions constitute the background for the normative part and the policy recommendations.

The policy recommendations (Chapter 9) are diversified and developed along three possible policy options, each one of them entailing different legislative ambitions and a different potential impact on the national systems.

The options considered and developed are: the maintenance of the current scenario (Option A); the introduction of a criminal offence for seriously negligent supervision under Art. 83 para 2 TFEU (Option

B); and the introduction of an administrative offence for negligent supervision on the basis of Art. 325 para 4 TFEU (Option C).

Under each policy option, specific recommendations are provided in order to ensure the effectiveness and coherence of the liability framework with fundamental rights and the general principles of criminal law. The feasibility of each option has also been assessed and careful consideration given to the need to ensure the compatibility and complementarity of any new legislative action in the PIF domain with the start-up phase of the European Public Prosecutor's Office.

## CHAPTER II

### FINLAND NATIONAL REPORT

*Prof. Raimo Lahti*

SUMMARY: 1. Introduction. – 1.1. Debate on the implementation of Art. 3 of the PIF Convention. – 1.2. Debate on corporate criminal liability. – 1.3. Significant cases involving the liability of heads of business. – 2. Relationship with general principals of criminal law. – 2.1. General information on the system of perpetration and complicity. – 2.2. General information on omission liability. – 2.3. Duty to report an offence. – 2.4. General information on strict liability. – 2.5. Special rules on liability. – 3. Concept and scope of the criminal law responsibilities of heads of business. – 3.1. Liability of heads of business (general information). – 3.2. Personal scope of the liability. – 3.3. Duties to control and supervise. – 3.4. Violation of supervisory duties and the commission of an offence. – 3.4.1. Causal link. – 3.4.2. *Mens rea*. – 3.5. Delegation of control and supervisory duties: scope and limits. – 3.6. Fulfilment of supervisory duties and disciplinary powers. – 3.7. Liability and collective decisions. – 3.8. Relationship with corporate liability. – 3.8.1. Triggering persons. – 3.8.2. Concurrence and accumulation of liabilities. – 3.9. Compliance programmes. – 4. Defences. – 4.1 Effective powers of supervision and control and liability. – 4.2. Delegation of supervisory powers. – 4.3. Compliance programmes. – 4.4. Third party advice, external auditing and liability of heads of business. – 5. Liability of heads of business and sanctions. – 5.1. Criminal and punitive sanctions. – 5.2. Other sanctions and measures. – 5.3. Sentencing criteria. – 5.4. Confiscation. – 5.5. Enforcement practice. – 6. Relationship with punitive administrative law. – 6.1. Parallel criminal and administrative proceedings against the head of business. – 6.1.1. Trans-procedural use of evidence against the head of business. – 6.1.2. Admissibility and use of foreign evidence against the head of business. – 6.2. Multiple and parallel criminal and administrative proceedings against the legal person and the head of business. – 6.2.1. Trans-procedural use of evidence. – 6.2.2. Admissibility and use of foreign evidence. – 6.2.3. Right to silence of the head of business in proceedings against the legal person. – Annex I. – Annex II.

## 1. Introduction

### *1.1. Debate on the implementation of Art. 3 of the PIF Convention*

When the 1995 Convention on the protection of European communities' financial interests was nationally implemented in Finland in 1998, no specific provision on the liability of heads of business was introduced. In the Government Proposal, it was stated that the Convention did not require a more extensive liability for the liability of heads of business than what was valid law in Finland: the provisions on complicity in Chapter 5 of the Criminal (Penal) Code (CC) should also be applied in relation to the heads of business.<sup>1</sup>

The statement of the Government Proposal was deficient, because the doctrine and case law applicable to the liability of the directors of corporations were not restricted to the use of complicity provisions but were developed into principles and rules of *sui generis* (see below). In 1995, two such partial revisions of the Criminal Code were carried out as part of the total reform of the Code, and both were significant for the doctrine on the liability of heads of business. Firstly, corporate criminal liability was introduced by the enactment of Chapter 9 of the Criminal Code (Act. No. 743/1995; cited in Appendix 1). Secondly, the criminal liability within legal persons—i.e. the principles governing the allocation of individual criminal responsibility, especially the liability of heads of business—was partly regulated in 1995 (Act No. 578/1995), when special provisions on such liability were given for labour and environmental offences (CC 47:7; 48:7).

Considerations relating to procedural safeguards were not involved in the national implementation of the 1995 Convention.

### *1.2. Debate on corporate criminal liability*

The legislative works for drafting the partial revisions of the Criminal Code in 1995 and for the total reform of the Code mentioned above (Part 1.1) illustrate the policy debate.

Economic criminality became a source of concern for the authorities for the first time in the late 1970s. At that time, tax fraud was regarded as the most common economic crime. It was estimated that tax fraud led to a 5–10 per cent reduction in the collection of taxes.

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<sup>1</sup> Government Proposal 45/1998, 13. At that time, the provisions on complicity were in force according to their original content in the Penal Code of 1889.

In 1980, the Ministry of Justice established a broad-based project organisation to prepare a proposal for a total reform of the Criminal Code of 1889 (39/1889). The goal was to give the highest priority to reassessment of the provisions on economic crime. Two years later, the Ministry of Justice established a separate working party to examine the factual phenomena of economic crime as well as the material legislation and control machinery on economic crime; the working group was also entitled to make proposals for the improvement of the prevention, supervision and investigation of economic crime.

These preparations led to various government measures to tighten control of economic crime. On the level of legislation, the most important action was the revision of provisions on economic crime in gradual stages of the total reform of the Criminal Code in the 1990s (1990, 1995 and 1999).<sup>2</sup> For instance, completely new provisions on subsidy offences and business offences were incorporated into Chapters 29 and 30 of the revised Criminal Code in 1990 (769/1990). A major legislative reform dealt with the introduction of corporate criminal liability in 1995 (in Chapter 9 of the Criminal Code: 743/1995), as well as provisions of labour and environmental offences (Chapters 47 and 48 of the Criminal Code: 578/1995). New clarifying provisions were also enacted on the individual criminal responsibility of directors in a corporate body in Chapters 47 and 48 of the Code (CC 47:7; 48:7).

According to the Finnish Criminal Code, a corporation may be sentenced to a corporate fine for certain enumerated, mostly economic offences. The main reasons for the introduction of this type of corporate liability, as expressed in the legislative drafts, can be summarised in the following way: the social significance of corporate activity; the accumulation of actions and default; the lack of proportionality between offences and punishment; the difficulties in allocating individual criminal responsibility; the transfer of responsibility in hierarchical relationships; the need to direct effective sanctions in an equitable manner; and the idea that it is fair to direct reproach at a corporate body when an offence has been committed in the operations of the corporation.<sup>3</sup>

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<sup>2</sup> An unofficial English translation of the Criminal (Penal) Code, as it was in force in 2015 (766/2015), is available at the website of the Ministry of Justice: [https://www.finlex.fi/fi/laki/kaannokset/1889/en18890039\\_20150766.pdf](https://www.finlex.fi/fi/laki/kaannokset/1889/en18890039_20150766.pdf).

<sup>3</sup> As to a more detailed review, see M Tolvanen, 'Trust, Business Ethics and Crime Prevention – Corporate Criminal Liability in Finland' (2009) *Fudan Law Journal* 99.

It should be noted that the allocation of individual criminal responsibility has in practice been the primary form of corporate complicity (or liability linked to organisational crime) in relation to the criminal liability of the corporation itself. This state of affairs can be explained by the facts that corporate criminal liability is still a relatively young construction in Finland and it fragmentarily covers offences to which it is applicable. However, it is increasingly applied to economic and financial offences.

Corporate criminal liability was introduced in 1995 (see above, Part 1.1). Corporate criminal liability is restricted to specific offences, mostly economic offences. PIF offences are covered by the provisions on corporate criminal liability, including, for example, subsidy offences except when it is a question of subsidies granted for personal consumption (CC 29:6–8, 9.2, 10), tax fraud when related to taxes collected on the behalf of European communities (CC 29:1–2, 9.1, 10), active corruption of officials or members of Parliament (CC 16:13–14b, 18) and money laundering (CC 32:6–7, 9, 14).

Administrative (penal) liability of legal persons is provided to cover specific infringements and, exceptionally, (criminal) offences. Finnish law does not contain a clear and uniform system or definition of administrative sanctions or administrative penal law. The field of administrative sanctions is quite heterogeneous, and sector-specific rules are laid down in laws governing the use of public authority.<sup>4</sup> There are, however, several types of such sanctions already in use, but a comprehensive systematic review and rethinking of them is still under investigation, most recently (2018) in a working group of the Ministry of Justice.

A typical feature of (punitive) administrative sanctions is that most can be imposed on legal persons as well (corporate bodies, etc.). However, the legislation is not coherent in this case either. Provisions do not always indicate explicitly whether it is possible to impose sanctions on both legal and natural persons.

Normally, a criminal sanction and a punitive administrative sanction (penalty) are not established for parallel use. However, fraudulent tax evasion has traditionally been an exception. Accordingly, minor violations of fraudulent tax evasion have been sanctioned (including when

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<sup>4</sup> See R Lahti, ‘Towards a Principled European Criminal Policy: Some Lessons from the Nordic Countries’ in J B Banach-Gutierrez and C Harding, *EU Criminal Law and Policy* (Routledge 2016), 56–69. See also L Halila and V Lankinen, ‘Administrativa sanktionsavgifter i nordisk kontext’ (2014) *JFT* 305, 325.

it is a question of a criminal offence) by the tax authority: a penalty fee (called a tax or customs increase) is imposed on the taxpayer (either a legal or natural person) by this administrative public authority. As mentioned above, the provisions on tax fraud (CC 29:1–3) also cover tax frauds which are related to taxes collected on behalf of European communities.

In 2013, in a separate legal Act (781/2013), a prohibition of double jeopardy was introduced for tax fraud cases (i.e. a prohibition against the cumulative use of criminal punishment and a punitive administrative fee). So, as a rule, neither may charges be brought nor court judgment passed if a punitive tax or customs increase has already been imposed on the same person in the same case (CC 29:11).

When the Market Abuse Regulation (EU No. 596/2014) and the Market Abuse Directive (2014/57/EU) were nationally implemented in Finland in 2016, the scope of punitive administrative sanctions for security markets' offences (which are regulated in Chapter 51 of the Criminal Code) was dramatically enlarged. The Financial Supervisory Authority (FSA) may exercise supervisory powers in respect of financial markets. The FSA imposes an administrative fine for a failure to comply with or a violation of provisions in section 38 of the Act on the Financial Supervisory Authority (878/2008).

Already before the 2016 reform of market abuse legislation, administrative penalties could in quantity be several millions of euros and could be imposed for a restraint on competition (see the Competition Act of 948/2011 with the amendments up to the Act of 1078/2016). It should be noted that this competition infringement is not criminalised in Finland, and so only the administrative penalty can be imposed.

It should be noted that the introduction of corporate criminal liability was a part of the total reform of the Finnish Criminal Code and one of the major objectives of that reform was to reassess the punishability and penal regulation of economic and corporate crime.

### *1.3. Significant cases involving the liability of heads of business*

As to the examples of case law, see below.

## 2. Relationship with general principals of criminal law

### 2.1. General information on the system of perpetration and complicity

Chapter 5 of the Finnish Criminal Code (Act No. 515/2003) includes provisions on attempt and complicity (see below, cited in Appendix 2). The complicity provisions substantially follow the model of the German Criminal Code. In the recodification of the Finnish criminal law in 1990–2003, the complicity provisions were mainly retained such as they had been in force since the enactment of the Criminal Code in 1889.

The Finnish provisions (CC 5.3–7) differentiate between principals and co-perpetrators on the one hand, and inciters (instigators) and accomplices (abettors) on the other. This differentiated model of participation is in line with the emphasis on the expressive or symbolic function of criminal law. This kind of punishment theory is strongly supported in Finnish and Scandinavian criminal policy. The authoritative disapproval expressed by criminal law should be differentiated according to the various roles of participants.

The indirect principal (commission of an offence through an agent) is also a type of perpetrator, thus a new clarifying provision (CC 5:4) was added to the Code in 2003 concerning the indirect principal. The penal scale for an abettor is mitigated. The system of ‘borrowed criminality’ (*Akzessoritätsprinzip*) is applied in the participation doctrine, i.e. in both types of participation, instigation and abetting, the liability is of an accessorial or derivative nature.

Sections 3–8 in Chapter 5 of the Criminal Code apply to two or more individuals acting in concert in the commission of the offence. The provisions in CC 5:3–6 define the different forms of participation as follows:

- CC 5:3 on *co-perpetration*. If two or more persons have committed an intentional offence together, each is punishable as an offender. The term ‘committed’ has been interpreted extensively in juridical practice. In the legal literature, it has been recommended to apply the German doctrine of ‘control over crime’ (*Tätherrschaft*) in drawing the line between co-perpetration and accomplice.<sup>5</sup>

- CC 5:4 on commission of an offence through an agent, i.e. *indirect principal* (*mittelbare Täterschaft*). A person is sentenced as

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<sup>5</sup> See D Frände, *Yleinen rikosoikeus* [General Criminal Law] (Edita, Helsinki 2012) 245–246.

an indirect principal if he has committed an intentional offence by using, as an agent, another person who cannot be punished for the said offence due to the lack of criminal responsibility or intention or due to another reason connected with the conditions for criminal liability.

It should be noted that if the immediate actor fulfils the conditions of criminal responsibility and is thus punishable for the offence, the concept of indirect principal and CC 5:4 are not applicable, in contrast to many other legal orders (such as the German Criminal Code). This fact does not exclude that such a commission of an offence through an agent could trigger a perpetrator's responsibility (by interpreting 'commission' extensively).

– CC 5:5 on *instigation*. A person who intentionally persuades another person to commit an intentional offence or to make a punishable attempt at such an act is punishable for incitement to the offence as if he were the offender.

– CC 5:6 on *aiding and abetting (accomplice)*. A person who, before or during the commission of an offence, intentionally furthers the commission by another of an intentional act or of its punishable attempt, through advice, action or otherwise, shall be sentenced for abetting on the basis of the same legal provision as the offender. The sentence is determined in accordance with a mitigated (->¾) penal scale.

According to the legislative drafts and precedents of the Supreme Court (KKO 2009:87 and KKO 2015:10 concerning aiding and abetting fraud or dishonesty by a debtor, respectively), an active act or omission by the accomplice does not need to be a necessary precondition for the consequence; furthering the probability of the commission of the offence is enough. Neither is a special intent or specific direction required: the applicable lowest level of intention is defined in the general provision on intention (CC 3:6) by using a probability assessment.<sup>6</sup>

– Incitement to punishable aiding and abetting is punishable as aiding and abetting.

There are no legal provisions or legal practice as to whether the complicity provision should also be applied by analogy in the field of punitive administrative law. Because such provisions are missing, a unified system of participation should be applicable.

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<sup>6</sup> As for the intention in Finnish criminal law, see Jussi Matikkala, 'Nordic Intent' in Kimmo Nuotio (ed.), *Festschrift in Honour of Raimo Lahti* (Forum Iuris, Helsinki 2007) 221–234.

## 2.2. General information on omission liability

After the revision of the general part of the Criminal Code in 2003, a special provision on omission liability was included in Chapter 3 of the Code (CC 3:3):

### **Chapter 3, section 3 – The punishability of omission (515/2003)**

(1) An omission is punishable if this is specifically provided in the statutory definition of an offence.

(2) An omission is punishable also if the offender has neglected to prevent the causing of a consequence that accords with the statutory definition, even though he or she had had a special legal duty to prevent the causing of the consequence.

Such a duty may be based on:

- (a) an office, function or position,
- (b) the relationship between the offender and the victim,
- (c) the assumption of an assignment or a contract,
- (d) the action of the offender in creating danger, or
- (e) another reason comparable to these.

Section 1 defines the punishability of ‘genuine’ omission and section 2 derivative omission (commission by omission: *unechter Unterlassungsdelikt*). The latter is significant here. The definition of the prerequisites for derivative omission liability is vague and therefore problematic from the point of view of the principle of *lex certa*. In the *travaux préparatoires*, the introduction of new legal definitions into the general part of the Criminal Code—not only regarding omission, but other prerequisites of liability—was regarded as an improvement in relation to the earlier state of affairs when no legal definition existed. It is also noteworthy that it must be a question of an omission of a special legal duty to prevent the causing of the consequence (concerning a so-called ‘result of offence’).

The types of special legal duties have been defined in the provision (CC 3:3.2), though very generally—for example, by saying that such a duty may be based on a function or position (point a) or on another reason comparable to that specifically mentioned in the section (point e).

When assessing the causal link required between the omission and the commission of an offence (consequence), the formula of condition *sine qua non* is commonly used: the omission O of the legal duty in question is considered to be causal for result R if R would not have occurred but for O. The probability test of this assessment should qualify very near certainty.

The *mens rea* (imputability) requirement for omission liability is determined by the type of offence in question, and thus depends on

the statutory definition of the offence in the special part of the criminal law. Chapter 3, section 5, subsection 2 of the Criminal Code prescribes that ‘unless otherwise provided, an act referred to in the Code is punishable only as an intentional act’. Intent and negligence are the basic forms of imputability (CC 3:5.1), although negligence is divided into ‘normal’ negligence and gross negligence (CC 3:7).

In the field of punitive administrative law, the same principles which are valid in criminal law and criminal procedural law should to a great extent be followed. The Constitutional Law Committee of Parliament has a key role in the legislative process to oversee that relevant human rights obligations and constitutional rights are taken into account in final drafting. In its practice, it is emphasised that the regulation on administrative sanctions should be proportionate, for example. Issues which are related to proportionality include sanctioning of very minor misconducts and the scaling of sanctions based on the severity of the conduct.<sup>7</sup> Although the principle of legality and legal certainty (*lex certa*) in criminal cases does not, as such, apply to administrative sanctions, the principle of *nulla poena sine lege* cannot be ignored generally in such regulations. This provides that a sanction’s provisions must define the punishable conduct and the sanction with sufficient definiteness. It must emerge from the provisions that violating the statutes may be sanctioned. In addition, sanctioned acts and negligent behaviours must be described by law in order to identify them.<sup>8</sup> However, the requirement of *mens rea* (personal guilt, blameworthiness) is in punitive administrative law weaker and not followed without exception.

### 2.3. Duty to report an offence

There is no general provision about the duty to report an offence and the criminal consequences for the failure to do so. When the Rome Statute of the International Criminal Court was nationally implemented in Finland in 2008 (212/1998), a penal provision on failure to report the international offence (genocide, crimes against humanity and war crimes) of a subordinate was included in Chapter 11 of the Criminal Code (CC 11:13). There is also a penal provision on failure to report a serious offence (CC 15:10: 563/1998), but its prerequisite

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<sup>7</sup> E.g. Constitutional Law Committee 58/2010.

<sup>8</sup> E.g. Constitutional Law Committee 60/2010 and Constitutional Law Committee 74/2002.

is that there is still time to prevent the offence (i.e. the offence is not yet completed).

#### *2.4. General information on strict liability*

Strict liability for criminal offences is not allowed in Finnish law. Intent and negligence are prerequisites for criminal liability (CC 3:5.1). The requirement of personal guilt or blameworthiness in criminal law is in recent legal literature drawn from the constitutional right of the inviolability of human dignity.<sup>9</sup>

The requirement of *mens rea* (personal guilt, blameworthiness) is in punitive administrative law weaker and not followed without exception (see above, Part 2.2). A recent legislative example concerns the penalty fee in taxation (see above, Part 1.2). The Constitutional Law Committee of Parliament accepted in its statement that such a tax increase can be imposed irrespective of the negligence of the taxpayer under the condition that the threshold for waiving the penalty fee is not too high and the discretion of the tax authority is bound by law.<sup>10</sup>

#### *2.5. Special rules on liability*

See the part on administrative liability in section 1.2.

Normally, a criminal sanction and an administrative sanction are not established for parallel use. However, fraudulent tax evasion has traditionally been an exception. Accordingly, minor violations of fraudulent tax evasion have been sanctioned (including when it is a question of a criminal offence) by the tax authority: a penalty fee (called a tax or customs increase) is imposed on the taxpayer (either a legal or natural person) by this administrative public authority. As mentioned above, the provisions on tax fraud (CC 29:1–3) also cover tax frauds which are related to taxes collected on behalf of European communities.

In 2013, a separate legal act (781/2013)—a prohibition of double jeopardy—was introduced for tax fraud cases (i.e. a prohibition against the cumulative use of criminal punishment and an administrative penal fee). So, as a rule, neither may charges be brought nor court judgment

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<sup>9</sup> E.g. D Frände, *Yleinen rikosoikeus* (n 11), 165.

<sup>10</sup> Constitutional Law Committee 39/2017.

passed if a punitive tax or customs increase has already been imposed on the same person in the same case (CC 29:11).

### **3. Concept and scope of the criminal law responsibilities of heads of business**

#### *3.1. Liability of heads of business (general information)*

As mentioned above (Part 1.2), new clarifying provisions were also enacted on the individual criminal responsibility of directors in a corporate body into Chapters 47 and 48 on labour and environmental offences of the Criminal Code in 1995, in connection with the partial reform of the whole Code CC 47:7; 48:7). Their content is as follows:

##### **Chapter 47, section 7 – Allocation of liability (578/1995)**

Where this Chapter provides for punishment of the conduct of an employer or representative thereof, the person into whose sphere of responsibility the act or omission belongs shall be sentenced. In the allocation of liability due consideration shall be given to the position of said person, the nature and extent of his or her duties and competence and also otherwise his or her participation in the origin and continuation of the situation that is contrary to law.

##### **Chapter 48, section 7 – Allocation of liability (578/1995)**

Where this Chapter provides for punishment of conduct, the person into whose sphere of responsibility the act or omission belongs shall be sentenced. In the allocation of liability due consideration shall be given to the position of said person, the nature and extent of his or her duties and competence and also otherwise his or her participation in the origin and continuation of the situation that is contrary to law.

A more general provision on the allocation of individual liability was included in the reformed chapter on attempt and complicity in 2003 (CC 5:8: ‘Acting on behalf of a legal person’, cited in Appendix 2).

The guidance given in those provisions is rather vague: ‘[I]n the allocation of liability due consideration shall be given to the position of that person, the nature and extent of his duties and competence and also otherwise his participation in the arising and continuation of the situation that is contrary to law’. The provision in CC 5:8 is, however, clear when prescribing that the person who exercises actual decision-making power in the legal person (*faktischer Geschäftsführer*) is to be considered equal to the member of a statutory body or management of a corporation.

It is noteworthy that these special provisions on the allocation of lia-

bility should be interpreted in coherence with the general provision on derivative omission (CC 3:3.2; see above, Part 2.2).

### *3.2. Personal scope of the liability*

The provision of Chapter 5, section 8 of the Criminal Code defines subjective scope in the following way: ‘A member of a statutory body or management of a corporation, foundation or other legal person, a person who exercises actual decision-making power in the legal person or a person who otherwise acts on its behalf in an employment relationship in the private or public sector or on the basis of a commission [may be sentenced for an offence committed in the operations of a legal person...].’

This provision, along with the provisions of CC 47:7 and CC 48:7, leaves the subjective scope open. According to the doctrine and case law, it is important to take into consideration—except in the case of the general provision on derivative omission (CC 3:3.2)—the acts and other regulations concerning the corporation, foundation or other legal person in question: how the duties of various statutory bodies or management are prescribed. For example, as to limited liability companies, the following provisions in the Act of 624/2006 defining the duties of the board of directors and managing director are important.

The Board of Directors shall see to the administration of the company and the appropriate organisation of its operations (general competence). The Board of Directors shall be responsible for the appropriate arrangement of the control of the company accounts and finances (Chapter 6, section 2, subsection 1).

The Managing Director shall see to the executive management of the company in accordance with the instructions and orders given by the Board of Directors (general competence). The Managing Director shall see to it that the accounts of the company are in compliance with the law and that its financial affairs have been arranged in a reliable manner. The Managing Director shall supply the Board of Directors and the Members of the Board of Directors with the information necessary for the performance of the duties of the Board of Directors (Chapter 6, section 17, subsection 1).

As to the liability of corporate owners, there is no case law available. With reference to the provision of CC 5:8, it may be said that liability is possible when he or she exercises actual decision-making power in the legal person.

When taking into account the general provision on derivative omission (CC 3:3.2), in which an omission of a special legal duty based on,

for example, an office, function and position is required, it can be concluded that the normal employee must have a certain independence. For instance, an account clerk has not been regarded as being in such a position and able to act on behalf of the legal person, but he or she may be an accessory to an accounting offence.

### *3.3. Duties to control and supervise*

It is typical that such a liability of heads of business is based on specific duties to control and supervise activities of the subordinates (for example, with regard to labour safety and environmental regulations). After the introduction of a provision on subordinate omission (CC 3:3.2; see above, Part 2.2), there is a strengthened legal basis for such duties.

### *3.4. Violation of supervisory duties and the commission of an offence*

#### *3.4.1. Causal link*

In principle, there should be such a causal relationship as described in connection with the provision of CC 3:3.2 (see above, Part 2.2), at least when it is a question of a resultant offence.

#### *3.4.2. Mens rea*

The prerequisite of *mens rea* should also be assessed as described in connection with the provision of CC 3:3.2 (see above, Part 2.2). This often means difficulties in proving intent, when the statutory definition of the offence in question requires intent as the form of imputability. The lowest level of intent is to be drawn by using a probability theory.<sup>11</sup> There are court decisions in which the formula ‘must have known...’ is used, but it is often explained to indicate a certain way to draw conclusions from the evidence presented by the prosecutor without referring to the wider scope of intent.

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<sup>11</sup> See Chapter 3, section 6 (515/2003) of the Criminal Code: ‘A perpetrator has intentionally caused the consequence described in the statutory definition if the causing of the consequence was the perpetrator’s purpose or he or she had considered the consequence as a certain or quite probable result of his or her actions.’

### *3.5. Delegation of control and supervisory duties: scope and limits*

The practice of allocation of individual criminal responsibility has been very much in line with the guiding principles of Corpus Juris 2000, as formulated in the follow-up study.<sup>12</sup> See Article 12 of the study.<sup>13</sup>

For instance, in a recent precedent of the Supreme Court (KKO 2016:58), members of the board of directors of a potato flakes factory (limited company) were convicted of impairment of the environment through gross negligence (CC 48:1) when the effluent from the factory's potato sludge contaminated the environment. These directors had omitted their supervisory duties as members of the company's board and were therefore liable for their omission to prevent the contamination (in line with the provisions of CC 3:3.2 and CC 48:7). A factual division of labour between the managing director (having the main responsibility for the factory's operational activities) and board members did not exclude the supervisory duty nor the board members' liability for the consequence.

In another precedent of the Supreme Court (KKO 2007:62), the

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<sup>12</sup> See Mireille Delmas-Marty and John AE Vervaele (eds), *The Implementation of the Corpus Juris in the Member States* (Vol. I, Intersentia, Antwerp 2000) 189–210 (193).

<sup>13</sup> Article 12. – *Criminal liability of the head of business or persons with powers of decision and control within the business: public officers*.

1. If one of the offences under Articles 1 to 8 is committed for the benefit of a business by someone acting under the authority of another person who is the head of the business, or who controls it or exercises the power to make decisions within it, that other person is also criminally liable if he knowingly allowed the offence to be committed.

2. The same applies to any public officer who knowingly allows an offence under Articles 1 to 8 to be committed by a person under him.

3. If one of the offences under Articles 1 to 8 is committed by someone acting under the authority of another person who is the head of a business, or who controls it or exercises the power to make decisions within it, that other person is also criminally liable if he failed to exercise necessary supervision, and his failure facilitated the commission of the offence.

4. In determining whether a person is liable under (1) and (3) above, the fact that he delegated his powers shall only be a defence where the delegation was partial, precise, specific, and necessary for the running of the business, and the delegates were really in a position to fulfil the functions allotted to them. Notwithstanding such a delegation, a person may incur liability under this article on the basis that he took insufficient care in the selection, supervision or control of his staff, or in the general organisation of the business, or in any other matter with which the head of business is properly concerned.

chairman of the board of directors of a housing company was sentenced for negligent homicide when he omitted the duty to take care that snow and ice were removed properly from the roof of a house of the company, with the result that the snow and ice fell onto a pedestrian and caused his death. The Supreme Court argued that because the responsibility to remove the snow and ice from the roof was not clearly delegated to a service company, the housing company was responsible and the liability was allocated to the chairman of its board of directors.

### *3.6. Fulfilment of supervisory duties and disciplinary powers*

When the offence in question has been committed (the result of the offence is completed), there is no ground for exclusion of a person's responsibility in that actual case. Participation in the continuation of the situation that is contrary to law is one of the factors to be taken into account when assessing to whose sphere of responsibility the act or omission belongs (see the wording of CC 47:7 and 48:7).

Similarly, where corporate criminal liability is concerned, the continuation of the situation that is contrary to law can be taken into consideration when assessing whether the care and diligence necessary for the prevention of the offence have been observed in the operations of the corporation (so-called 'corporation guilt': CC 9:2.1). See section 3.8.1 below.

### *3.7. Liability and collective decisions*

In principle, the liability of heads of business is assessed individually. An example of collective decision-making bodies is the board of directors of companies or other legal persons, such as the precedent of the Supreme Court (KKO 2016:58) where members of the board of directors of a potato flakes factory (limited company) were convicted of impairment of the environment through gross negligence (see above Part 3.5). A factual division of labour between the managing director (having the main responsibility for the factory's operational activities) and board members did not exclude the supervisory duty nor the board members' liability for the consequence.

### *3.8. Relationship with corporate liability*

#### *3.8.1. Triggering persons*

As mentioned above (Part 1.2), a corporation may be sentenced to a corporate fine for certain enumerated, mostly economic, offences (Chapter 9 of the Criminal Code, as amended 743/1995; cited in Appendix 1). The corporate fine—which is the only criminal sanction available—is at least 850 euros and at most 850,000 euros.

The Finnish doctrine behind corporate criminal liability is not clear.<sup>14</sup> The acts or omissions of the individual offender are under certain conditions attributed to the legal person, not as acts of the legal person but as acts of the individual for the company (CC 9:3). A crucial precondition is that a person who is part of its statutory organ or other management or who exercises actual decision-making authority therein has been an accomplice in an offence or allowed the commission of the offence, or alternatively that the care and diligence necessary for the prevention of the offence has not been observed in the operations of the corporation (CC 9:2). The description of those whose position may implicate liability is in the first-mentioned precondition similar to the beginning of the definition in Chapter 5, section 8 ('Acting on behalf of a legal person'), but as a whole the wording in CC 9:2 is more restricted. According to a precedent of the Supreme Court (KKO 2008:3), in a case of negligent impairment of the environment (CC 48:4), only such representatives of the limited company who had so much independent and considerable decision-making power that it would qualify as compliance of an identification principle can be regarded as implicating the liability for the corporation.

The last-mentioned precondition in CC 9:2 refers to the blameworthy organisational conduct (fault) of the corporation. In case of the last-mentioned alternative, it is possible to impose a corporate fine based on anonymous culpa. For instance, in the Supreme Court case KKO 2008:3, this last-mentioned precondition of organisational fault was proved but not the precondition ('identification') which is first mentioned in CC 9:2.

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<sup>14</sup> See also M Tolvanen, in *Fudan Law Journal* (n. 8) Chapter 2.

### 3.8.2. *Concurrence and accumulation of liabilities*

Corporate criminal liability does not replace individual criminal responsibility because they are parallel forms of liability. Normally, both the individual manager and the company are prosecuted when the formal conditions are met.<sup>15</sup> An exception is a situation where the company was so small that the corporate fine was in fact directed to its managing director, who was in the same proceedings sentenced to imprisonment for intentional impairment of the environment (CC 48:1): it was decided to dismiss the corporate fine (precedent of the Supreme Court, KKO 2002:39).

### 3.9. *Compliance programmes*

There is no Finnish case law or legal literature on these issues to date. To my mind, it is obvious that the adoption of compliance programmes and the appointment of compliance officers may have significance in assessing: a) the acceptability of the behaviour of heads of business, in particular whether there was a breach of duty of diligence (*actus reus* of negligence); and b) whether organisational fault existed as a prerequisite for corporate criminal liability (see above, Part 3.8).

## 4. Defences

### 4.1. *Effective powers of supervision and control and liability*

This kind of defence is possible primarily in relation to lower-level managerial employees. However, in a quite recent precedent of the Supreme Court (KKO 2013:56) concerning a work safety offence (CC 47:1), it was decided that the technical director and production manager of a limited company were not responsible for the elimination of the deficiencies of a squeezer, because they did not have enough factual influence over the resources for repairing the squeezer. The shifter was regarded as responsible for the supervision of the machines and their use and was also sentenced for negligent bodily injury (CC 21:10) when

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<sup>15</sup> See generally R Lahti, ‘Über die strafrechtliche Verantwortung der juristischen Person und die Organ- und Vertreterhaftung in Finnland’ in *Festschrift für Keiichi Yamakawa* (Duncker & Humblot, Berlin 2017) 131–152.

an employee was injured using the deficient squeezer. The managing director and members of the board of directors were not prosecuted.

#### *4.2. Delegation of supervisory powers*

As to the delegation of control and supervision powers, see my answer and references to the precedents of the Supreme Court KKO 2016:58 and KKO 2007:62 (above, Part 3.5). Decision KKO 2016:58 reiterates that a factual division of labour between the managing director (having the main responsibility for the factory's operational activities) and board members did not exclude the supervisory duty nor the board members' liability for the consequences.

#### *4.3. Compliance programmes*

As to the significance of the implementation of compliance programmes, see my answer above (Part 3.9).

#### *4.4. Third party advice, external auditing and liability of heads of business*

The subjects of liability have been defined in the penal provisions on accounting offences (CC 30:9, 9a and 10; 61/2003). There is also a penal provision on auditing offences (CC 30:10a; 474/2007). The basic statutory definition of an accounting offence is as follows:

##### **Chapter 30, section 9 – Accounting offence (61/2003)**

If a person with a legal duty to keep accounts, his or her representative, a person exercising actual decision-making authority in a corporation with a legal duty to keep books, or the person entrusted with the keeping of accounts,

(1) in violation of statutory accounting requirements neglects the recording of business transactions or the balancing of the accounts,

(2) enters false or misleading data into the accounts, or

(3) destroys, conceals or damages account documentation

and in this way impedes the obtaining of a true and sufficient picture of the financial result of the business of the said person or of his or her financial standing, he or she shall be sentenced for an accounting offence to a fine or to imprisonment for at most two years.

The liability of an external auditor should, to my mind, be assessed

in an analogous way to the delegation of liability (see above, Part 3.5 and Part 4.2).

## 5. Liability of heads of business and sanctions

### 5.1. *Criminal and punitive sanctions*

This section offers some general remarks on sanction systems, firstly about criminal sanctions, which are applicable to all kinds of sentenced persons, not only to the heads of business.<sup>16</sup>

The mechanism through which the general preventive effect of the punishment is deemed to be reached is not deterrence in the first place but socio-ethical disapproval, which affects the sense of morals and justice—general prevention instead of general deterrence, without calling for a severe penal system. The legitimacy of the whole criminal justice system is an important aim; therefore, such principles of justice as equality and proportionality are central. The emphasis on the non-utilitarian goals of the criminal justice system—fairness and humaneness—must be connected with the decrease in the repressive features (punitiveness) of the system—for example, through the introduction of alternatives to imprisonment. The significance of individual prevention or incapacitation is regarded as very limited.

The first changes in the system of criminal sanctions prepared since the 1970s pertained to alternatives to custodial sentences. Accordingly, legislation enacted in 1996 incorporated community service as a regular part of the system of sanctions. Legislation enacted in 2005 incorporated conciliation—including both criminal and civil cases—as a regular part of social welfare and the restorative justice system. Electronic monitoring was introduced as a new type of criminal sanction in 2011; it shall be imposed under certain material prerequisites as an alternative to a custodial sentence of imprisonment for at most six months.

The general punishments in force are the following: fine, conditional imprisonment, community service, electronic monitoring and unconditional imprisonment (Chapter 6 of Criminal Code; 515/2003 with amendments up to 564/2015).

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<sup>16</sup> R Lahti, ‘Towards a more Efficient, Fair and Humane Criminal Justice System: Developments of Criminal Policy and Criminal Sanctions during the last 50 Years in Finland’ (2017) *Law, Criminology & Criminal Justice. Cogent Social Sciences*, 3 (<http://dx.doi.org/10.1080/23311886.2017.1303910>).

### 5.2. *Other sanctions and measures*

A special criminal sanction for those who have in their business activity as an entrepreneur or a manager of an enterprise committed economic crime or otherwise crucially omitted their legal duties was introduced in 1985 (1059/1985), namely the prohibition of engagement in business. Although it is not a necessary precondition that the suspected person has fulfilled all definitional elements of an economic crime, this sanction can be characterised as a criminal sanction because the investigation and prosecution follow the rules of a criminal process.

As to punitive administrative sanctions, they have been increasingly introduced, especially in the attempt to eliminate criminal penalties for minor and/or negligent offences (decriminalisation). It has also been presented that the flexibility of administrative decision-making to some extent explains their introduction. In addition, administrative sanctions are used in EU law, particularly in order to safeguard the financial interests of the Union, and this development is reflected in national legislation.

Administrative sanctions are closely related to the specific legislative objectives of a particular sector of administration and its regulatory objectives enforced by specialised administrative authorities. The legislative differences in sanctioning are largely due to the sectoral nature of administrative sanctions. Administrative sanctions are closely linked to enforcement and supervision procedures, and the methods of a specific public authority. The sectoral nature of the administrative sanctions and the priority of specific regulations (*lex specialis*) emphasises the fact that administrative sanctions are part of the sectoral sanction scheme.<sup>17</sup>

There are no punitive administrative sanctions established especially for heads of business. See also my answer above, Part 1.2.

### 5.3. *Sentencing criteria*

There are general sentencing provisions in Chapter 6 (515/2003) of the Criminal Code, including grounds for increasing and reducing the punishment, grounds for mitigating the punishment and the penal latitude, and grounds for the choice of the type of punishment. The general principle governing the assessment of punishment of an individual of

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<sup>17</sup> *Rangaistusluonteisia hallinnollisia seuraamuksia koskevan säätelyn kehittäminen* [Developing the Regulation of Punitive Administrative Sanctions] (Oikeusministeriön työryhmän muistioluonnos 8.11.2017), 12–13 [Draft Memorandum of the Ministry of Justice Working Group].

fender reads as follows: '[T]he sentence shall be determined so that it is in just proportion to the harmfulness and dangerousness of the offence, the motives for the act and the other culpability of the offender manifest in the offence' (CC 6:4). The basis for calculating the corporate fine is formulated in the following way: the amount of the corporate fine shall be determined in accordance with the nature and extent of the omission or the participation of the management and the financial standing of the corporation (CC 9:6.1).

There are no specific sentencing criteria to determine the punishment for the individual head of business; nor are general criteria/guidelines followed in administrative punitive law, because of the sectoral nature of administrative sanctions.

#### *5.4. Confiscation*

Forfeiture, especially forfeiture of the proceeds of crime, is a commonly imposed criminal sanction with respect to economic and corporate crime. The forfeiture shall be ordered on the perpetrator, a participant or a person on whose behalf or to whose benefit the offence has been committed, where these have benefited from the offence. A prerequisite for a forfeiture order is that the relevant act is criminalised by law, and so the forfeitures are imposed in criminal proceedings. In Finnish doctrine, forfeiture is classified as a security measure instead of a punishment. Therefore, Article 6, Paragraphs 2–3 (fair trial) of the European Convention on Human Rights are not regarded as directly applicable to the forfeiture proceedings.

Chapter 10 of the Penal Code includes the general provisions on forfeiture; they were revised in the Act of 875/2001 as a part of the total reform of the Code. In the Act of 356/2016, these provisions were reshaped in order to implement Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the EU. The provisions were preserved as general and so their application is not restricted to the crimes listed in Article 3 of the Directive 2014/42/EU.

#### *5.5. Enforcement practice*

Punitive administrative sanctions (typically punitive fees) have been introduced in various sectors of business and financial activity, and implementation of the EU's legislative instruments has increased the use of administrative criminal law in combatting economic and financial of-

fences. In practice, the most important administrative fee of a penal nature is the punitive tax increase, which is set concurrently with the assessment of taxes in cases of tax deceit. Another early example of the adoption of a noticeable punitive fee concerns competition law: since 1992, when a new Act on competition restrictions was enacted, the competition restriction offence has been decriminalised and replaced with the provisions on a competition restriction fee. A similar type of punitive administrative fee was adopted by the legislative Acts in 2016 for the protection against market abuse, as prescribed by Regulation (EU) 596/2014.<sup>18</sup>

The level of monetary administrative sanctions introduced when implementing the EU's legislative instruments is much higher than the actual level of monetary criminal sanctions; for example, the maximum corporate fine is only 850,000 euros.

## 6. Relationship with punitive administrative law

### 6.1. *Parallel criminal and administrative proceedings against the head of business*

#### 6.1.1. *Trans-procedural use of evidence against the head of business*

As mentioned above (Part 1.2), a criminal sanction and a punitive administrative sanction are not normally established for parallel use. However, fraudulent tax evasion has traditionally been an exception and the most recent example covers security markets offences.

In 2013, a separate legal Act (781/2013), a prohibition of double jeopardy, was introduced for tax fraud cases (i.e. a prohibition of the cumulative use of criminal punishment and a punitive administrative fee). So, as a rule, charges may not be brought for, nor court judgment passed, if a punitive tax or customs increase has already been imposed on the same person in the same case (CC 29:11). This special Act was introduced to take into account the case law of the European Court of Human Rights on the application of the principle of *ne bis in idem*. It also indicates the direction of legislative reforms in other fields of economic and financial activity.

In Finnish procedural law, the traditionally recognised basic ele-

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<sup>18</sup> See Securities Markets Act (258/2013), as amended by the Act of 519/2016. See also the amendment of Chapter 51 (Security markets offences) of the Penal Code by the Act of 521/2016.

ments of a due process or fair trial are the right to access to court, an independent and impartial tribunal, the presumption of innocence and guarantees of procedural rights. It is noteworthy that these procedural principles and rules are applicable to all kinds of offences (including corporate and corporate-related crime), except that summary (simplified) penal proceedings and fixed fine penal proceedings for minor offences have some specific features which make the proceedings more expeditious and cost-effective.

A fundamental principle that reflects the presumption of innocence is *favor defensionis* (in favour of the defence). This ‘meta’ principle implies specifying principles, most importantly the principle of *nemo tenetur se ipsum accusare*, or privilege against self-incrimination (an individual may not be compelled to testify against him-/herself and the right to silence), and the principle of *in dubio pro reo* (in case of unclear guilt, the accusation shall be dismissed). The burden of proof is on the prosecutor’s side. A judgment of guilty may be made only on the condition that there is no reasonable doubt regarding the guilt of the defendant.

In addition to the accusatorial principle, other leading principles governing the main hearing in the proceedings are the requirements of orality and immediacy. Therefore, all pleadings shall, as a rule, be oral and the opposing party has the right to cross-examine all evidence presented against him/her. The acceptability of other than oral evidence in the open court is very restricted.<sup>19</sup>

A general provision on evidence stipulates the following: ‘(1) A party has the right to present the evidence that he or she wants to the court investigating the case and comment on each piece of evidence presented in court, unless provided otherwise in law. (2) The court, having considered the evidence presented and the other circumstances that have been shown in the proceedings, determines what has been proven and what has not been proven in the case. The court shall consider the probative value of the evidence and the other circumstances thoroughly and objectively on the basis of free consideration of the evidence, unless provided otherwise in law.’<sup>20</sup>

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<sup>19</sup> See Criminal Procedure Act (689/1997) generally. An unofficial translation is available from the website of the Ministry of Justice: [https://www.finlex.fi/fi/laki/kaannokset/1734/en17340004\\_20150732.pdf](https://www.finlex.fi/fi/laki/kaannokset/1734/en17340004_20150732.pdf).

<sup>20</sup> Code of Judicial Procedure (4/1734), as the provisions on evidence in Chapter 17 enacted in 2015 (732/2015); cited in section 1 of Chapter 17. An unofficial translation is available from the website of the Ministry of Justice: [https://www.finlex.fi/fi/laki/kaannokset/1734/en17340004\\_20150732.pdf](https://www.finlex.fi/fi/laki/kaannokset/1734/en17340004_20150732.pdf).

### *6.1.2. Admissibility and use of foreign evidence against the head of business*

The general provisions on criminal procedure and evidence are also applicable when assessing the use of such evidence which has been gathered in the administrative proceedings or in foreign proceedings.

### *6.1.3. Administrative investigations and right to silence of the head of business*

The application of the privilege against self-incrimination is clear in criminal proceedings. According to the Code of Judicial Procedure (4/1734 with amendments, Chapter 17, section 25, sub-section 2), the court may not, in criminal proceedings, use evidence which was obtained from a person in proceedings other than a criminal investigation or in criminal proceedings, through the threat of coercive measures or otherwise against his or her will, if he or she at the time was a suspect in an offence or a defendant, or a criminal investigation or court proceedings were underway in respect of an offence for which he or she was charged. If, however, a person in other than criminal proceedings or comparable proceedings has, in connection with fulfilling his or her statutory obligation, given a false statement or submitted a false or untruthful document or a false or forged object, this may be used as evidence in a criminal case concerning conduct in violation of his or her obligation. According to *travaux préparatoires*, therefore, privilege against self-incrimination is respected in criminal procedure, even though certain other law stipulates an obligation to provide authorities with information that otherwise could incriminate the one giving the required information.<sup>21</sup>

As to the privilege against self-incrimination in the context of administrative investigations or, more generally, in administrative procedures, its content and scope are uncertain and determined on the case law of the European Court of Human Rights.

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<sup>21</sup> Government Proposal 46/2014, 88.

## *6.2. Multiple and parallel criminal and administrative proceedings against the legal person and the head of business*

### *6.2.1. Trans-procedural use of evidence*

The answer to the question of whether parallel criminal and administrative proceedings are allowed is, in both legal doctrine and practice, affirmative. The principle of *ne bis in idem* is not regarded as applicable, because the subjects (defendants) are different (legal person and individual head of business).

There is normally a concentration (and, in that sense, a coordination) of the criminal proceedings against the legal person and the individual head of business.

### *6.2.2. Admissibility and use of foreign evidence*

As to this question, see *mutatis mutandis* above, Part 6.1.2.

### *6.2.3. Right to silence of the head of business in proceedings against the legal person*

As to the question of whether heads of business have the right to silence in the context of administrative proceedings, see *mutatis mutandis* on the privilege against self-incrimination (above, Part 6.1.3). To the extent that privilege against self-incrimination is applicable in administrative investigations, it is also applicable to those representatives of the legal person who have such an independent and considerable decision-making power that it would qualify compliance with the identification principle and therefore could be regarded as implicated in the liability for the corporation (cf. above, a reference to the argument of the Supreme Court decision KKO 2008:3; Part 3.8.1).

## *6.3. Relationship between liability of the legal person and liability of the head of business*

A plea of guilty has a modest role in Finnish procedural law. New legislation on consensual proceedings was enacted in 2014 (670/2014) as part of the revision of the Criminal Procedure Act. The new legislation maintains the legality principle in prosecution as a main rule, but the exceptions—grounds for waiving prosecution—have become more ex-

tensive. One of the grounds for waiving prosecution is that criminal proceedings and punishment are deemed unreasonable or inappropriate in view of a settlement reached by the suspect in the offence and the injured party; the other is the action of the suspect in the offence to prevent or remove the effects of the offence (Chapter 1, section 8).

An innovation concerns the introduction of plea bargaining, which is intended to be applied particularly in complicated cases of economic and corporate crime. The prosecutor may therefore, on his or her own motion or on the initiative of the injured party, undertake measures for the submission and hearing of a proposal for judgment in confession proceedings. The prosecutor must at his discretion take into consideration the nature of the case and the claims to be presented: the expenses apparently resulting from, and the time required for, a hearing in confession proceedings on the one hand, and the normal procedure on the other. Preconditions for a confession proceeding are that the suspect in the offence in question admits having committed the suspected offence and consents to confession proceedings and that the injured party has no claims in the case or consents to confession proceedings. The prosecutor must commit to requesting punishment in accordance with a scale mitigated by one third. The proposal for judgment will be handled and confirmed by the court (Chapter 1, sections 10–11, and Chapter 5b of Criminal Procedure Act). It should be noted that the mitigation of the punishment concerns a plea of one's own guilt only, not testifying about the guilt of accomplices.

The explained provisions on plea bargaining do not recognise a situation where the guilty plea from a legal person would shield the head of business from criminal liability or otherwise diminish it.

In case this situation of double jeopardy occurs—which should be avoided in line with the practice of the European Court of Human Rights and in line with the separate legal Act (781/2013) on the prohibition of the cumulative use of criminal punishment and an administrative penal fee)—in fraudulent tax evasion cases, the following sentencing provision is applicable. Chapter 6, section 7, subsection 1 (515/2003) of the Criminal Code prescribes that another consequence (sanction) of the offence or of the sentence shall be taken as a ground mitigating the punishment. See also the precedent of Supreme Court KKO 1981 II 14.

## ANNEX I

### **Chapter 9 of the Criminal Code – Corporate criminal liability (743/1995)**

#### **Section 1 – Scope of application (61/2003)**

(1) A corporation, foundation or other legal entity (in the following, 'corporation') in the operations of which an offence has been committed shall on the request of the public prosecutor be sentenced to a corporate fine if such a sanction has been provided in this Code for the offence (441/2011).

(2) The provisions in this Chapter do not apply to offences committed in the exercise of public authority.

#### **Section 2 – Prerequisites for liability (61/2003)**

(1) A corporation may be sentenced to a corporate fine if a person who is part of its statutory organ or other management or who exercises actual decision-making authority therein has been an accomplice in an offence or allowed the commission of the offence or if the care and diligence necessary for the prevention of the offence have not been observed in the operations of the corporation.

(2) A corporate fine may be imposed even if the offender cannot be identified or otherwise is not punished. However, no corporate fine shall be imposed for a complainant offence which is not reported by the injured party so as to have charges brought, unless there is a very important public interest in the bringing of charges.

#### **Section 3 – Connection between offender and corporation (743/1995)**

(1) The offence is deemed to have been committed in the operations of a corporation if the perpetrator has acted on the behalf or for the benefit of the corporation and belongs to its management or is in a service or employment relationship with it or has acted on assignment by a representative of the corporation.

(2) The corporation does not have the right to compensation from the offender for a corporate fine that it has paid, unless such liability is based on statutes on corporations and foundations.

#### **Section 4 – Waiving of punishment (61/2003)**

(1) A court may waive imposition of a corporate fine on a corporation if:

(a) the omission referred to in section 2(1) by the corporation is

slight, or the participation in the offence by the management or by the person who exercises actual decision-making authority in the corporation is slight, or

(b) the offence committed in the operations of the corporation is slight.

(2) The court may waive imposition of a corporate fine also when the punishment is deemed unreasonable, taking into consideration:

(a) the consequences of the offence to the corporation,

(b) the measures taken by the corporation to prevent new offences, to prevent or remedy the effects of the offence or to further the investigation of the omission or offence, or

(c) where a member of the management of the corporation is sentenced to a punishment, and the corporation is small, the sentenced person owns a large share of the corporation or his or her personal liability for the liabilities of the corporation are significant.

### **Section 5 – Corporate fine (971/2001)**

A corporate fine is imposed as a lump sum. The corporate fine is at least 850 euros and at most 850,000 euros.

### **Section 6 – Basis for calculation of the corporate fine (743/1995)**

(1) The amount of the corporate fine shall be determined in accordance with the nature and extent of the omission or the participation of the management, as referred to in section 2, and the financial standing of the corporation.

(2) When evaluating the significance of the omission and the participation of the management, consideration shall be taken of the nature and seriousness of the offence, the status of the perpetrator as a member of the organs of the corporation, whether the violation of the duties of the corporation manifests heedlessness of the law or the orders of the authorities, as well as the grounds for sentencing provided elsewhere in the law.

(3) When evaluating the financial standing of the corporation, consideration shall be taken of the size and solvency of the corporation, as well as the earnings and the other essential indicators of the financial standing of the corporation.

### **Section 7 – Waiving of the bringing of charges (61/2003)**

(1) The public prosecutor may waive the bringing of charges against a corporation, if (441/2011):

(1) the corporate omission or participation of the management or of the person exercising actual decision-making power in the corporation,

as referred to in section 2, subsection 1, has been of minor significance in the offence, or

(2) only minor damage or danger has been caused by the offence committed in the operations of the corporation and the corporation has voluntarily taken the necessary measures to prevent new offences.

(2) The bringing of charges may be waived also if the offender, in the case referred to in section 4, subsection 2(3), has already been sentenced to a punishment and it is to be anticipated that the corporation for this reason is not to be sentenced to a corporate fine.

(3) Service of a decision not to bring charges against a corporation or to withdraw charges against a corporation shall be given to the corporation by post or through application as appropriate of what is provided in Chapter 11 of the Code of Judicial Procedure. The provisions of Chapter 1, section 6(a), subsection 2 and section 11, subsections 1 and 3 of the Criminal Procedure Act on the waiving of charges apply correspondingly to the decision (673/2014).

(4) The provisions of Chapter 1, section 12 of the Criminal Procedure Act on the revocation of charges apply to the revocation of charges on the basis of subsection 1. However, service of the revocation shall be given only to the corporation.

## **Section 8 – Joint corporate fine (743/1995)**

(1) If a corporation is to be sentenced for two or more offences at one time, a joint corporate fine shall be imposed in accordance with the provisions of sections 5 and 6.

(2) No joint punishment shall be imposed for two offences, one of which was committed after a corporate fine was imposed for the other. If charges are brought against a corporation which has been sentenced to a corporate fine by a final decision, for an offence committed before the said sentence was passed, a joint corporate fine shall also not be imposed, but the prior corporate fine shall be duly taken into account when sentencing to the new punishment.

**[Section 9 has been repealed: 297/2003]**

## **Section 10 – Enforcement of a corporate fine (673/2002)**

(1) A corporate fine is enforced in the manner provided in the Enforcement of Fines Act (672/2002).

(2) A conversion sentence may not be imposed in place of a corporate fine.

**ANNEX II****Chapter 5 of the Criminal Code – On attempt and complicity (515/2003)****Section 1 – Attempt (515/2003)**

(1) An attempt of an offence is punishable only if the attempt has been denoted as punishable in a provision on an intentional offence.

(2) An act has reached the stage of an attempt at an offence when the perpetrator has begun the commission of an offence and brought about the danger that the offence will be completed. An attempt at an offence is involved also when such a danger is not caused, but the fact that the danger is not brought about is due only to coincidental reasons.

(3) In sentencing for an attempt at an offence, the provisions of Chapter 6, section 8, subsection 1(2), subsection 2 and subsection 4 apply, unless, pursuant to the criminal provision applicable to the case, the attempt is comparable to a completed act.

**Section 2 – Withdrawal from an attempt and elimination of the effects of an offence by the perpetrator (515/2003)**

(1) An attempt is not punishable if the perpetrator, of his or her own free will, has withdrawn from the completion of the offence, or otherwise prevented the consequence referred to in the statutory definition of the offence.

(2) If the offence involves several accomplices, the perpetrator, the instigator or the abettor is exempted from liability on the basis of withdrawal from an offence and elimination of the effects of an offence by the perpetrator only if he or she has succeeded in also getting the other participants to desist or withdraw from completion of the offence or otherwise been able to prevent the consequence referred to in the statutory definition of the offence or in another manner has eliminated the effects of his or her own actions on the completion of the offence.

(3) In addition to what is provided in subsections 1 and 2, an attempt is not punishable if the offence is not completed or the consequence referred to in the statutory definition of the offence is not caused for a reason that is independent of the perpetrator, instigator or abettor, but he or she has voluntarily and seriously attempted to prevent the completion of the offence or the causing of the consequence.

(4) If an attempt, pursuant to subsections 1 through 3, is not punishable but at the same time comprises another, completed, offence, such an offence is punishable.

**Section 3 – Complicity in an offence (515/2003)**

If two or more persons have committed an intentional offence together, each is punishable as a perpetrator.

**Section 4 – Commission of an offence through an agent (515/2003)**

A person is sentenced as a perpetrator if he or she has committed an intentional offence by using, as an agent, another person who cannot be punished for said offence due to the lack of criminal responsibility or intention or due to another reason connected with the prerequisites for criminal liability.

**Section 5 – Instigation (515/2003)**

A person who intentionally persuades another person to commit an intentional offence or to make a punishable attempt at such an act is punishable for incitement to the offence as if he or she were the perpetrator.

**Section 6 – Abetting (515/2003)**

(1) A person who, before or during the commission of an offence, intentionally furthers the commission by another of an intentional act or of its punishable attempt, through advice, action or otherwise, shall be sentenced for abetting on the basis of the same legal provision as the perpetrator. The provisions of Chapter 6, section 8, subsection 1(3), subsection 2 and subsection 4 apply nonetheless to the sentence.

(2) Incitement to punishable aiding and abetting is punishable as aiding and abetting.

**Section 7 – Special circumstances related to the person (515/2003)**

(1) Where a special circumstance vindicates, mitigates or aggravates an act, it applies only to the perpetrator, inciter or abettor to whom the circumstance pertains.

(2) An inciter or abettor is not exempted from penal liability by the fact that he or she is not affected by a special circumstance related to the person and said circumstance is a basis for the punishability of the act by the perpetrator.

**Section 8 – Acting on behalf of a legal person (515/2003)**

(1) A member of a statutory body or management of a corporation, foundation or other legal person, a person who exercises actual decision-making power in the legal person or a person who otherwise acts on its behalf in an employment relationship in the private or public sector or

on the basis of a commission may be sentenced for an offence committed in the operations of a legal person, even if he or she does not fulfil the special conditions stipulated for a perpetrator in the statutory definition of the offence, but the legal person fulfils said conditions.

(2) If the offence has been committed in organised activity that is part of an entrepreneur's business or in other organised activity that is comparable to the activity of a legal person, the provisions in subsection 1 on an offence committed in the operations of a legal person correspondingly apply.

(3) The provisions of this section do not apply if different provisions elsewhere apply to the matter.

## CHAPTER III

### FRANCE NATIONAL REPORT

*Dr Juliette Tricot \**

SUMMARY: 1. Introduction: Criteria for imputation of criminal law responsibilities of heads of businesses and their theoretical justifications. – 1.1. The implementation of the PIF Convention. – 1.2. Cases of investigation against top managers for offences committed by their employees. – 1.3. The policy debate on the liability of company directors. – 1.4. Introduction and scope of corporate criminal liability in France. – 1.5. Administrative liability of legal persons. – 1.6. Policy debate on the introduction of corporate criminal liability in France. – 2. Relationship with general principles of criminal law. – 2.1. General aspects of perpetration and complicity under French criminal law. – 2.2. Complicity under French criminal law. – 2.3. Omission liability under French criminal law. – 2.4. Duty and failure to report the commission of an offence. – 2.5. Strict liability under French law. – 2.6. Special rules on liability. – 3. Concept and scope of the criminal law responsibilities of heads of business. – 3.1. Sources and origin of the criminal liability of heads of business. – 3.2. Subjective scope of the criminal liability of the heads of business. – 3.3. Liability of the head of business and duty to control and supervise the employees. – 3.4. Functional imputation and causal link. – 3.5. Subjective element (*mens rea*). – 3.6. Delegation of powers: scope and conditions. – 3.7. Liability of the head of business and collective decisions. – 3.8. Relationship between individual liability of the head of business and corporate criminal liability. – 3.8.1. Concurrence of liabilities. – 3.9. Compliance programmes and liability of the head of business. – 3.10. Failure to adopt a compliance programme and administrative (non-criminal) liability: the Sapin II Law. – 4. Defences. – 4.1. General remarks. – 4.2. Delegation of supervisory powers as a defence. – 4.3. Compliance programmes. – 4.4. Bookkeeping offences and liability of the chartered accountant. – 5. Sanctions. – 5.1. General remarks. – 5.2. Other punitive measures. – 5.3. Confiscation. – 6. Relationship with punitive adminis-

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trative law. – 6.1. Parallel criminal and administrative proceedings against the individual head of business. – 6.2. Parallel criminal or administrative proceedings against the legal person and against the individual head of business. – 6.3. Is the individual liability of the head of business shielded or diminished if the corporation has previously pleaded guilty? – 6.4. Accumulation of sanctions and proportionality.

## **1. Introduction: Criteria for imputation of criminal law responsibilities of heads of business and their theoretical justifications**

### *1.1. The implementation of the PIF Convention*

French law does not provide for a specific provision on fraud against EU financial interests. The circumstance, already pointed out by the doctrine when the former penal code was in force,<sup>1</sup> has not been modified by the codification of 1992.<sup>2</sup>

The adoption of the PIF Convention did not alter this absence. According to a circular published by the Ministry of Justice in 2001,<sup>3</sup> the PIF Convention ‘does not require adaptation of the law’. Existing criminal offences make it possible to punish all of these acts. With respect to resource fraud, this concerns tax and customs offences and, as far as expenditure fraud is concerned, mainly fraudulent offences (Article 313-1 of the Penal Code), forgery (Article 441-1 et seq. of the Penal Code) and obtaining public aid through false declarations (Article 441-6 of the Penal Code).

Thus, the failure to adopt an *ad hoc* provision transposing Article 3 is justified by the French executive based on the prior conformity of national law.

### *1.2. Cases of investigation against top managers for offences committed by their employees*

Due to the lack of adoption for transposition purposes of *ad hoc* provisions, both as regards offences and as regards the criminal liability

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<sup>1</sup> M. Delmas-Marty, ‘Droit Pénal des Affaires’ 1 PUF (1990) 36.

<sup>2</sup> M. Delmas-Marty, ‘Avant-propos’ RSC (1995).

<sup>3</sup> Circular of 3 Jul. 2001 of the Directorate of Criminal Affairs and Pardons, ‘Presentation of the provisions of the Act amending the Criminal Code and the Code of Criminal Procedure and relating to corruption’, CRIM 2001-11 G3/03-07-2001.

of company directors, it is very difficult to identify published decisions related to the prosecution or conviction of heads of business for EU budget fraud. It is nevertheless possible to reason by analogy by identifying the few decisions relating to the liability of directors for acts committed by an employee concerning criminal offences which, according to the aforementioned circular (*supra* 1.1.), serve to punish fraud against EU financial interests. However, for the same reason, statistical data are non-existent; and, in addition, it is not possible to reason by analogy since data concerning the convictions of company directors in general are non-existent. Apart from very general and therefore not very detailed data concerning the criminal liability of legal persons,<sup>4</sup> economic and financial crime<sup>5</sup> is very rarely the subject of statistical data relating to the activity of criminal courts.<sup>6</sup>

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<sup>4</sup> ‘Le traitement judiciaire des infractions commises par les personnes morales’ (*Infostat* No. 154, 2017); ‘Les condamnations de personnes morales en 2005’ (*Infostat* No. 103, 2008).

<sup>5</sup> The last statistical bulletin of the Ministry of Justice dates from 2002: ‘La délinquance économique et financière sanctionnée par la Justice’, *Infostat* No. 62.

<sup>6</sup> Abstract of *Infostat* No. 154, 2017, cit. ‘Le traitement judiciaire des infractions commises par les personnes morales’: ‘Natural persons tried in the same cases as legal persons:

In 2015, of the 3,600 cases tried by at least one legal entity, 45 per cent also involved at least one natural person. These 1,600 “mixed” cases concern 2,500 natural persons and 1,900 legal entities. In 70 per cent of these cases, only one natural person is tried.

Natural persons tried in these mixed cases are tried in 30 per cent of cases for offences related to work and social security. Together with environmental offences, competition and price offences, unintentional injuries and offences against the immigration police and the status of nomads, these offences cover almost two thirds of the 1,600 mixed cases.

The acquittal rate for these mixed cases is 25 per cent for natural persons and 24 per cent for legal persons.

Acquittal is therefore more often pronounced than in all cases tried in 2015 (rate of 19 per cent for all legal persons and 4 per cent for all natural persons).

In the field of the 1,100 mixed cases involving only two authors, in cases where the legal person is discharged, the natural person is also discharged in 84 per cent of cases. If the legal person is convicted, the natural person is also convicted in 93 per cent of cases.

In mixed cases, the majority of natural persons found guilty are fined (55 per cent) and in more than one third of cases they are sentenced to imprisonment (38 per cent). In cases of environmental offences (236 natural persons convicted), prison sentences are less often handed down (2 per cent), while natural persons are even more often fined (77 per cent of cases). The most severely punished offences are manslaughter (63 natural persons, 59 of whom were sentenced to imprisonment) and fraud and breach of trust (105 natural persons, 87 of whom were sentenced to imprisonment).

With regard to fraud cases, two decisions handed down by the Criminal Chamber of the Court of Cassation should be noted.

The first decision is an example of a decision based on the failure to supervise. On the 17 February 2016,<sup>7</sup> the Criminal Chamber was to rule on the case of a factoring company that was cheated following the presentation of false invoices drawn up on the basis of false contracts and false time sheets by a contracting company. The managers of this second company, who were prosecuted for organised fraud, were discharged, the judges of the merits believing that the false documents had been established by a secretary in good faith following the manoeuvres of one of the company's former commercial agents (who used an assumed identity) carried out without the knowledge of the defendants. The factoring company appealed to the Court of Cassation, arguing that 'it is for the managers and partners of a company to supervise the employees of that company; that this duty of supervision implies that the offence of fraud is characterised against those managers and partners when, by reason of their negligence, one of the employees engages in fraudulent manoeuvres benefiting the company.'

The argument was partially accepted: the Court of Cassation observed, 'To acquit Mr. Isaac and Mr. Mikael X...co-managers of the company Concorde of the charge of organised fraud, committed within the framework of a factoring contract with BNP Paribas Factor, the judgment under appeal notes that if the civil party was the victim of a fraud by the production of false invoices drawn up on false contracts and false statements of hours worked, the investigation does not make it possible to refute the defendants' argument that a third party, whose identity could not be established but whose activity within Concorde is proven, intervened without their knowledge to commit the offence.' The court, then, considered that 'given that by deciding in this way, without seeking better if it was not the responsibility of the managers of Concorde to ensure the accuracy of the documents attached to the subrogatory receipts sent to BNP Paribas Factor, the Court of Appeal did not justify its decision.'

The ground allows an intentional commission of an offence to be attributed to corporate officers guilty merely of negligence and omission. The reasoning is not new (it concerns, for example, the intentional offences of tax evasion and concealed work), which evokes the idea of a

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In the end, 42 per cent of natural persons sentenced in mixed cases to imprisonment were tried for labour and social security cases, fraud and breach of trust, as well as for offences relating to the immigration police or the status of nomads.'

<sup>7</sup> No. 15-81.150.

‘guarantee’ to which company directors would be obliged vis-à-vis third parties. The High Court remains cautious, which implies that the obligation for them to check the accuracy of documents effectively is not automatic, but that it is likely to vary according to the circumstances (‘without better seeking’).

The second decision is an example of a decision based on the notion (doctrinal but not legal) of the moral author (on this notion, *infra Part 2.1, General aspects of perpetration and complicity under French Law*). On 16 December 2009,<sup>8</sup> the Criminal Chamber ruled on a case relating to a manager of a communications agency sued for soliciting merchants by offering to rent them advertising inserts by posing as the company ‘Yellow Pages’. This service was invoiced when the court of appeal found that the ‘company ACF, which was set up only to obtain funds in a short period of time, by abusing the reference to the ‘Yellow Pages’, has not carried out any work of designing advertising inserts and has not created any medium corresponding to future printing work’. There was little doubt about the offence. It does not even appear to have been challenged in the appeal against the conviction judgment. The main issue concerned the capacity in which this manager had intervened. She contested that she was the perpetrator of the offence that had materially been committed by her salesmen: she had had no personal contact with the victims. She should have been prosecuted as an accomplice, which would have required establishing that each of the salesmen was aware of the fraud (knew the imaginary nature of the rented advertising space) and that it had been ‘provoked’ within the meaning of Article 121-7 of the Criminal Code. However, the prosecuting authority preferred to see in the defendant a moral perpetrator of the fraud, which the Court of Appeal admitted by adding ‘that the persons acting on behalf of the Company had the status of subordinates and had received instructions which were necessarily given by the manager’. The Court of Cassation specifically approved this ground. It noted that in order to find the company guilty on this count, the judgment stated that ‘the persons acting on behalf of ACF were subordinates and had received instructions which were necessarily given by the manager’. The court then considered that ‘in the state of these statements, from which it emerges that the defendant personally participated in the facts prosecuted, the Court of Appeal, which characterised in all their elements the offences of fraud and attempt of which it found the defendant guilty, justified its decision’.

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<sup>8</sup> No. 09-81.109.

This solution has been severely criticised. According to Emmanuel Dreyer,<sup>9</sup> the court is committing a real fraud against the law insofar as, legally, participation in the offence as a moral perpetrator does not exist. According to the French scholar, the legislature condemned it when it refused, adopting the new Code, to admit that ‘instigation’ could be punishable in a general manner.

As regards tax fraud, criminal case law considers that the head of a company cannot escape criminal liability by alleging—even if truthful—the fact that the company is partially or totally in the hands of a *de facto* manager.<sup>10</sup> The same applies when the director of a company invokes his own incompetence in tax matters; the difficulties he encountered in the exercise of his functions;<sup>11</sup> the errors of its employees;<sup>12</sup> the

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<sup>9</sup> ‘Un an de droit de la publicité’, *Revue Communication, commerce électronique*, 2010, 7-8.

<sup>10</sup> Cass. Crim., 2 Apr. 2014, No. 13-82.269, must be overturned, the judgment of discharge pronounced in favour of the *de jure* manager where it is considered that he did not take part in the management of the company, that he granted all his confidence to a *de facto* manager, and was completing his studies and working abroad, since no delegation of powers had taken place and the person concerned could not have been unaware of the existence of the VAT debt which appeared on the liabilities side of the company’s three consecutive balance sheets. Cass. Crim., 25 March 2009, No. 08-82.947: ‘in the absence of any delegation of powers, the legal or statutory manager of a company, who cannot rely on the joint liability of the *de facto* manager, must be held liable for the accounting and tax obligations of the company’. Cass. Crim., 28 March 2007, No. 06-82.724; Cass. Crim., 28 May 2003, No. 02-85.017; Cass. Crim., Feb. 13, 1997, No. 96-80.864. Compare, however, Cass. Crim., 8 Nov. 2006, No. 05-85.922; Cass. Crim., 15 Dec. 2004, No. 03-87.827.

<sup>11</sup> Cass. Crim., 10 Sept. 2014, No. 13-84.933.

<sup>12</sup> Cass. Crim., 12 June 2014, No. 13-83.391, approving the judges of the merits for having observed that ‘the *de jure* manager of the said SARL is Mr. X ... and that, in that respect, he was required to ensure that complete and reliable accounts were drawn up and to draw up the tax returns accordingly; that, in substance, the defendant did not contest the reality of the amount of VAT evaded and that he indicated that he could not ensure the follow-up of the company for which he had left the responsibility to the secretary, his concubine and the accountant; that such explanations on the part of a *de jure* manager are ineffective in the light of settled case law and the obligations incumbent on *de jure* managers as regards the management of commercial companies and the accounting obligations of the latter; that in the present case, as the first judge pointed out exactly, these were voluntary practices which lasted more than two years and whose sole purpose was to artificially create cash at SARL Becomo; that, on the other hand, the accused declared at the bar of the court “that he was not aware” of his concubine’s practices in this matter, which constitutes the negation of his personal obligations in his capacity as manager’. Cass. Crim., 16 Dec. 2009, No. 09-80.125, the judges of the merits having rightly observed that ‘the negligence alleged by Richard X ... in the control of his collaborators could not exonerate him from his liability whereas with the knowledge of his fiscal

errors of an auditor;<sup>13</sup> or the fraudulent acts of the above.<sup>14</sup> Recently, the Criminal Chamber affirmed that in the absence of any delegation of powers, the manager of a company must be held liable for the company's tax obligations.<sup>15</sup> A few months earlier, it had affirmed in the form of a principle that 'in the absence of any delegation of powers, the legal or statutory director of a company is personally bound to comply with the accounting and tax obligations incumbent upon the company, the Court of Appeal justified its decision....'<sup>16</sup> The case concerned a tax fraud attributed to a company director who claimed that he did not have the necessary knowledge to control the accounting of the companies of which he was the manager and that he had set up a structure of nine persons in charge of ensuring this, under the authority of an administrative and financial director.

Finally, as regards custom offences, the 'criminal liability of the head of business' applies. It presupposes the personal participation in the facts,<sup>17</sup> although this is presumed<sup>18</sup> in the absence of delegation of powers.<sup>19</sup> The company director will thus be considered as an author, in particular in his capacity as 'holder', or as 'interested in fraud' (see *infra* 2.6, *Special rules on liability*).

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obligations and already object of a previous control, it belonged to him, in his capacity as manager of the SARL X ... to do everything possible to satisfy its tax obligations; that he cannot hide behind the incompetence of its employees or their dishonesty to exonerate himself...; that, if the accused justifies health problems as from August 2003, it is not established by medical documents that he was unable to perform the administrative part of his activity as a manager and to assume his role of supervision and management of his staff'. Cass. Crim., 19 Sept. 2007, No. 06-88.533; Cass. Crim., 3 Oct. 1989, No. 88-87.508, by condemning the defendant on the grounds that 'it is up to the company manager to sign the monthly declarations of the turnover which it achieves and not to the accountant whom the company manager has freely chosen and retained in his service despite his shortcomings', the Court of Appeal, 'did not presume the criminal liability of the defendant, but established, without insufficiency or contradiction, his personal participation, both material and intentional, in the offence of which he was found guilty'.

<sup>13</sup> Cass. Crim., 25 Feb. 2009, No. 08-82.782; Cass. Crim., 20 Apr. 2005, No. 04-83.080.

<sup>14</sup> Cass. Crim., 8 Feb. 2012, No. 11-81.320.

<sup>15</sup> Cass. Crim., 22 Nov. 2017, No. 16-86.550.

<sup>16</sup> Cass. Crim., 5 Jan. 2017, No. 15-82.435.

<sup>17</sup> Cass. Crim., 27 Feb. 2002, No. 01-83.119; Bull. Crim., No. 51.

<sup>18</sup> Cass. Crim., 5 Feb. 1998, No. 96-85.596; Bull. Crim., No. 48. See, however, Cass. Crim., 22 Oct. 2008, No. 08-80.843; Bull. Crim., No. 213.

<sup>19</sup> Cass. Crim., 5 May 1997, No. 95-86.136; Bull. Crim., No. 164.

### 1.3. The policy debate on the liability of company directors

Sometimes referred to as principled<sup>20</sup> liability—as opposed to ordinary criminal liability<sup>21</sup>—the liability of the head of business, also known as the liability of private decision-makers,<sup>22</sup> originated from case law.

According to a very old ruling from the Criminal Chamber of the Court of Cassation: ‘If, in general, each person is liable to punishment only because of his or her personal fact, this rule suffers an exception in certain matters; in particular in the case of regulated industrial professions, the conditions or mode of exploitation imposed on industry essentially oblige the head or master of the establishment who is personally bound to have them carried out and, in the event of an offence, even by the fault of his workers or servants, it is no less he who is deemed to be first and foremost an offender.’<sup>23</sup>

Since then, and in accordance with established case law, the company manager has been held liable for offences committed in the course of the operation of the company under his responsibility, with the company manager being apprehended as an indirect perpetrator

<sup>20</sup> B. De Lamy, M. Segonds, *Juris Classeur Droit Pénal des Affaires*, Notions Fondamentales, fasc. 5.

<sup>21</sup> In accordance with the rules of ordinary law, the decision-maker must, first of all, answer for the offences he has committed materially: he is the material perpetrator of the offence. He is also responsible for the offences to which he has materially contributed: he is a co-perpetrator in this case. Finally, he must answer for the offences he has ordered: the decision-maker is, in such a case, apprehended as an accomplice by instigation, even if it is worth noting the frequent legal assimilation of the intellectual perpetrator (mastermind) with the material perpetrator (C. Pén., Article 433-18; C. Monét. Fin., Article L. 465-1), *infra* Part 2.

<sup>22</sup> M. Delmas-Marty, G. Giudicelli-Delage, *Droit pénal des affaires*, op. cit.

<sup>23</sup> ‘Si, en général, chacun n'est pasable de peine qu'à raison de son fait personnel, cette règle souffre exception en certaines matières; notamment en fait de professions industrielles réglementées, les conditions ou le mode d'exploitation imposé à l'industrie, obligent essentiellement le chef ou le maître de l'établissement qui est personnellement tenu de les faire exécuter et, en cas d'infraction, même par la faute de ses ouvriers ou préposés, ce n'est pas moins lui qui est avant tout réputé contrevenant’, Cass Crim., 28 Jan. 1859, S. 1859, I, 364; C. Mascala, ‘La Responsabilité Pénale du Chef d'Entreprise’, *Les Petites Affiches*, 19 Jul. 1996, 16. See also Cass Crim., 28 Feb. 1956, *Widerkehr*; J. Pradel, A. Varinard, GADPG, No. 37: ‘La responsabilité pénale peut cependant naître du fait d'autrui dans les cas exceptionnels, où certaines obligations légales imposent le devoir d'exercer une action directe sur les faits d'un auxiliaire ou d'un subordonné’ (‘Criminal liability may, however, arise from the actions of others in exceptional cases, where certain legal obligations impose a duty to act directly on the actions of an auxiliary or subordinate person’).

(*auteur médiat*), while the employee, who is responsible for the violation of the penalised norm, is apprehended as an immediate (direct) perpetrator.<sup>24</sup>

The 1992 Penal Code, like its predecessor, remains silent on the subject. As the authors point out, the question is ‘very sensitive in French law. So sensitive that Parliament finally renounced to legislate on this point when the Penal Code was revised, preferring to abandon the question in the hands of the courts and let case law assign liability within the company.’<sup>25</sup>

Even today, the principle of criminal liability of a company manager is still subject to only scattered provisions according to the various codes (e.g. Labour Code, Article L. 4741-1).<sup>26</sup>

Legal literature has gradually and overwhelmingly stressed that, despite its deceptive appearance, this liability respects the principle of personal liability and therefore does not correspond to a case of vicarious liability.<sup>27</sup>

The bold case law of the Court of Cassation has given rise to numerous theories aimed at establishing the (acceptable) basis that the judges had been careful not to point out.

A synthesis of these theories is proposed by B. De Lamy and M.

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<sup>24</sup> On these notions, see *infra* Part 2.

<sup>25</sup> M. Delmas-Marty, S. Manacorda, ‘Rapport National Français’, in M. Delmas-Marty, J.A.E. Vervaele (eds), *The Implementation of the Corpus Juris in the Member States* (vol. 2), Intersentia 2000, p. 307.

<sup>26</sup> Article L. 4741- 1 of the Labour Code punishes with a fine of 3,750 euros ‘the employer or his delegate’ who ‘by his personal fault’ disregards the rules of health and safety. This formula, due to a law of 17 May 2011, takes away the employee’s responsibility and enshrines the position of the Court of Cassation, which had remained faithful to the former text of the Labour Code designating as responsible the ‘heads of establishments, directors and managers’ (against the former Labour Code, s. L. 263-2)—although since 1 March 2008, the same Code referred to ‘the employer or his servant’—and had ruled that, according to these provisions, a breach of the health and safety rules could ‘only be attributed to the heads of establishments or their delegate.’ This is also the case with Article 433-18 of the Penal Code, which punishes, *inter alia*, ‘the de facto or de jure manager of an undertaking’ who has ‘placed’ or ‘allowed to appear’—that is by an employee—the prohibited mention of certain qualities in an advertising document.

<sup>27</sup> It is true that company directors are liable whenever, by failing to prevent their employees from committing an offence, they fail to ensure that the law is enforced. They are therefore not really liable ‘for the actions of others’ but rather, as Professor Larguier put it, ‘via the actions of others’, which makes it possible to respect the principle of personal liability.

Segonds.<sup>28</sup> According to these authors, three theses confronted one another.<sup>29</sup>

The first theory favours the notion of profit and risk. However, it is neglected because of the absence of the necessary subjective dimension in criminal law. It does, however, have the merit of emphasising precisely the need for a theory based on fault.

That is the second thesis. The decision-maker's fault consists in the violation of a general duty of supervision which is incumbent upon him personally. Therefore, the breach of this obligation is also personal. Criticised in the name of the principle of legality, since such a general obligation is not spelled out in any text (this obligation is therefore neither precise nor explicitly penalised), the thesis has also been criticised in that it would make it possible to transform a commission offence (the material fact having actually been committed by the employee) into an omission offence (the manager's abstention constitutes the material element). However, this objection is resolved through the renewal of theory through the notion of the 'moral perpetrator' (intellectual or mediate) and through causality. If the behaviour of the head of business does not correspond to that described in the criminal law, his/her conduct is nevertheless the real cause of the offence. Thus, without the decision-maker's fault of abstention, the material facts would not have been committed; the material element is unique (it is not transformed); the fault of the head of business is very personal; the material fact of the employee is only the revelation (*révélateur*) of the criminal liability of his employer.

The fault thesis is complemented by that of power<sup>30</sup> (third thesis), which gives the mechanism its deep rationality and has the advantage of explaining the cause of special defences also found in case law (delegation of powers). The basis of the power explains why liability is assigned

<sup>28</sup> B. De Lamy, M. Segonds, *Juris Classeur Droit Pénal des Affaires*, Notions Fondamentales, Fasc. 5.

<sup>29</sup> One author underlines the reservation (prudence) of the doctrine when it comes to clarifying the technical basis of criminal liability as a matter of principle for heads of businesses, Ph. Conte, 'Remarques sur la Responsabilité Pénale du Chef d'Entreprise, Spécialement en Matière Fiscale', *Mélanges en l'honneur de Patrick Serlooten*, Dalloz, 2015, pp. 551–563, sp. p. 552.

<sup>30</sup> Fault and power now combine to create this kind of liability. Thus, the failure to oppose (in particular to prevent) the occurrence of an offence is indeed wrong, since the agent had the power (means) to oppose it and that by not (or poorly) exercising his powers he allowed/caused and therefore committed the offence. Rather, power is defined here as the ability to make a decision that imposes legal constraints on others and not merely the exercise of control or supervision.

to the real decision-maker, whether the *de facto* executive or the delegate.<sup>31</sup>

The decision-maker's powers and authority give him or her control over the people and things for which he or she is responsible. He/she therefore has the power to prevent the offence from being committed. A (legal) obligation therefore derives from the powers (particularly those of management, which confer a normative power), the breach of which can be punished under criminal law.

The liability of the head of business is therefore very personal (the material facts of the employee betray a poor organisation of the company for which the manager is accountable). It is a criminal liability based on the function. The head of business is the 'guarantor' of the law's proper application (he/she alone has the power to enforce it). Furthermore, his/her liability presupposes a fault, which is directly drawn from the organisational defect revealed by the material fact of the employee.

A more modern approach has attempted to show that a manager's responsibility has a functional basis (i.e. stems from functions) and is of a non-behavioural nature (i.e. not based on conduct). While acknowledging the resulting difficulties with regard to the principles of criminal law, it stresses that the objective nature of imputation is not so questionable if we accept that criminal law is no longer repressive but pursues a regulatory function. In this context, the principles of criminal law are no longer imposed with the same rigour. Thus, in a regulatory system, the disappearance of fault aims to attribute the offence to the person who was best able to prevent, correct and prevent the disorder.

Today, the doctrine agrees that the principled responsibility of the head of a company has two persistent weaknesses: firstly, the absence of legal foresight and the discovery by case law of cases of liability not specifically provided for (such as the provision of the above-mentioned Labour Code); and secondly, the fragility of the subjective dimension, in that the decision-maker's fault is generally presumed (no confirmation of the manager's failure is required). Moreover, the nature of this fault is undetermined, as failure may be due to simple negligence<sup>32</sup> or the result of a genuine desire (e.g. to escape financial constraints).

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<sup>31</sup> A. Cœuret, 'La Responsabilité Pénale dans l'Entreprise: Vers un Espace Judiciaire Européen Unifié? Les Propositions "Espace Judiciaire Européen" confrontées à la Situation en France', RSC, 1997, p. 297f.

<sup>32</sup> In French criminal law, all aspects of negligence are considered part of the subjective dimension of the offence. French scholars consider negligence an issue of

It should be stressed that these weaknesses only concern intentional offences. For the offences of recklessness, Act No. 2000-647 10 July 2000, which amended Article 121-3 of the Penal Code, now provides the legal framework for characterising the head of business as an indirect perpetrator and for attributing to him the offence (and fault) he has personally committed through recklessness or negligence (*infra* Part 2).

In addition to these two criticisms, there are also those addressed to the presumptions of responsibility. However, as suggested above, some authors note that infringements of the principles of criminal law are mitigated by the fact that imputations to heads of business are mainly subject to regulatory rather than repressive sanctions.<sup>33</sup>

#### *1.4. Introduction and scope of corporate criminal liability in France*

The criminal liability of legal persons has been introduced in France with the new Penal Code.<sup>34</sup> Article 121-2 was initially based on a principle of speciality: only for offences explicitly referred to by the legislator could legal persons incur criminal liability. However, the so-called Perben 2 law of 9 March 2004 (entered into force on 31 December 2005) established the abandonment of the principle of speciality in favour of a generalisation of the criminal liability of legal persons for

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the subjective dimension of the offence and an integral and indivisible aspect of culpability. The objective foreseeability of the perpetration of the offence, the breach of a duty of care, and the occurrence of the result due to the breach are considered subjective aspects of the criminal offence. In Article 121-3 CP, the legislature has provided a detailed rule on criminal liability for negligent conduct.

Article 121-3 CP: ‘...However, the deliberate endangering of another person is a less serious crime where the law so provides.

A less serious crime also exists, where the law so provides, in cases of recklessness, negligence, or failure to observe a duty of care or precaution provided by law or regulation, if it has been established that the offender has failed to meet the ordinary standard of care, taking into account, if appropriate, the nature of his tasks or his functions, his responsibilities, as well as his powers and the means that are at his disposal.

In the case referred to in the above paragraph, natural persons who have not directly caused a harm but who have created or contributed to the creation of a situation that permitted its occurrence or who did not take the measures necessary to prevent it are criminally liable if they violated in a patently deliberate way a specific duty of care or precaution provided by law or regulation or if they committed a specified kind of misconduct leading to the exposure of another person to a particularly serious risk that they ought to have recognised...’

<sup>33</sup> M. Bénéjat, No. 322.

<sup>34</sup> However, French criminal law already had special mechanisms for criminal liability of legal entities (this was and still is the case in customs matters, for example).

all offences (subject to the special cases of liability provided for with respect to media).

Consequently, all PIF offences are liable to be committed by a legal person who may therefore incur criminal liability.

### *1.5. Administrative liability of legal persons*

Many criminal offences have an administrative equivalent which may lead to the (punitive) administrative liability of the legal person (e.g. fiscal, financial, environmental offences) and/or the decision-maker, subject to the possible application of the *ne bis in idem* principle (*infra* Part 6).

This punitive liability of legal persons predates the introduction of the criminal liability of legal persons, which was added to it.

### *1.6. Policy debate on the introduction of corporate criminal liability in France*

A synthesis of the doctrinal debates (former<sup>35</sup> and current) is proposed by Bertrand de Lamy and Marc Segonds,<sup>36</sup> who distinguish three main controversies.

The first is the absolute impossibility for a legal entity to carry out the material element of any offence (objective dimension of criminal responsibility). This argument was refuted in particular by Donnedieu de Vabres, who suggested that it was sufficient to admit the existence of a human *substratum*<sup>37</sup> as a basis for the criminal liability of legal persons. Article 121-2 of the Penal Code has endorsed this concept of the criminal liability of legal persons by requiring, *inter alia*, that the offence charged against a legal person be committed by its ‘organs’ or ‘representatives’; however, it is recognised that the organ or representative concerned may be not only individual, but also collegial in nature.

The majority doctrine agrees that the criminal liability of legal persons differs from the criminal liability of natural persons<sup>38</sup> in that, on

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<sup>35</sup> The first projects date back to the 1930s (Matter Project 1934).

<sup>36</sup> B. De Lamy, M. Segonds, *Juris Classeur Droit Pénal des Affaires*, Notions Fondamentales, Fasc. 7.

<sup>37</sup> H. Donnedieu de Vabres, ‘Les Limites de la Responsabilité Pénale des Personnes Morales’, RD Pén. Crim., 1950, p. 339, spécialement p. 342.

<sup>38</sup> More broadly, ‘les principes qui gouvernent désormais le sort des personnes physiques et des personnes morales sont différents’ (‘the principles that now govern

the one hand, the link between the offence and the legal person can only be indirect (mediated, *médiat*)<sup>39</sup> and, on the other hand, that the material activity of the legal person can only be based on a legal fiction.<sup>40</sup>

The second controversy concerns the subjective dimension of criminal liability. Part of the doctrine, recalling the theory of fiction, stressed the lack of will proper to the legal being and, in so doing, the impossibility of imputing *a fortiori* a criminal will to it. This argument has been rejected by the doctrine of the theory of reality, according to which the legal person has a will distinct from that of all the natural persons who make up the legal person. The case law, based on a narrow interpretation of Article 121-2, has chosen an intermediate solution, considering that the material element, as well as the intentional element, must be characterised in the person of the organ<sup>41</sup> or representative of the legal person.<sup>42</sup> It would therefore be advisable to reason not in terms of the imputability of the legal person but much more in terms of imputation of the offence to the legal person.<sup>43</sup>

The third controversy concerns the principles of personal liability and personal (individualised) punishment. As for the first, the theory of vicarious liability was quickly dismissed. Although the commission of the offence presupposes the mediation of an organ or representative, ‘there is no derogation, but adaptation of the principle of personal liability on the basis of the necessary legal fiction: the organs or representatives are the legal person.’<sup>44</sup> As for the argument based on the infringement of the principle of the personal nature of penalties, it is rejected in that it leads to the denial of the person’s legal autonomy. However, it is

the fate of natural and legal persons are different’), cf. Ph. Conte, *La Responsabilité Pénale des Personnes Morales au regard de la Philosophie du Droit Pénal*, in *La Personne Juridique dans la Philosophie du Droit Pénal*, éd., Panthéon Assas, 2003, p. 109, 119.

<sup>39</sup> P. Maistre du Chambon and Ph. Conte, *Droit Pénal Général*: A. Colin, 6th ed. 2002, p. 197, No. 369.

<sup>40</sup> J.-Ch. Saint-Pau, ‘*La Responsabilité Pénale des Personnes Morales: Réalité et Fiction*’, in *Le Risque Pénal dans l’Entreprise*, Litec, 2003, p. 71.

<sup>41</sup> Cass. Crim., 2 Dec. 1997, No. 96-85.484; No. 1997-005349; Bull. Crim., 1997, No. 408; D. 1999, Somm. p. 152, note G. Roujou de Boubée; JCP G 1998, II, p. 682, rapp. F. Desportes; JCP E 1998, p. 949, obs. Ph. Salvage; RJDA 1998, p. 175, note N. Rontchevsky.

<sup>42</sup> Cass. Crim., 18 Jan. 2000, No. 99-80.318; No. 2000-000995; Bull. Crim., 2000, No. 28; D. 2000, Jurispr. p. 636, note J.-Ch. Saint-Pau; JCP G 2000, II, 10395, note F. Debove.

<sup>43</sup> P. Maistre du Chambon and Ph. Conte, op. cit., p. 196, No. 367; cf. E. Dreyer, ‘*Responsabilité Pénale des Personnes Morales: Question d’Imputation ou d’Imputabilité?*’, *Gazette du Palais*, 3 Nov. 2015, No. 307, p. 24.

<sup>44</sup> J.-Ch. Saint-Pau, op. cit., p. 81.

sometimes invoked by those who dispute the justification of legal persons' liability because of the complexity of their internal structure, which would make it impossible to determine who is 'guilty' as a natural person. The fault thus sanctioned would then present the characteristics of a collective fault and the legal person is presented as a scapegoat.

As for legislative debates, it can be noted that the explanatory memorandum to the bill (in 1986) stressed the willingness of the legislator to put an end to impunity for legal persons, particularly in criminal business law, which is 'all the more shocking because they are often, by the scale of the means at their disposal, the cause of serious harm to public health, the environment, economic public order or social legislation' and that 'in addition, the decision which causes the offence is taken by the corporate bodies themselves, which determine the industrial, commercial or social policy of the undertaking.'<sup>45</sup> This is in line with the legislator's desire to remove 'the presumption of criminal liability which today actually weighs on decision-makers in relation to offences of which they are sometimes unaware' and thus to ensure 'better respect for the principle that, in criminal law, no one is liable except for his or her own conduct.'<sup>46</sup>

Finally, the arguments of pragmatism (adapting the law to criminological reality) and fairness (reducing the extent of criminal liability of natural persons) do not mask Parliament's indifference to questions of legal theory<sup>47</sup> and the desire to (tendentially) substitute criminal liability of the structures for that of decision-makers.<sup>48</sup>

Some authors thus consider that the criminal liability of legal persons 'is decreed more than established'<sup>49</sup> and that it is not certain that a theoretical basis can be found for it.<sup>50</sup> This would be a *sui generis* mechanism of legal imputation, essentially pragmatic, which does not re-

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<sup>45</sup> Projet de Nouveau Code Pénal, op. cit., p. 16.

<sup>46</sup> Projet de Nouveau Code Pénal, op. cit., p. 17.

<sup>47</sup> J.-H. Robert, *Droit Pénal Général*, PUF, 6th ed. 2005, p. 373.

<sup>48</sup> This will then be confirmed by the law of 10 July 2000 on the definition of unintentional offences (2000-647, *infra*).

<sup>49</sup> X. Pin, *Droit Pénal Général*, Dalloz, 2017.

<sup>50</sup> Only positivist doctrines would be able to justify it, since they are indifferent to the notion of fault (see in this sense, J.-H. Robert, *Droit Pénal Général*, op. cit., p. 363). However, in reality, the liability of legal persons has not been conceived in terms of their dangerousness (intrinsically vicious structures, security measures), but rather in terms of their assets (significance of the economic impact of criminal sanctions). See more explicitly in this respect Article 14 of the Corpus Juris, laying down criminal provisions for the protection of the European Union's financial interests, on the criminal liability of groups (ed. M. Delmas-Marty, *Economica*, 1997, pp. 71-73). See also

quire any conditions of imputability on the part of the entity<sup>51</sup> and which does not harmonise well with the notions of fault.

Today, the doctrine seems to agree that it is not a question of vicarious liability but of personal liability by representation.

It is indirect or subsequent, because it involves an offence committed by a body or representative. It is personal because the body or representative expresses the will of the legal person. In other words, the offence committed by the organ or representative is an offence committed personally by the legal person.<sup>52</sup>

## 2. Relationship with general principles of criminal law

### 2.1. General aspects of perpetration and complicity under French criminal law

There are only two general categories of participant (parties to crime) who differ as much in their actions as in their willingness: perpetrators and accomplices.

According to Article 121-4 of the Penal Code, the perpetrator is ‘he who commits or attempts to commit the offending acts’.

However, it is sometimes necessary to check, before retaining the personal liability of the agent, that the legislator has not limited the category of perpetrators by requiring them to be of a particular quality, which is often the case for heads of business referred to as ‘employers’ or ‘managers’, for example (see below).

General criminal law has two forms of participation as a perpetrator: coaction and instigation.

**Coaction.** French law does not define coaction.<sup>53</sup> The judge must therefore treat this form of participation as the juxtaposition of several solitary actions within the meaning of Article 121-4 of the Penal Code. In other words, the co-perpetrator is another perpetrator. Nevertheless,

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J. Amar, ‘Contribution à l’Analyse Économique de la Responsabilité Pénale des Personnes Morales’, Dr. Pénal 2001. Chron. 37.

<sup>51</sup> See, however, the proposal to make the requirement of an offence committed on behalf of the legal person by its organs or representatives a condition of imputability: E. Dreyer, ‘Responsabilité Pénale des Personnes Morales: Question d’Imputation ou d’Imputabilité?’ Gaz. Pal. Spécialisée, 2015, n° 305–307, p. 24.

<sup>52</sup> On the personal nature of the liability of legal persons and the idea of a ‘diffuse fault’, see J.-C. Saint-Pau, ‘La Responsabilité des Personnes Morales: Réalité et Fiction’, in *Le Risque Pénal dans l’Entreprise*, Litec, Carré droit, 2003, p. 72f.

<sup>53</sup> E. Baron, *La Coaction en Droit Pénal*, Thèse Bordeaux, 2012.

there are situations in which the co-perpetrator is also considered an accomplice.

**Instigation.** The moral perpetrator is the one who does not materially carry out the offence but who causes or allows another person to commit the offence. His participation is in this sense of an intellectual nature.

Very often this instigation is especially incriminated.<sup>54</sup> Where this is not the case, the current law offers only a choice between perpetrator status (Penal Code, Article 121-4) or accomplice status (Penal Code, Article 121-7).

However, it should not be possible for the moral perpetrator to be treated as a perpetrator as such within the meaning of Article 121-4 of the Penal Code because he or she does not carry out the offence in practice. On the other hand, if all the conditions for secondary participation are met, the moral perpetrator must be treated as an accomplice by provocation or instruction.

The assimilation of the instigator to an accomplice results from Article 121-7 of the Penal Code, which considers as an accomplice the person who 'by means of a gift, promise, threat, order, or an abuse of authority or power, provokes the commission of an offence or gives instructions to commit it'.<sup>55</sup>

However, case law is often tempted to equate the moral perpetrator with a material perpetrator to take account of his or her *animus auctoris*.

Apart from these cases, case law may deviate from legal criteria and

<sup>54</sup> The legislator punishes the act of having carried out (*faire faire*), such as having biomedical research carried out (C. Pen., Article 223-8), having unlawful processing of computer data carried out (C. Pen., Article 226-16), or having telephone canvassing carried out when a consumer is registered on a list of opposition to canvassing (Consumer Code, Article L. 223-1), etc.

<sup>55</sup> This assimilation is criticised because the repression of the accomplice is always subordinate to the realisation of the principal offence, while the instigator has a power of harm that deserves to be punished as such; see X. Pin, *Droit Pénal Général*, Dalloz, Cours, 2017. The preliminary draft Penal Code of 1986 had taken this approach, clearly distinguishing the accomplice—who assists in the preparation or commission of the offence—from the instigator who is liable to punishment irrespective of any principal offence. It was planned to introduce an Article 121-6 worded as follows: 'The instigator is the person who by gift, promise, deception, threat, order, abuse of authority or power directly causes a third party to commit a crime, even if, because of circumstances beyond the control of the instigator, the provocation is not followed by action. The instigator is liable to the same penalties as the offender.' However, the drafters of the new Penal Code did not retain this draft, in particular because of the difficulties regarding the evidence of the provocation, when it was not followed by action.

consider that the person who caused the offence to be committed is, because of his control over the facts and his or her *animus auctoris*, comparable to a material perpetrator. In this case, material participation is less important than culpable intent. This assimilation occurs mainly in two cases: first of all, where there is a subordinate relationship between the moral perpetrator and the material perpetrator such that the latter is merely an instrument of execution;<sup>56</sup> then, when the shadow man is the real organiser of the offence. Thus, a boss who paid an employee to alter the operation of an electricity meter in order to reduce the amount of consumption recorded could be convicted not as an accomplice by provocation, but as the perpetrator of a deception<sup>57</sup> because, by assuming the management of the criminal enterprise, he was the master of the action. Similarly, the Criminal Chamber of the Court of Cassation held that a company manager who had organised sales of textiles to elderly persons in accordance with methods constituting the offence of abuse of weakness (Consumer Code, Article L. 121-8 to L. 121-10) had to be classified as a perpetrator, whereas materially it was an employee who had committed the offence.<sup>58</sup>

These examples are not isolated.<sup>59</sup>

Nevertheless, it should be stressed that the change of qualification seems essentially symbolic because, in terms of repression, the accomplice is punished in any case as a perpetrator.

Finally, in addition to these two hypotheses, we must add the case of an offence resulting from a collegial decision taken by majority vote. In principle, the collegial body acts as a screen between the legal person or any group and the voters, as the decision is anonymous and collective.<sup>60</sup> Nevertheless, the judges sometimes note a personal act attributable to certain voters in order to reproach them personally for the offence resulting from the collegial decision (on this point, see below).

**Remarks on the theory of borrowed criminality.** Perpetrators, co-perpetrators and accomplices therefore participate in the production of the illicit act to which each of them is associated by a link of their own which does not pass through the person of a principal perpetrator.

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<sup>56</sup> Crim., 14 Dec. 1974, RSC 1976. 409, obs. J. Larguier. In this case, a bank manager had asked an employee to systematically open all correspondence received by the bank; the employee materially violated the correspondence, but the director was convicted as the perpetrator.

<sup>57</sup> Crim., 2 Nov. 1945, D. 1946.

<sup>58</sup> Crim., 1 Feb. 2000, Dr. Pénal 2000. 59, obs. J.-H. Robert.

<sup>59</sup> Crim., 28 Mar. 1996, Dr. Pénal 1996. 223, obs. J.-H. Robert.

<sup>60</sup> Crim., 11 May 1999, RSC 2000. 194, obs. B. Bouloc.

The materiality of this act is common to them and serves, under French law, to determine the penalty incurred. But the responsibility of each participant is also determined by personal factors, so that the accomplice can be convicted when the main perpetrator is not, due to a lack of intention or discernment and vice versa. If the accomplice ‘borrows’ something from the principal perpetrator, it is the name of the offence and the penalty attached to it.<sup>61</sup>

**Remarks on the participation in the offence and criminal liability of the head of business.** The liability of the manager is an indirect participation in the offence which does not in principle exclude the liability of servants, who are the material perpetrators of the offence.<sup>62</sup>

## 2.2. *Complicity under French criminal law*

Non-official translation of the Penal Code:

Article 121-6: The accomplice to the offence, in the meaning of Article 121-7, is punishable as a perpetrator.

Article 121-7: The accomplice to a felony or a misdemeanour is the person who knowingly, by aiding and abetting, facilitates its preparation or commission.

Any person who, by means of a gift, promise, threat, order, or an abuse of authority or powers, provokes the commission of an offence or gives instructions to commit it, is also an accomplice.

According to Article 121-7 of the Penal Code,<sup>63</sup> complicity (secondary participation) can be achieved either by aiding or abetting or by instigation.

In all cases, the act of complicity must have a causal link with the main offence (fact).<sup>64</sup>

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<sup>61</sup> J.H. Robert, *Juris Classeur*, Code Pénal.

<sup>62</sup> Crim., 23 oct. 1984, D. 1985, IR 134.

<sup>63</sup> It should be noted that under the Penal Code, complicity in a contravention is not always punishable. Indeed, if complicity by provocation and instruction is punishable regardless of the nature of the offence, complicity by aid or assistance is, subject to a legal provision to the contrary, limited to crimes and misdemeanours.

<sup>64</sup> As mentioned above, according to the ‘theory of borrowed criminality’, French criminal law links the act of complicity to the main offence. It is considered that the accomplice’s conduct is justified in its connection with the main offence to the extent that the act of complicity is ultimately neutral in itself with respect to criminal law. This act will only be coloured by a criminal aspect when it has a causal link

**Complicity by aiding or abetting.** The first mode of secondary participation is complicity by aiding and abetting (Article 121-7, Paragraph 1, Penal Code), which consists in ‘facilitating the preparation or the commission’ of the offence. This may be the provision of material means or a mere encouragement to commit the offence (aiding or moral abetting). The important thing is that this aiding or abetting is the result of a positive act, prior to or concurrent with the offence.

Firstly, it must traditionally be a positive act or active participation:<sup>65</sup> there can be no secondary participation on the part of a person who abstains or passively assists in the commission of an offence.<sup>66</sup>

**Complicity through inaction.** However, abstention may be punishable as aiding and abetting if it reveals punishable collusion.<sup>67</sup>

This collusion presupposes, cumulatively, the power (legal or contractual) to effectively oppose the offence, the willingness to let the principal perpetrator carry out the criminal acts, and the knowledge that these acts are currently committed or will be committed in the near future.

This scheme can be found in three cases.

First of all, complicity by abstention may be retained if it is the result of a prior agreement with the offender or offenders; collusion replaces the requirement for a material act of participation, the difficulty being to prove it.<sup>68</sup> Secondly, aiding and abetting by abstention may

with a main (principal) punishable act (which is reduced by case law to the material act). It does not matter that the perpetrators (of the main offence) are not actually punished. This theory differs from the ‘theory of *borrowed penalty*’ which has formally been abandoned with the new Penal Code. From now on, the accomplice is punished as a perpetrator and not as the perpetrator. This redrafting of the text led to the question of whether the accomplice should have the same quality as that required for the perpetrator for certain offences (i.e. requirement of a specific quality: manager, civil servant). The Court of Cassation replied in the negative, admitting as aiding and abetting the conviction of a person who could not have been convicted for lack of the quality required by the text (Crim., 20 mars 1997, No. 96-81.361).

<sup>65</sup> It is, moreover, the characterisation of this active participation and the degree of involvement of the individual in the offence that makes it possible to determine whether he or she should be qualified as a perpetrator or an accomplice: see Crim., 8 Feb. 2017, n° 16-82110, Gaz. Pal. 2017, n° 16, p. 43, obs. S. Detraz.

<sup>66</sup> At most, the spectator can be accused, as the perpetrator of an autonomous offence, such as the offence of not obstructing the commission of a crime or a misdemeanour (§ 223-6 (1) of the Penal Code) or of not providing assistance to a person at risk (§ 223-6 (2) of the Penal Code).

<sup>67</sup> A. Decocq, ‘Inaction, abstention et complicité par aide et assistance’, JCP 1983, I. 3124.

<sup>68</sup> See, however, Crim., 19 Dec. 1989, RSC 1990. 775, obs. A. Vitu (complicity of parricide on the part of a mother who left a loaded rifle within reach of her children).

be used against an accomplice who had a professional duty (legal or contractual) to act to prevent the offence and who abstained, knowing that the offence was going to be committed.<sup>69</sup> Finally, case law sometimes considers that the presence of aggressors in a group can be a moral help, encouraging perpetrators in their actions.

Furthermore, the act of participation must precede or coincide with the principal act (the main offence). However, this principle is also attenuated: if the subsequent complicity results from an earlier agreement, it remains punishable.<sup>70</sup> The proof of the previous agreement also involves complicity.

That said, there are autonomous incriminations that apply to attitudes of facilitating the offence after the fact (Article 321-1 *et seq.* of the Penal Code, for instance).

**Complicity by instigation.** The second form of complicity is provided for in Article 121-7, Paragraph 2, of the Criminal Code. This is the instigation that divides into complicity through the provision of instructions and through provocation.

As regards the provision of instructions or intellectual means, this is information given in full knowledge of the facts, sufficiently precise to be necessary for the commission of the offence.

With regard to provocation, it must not only be followed by action, but also by ‘gift, promise, threat, order or abuse of authority or power’. It cannot be a mere suggestion, since provocation must be circumstantial; the judge must therefore take note of the form it takes.<sup>71</sup>

In all cases, an accomplice is punishable only if he or she knowingly associates himself or herself with the principal offence (act).

This intentional element will logically be inferred from the carrying out of provocative or investigative acts with a view to committing the offence; and, in the case of aiding or abetting, it should be noted that

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In this case, the court appears to have equated negligence with collusion, which leads critically to presume a previous agreement).

<sup>69</sup> Crim., 27 Oct. 1971, Bull. Crim., n° 384 (customs officer complicit in the theft of goods he was to supervise); Crim., 15 Jan. 1979, Bull. Crim., n° 271 (accountant complicit in bankruptcy for not having verified the figures given by his client); Crim., 28 May 1980, D. 1981. IR 137 (member of the management board of a company complicit in the abuse of corporate assets because he did not oppose it); Crim., 31 Jan. 2007, AJ Pénal 2007. 130 obs. G. Royer (account auditor complicit in fraud).

<sup>70</sup> Crim., 1 Dec. 1998, Dr. Pénal 1999. 80, obs. M. Véron (aiding and abetting the illegal taking of interests by applying an agreement previously concluded).

<sup>71</sup> See, for verbal provocation, Crim., 18 Mar. 2003, Dr. Pénal 2003, 95, obs. M. Véron; D. 2004. Somm. Comm. 311, obs. B. de Lamy.

the accomplice acted knowingly—i.e. that he had the conscience and willingness to associate himself with the principal fact.

As for the wording of this intention, it is important to note that it is not necessary to highlight a complete and direct agreement between the perpetrator and the accomplice. It is possible to become an accomplice through another accomplice if one is aware of participating in the offence ('complicity of complicity').<sup>72</sup>

A simple unilateral adherence to the criminal project is sufficient. The accomplice does not have to be in exactly the same state of mind as the perpetrator. Thus, while the main offence requires a special intent, it does not appear that this particular *mens rea* must be demonstrated by the accomplice; case law is in this vein.<sup>73</sup> The purpose of the intent must be participation in the main offence. It must therefore be admitted that the accomplice can only be charged with offences that he or she has foreseen or could foresee. This led case law to rule out complicity in offences of recklessness as a matter of principle until recently. Since 13 September 2016 (No. 15-85046), this position has been weakened and the doctrine remains divided.

Several scholars welcomed this decision on the grounds that the intentional nature of complicity would not be incompatible with the imputation of an offence of recklessness, as the mere conscience of recklessness would characterise the intention to associate itself with it. The argument is that the subjective element of the primary offence should not be confused with the intent required for complicity.<sup>74</sup>

This analysis is seductive but is criticised because it amounts to reproaching a person criminally for having voluntarily associated with—yet having abstained from—an act that has led to unintentional damage, whereas the act without the damage does not even appear to be a crime. The mere awareness of possible damage cannot constitute participation as an accomplice to the harmful offence. In this case, it would have been more realistic to consider the one who abstained as the indirect perpetrator of the damage, by showing that his absence or silence constituted an aggravated fault (*faute qua-*

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<sup>72</sup> '...knowingly aiding or abetting the perpetrator of the fraud even through another accomplice, constitutes the complicity incriminated by Article 121-7 of the Penal Code', Crim., 15 Dec. 2004, No. 04-81.684.

<sup>73</sup> V. Crim., 9 Nov. 1992, Bull. Crim., n° 364.

<sup>74</sup> Crim., 13 Sept. 2016, n° 15- 85046, RSC 2016, p. 760, obs. Y. Mayaud; JCP G, 1067, note F. Rousseau.

*lifiée*) within the meaning of Article 121-4, Paragraph 4, of the Criminal Code (*infra*).

### 2.3. *Omission liability under French criminal law*

**Offences of omission.** Acts of omission are generally not subject to criminal liability. However, French criminal law provides for specific offences for which omission is punishable. In these few cases, general rules apply so that, in particular, attempt and participation are also punishable.

Moreover, in accordance with Article 121-3 Paragraph 1 of the Criminal Code, crimes and misdemeanours are punishable only if committed intentionally. However, Article 121-3 Paragraph 3 of the Criminal Code provides for criminal liability for negligence if the law expressly so provides. These general requirements also apply to offences of omission expressly recognised as punishable. Therefore, intent is, in principle, generally required. However, negligence by omission is not excluded. Most importantly, the most common negligence offences—such as negligent homicide (section 221-6 CP) and negligent bodily harm (section 222-19 CP)—because they apply to both acts and omissions, make negligence by omission quite common in practice.

**Secondary participation.** As indicated above, in French criminal law, the existence of a punishable predicate offence is a prerequisite for complicity. Accordingly, subject to the specific offences of omission, because commission by omission is not, in principle, punishable, secondary participation in an act of omission is also not punishable. However, according to the case law, the criminal liability of the accomplice by omission may be recognised when a prior agreement or a legal duty can be established or if the offender has provided moral support (*appui moral*).

**Sentencing.** Judges generally enjoy broad sentencing discretion in French criminal law. The Criminal Code does not provide for minimum sentences. As regards offences of omission, there is no legal provision in French criminal law providing for special conditions. Furthermore, the existence of a special judicial practice with respect to the assessment of crimes of omission is not documented.

**Specific duty to act, duty of care.** There is no theory of the duty of care in French law. Nevertheless, specific legal obligations may arise from laws or regulations or be part of a definition of a criminal offence. In such cases, a relevant breach may establish criminal liability by omission.

When it is the guarantee of a professional regulation, the offence is generally committed by a simple failure to comply with an obligation to act.<sup>75</sup> This is the case of all offences relating to formalities necessary for the life of companies, such as the omission of advertisements or formal mentions in company documents, the omission of convening meetings or the failure to communicate social information. Long criticised for its reliance on a less material than virtual causal link, however, the omission does not appear to be contrary to the principle that there is no offence without material activity. Indeed, the omission here consists of an omission in the function (*abstention dans la fonction*). It is not a question of 'forcing a person to intervene in a situation which he or she has not contributed to creating, but of requiring him or her to carry out his or her activity without creating social danger, by making proper use of his or her powers'.<sup>76</sup>

In the case of regulatory offences, which punish a state of fact contrary to the law rather than reprehensible behaviour, guilt is a secondary factor. The finding of non-application of the regulation seems to be sufficient. Thus, 'fault of negligence is necessarily established by the mere evidence of non-compliance with regulations'.<sup>77</sup> As for intent, in addition to the fact that the professional 'cannot fail to know',<sup>78</sup> his bad faith is inferred from the circumstances of the case according to a constant jurisprudential formula: 'the sole finding of an informed violation of the statutory or regulatory prescription implies, on the part of the perpetrator, the criminal intent'.<sup>79</sup> It is only a rule of evidence, establishing only a presumption, but it tends to become irrebuttable.

#### 2.4. Duty and failure to report the commission of an offence

**Duty to report (general remarks).** There is no general obligation to report offences. The Penal Code provides, in a section entitled 'Obstacles to access to justice', for specific offences of non-denunciation,

<sup>75</sup> For an extended list of offences of omission in criminal business law, W. Jeandidier, 'L'Élément Matériel des Infractions d'Affaires ou la Prédition pour l'Inconsistance', in *Mélanges Gassin*, PUAM, 2007, p. 245.

<sup>76</sup> P. Conte, P. Maistre du Chambon, *Droit Pénal Général*, Armand Colin, No. 308 et 346.

<sup>77</sup> Crim., 21 Dec. 1907.

<sup>78</sup> 'Ne peut pas ne pas savoir'.

<sup>79</sup> 'La seule constatation de la violation en connaissance de cause de la prescription légale ou réglementaire implique, de la part de son auteur, l'intention coupable', Crim., 12 May 2009, No. 08-87418.

most of which protect persons. However, Article 434-1 generally criminalises the offence of non-denunciation of a crime that it is still possible to prevent or limit its effects, except for the close relatives or spouse of the perpetrator or accomplice of the crime and persons subject to professional secrecy.

However, there is a certain obligation: 'Every constituted authority, every public officer or civil servant who, in the performance of his duties, has gained knowledge of the existence of a felony or of a misdemeanour is obliged to notify forthwith the district prosecutor of the offence and to transmit to this prosecutor any relevant information, official reports or documents' (Article 40, Paragraph 2 CCP). Above all, because of their profession, some have to report certain facts.

**Reporting duties of professionals.** The objective of regulating professional activity leads the legislator to seek, if necessary by threatening criminal sanctions, the cooperation of professionals who have a power or duty of supervision over others. Some professionals are under a legal obligation to disclose criminal acts discovered in the performance of their duties. In addition to this professional liability, however, they may also be liable under ordinary law (concealment or money laundering).

**Criminal and disciplinary duty to disclose criminal acts.** Many professionals are what case law calls 'necessary confidants' (*confidents nécessaires*). The legislator takes advantage of this necessity to compel them to disclose the criminal acts of which they are aware. For some, the obligation is criminal in nature, but for a greater majority the obligation is merely disciplinary. In the latter case, however, the risk of criminal liability remains, since failure to disclose offences may constitute an (ordinary law) non-public disclosure offence or a consequential offence such as concealment or money laundering.

Article L. 820-7 of the Commercial Code provides for the penal duty to report criminal acts. Despite the generality of the provision, this duty is incumbent on the auditor alone. The notion of a criminal act is broader than that of an offence and makes it possible to include attempted offences. It also covers, without distinction, crimes, misdemeanours and petty offences. The obligation presupposes knowledge of the facts and not mere suspicion, unlike other reporting obligations (not penalised).

**Disciplinary reporting obligations.** The Monetary and Financial Code (MFC) imposes various disclosure obligations on many professionals, all of whom have in common the ability to monitor the activity of their clients (whether this power is the subject of their function or whether it is incidental to it). The obligations to disclose consist of declarations to the public prosecutor or the TRACFIN service (French FIU). The existence of a criminal obligation on the

auditor does not prevent him/her from also denouncing facts covered by the MFC. However, the criminal obligation applies only where there is certainty that the facts are wrongful. The declaration to TRAC-FIN must be made as soon as there is any doubt. While, by virtue of the MFC, silence only exposes the professional to disciplinary sanctions, the risk of criminal liability is not entirely eliminated if, by not declaring them, the professional conceals the criminal acts and in doing so commits money laundering. The absence of criminal liability for failure to disclose criminal acts against professionals other than the statutory auditor does not protect them from criminal prosecution. The indirect criminal penalties for money laundering or complicity seem even more severe than those for the specific offence.

**Duty to speak and self-accusation.** Article L. 820-7 of the Commercial Code does not provide for any limit on the benefit of any individual. Case law does not seem to have settled the case where the auditor becomes aware of an offence because he/she himself is personally involved (e.g. as an accomplice). As for the doctrine, it noted that Article L. 820-7 contrasts by its silence with its more general counterpart, Article 434-1 of the Penal Code, which criminalised the non-denunciation of crime. The latter does not exempt participants in the crime from its scope. However, by reserving the case of some of their relatives (parents or spouses), it has allowed case law, by reasoning *a fortiori*, to exclude perpetrators and accomplices.<sup>80</sup> The doctrine considers that the solutions enshrined in the general provision should apply to the special provision, especially since the case law of the ECHR suggests it (even if it does not require it).

## 2.5. Strict liability under French law

### **Contraventional liability (*responsabilité contraventionnelle*).**<sup>81</sup>

Liability based on the commission of a petty offence can be seen as the breeding ground for cases of strict liability. According to Article 121-3, Paragraph 5, of the Penal Code, ‘there is no petty offence in the event of force majeure’. This section is intended to describe the content of the subjective element of petty offences, at least when they are

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<sup>80</sup> Cass. C., 27 Dec. 1960: Bull. 1960, No. 624; Rev. Sc. 1961, p. 345, obs. L. Hugueney, on Article 62 of the former Criminal Code.

<sup>81</sup> B. De Lamy, M. Segonds, *Juris Classeur Droit Pénal des Affaires*, Notions Fondamentales, Fasc. 5.

not intentional or negligent—i.e. when the statutory instrument does not give any indication, even implicitly, as to the nature of the subjective element.

The origin of what is known as a ‘contraventional fault’ is a case law. The Court of Cassation developed, as early as the nineteenth century, a theory according to which petty offences (but also certain misdemeanours) constituted purely ‘material’ offences. This formula meant that these offences were fully constituted even though there was no intent, recklessness or negligence, the finding of the material act alone being sufficient.

However, the Criminal Chamber of the Court of Cassation allowed the offender to be exonerated, not by proving his absence of fault, but by proving a cause of criminal irresponsibility such as insanity or coercion.

Since the Penal Code of 1994, solutions of the Court of Cassation regarding petty offences have remained in force, which is awkwardly expressed in the last paragraph of the same text, referring to ‘force majeure’.

The authors very early on sought a basis for this case law which greatly facilitates repression, and several proposals were made. The oldest and still most widespread one today is to say that, in matters of petty offences, fault is required, but it is presumed from the commission of the offending act.

Other authors have tried to give substance to this fault by observing that it consists of non-compliance with rules establishing a minimum discipline necessary for life in society. Compliance with these standards is so imperative that it is not possible to accept that the offender can claim that he or she acted without fault or in good faith.

It follows from this reasoning that fault is a corollary of non-compliance with the rule and that it is confused with the offence itself. Therefore, it must be concluded that fault is simply the material non-compliance with the law. Criminal culpability where petty offences are concerned is nothing more than non-compliance with the law—that is, a violation of a norm. Therefore, the only psychological aspect required remains the imputability of the fact.

That is why part of the doctrine does not hesitate to consider that liability in this matter is purely objective, being reduced to proof of the mere commission (materiality) of the facts, excluding any subjective element.<sup>82</sup>

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<sup>82</sup> Y. Mayaud, op. cit., No. 291.

This presentation corresponds to the state of positive law, even if it runs counter to the general principle that there is no criminal liability without fault.

**Extension for misdemeanours.** Article 121-3, Paragraph 3, of the Penal Code provides that unintentional misconduct means not only recklessness and negligence, but also failure to comply with a duty of care or precaution provided for by statute or regulation.

As far as the violation of an obligation of this nature provided for in a regulation is concerned, it is often itself incriminated and punished with petty offence penalties, which makes it very easy to establish unintentional misconduct simply by establishing that the contravention has been committed.

It can be inferred from all this that where unintentional fault consists of a breach of an obligation of due care or precaution provided for in a text, the mere finding of a violation of that text is sufficient to characterise the fault, which is therefore reduced to the mere conventional fault.

In other words, the former case law category of ‘material offences’ has not completely disappeared, because unintentional offences, such as manslaughter or reckless injury, are sometimes made up only of this single fault, with the smallest of contents.

Scholars consider that the solution is not open to criticism provided that the breach referred to in Article 121-3, Paragraph 3, of the Penal Code is solely an obligation of due care or precaution.

However, it is logical that a person who does not comply with a rule, having this purpose, cannot claim that he or she did not commit a fault or that he/she was prudent when it is contradictory to claim that he or she was prudent by failing to comply with a rule of due care or precaution.

Thus, in this specific case, as in general in petty offence cases, it is not possible to prove that there was no fault, but the explanation lies in the nature of the rule that was not respected, a rule that requires due care or precaution for others. Violation of such a rule necessarily establishes recklessness.

On the other hand, many petty offences are constituted by non-compliance with rules that are not aimed at due care or precaution. In such cases, the violation of the rule does not appear as a sign of recklessness or negligence, but more generally as an indiscipline sufficient to establish criminal liability.

In general, it should be noted that the category of petty offences, which remains the third category of criminal offences, corresponds in

many legal systems to decriminalised offences subject to administrative repression.

**Low constitutional constraints.** The Constitutional Council has belatedly conferred a constitutional value on the requirement of guilt, affirming, with regard to the criminalisation of the offence of ‘great speeding’ (Article L. 413 (1) of the Highway Code), that ‘it follows from Article 9 of the Declaration of the Rights of Man and the Citizen, with regard to felonies and misdemeanours, that guilt cannot result from the mere material imputability of penalized acts; that consequently, and in accordance with the combined provisions of the aforementioned Article 9 and the principle of the legality of offences and penalties affirmed by Article 8 of the same Declaration, the definition of a criminal offence, in the case of a misdemeanour, must include, in addition to the material element of the offence, the moral element, intentional or unintentional, of the offence.’<sup>83</sup>

According to the Constitutional Council, this means that the principle applies only to felonies and misdemeanours. Moreover, the principle does not preclude the introduction of presumptions of guilt on an exceptional basis. The Council thus considered that if ‘in principle the legislator cannot establish a presumption of guilt in criminal matters...but exceptionally, such presumptions may be established, in particular in the case of petty offences, provided that they are not irrebuttable, that the rights of the defence are respected and that the facts reasonably give rise to a likelihood of imputability’.

## 2.6. *Special rules on liability*

There are special rules on criminal liability in certain areas.

This is the case in customs matters, with presumptions relating sometimes to the commission of the elements of the offence, sometimes to the imputation of the offence; in press-related offences, with the famous mechanism of so-called ‘cascade liability’ (*responsabilité en cascade*), which automatically ascribes the press offence to the director of publication; and in transport<sup>84</sup> or environmental matters.

In addition to these specific provisions provided for by the law, the

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<sup>83</sup> Cons. Const., 16 Jun 1999, No. 99-411 DC, Consid. No. 16.

<sup>84</sup> Objective criminal liability established by the Customs Code on Transport: Article 393-1 CD.

field of tax fraud, which is the subject of specific rules laid down by case law, should be added..

These mechanisms use different legal techniques but have in common facilitating the proof of the offence and/or its attribution. They aim to ensure the identification of a criminal offender.

With regard to PIF offences, it is interesting to briefly present two particular sectors: criminal liability in customs matters and criminal liability in tax matters.

**Directors' liability in the event of customs offences (relevant to the fight against fraud).** The criminal liability of the head of business applies in customs matters, which presupposes (as customs offences all require intent) his/her personal participation in the commission of the offence.<sup>85</sup>

However, this is presumed<sup>86</sup> in the absence of delegation of powers.<sup>87</sup>

The company director will thus be considered the perpetrator, in particular in his capacity as holder (*détenteur*), or as 'interested in fraud' (*intéressé à la fraude*), two concepts specific to customs criminal law which make it possible to presume guilt or imputation of the offence.

The status of holder allows the presumption of criminal liability. Article 392 §1 of the Customs Code states that 'the holder of fraudulent goods is deemed liable for fraud'. The holder is defined as the person who, regardless of his capacity as an employee or principal,<sup>88</sup> has physical or legal control (owner, importer, etc.) of the goods or ensures *de jure* or *de facto* supervision.

The legal presumption of guilt dispenses with characterising the participation of the persons concerned in the offence: their quality—which must be proved—is sufficient to prove it. The presumption of guilt is irrefutable: the persons concerned do not have the power to prove their lack of material participation in the offence as perpetrators.<sup>89</sup> Consequently, only force majeure and good faith are grounds for exemp-

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<sup>85</sup> Cass. Crim., 27 Feb. 2002, No. 01-83.119: Bull. Crim., No. 51.

<sup>86</sup> Cass. Crim., 27 Feb. 2002, No. 01-83.119: Bull. Crim. No. 51; Crim. 5 Feb. 1998, No. 96-85.596: Bull. Crim. No. 48; V. vine stock. Cass. Crim, 22 Oct. 2008, No. 08-80.843: Bull. Crim. No. 213.

<sup>87</sup> Cass. Crim., 5 May 1997, No. 95-86.136: Bull. Crim. No. 164.

<sup>88</sup> Cass. Crim., 23 Feb 2005, No. 01-86.922 and 03-84.441: Bull. Crim., No. 71, company director.

<sup>89</sup> Criminal Court, 6 May 2015, No. 13-87.428.

tion, which allows the presumption to be considered in accordance with Article 6 §2 CESDH.<sup>90</sup>

Article 399 §1 of the Customs Code states that those interested in fraud (*intéressé à la fraude*) ‘shall be liable to the same penalties as the perpetrators of the offence’. Customs criminal law thus has a particular type of criminal participation in an offence—interest in fraud—which is very close to complicit, but has the advantage of being based on presumption of participation (presumption of interest in fraud) and allows account to be taken of behaviours/actions subsequent to fraud.

**Directors’ liability for tax fraud.** In principle, and unless there is a legal exception, the legal directors of legal persons are not criminally liable in their capacity as such:<sup>91</sup> in accordance with ordinary law (C. Pen., Articles 121-1 and 121-4), their personal and intentional participation in tax fraud is required by case law.<sup>92</sup> Nevertheless, this principle is largely artificial.

In case law, the idea of personal and intentional participation has been considerably weakened, so that it is now *ipso facto* established in the absence of delegation of powers and force majeure.

Thus, since the late 1980s, case law has considered that, since it is the head of the legal person who is personally responsible for fulfilling the latter’s tax obligations<sup>93</sup>—either him/herself or through his/her employees (accountants, etc.), the activity of which he/she must then scrupulously monitor—any failure in this matter reveals both an involvement of the manager in the fraud (by action or omission) at a material level and, on a moral level, a fault on his part, in that it necessarily implies a lack of interest shown by the natural person in his/her duties.

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<sup>90</sup> Cass. Crim., 10 Feb 1992, No. 0-83.278: Bull. Crim., No. 62.

<sup>91</sup> Cass. Crim., 21 June 1982, No. 81-93.586: Bull. Crim., 1982, No. 165, concerning a legal director who had never had effective management of the company.

<sup>92</sup> See, for example, Cass. 8 Feb. 2012, No. 11-81.320. Cass. Crim., 4 May 2011, No. 10-85.268. Cass. Crim., 4 Nov. 2010, No. 10-81.433. Cass. Crim., 16 Dec. 2009, No. 09-80.125. Cass. Crim., 13 Mar. 1997, No. 96-81.081: Bull. Crim., 1997, No. 107, adding that ‘an order received from a superior does not constitute a cause of criminal irresponsibility for the offender’. Cass. 13 Feb. 1997, No. 96-80.864. Cass. Homicide, 3 Oct. 1989, No. 88-87.508.

<sup>93</sup> See, for example, Cass. Crim., 17 June 2009, No. 08-85.106. Cass. Crim., 20 Apr. 2005, No. 04-85.527: ‘the manager of a company must be held responsible for the company’s tax obligations towards the Administration’. Cass. Crim., 29 Feb. 1996, No. 95-83.838: Bull. Crim., 1996, No. 101: ‘the manager of the limited liability company, who is vested by Article 49, Paragraph 5, of the law of 24 July 1966 with the broadest powers to act in all circumstances on behalf of the company vis-à-vis third parties, is held liable for tax obligations vis-à-vis the Administration’. Cass. Crim., 26 Jan. 1987, No 85-96.567.

In short, only two positive and abstract conditions are to be verified in order to retain the criminal responsibility of the person concerned: on the one hand, to verify that he/she is indeed a director *de jure* according to the law or the statutes; and, on the other hand, to ensure that he/she was in office at the time of the fraud. The individual can then escape criminal liability only in the event of delegation of powers, or even force majeure.

Cases of legal presumption of (criminal) liability are hardly any different from the presumption of criminal liability established by the case law on the directors of legal persons in the field of tax fraud.

It is therefore rarely implemented.<sup>94</sup>

### **3. Concept and scope of the criminal law responsibilities of heads of business**

#### *3.1. Sources and origin of the criminal liability of heads of business*

As mentioned above, the criminal liability of heads of business is a case law creation (*supra*) dating back to the end of the nineteenth century.<sup>95</sup>

It has been enshrined in certain sectors by the legislator through so-called ‘ascribed’ offences (*infractions attribuées*), which *a priori* designate the offender by virtue of special qualities, such as that of employer,<sup>96</sup> manager<sup>97</sup> or ‘presidents, administrators, directors general’.<sup>98</sup>

Through the offence,<sup>99</sup> ‘functional liability’ (liability related to and based on the function) is instituted.

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<sup>94</sup> Cass. Crim., 16 Dec. 2009, No. 09-80.125, appeal against a judgment of conviction stating that ‘on the intentional element, Article L. 223-22 of the French Commercial Code, applicable in tax matters, enacts a presumption of liability which is intended to apply in matters of tax fraud [and] that the director can only fight this presumption of liability by proof of a delegation of power or a case of force majeure’: the French Supreme Court declared, without referring to the text of the Commercial Code, ‘that in the state of these enunciations, without insufficiency or contradiction, which, in the absence of delegation of powers, establish the personal participation of the accused in the facts being prosecuted, the Court of Appeal, which has characterised in all its material and intentional elements the offence including Richard X. has been found guilty, has justified his decision’.

<sup>95</sup> Crim., 30 Dec. 1892.

<sup>96</sup> L4741-1 Labour Code.

<sup>97</sup> L311-34 Consumer Code.

<sup>98</sup> L242-1 Commercial Code.

<sup>99</sup> Sometimes also qualified as professional: M. Bénéjat, *La Responsabilité Pénale Professionnelle*, Thèse Bordeaux, 2010.

In most cases, the manager's liability is not based on any specific text. Having limited it to so-called 'regulated' companies or professions, the case law generally accepts that the obligation to comply with the various legal and regulatory requirements<sup>100</sup> weighs 'essentially' on the head of business<sup>101</sup> and that he or she must 'personally supervise the application of the laws'.<sup>102</sup>

**Explicit, implicit or tacit imputations.** Some authors<sup>103</sup> propose to distinguish according to whether the attribution of liability to the decision-maker is imposed (1) by law explicitly, (2) only possible, suggested, but not imposed by law, therefore implicit, or (3) not even mentioned and in this sense tacit. In the first two cases, the liability of the head of business will be exclusive if the text only targets the head of business or cumulative when it designates other possible authors.

**Explicit imputation.** In rare cases, the legislator explicitly ascribes liability to the head of business for an offence committed by a third party.<sup>104</sup>

**Implicit imputation.** Where the texts refer to the head of business as the possible perpetrator of the offence, in most cases, it is not specified whether he/she should be held liable when the material element was performed by a subordinate or only when this element was performed by the head of business him/herself. Sometimes the texts target the head of business and subordinates. In this case, imputation seems to be an alternative. Sometimes, the legislator provides for the sole liability of managers, as is often the case in corporate criminal law.

**Tacit imputation.** In this case, the texts remain silent as to the perpetrator of the offence, who may be any person. This is the most frequent case in business criminal law.

Faced with this fragmentary approach of the legislator, case law tends to standardise solutions.

Thus, for unintentional offences, ancient material misdemeanours (*délits matériels*: see 2.5. *Strict liability under French Law*; 3.5. *Subjective element (mens rea)*), contraventions (petty offences) and so-called assigned or ascribed (*attitrées*) offences (all those, exclusively or not, aimed at heads of business—i.e. explicit and implicit imputations), case

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<sup>100</sup> Crim., 6 Oct. 1955, JCP 1956. II. 9098, note de Lestang.

<sup>101</sup> Crim., 26 Aug. 1859, S. 1859. 1. 973.

<sup>102</sup> Crim., 23 Jan. 1975, JCP 1976. II. 18333, note J.-H. Robert.

<sup>103</sup> M. Delmas-Marty, G. Giudicelli-Delage, *Droit Pénal des Affaires*, PUF, 2000.

<sup>104</sup> In the Penal Code, see Article 433-18, Article 226-16 and 17; for other examples, as for instance in the matter of waste, see M. Delmas-Marty, G. Giudicelli-Delage, *Droit Pénal des Affaires*, p. 53.

law tends to attribute criminal liability to the decision-maker unless he/she can prove that he/she had correctly delegated his/her powers (see Q16).

In addition, for intentional offences, case law sometimes applies the same principles. While affirming, in accordance with general principles, that such offences require the personal participation of the decision-maker in order for his liability to be incurred, it tends to presume such participation (both its objective and subjective dimensions). In practice, it limits grounds for non-imputation to cases where powers had been (correctly) delegated. This is particularly the case in tax matters.

However, there is also comparable reasoning in customs matters and in fraud cases (i.e. concerning the offences which serve as implementation of the PIF convention and the texts adopted by the EU subsequently; cf. *supra* Q2).

### 3.2. Subjective scope of the criminal liability of the heads of business

**General remarks.** To the extent that the law does not define who the head of a business is, the difficulty lies in knowing to whom to attribute the offence. It is, in principle, the person who has the most extensive powers, in fact or in law, and exercises them independently.<sup>105</sup>

The attribution of the status of (criminally) liable head of business requires a distinction to be drawn between whether the offence is committed in a single undertaking or involves more than one undertaking.<sup>106</sup>

**Single undertaking.** In this case, a distinction must be made between *de jure* and *de facto* directors. As for the former, in the case of sole proprietorship, the person responsible in principle is the natural person, owner or manager, who effectively directs them.

In other cases (legal person), the status of head of business is attributed to the person or persons who holds full management powers

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<sup>105</sup> The Court of Cassation drew a surprising conclusion from this in the particular case where the company, placed in receivership, is run by a receiver: it is he who, instead of the debtor or the statutory organs of the debtor legal person, becomes the head of the company in all areas, whether it is to apply company law (convening a general meeting of shareholders, for example) or labour law (*infra*); Crim., 21 Jun. 2000, *Droit Pénal* 2000, comm. 128, J.H. Robert.

<sup>106</sup> Distinction borrowed from C. Coeuret, F. Fortis, F. Dusquenne, *Droit Pénal du Travail*, Lictec, 2016, No. 297.

over the personnel and property assigned to the activity. Its identification shall be based on the type of legal person concerned.

In limited liability companies, this is the manager.

In public limited companies, it is the chairman of the board of directors and, where applicable, the chief executive officer. In the latter case, the joint liability of the president and the director may be sought provided that the judge verifies, on the one hand, in the company's articles of association, the existence of a distribution of powers and, on the other hand, in practice, the exact personal share taken by each of them in the commission of the offence.<sup>107</sup>

However, the liability of the executive board must also be considered. Where a precise and official division of tasks exists between the members of the board, each of them shall be liable for offences committed in the sector for which they are responsible.<sup>108</sup> In practice, it is the chairman of the board who is prosecuted, even if it is an unintentional fault and no division of labour has been carried out.

In simplified joint stock companies, this is the chairman. If the articles of association so provide, it may be a chief executive officer or deputy chief executive officer.

In partnerships or limited partnerships, this is the sole manager or co-managers (subject to any planned functional distribution).

In associations, it is the president.

In unions, these are the directors or administrators in charge of the internal management of the group.

Finally, criminal liability may be borne by the receiver who is required, in his mission, to comply with the legal and contractual obligations of the company manager (instead of the latter; *supra*).<sup>109</sup>

As for *de facto* or actual directors, criminal judges do not hesitate to control the effective exercise of management powers. They may waive the liability of the *ex officio* manager to retain only that of the actual manager, but they can also retain joint liability.<sup>110</sup>

**Plurality of undertakings.** In criminal labour law, the responsible company manager is the one whose staff has been the victim of the offence,<sup>111</sup> unless the execution of the work has been placed under a single management.

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<sup>107</sup> Crim., 23 Nov. 2010, No. 10-82.057.

<sup>108</sup> Crim., 2 Jun. 1987.

<sup>109</sup> Crim., 3 Mar. 1998.

<sup>110</sup> Crim., 8 Jun. 2004, No. 03-86.331 et 13 Apr. 2010, No. 09-86.429.

<sup>111</sup> Crim., 22 Feb. 1966, Bull. 32.

**Appointment of officers within a group of managers: the case of corporate criminal law.** In corporate criminal law, the texts generally provide for explicit (or ascribed) imputations (see above). They explicitly designate the person who bears responsibility for the acts in question.

These legal imputations do not pose any difficulties when the designated person is only one person.

The situation is more complex when the texts are aimed at a group of executives (the president, directors or general managers of a public limited company, for example: Article 242-6 Commercial Code – abuse of corporate assets). Where intent is a condition of attribution of the offence, the person liable is the one who is qualified as required by law and has knowingly committed the offence (these two conditions are cumulative and distinct from each other; they must be verified separately). Where, on the other hand, the imputation is carried out in the same way as the imputation of petty offences—i.e. without being based on concrete proof of intent—the question arises as to whether all directors of the public limited liability company can be collectively liable or whether only their managing director (or the chairman if he or she has retained the management) is liable.

The prevailing case law retains the liability of the executive who exercises day-to-day management in the highest position—i.e. according to the provisions of the articles of association of the company, either the president or the chief executive officer. Delegation of powers is possible, but in this case, to remain within the legal requirements, a member of the board of directors must be appointed.

In public limited companies with a management board, a similar approach leads to criminal liability for the chairman. The responsibility of members of the supervisory board, which is theoretically contemplated by the doctrine, does not have an example in case law.

### *3.3. Liability of the head of business and duty to control and supervise the employees*

The liability of the head of business is based on control and monitoring obligations. However, these obligations are not necessarily specific and do not necessarily refer to the manager. The legal or regulatory requirements imposed on the company (i.e. the general rules which apply to all companies and the special rules which apply specifically to the particular activity of each company) are considered grounds for criminal liability of the head of business insofar as it is

incumbent upon the role to ‘personally ensure strict enforcement by its subordinates’.<sup>112</sup>

In other words, according to case law, a general obligation weighs on the head of business to personally ensure compliance with the rules applicable in the company. This duty of supervision, which has sometimes been legally established, is based on both the economic power of the head of business over the assets of the enterprise and the managerial power conferred on him by his capacity as employer, managerial power which justifies the attribute of a normative power and, in particular, a disciplinary power which he is authorised to use whenever his employees, through their actions, are likely to give rise to criminal liability on the part of the manager of the company.

In addition, according to some authors, French case law ‘opines in favour of the ability to make decisions that impose legal constraints on others and not only in favour of the exercise of control or supervision, terms that do not, in the French language, bring out the same capacity of influence on the subjects of power.’<sup>113</sup>

Imputation to professional decision-makers is based on a power of control over the subject matter of the offence. In other words, the imputation of an offence to a professional who is a natural person is explained by his capacity to influence the subject matter of the offence.

In this sense, the basis of imputation lies entirely in the professional functions, in the ability to control the offence, which results from a decision-making power exercised over the undertaking.

This abstract capacity to influence can be used to characterise a fault. However, the automaticity of the finding of fault makes one doubt its effectiveness. Less than a presumption of fault, there is above all a presumption of liability. The capacity to influence constitutes a cause of imputation and its absence—less a cause of exemption comparable to an absence of fault than a cause of non-imputation (to which is added another: force majeure).

### 3.4. Functional imputation and causal link

The liability of the head of business is a functional and non-be-

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<sup>112</sup> According to the terms of the decision of the Criminal Chamber, which is generally regarded as the true starting point of current case law.

<sup>113</sup> A. Cœuret, ‘La Responsabilité Pénale dans l’Entreprise: Vers un Espace Judiciaire Européen Unifié? Les Propositions ‘Espace Judiciaire Européen’ Confrontées à la Situation en France’, RSC, 1997, p. 297 et s. sp. p. 302.

havioural liability. Apart from cases of an autonomous offence (that consists in having someone do something or allowing something to be done which sanctions misconduct of management), the judge ascribes the offence committed by the employee to the head of business who has not, however, accomplished the (constituting) facts.

This imputation is based on the fact that the decision-maker has, by virtue of his functions, a power of action or non-action to provoke or prevent the offence. It is because of this power that he derives from his office that he is responsible for the offence.

The notion of moral or intellectual perpetrator (*supra*) is sometimes also advanced to justify the liability of the decision-maker: his behaviour—although distant, although not corresponding to the material element described in the text, and even committed before the material action—constitutes the real cause of the offence.

This reasoning presupposes that the facts accomplished by someone other than the head of business occurred only because the head of business committed a fact and a fault of omission. Without this conduct on the part of the head of business, the facts would not have happened.

The act of the third party—usually the employee—is therefore not the real cause of the offence. It is only the opportunity that allowed the offence to happen. In other words, ‘the immediate (or material) perpetrator’s behaviour merely updated the previously virtual responsibility of the manager’.<sup>114</sup>

It is an abstract assessment of the causal link that is retained and is sufficient to establish criminal liability. Indeed, the causal link is not established with respect to a specific behaviour, but with respect to organic function in general. Thus, imputation results less from an effective influence on the infringement than from an ability to influence.<sup>115</sup>

Also, according to some, this abstract assessment reflects a purely functional responsibility (and, in this sense, non-behavioural and therefore detached from an approach in terms of fault). It is because the decision-maker, by virtue of his or her organic functions, whether acting or not, has the power to provoke or prevent the offence that he or she is responsible for it. This conception of causality makes it possible to identify a fault but on the condition of conceiving causality in a concrete way (the decision-maker could actually prevent the offence but did not do

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<sup>114</sup> M. Delmas-Marty, G. Giudicelli-Delage, *Droit Pénal des Affaires*, PUF, 2000, p. 58.

<sup>115</sup> M. Bénéjat, op. cit., No. 318; see also F. Rousseau, *L’Imputation dans la Responsabilité Pénale*, Dalloz, 2009, NBT, No. 178.

so). However, it is an abstract conception that is retained by the case law. The misconduct of management which justifies the organic responsibility of the company manager is artificial because it stems from his or her position alone.

### 3.5. *Subjective element (mens rea)*

See also *supra* 2.6. *Strict liability under French Law*

The presentation of the subjective element required to establish the criminal liability of the head of business is not uniform in legal literature. Case law on its part does not provide a clear presentation of the issue. Nevertheless, the following general elements can be identified. The scholars generally agree that, first and foremost, the liability of heads of business requires that a distinction be made according to the subjective element of the offence committed. The designation of the liable person is thus governed by two different regimes, the application of which depends on the distinction between intentional and unintentional offences. This distinction needs to be clarified.

**The case of explicitly unintentional offences (e.g. manslaughter, reckless injury).**<sup>116</sup> With regard to these offences, since the law of 10 July 2000, which was intended to limit the criminal liability of public officials but applies, for constitutional reasons of equality, also to private officials, Article 121-3, Paragraph 4 of the Penal Code requires a distinction to be made between direct and indirect perpetrators of negligence. In order to engage the liability of the direct perpetrators (those who directly committed the offence), a simple negligence will suffice. On the other hand, for indirect perpetrators (those who have created or contributed to creating the situation which allowed the damage to happen or who failed to take steps to prevent it), an aggravated or ‘qualified’ fault will have to be established: that is, either a deliberate fault (the patently deliberate breach of a duty of care or precaution provided by law or regulation: *faute délibérée*), or a gross negligence (namely, putting another person at a particularly serious risk that the offender could not have failed to recognise). Both types of fault constitute a heightened reproach and represent the most serious type of negligence.

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<sup>116</sup> Under Article 121-3 CP, the offences are in principle intentional, except if ‘the law so provides’ in cases of recklessness, negligence or failure to comply with a duty of care or security provided for by the law or regulation.

Where an offence of negligence<sup>117</sup> has been committed, the head of business (or his/her delegate) is considered an indirect offender. Therefore, a qualified fault must be established in order to hold him/her criminally liable. Natural persons may incur criminal liability on the basis of a simple or ordinary negligence<sup>118</sup> only where it can be established that there is a direct causal connection between their conduct and the resulting harm.

**The case of genuinely intentional offences (e.g. fraud, fraudulent breach of trust, misuse of a company's property, etc.).** With regard to these offences, the required *mens rea* consists of intent, which can nevertheless be established by implication, deduced from the material element. The personal participation of the head of business in the offence has to be established.

However, the distinction (between intentional offences and non-intentional offences) presupposes taking account of offences that are theoretically intentional but in practice considered by judges to be offences of presumed intent and giving rise to a 'contraventional liability' (Q10) when the person responsible is a head of business or, more generally, a professional. These offences belong to the former category of material offences which the 1994 Penal Code in principle abolished.

In the latter case, heads of business are condemned for not having

<sup>117</sup> Offences of negligence differ from intentional offences in that negligent offenders do not act volitionally with respect to the results of their acts; this is why they are also called involuntary offences (*infractions involontaires*). Still, it should not be forgotten that the breach of a duty of care that leads to an unintended result may well be intentional. Consequently, it is possible to distinguish between deliberate imprudence and imprudence that is not deliberate and between other more or less serious degrees of negligence.

<sup>118</sup> Simple or ordinary negligence within the meaning of Article 121-3 Paragraph 3 CP is defined as the type of imprudence to which anyone can fall prey. By failing to anticipate the consequences of his or her conduct, the offender risks being blamed for carelessness (*imprévoyance*). In addition, the offender has breached either a duty of care or a precaution provided by law or regulation or laid him- or herself open to reproach for failing to exercise the ordinary standard of care (*indiscipline*). In the case of ordinary negligence, the offender is not aware that he or she is committing a criminal offence. Because the offender does not anticipate the resulting harm, he or she also does not have the intent to bring about such a result. Still, the failure to exercise the duty of care or precaution may itself have occurred intentionally, such as the act of deliberately running a red light. Article 121-3 Paragraph 3 CP distinguishes between two types of ordinary negligence: recklessness or negligence (*faute d'imprudence et de négligence*), on the one hand, and the breach of a duty of care or precaution provided by law or regulation (*manquement à une obligation de prudence ou de sécurité prévue par la loi ou le règlement*), on the other. In order for the criminal offence definition to be satisfied in the context of these kinds of simple breaches of duty, there must be a direct causal connection between the breach of duty and the resulting harm.

taken the precaution of organising their establishment in such a way that in each of its components a person is charged by virtue of a delegation of powers to ensure the application of criminal laws.

Traditional doctrine considers that the *mens rea* required is negligence, most often presumed. The company manager is accused of failing to supervise his employees.

This presentation respects the principle that there is no criminal liability without fault. However, the decision-maker's fault never appears so explicitly in case law. Above all, the fault identified by the doctrine does not correspond to that which is actually established by the judges and which corresponds to the *mens rea* of the alleged offence.

Nevertheless, two major theories attempt to show that the criminal liability of the head of business is indeed based on a fault.<sup>119</sup>

The first<sup>120</sup> consists in considering that the manager intentionally violates 'a duty of guarantee with regard to third parties, whether his staff or his clientele', a duty incumbent upon him in that capacity (*es qualités*). Under these conditions, the discrepancy at the level of the moral element disappears (it is not a question of reproaching a simple negligence, but an intention, insofar as the violation of the duty of guarantee is voluntary). However, it is the legal result of the offence that is modified and is aimed at violating this duty of guarantee.

The second<sup>121</sup> suggests that the reasoning should not start from the (elements of the) offence but should be articulated in terms of imputation. This presupposes first of all a clear distinction between commission of the offence and participation in the offence. Thus, participation does not require the realisation of all the constituent elements of the offence. In this sense, the manager's supervisory fault may constitute an act of participation. However, this participation would have the particularity of giving rise to liability as an author (and not as an accomplice). This would be a *sui generis* mode of participation of jurisprudential origin. The interest of this theory would be to explain the liability of a person who carries out a fault different from that which is incriminated. However, this theory does not solve the problems of legality, since there is no legal provision to that effect.

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<sup>119</sup> For a presentation, see M. Bénéjat, *op. cit.*

<sup>120</sup> Ph. Conte, M. Maistre du Chambon, *Droit Pénal Général*, Armand Colin, 2004, 7<sup>th</sup> ed. No. 440.

<sup>121</sup> F. Rousseau, *L'Imputation dans la Responsabilité Pénale*, Dalloz, NBT, 2009, No. 272.

### 3.6. *Delegation of powers: scope and conditions*

**Delegation of powers.** Of ancient jurisprudential origin,<sup>122</sup> the legal regime of delegation of power remains fully defined by the Criminal Chamber of the Court of Cassation,<sup>123</sup> which has established not only its scope of application but also the conditions relating to the delegator, the delegate and the act of delegation.

Since four rulings of 11 March 1993, but after much hesitation, the Criminal Chamber of the Court of Cassation has abandoned its previous case law, which had the effect of limiting the delegation of power to certain areas of business criminal law.<sup>124</sup> This generalisation of the field of delegation, which is intended to make the delegation of powers a normal mode of management of the company, has received the approval of the entire doctrine.

The absence of a delegation may constitute an organisational fault, which could possibly be blamed on the company manager in the event of an accident.<sup>125</sup> In this way, the judge assesses the company's management. In this sense, the delegation of powers is not always a favourable measure (*infra* Part 4). For this reason, it deserves legislative consecration and regulation.

This delegation does not require any particular form; the important thing is that it is 'certain and unambiguous'<sup>126</sup> and that it is not general, but partial and limited. As for substance, the delegation is effective only under five conditions.

Firstly, the law must not oppose it.<sup>127</sup>

Secondly, the official must not have been personally involved in the offence: he or she must not have interfered in the powers of the delegate.<sup>128</sup> The delegate's autonomy of action is a condition of delegation.

Thirdly, the power must be susceptible to delegation: this is the

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<sup>122</sup> Cass., 1902, No. 237; D. 1903, I, p. 585, note Roux.

<sup>123</sup> The delegation of powers has not yet been the subject of a legal consecration of general scope—only a consecration of special scope appearing in Article R. 4511-9 of the Labour Code and, since the law of 17 May 2011, in Article L. 4741-1 of the Labour Code explicitly. Article 121-3, Paragraph 3 of the Criminal Code only implicitly enshrines the jurisprudence relating to the delegation of power.

<sup>124</sup> Cass. Crim., 11 Mar. 1993, No. 90-84.931, No. 91-80.958, No. 91-80.598 et No. 92-80.773.

<sup>125</sup> See for instance, Crim., 20 May 2008, no 08- 80.896, Dr. Pénal 2008. Chron. 9, obs. M. Segonds.

<sup>126</sup> Crim., 2 Feb. 1982, Bull. Crim., No. 36.

<sup>127</sup> See, for instance, Crim., 14 Oct. 2003, Bull. Crim., No. 190.

<sup>128</sup> Crim., 9 Nov. 2010, no 10- 81.074, Dr. Pénal 2010. 39, obs. J.-H. Robert.

question of the ‘own management powers’ that cannot be delegated. As such, it would appear that the executive cannot relinquish his power of control over the delegated authority, and certainly not his power to make strategic decisions (if so, he would no longer be an executive).<sup>129</sup>

Fourthly, the delegation must come from the real holder of these prerogatives. Thus, it was held that the chairman of a public limited liability company who was sued for possession with a view to the sale of products containing asbestos could not be exonerated by invoking a delegation of power granted to the chief executive officer by the board of directors, because in this case he himself should have proceeded with the delegation.<sup>130</sup> In addition, the delegation of powers implies a relationship of hierarchical subordination—at least an authority relationship.<sup>131</sup>

Fifthly, any delegation must address the competence, authority and means required. The authority seems to be the essential condition served by the other two: the judge will verify *in concreto* that the delegate had enough command power (including disciplinary power) to obtain the necessary obedience to comply with the law from employees under his supervision.<sup>132</sup> This requirement explains why the delegation of the same task to more than one person or co-delegation is not allowed, as the authority would then be diluted. However, sub-delegation is possible<sup>133</sup> provided it has been authorised by the manager.

### 3.7. *Liability of the head of business and collective decisions*

**Collegial decision: non-liability for the vote.** When a decision is adopted by the collective body of a legal person and constitutes an offence, can criminal liability be attributed to all natural persons who participated in the deliberation? The Criminal Chamber of the Court of Cassation gave a negative answer to this question.

A mayor and municipal councillors had been prosecuted for racial

<sup>129</sup> See, for instance, Crim., 15 May 2007, RPDP 2008. 629 obs. L. Leturmy (despite a delegation of powers, the company manager remains liable for breaches of the balance sheet presentation, on the grounds that this balance sheet is the responsibility of his or her own management).

<sup>130</sup> Crim., 17 Oct. 2000, Dr. Pénal 2001. 22, obs. J.-H. Robert.

<sup>131</sup> It is not essential that this hierarchical power necessarily and directly derives from the conclusion of an employment contract (Cass. Crim., 14 Dec. 1999: RD imm. 2001, p. 68, note M. Segonds).

<sup>132</sup> See, for instance, Crim., 8 Dec. 2009, D. 2010. 1664, obs. C. Mascala (not valid delegation due to the youth of the delegate).

<sup>133</sup> Crim., 30 Oct. 1996, Bull. Crim., no 116.

discrimination on the basis of a municipal council decision. The Criminal Chamber confirmed the ruling of the appeal court, dismissing the case by holding that ‘the contested deliberation, taken by a collegial body of the municipality, cannot be attributed to those of the municipal councillors who voted in favour’; the trial judges had made it perfectly clear that a decision by a legal person cannot be regarded as the result of an addition of individual wills.<sup>134</sup>

**Collegial decision: liability for acts.** However, the scope of this judgment must be clearly limited. In fact, through a decision of 17 December 2002,<sup>135</sup> the Court of Cassation admitted the conviction for discrimination of the deputy mayor who had proposed the disputed decision for a vote to the municipal council, of which he was the rapporteur and the mayor an accomplice for publicly welcoming the adoption of the resolution, even though he had been absent from the vote, and claimed to be the origin of the adopted measure.

It therefore seems clear that mere participation in the vote allowing the adoption of the criminal resolution is not sufficient to establish criminal liability. On the other hand, this liability may be incurred where the official may be accused of an act involving personal participation in the offence. The decisive element of the conviction was that they claimed to have been the initiators of the vote, so that ‘independently of the vote, they personally participated in the offence’.

Such a distinction does not seem to be very clear, as the fact of being rapporteur for the decision and putting it to the vote does not seem to be easily detachable from the vote itself.<sup>136</sup> Nevertheless, the Criminal Chamber confirmed this tendency in a judgment of 19 November 2003<sup>137</sup> by admitting the conviction for favouritism of a mayor who had fixed the agenda and presided over the session of the municipal council awarding the contested contract, the judges seeing this as the personal commission of the offence apart from the participation in the

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<sup>134</sup> Cass. Crim., 11 May 1999, No. 97-81.653: No. 1999-002093; Bull. Crim., 1999, No. 93; D. 2000, Somm. p. 113, G. Roujou de Boubée; Dr. Pén. 1999, comm. 140; Rev. Sc. Crim., 2000, p. 197, Y. Mayaud. For a dismissal in the case of municipal councillors prosecuted for favouritism after a vote: CA Aix en Provence, 16 May 2007: No. 2007-336744; JCP G 2007, IV, 3108.

<sup>135</sup> Cass. Crim., 17 Dec 2002, No. 01-85.650: No. 2002-017555; Bull. Crim., 2002, No. 227; Dr. Pén. 2003 Comm. 44, M. Véron; Rev. Sc. Crim., 2003, p. 556, Y. Mayaud. Appeal against CA Aix-en-Provence, 18 Jun. 2001: No. 2001-169339; JCP G 2002, IV, 2173.

<sup>136</sup> M. Véron, note ss Cass. Crim., 17 Dec. 2002, *op. cit.*

<sup>137</sup> Cass. Crim., 19 Nov. 2003, No. 02-87.336: No. 2003-021728; Dr. Pén. 2004, Comm. 32, M. Véron.

vote. The mayor's participation was therefore limited to the conduct of the vote. As one author points out, 'the final decision was not solely dependent on the mayor's will and was not a matter for personal action... Does this mean that whenever a municipal council votes on a decision that may constitute an offence, the criminal responsibility of the mayor who presided over the meeting must be retained?'<sup>138</sup> Such a solution is open to criticism because it gives an excessive interpretation of the notion of 'personal fact' within the meaning of Article 121-1 of the Criminal Code<sup>139</sup> and distorts the notion of perpetrator within the meaning of Article 121-4 of the same Code. Indeed, the perpetrator is here more a moral perpetrator than a material perpetrator.

### *3.8. Relationship between individual liability of the head of business and corporate criminal liability*

Under Article 121-2 of the Penal Code, in order to be imputed to the legal person, the offence must have been committed by an organ or a representative of the legal person.

**Organs.** The organs are the persons appointed by law or by the articles of association of the legal person to act on behalf of the legal person and to provide for its direction and management.

The bodies of local and regional authorities (mayor, president of the general or regional council, municipal, general or regional council, etc.) will thus be designated by the General Code of Local and Regional Authorities.

The organs of commercial companies (manager, board of directors, chairman of the board of directors, chief executive officers, management board, chairman of the management board, the supervisory board,<sup>140</sup> assembly, etc.) are laid down by the Commercial Code.

The Criminal Chamber has provided an interesting clarification

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<sup>138</sup> M. Véron, op. cit.

<sup>139</sup> And the Court of Cassation went even further, admitting the criminal liability of a mayor, his deputies and an adviser who only participated in the deliberations and took part in the vote awarding illicit subsidies. Crim., 22 Oct. 2008, Dr. Pénal 2009. 3, obs. M. Véron.

<sup>140</sup> Since Article 12 (2) of the Criminal Code states that the offence must be committed on behalf of the legal person, it seems difficult to imagine that supervisory or control bodies, such as the supervisory board of a public limited company (see Article L. 225-68 Commercial Code) or the statutory auditors of companies, could incur criminal liability for the legal person, even if they are bodies within the meaning of the text of the Penal Code (See J.-C. Saint-Pau).

to the definition of the organ of an enabling entitlement society for low-rent housing by deciding that the housing allocation commission can be qualified as an organ of this society even if external personalities sit on it.<sup>141</sup> It should also be noted that, in this case, the body which may engage the criminal liability of the legal person is a collegial body.

In the silence of the law, the Criminal Chamber of the Court of Cassation has admitted that the *de facto* executives are qualified as organs (or representatives) within the meaning of Article 121-2 of the Penal Code.<sup>142</sup>

**Representatives.** The person who may act on behalf of the legal entity and engage it in the eyes of third parties will be considered a representative. The interest of the concept is to include persons other than organs. This status may thus be granted to the judicial or provisional receiver of the company who, although not an organ thereof, is nevertheless vested with the power to act in the name of and on behalf of the company. Similarly, a person who holds a special power of attorney in the corporation but is not a member of the corporation may qualify as a representative. Also to be considered as representatives within the meaning of Article 121-2 of the Penal Code are those who have been granted a delegation of powers, whether they are employed<sup>143</sup> by the legal entity or not.<sup>144</sup>

The sub-delegated employee is similarly considered a representative.<sup>145</sup>

The Court of Cassation also considered a representative a commercial agent who is not employed by the legal person, expressly stating that the status of the representative, employee or agent, is irrelevant.<sup>146</sup> In the absence of a formal delegation of power, the Criminal Chamber requires the trial court to explain the status and powers of the staff members concerned and the actual, if not formal, existence of a delegation of power in order to be able to consider them representatives of the legal

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<sup>141</sup> Crim., 11 Jul. 2017, No. 16-82426.

<sup>142</sup> Crim., 21 May 2014, No. 13-83.758.

<sup>143</sup> In this sense, Cass. Crim., 1 Dec. 1998, No. 97-84.773; Bull. Crim., 1998, No. 325; Rev. Sc. Crim., 1999, p. 336, obs. G. Giudicelli-Delage. Cass. Crim., 9 Nov. 1999, No. 98-81.746; Bull. Crim., 1999, No. 252.

<sup>144</sup> Crim., 14 Dec. 1999, No. 99-80.104.

<sup>145</sup> Cass. Crim., 25 Mar. 2014, No. 13-80.376; JCP S 2014, 1217, note A. Coeuret et F. Duquesne; JCP G 2014, 421, A. Donnier.

<sup>146</sup> Crim., 23 Feb. 2010, No. 09-81.819.

person.<sup>147</sup> It is admitted that delegation of powers may be a *de facto* delegation.<sup>148</sup>

### 3.8.1. Concurrence of liabilities

Imputation of an offence against the legal person is not necessarily subject to prior recognition of the liability of natural persons acting on its behalf. The accumulation of responsibilities is allowed but it remains optional. Article 121-2, Paragraph 3, of the Penal Code states that ‘the criminal liability of legal persons does not exclude that of natural persons who are perpetrators or accomplices in the same acts’; this accumulation is, however, desirable in order to avoid that the managers are relieved of responsibility.<sup>149</sup>

The draft Penal Code stated that, in the future, ‘the criminal liability of a company manager may also be retained at the same time as that of legal persons if it is proved that the manager has personally intervened in the decision or in the implementation of the offence, or if the law so provides, that he/she is personally liable for certain offences, labour or social security regulations, economic or fiscal matters...’. This interpretation has been taken up by the Ministry of Justice, considering in particular ‘in cases of unintentional offences, but also in cases of offences of a technical nature for which intent may result, in accordance with the traditional case law of the Court of Cassation, from simple non-compliance, in full knowledge of the facts, of a particular regulation, proceedings against the legal person alone should be preferred and the natural person should only be prosecuted as well if there is sufficient evidence of personal misconduct against him/her to justify a criminal conviction.’<sup>150</sup>

It should be noted, however, that the reform of the law of 10 July 2000, which aimed to clarify the definition of unintentional offences, has decriminalised unintentional offences where the causal link between

<sup>147</sup> Crim., 11 Oct. 2011, No. 10-87.212; D. 2011, p. 2841, obs. M. Blombed, note N. Rias; Rev. Companies 2012, p. 52 note H. Matsopoulou. Crim., 5 May 2015, No. 14-83 760; see also most recently on a non-delegated employee: Crim., 21 Nov. 2017, No. 16-86.667.

<sup>148</sup> Crim., 30 Mar. 2016, No. 14-84 994; Cass. Crim., 28 Feb. 2017, No. 15-87.378.

<sup>149</sup> On the whole question, see J.-C. Saint-Pau, ‘La Responsabilité Pénale d’une Personne Physique Agissant en Qualité d’Organe ou de Représentant d’une Personne Morale’, *Mélanges B. Boulloc, Dalloz*, 2007, p. 1011 s.

<sup>150</sup> Circ. Min. 13 Feb. 2006, NOR: JUSDO630016C.

the negligent conduct and the damage is indirect and the fault is a simple negligence (and not an aggravated fault: *supra*). In this case, the natural person who is an indirect perpetrator cannot be prosecuted. However, if he/she acted as an organ or a representative of a legal person, then the legal person's liability may be considered even though the liability of the organ or representative envisaged as a natural person cannot be considered (the decriminalisation sought by the legislator has benefited only natural persons and not legal persons).

Conversely, the director who has acted as an organ or representative of the legal person is criminally liable for the alleged offences. In a decision of 6 December 2016,<sup>151</sup> the Criminal Chamber of the Court of Cassation censored the decision of a Court of Appeal which had acquitted the natural person manager, considering that there was no element of the procedure which allowed for maintaining that he had been able to commit the offences apart from his capacity as manager of the company (road transport of waste without declaration, irregular waste management, hazardous waste management without approval). The Court of Appeal relied on Section 121-1 (personal liability). It was in his capacity as a manager that he had committed the offence, as an organ of the legal person, but not in his personal capacity. On the basis of Article 121-2, the Court of Cassation censored the reasoning of appellate judges and specified that the perpetrator was criminally liable, including when acting as an organ or representative of a legal person. Consequently, the company's liability is not exclusive to the prosecution of the natural person, even if he or she is an organ or representative. However, as the Amiens Court of Appeal pointed out on 25 March 2016,<sup>152</sup> the prosecution of a company cannot lead to a conviction against its organ or its representative in this capacity (i.e. *ès qualité*), but only against the legal person.

It should be noted that the same delegate may be appointed by a group of companies—which is common in construction sites—and the Court of Cassation then considers that, in the event of an accident at work, the workers' health and safety offences committed by the delegated employee appointed by all the companies engage the liability of the legal person, which is the victim's employer.<sup>153</sup> In this case, the de-

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<sup>151</sup> No. 15-85.152, Bulletin du Droit de l'Environnement Industriel, No. 68, Mar. 2017.

<sup>152</sup> No. 14/00664, SARL Humtertrans, Bulletin du Droit de l'Environnement Industriel, No. 68, Mar. 2017.

<sup>153</sup> Crim., 13 Oct. 2009, JCP 2010. Note 152, J.-H. Robert; D. 2010. 557, note J.-C. Planque.

legation is particularly remarkable in that it has the effect of giving rise to the liability of a legal person other than that which actually employs the delegate.

**The new procedure for a judicial convention of public interest introduced by the Sapin II Law.** The Sapin II Law creates the procedure for a judicial convention of public interest (*convention judiciaire d'intérêt public*: CJIP) which allows any legal person accused of corruption, trading in influence, money laundering, tax fraud (and their related offences) to settle via a deal with the Public Prosecutor's Office in exchange for abandonment of proceedings (Article 41-1-2 CPP).

One of the questions which the implemented decrees and practice have not yet made it possible to answer is whether the natural persons at the head of the legal entity concerned will be able to take advantage of the conclusion of a CJIP to be exonerated from their criminal liability. If the Sapin II Law provides that, despite the conclusion of a CJIP, 'the legal representatives of the legal person concerned remain liable as natural persons', it remains to be seen what the policy of the National Financial Prosecutor's Office (PNF) will be with regard to the prosecution of managers of companies that have effectively cooperated in the CJIP mechanism.

According to the statements of the National Financial Deputy Prosecutor, natural persons will be systematically prosecuted and total exemption from liability can never be one of the terms of the negotiation in the framework of the CJIP with the legal person.<sup>154</sup> As for the possibility of resolving the issue of directors' criminal liability with a separate convention, as may be the case in the United States (where the DPA also applies to natural persons), the law completely excludes it, since the prosecutor's office can only conclude a CJIP with a legal person. On the other hand, there is nothing to prevent heads of business from negotiating a minimal mitigation of their criminal liability that could be based on two factual elements. On the one hand, the bona fide manager could assert the quality of the compliance programme implemented under the Sapin II Law; on the other hand, the manager could avail himself of his full cooperation within the framework of the CJIP with an early denunciation and then a comprehensive internal investigation providing the Public Prosecutor's Office with all the necessary evidence. It is then possible that, on the strength of these two elements tending to prove his

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<sup>154</sup> See 27 Mar. 2017, 'Quelle coopération entre les procureurs et les entreprises après la loi Sapin 2', Cercle France-Amérique, statements from Éric Russo, Deputy National Financial Prosecutor.

good faith, the manager could negotiate a largely attenuated sentence with the Public Prosecutor's Office in the form of an Appearance with Prior Acknowledgement of Guilt (*comparution sur reconnaissance préalable de culpabilité*), a procedure open to natural persons. The CJIP cannot, however, mitigate the liability of natural persons, whether or not they are managers, who are directly responsible for the alleged acts.

### *3.9. Compliance programmes and liability of the head of business*

For the time being, subject to what will be explained below about the Sapin II Law of 9 December 2016, the relevant provisions of which came into force on 1 June 2017, compliance programmes do not play any role in ascribing criminal liability to the heads of businesses or legal persons.

However, while the absence of a compliance programme could not, in the absence of a legal provision requiring its adoption, be taken into account by the criminal court, the presence of such a programme and the finding of its effectiveness or ineffectiveness could be taken into account by the judge in order to assess the existence and extent of the fault committed.

Apart from the criminal framework, strictly speaking, punitive regulations recognise, albeit timidly, the role of compliance programmes; this is the case, for example, for competition law.

### *3.10. Failure to adopt a compliance programme and administrative (non-criminal) liability: the Sapin II Law*

Article 17 of the Sapin II Law establishes an obligation to put in place measures to prevent and detect corruption—i.e. an anti-corruption compliance programme. This obligation is primarily incumbent on the head of business (president, chief executive officer or manager). The originality of the law is therefore to provide that the manager of a company may be held personally liable for the failure of his company to comply with the measures for the prevention and detection of corruption provided for in Article 17. It is therefore up to him personally to ensure that his company has an anti-corruption programme in accordance with French law; otherwise, he incurs an administrative sanction of 200,000 euros pronounced by the French Anti-Corruption Agency. Regardless of this liability, the legal person is also liable. This obligation concerns companies and managers of companies with more than 500 employees and a turnover exceeding 100 million euros. The legal person incurs

an administrative penalty of 1 million euros. The law also extends the obligation to groups of companies (for all French or foreign subsidiaries) whose parent company is headquartered in France and which have more than 500 employees and a consolidated turnover of over 100 million euros.

The measures provided for in Article II of Article 17 of the Sapin II Law are intended to prevent and detect corruption committed in France, but also committed abroad. They aim at both the prevention and detection of public corruption (involvement of a public official) and private corruption (between two private actors).

There is no link to criminal liability. The law does not provide for compliance programmes to be taken into account when assessing the criminal liability of managers and the company. There are no mitigation or aggravation mechanisms. But the Public Prosecutor's Office seems ready to draw inspiration from foreign experiences. In addition, it could be inspired by the practice of the Competition Authority, which refuses to take the programmes into account when assessing liability, instead agreeing to do so for the establishment of the sanction. (Not only does the effectiveness of the programme determine the amount of the sanction to be fixed, but the commitment to implement a credible and substantial programme may lead to a 5–15 per cent reduction of the fine.)

## 4. Defences

### 4.1. General remarks

In principle, the only ground for the exemption of a head of business from criminal liability is the existence of a valid delegation of powers—i.e. meeting the criteria set out above.

However, in theory, the absence of fault—i.e. the demonstration by the head of business that he or she has effectively and correctly implemented his or her general duty of control and supervision—should constitute a defence. There are few examples of this in case law. This possibility appears essentially theoretical, given the fact that the fault of the manager is presumed.

### 4.2. Delegation of supervisory powers as a defence

The object of delegation concerns management powers and not the organic function of the manager. Therefore, the manager cannot

delegate all of his powers.<sup>155</sup> Indeed, the liability attached to the function remains to a certain extent, notably because of its ‘own management powers’.<sup>156</sup> The head of business remains liable for a set of cases that are not really limiting but that result from the logic of the delegation of powers mechanism. Firstly, the Criminal Chamber held that the effects of a delegation of powers should be reversed where the offence is habitual.<sup>157</sup> Secondly, the manager remains criminally liable for the powers that he or she has not transferred.<sup>158</sup> Thirdly, the criminal liability of the delegator may be sought if he has ‘personally participated in the commission of the offence’ attributed to the delegatee.<sup>159</sup> The intervention of the delegator in the delegated field constitutes interference, which his function allows him to do, but which neutralises the effects of the delegation of powers because, under these conditions, the delegate no longer has the independence necessary to carry out his mission.

The delegation of powers therefore appears less a cause for exemption than a cause of non-imputation. Effective management authority is the objective prerequisite for the allocation of liability. The delegation of powers appears to be a power-seeking instrument, proof of which rests with the prosecution authorities. However, the case law retains from the delegation a conception in terms of grounds for exemption. This is likely to be due to the punitive interest of this solution, which leads to the defence having to prove the existence of the delegation and its validity.

Subject to what has just been said (*supra*), delegation of powers is the principal, if not exclusive, defence available to the head of a company.

When it meets the required conditions (*supra*), it has the effect of transferring criminal liability (entirely) to the delegate.

A purely formal (paper) delegation is not enough to exempt the delegator; as mentioned above, the case law verifies very precisely the conditions of the delegation of powers.

However, in the case of unintentional offences, because he is an indirect perpetrator, it should be more difficult to hold him liable. He can defend himself by showing that he has committed only a simple fault of

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<sup>155</sup> Crim., 23 May 2007; Dreyer, D. 2004, p. 937.

<sup>156</sup> Crim., 6 Nov. 2007; Bull. 266, RSC 2008 349; DP 2008, No. 23.

<sup>157</sup> Crim., 6 Jul. 1960; Bull. No. 360.

<sup>158</sup> Crim., 12 Apr. 2005; Bull No. 129.

<sup>159</sup> Crim., 6 Feb. 2001, DP No. 78; 17 Sept. 2002, DP 2003 No. 9.

negligence and not an aggravated fault. If he succeeds in doing so, under Article 121-3, he shall not be held liable. However, case law tends often to retain the so-called 'specified fault' (first form of aggravated fault), so the decriminalisation expected of the law of 10 July 2000 did not really take place.

#### *4.3. Compliance programmes*

In principle, the effective implementation of a compliance programme or the designation of a compliance officer does not in any way exempt from liability. Even the Sapin II Law does not provide for such an effect. However, in practice, there is nothing to prevent the criminal court from taking this into account when assessing the existence and extent of the fault committed, but no known case law appears to have done so.

#### *4.4. Bookkeeping offences and liability of the chartered accountant*

The responsibilities of the head of business and the chartered accountant or auditor are independent.

Concerning the head of business, the mere quality of the director is insufficient to establish the moral element of the offence of presentation of unfaithful accounts. His/her personal participation (material and moral) is in principle required. This is why the case law considers that the defendant has no 'fraudulent intention' when he has entrusted the accounting work to a third professional accountant (CA Limoges, 2 Apr. 1997) or that certain irregularities belong to fields not falling within its competence (CA Rennes, 30 Jan. 2003).

### **5. Sanctions**

#### *5.1. General remarks*

The penalty in business criminal law is essentially governed by ordinary law.

This is the case for the main, complementary and alternative penalties of which the importance of some must be stressed, such as the prohibition on issuing cheques (Articles 131-19 and 131-20, Penal Code), the penalty of confiscation (Articles 131-21 and 131-21-1, Penal Code), the prohibition on exercising a public office or professional or social activity (Articles 131-27 to 131-29, Penal Code), the closure of an estab-

lishment or the exclusion from public procurements (Article 131-33 and Article 131-34, Penal Code) and the posting and dissemination of the pronounced decision (Article 131-35, Penal Code).

In practice, criminal judges very rarely use imprisonment and when they do, a conditional sentence is usually provided. They are sometimes encouraged to do so by the Ministry of Justice, which recommends the use of conditional sentences.<sup>160</sup>

### *5.2. Other punitive measures*

**Exclusion from public procurement.** The penalty of exclusion from public procurement contracts (Article 131-34 CP) may be incurred in case of felony and misdemeanour. It may be incurred as an additional penalty by natural persons and as a principal penalty by legal persons. It has a special (limited) scope of application: it may be pronounced only in cases expressly provided for by law. In the Criminal Code, it is provided for various offences against persons, property (this is the case for fraud, breach of trust and concealment in particular) or the nation (this is the case for forgery and the use of forgery; for legal persons, corruption and trading in influence are also added). Outside the Penal Code, it is incurred in particular for customs offences.

In labour law (illegal work), exclusion from public contracts is also an administrative sanction that may apply to the employer (natural or legal person).

In tax matters, special provisions are applicable.<sup>161</sup>

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<sup>160</sup> Circular Crim., 19 Sept. 2012, NOR: JUSD1234837C.

<sup>161</sup> Article 50, Finance Act No. 52-401 of 14 April 1952 for the 1952 financial year:

I. When a person is convicted for breach of a provision of the General Tax Code providing for criminal sanctions, the prohibition to obtain procurements from the State, departments, municipalities, public institutions as well as companies licensed or controlled by the State, departments and municipalities may be pronounced against him/her by the court for a maximum period of ten years from the date on which the sentence became final. This sanction is also imposed on legal persons under whose cover the convicted person would act to evade the above prohibition.

Where the convicted person is a de jure or de facto manager of an undertaking liable for the tax evaded, that undertaking may not obtain procurements from the State, departments, municipalities and public establishments or undertakings granted or controlled by the State, departments and municipalities for a period equal to that of the prohibition imposed pursuant to the preceding paragraph.

Exclusion pursuant to this paragraph shall automatically cease when the undertaking provides proof that it no longer employs the sentenced person.

**Prohibition to exercise.** The prohibition to exercise a commercial or industrial profession and the prohibition to direct, administer, manage or control an undertaking (Article 131-27 CP) is a penalty which may be imposed in case of felony or misdemeanour on a natural or legal person only where the law expressly so provides (special (limited) scope of application). In particular, it is incurred in the Penal Code with regard to offences against persons, offences against property (particularly in cases of fraud, breach of trust and concealment), offences against the nation (in particular corruption; in the case of forgery, the penalty is incurred only for legal persons).

**Tax matters.** Individuals guilty of any of the offences relating to direct taxes, value added tax and other turnover taxes, registration duty, property advertising tax and stamp duty are liable to the following optional additional penalties (CGI, Article 1750, 1° and 2°): the prohibition, in accordance with the procedures laid down in Article 131-27 of the Penal Code, to exercise directly or indirectly, for its own account or for the account of others, a liberal, commercial or industrial profession; and to direct, administer, manage or control in any capacity whatsoever, directly or indirectly, for its own account or for the account of others, a commercial or industrial undertaking or a commercial company.

**Customs matters.** Natural persons guilty of the offences provided for in Articles 414 and 459 of the Customs Code are liable to optional additional penalties (Customs Code, Article 432a, 1° and 2°): the prohibition, in accordance with the procedures laid down in Article 131-27 of the Penal Code, to exercise a commercial or industrial profession, to direct, administer, manage or control, directly or indirectly, for its own account or for the account of others, a commercial or industrial undertaking or a commercial company, the duration of this prohibition being a maximum of 15 years (Penal Code, Article 432a, 1° and 2°), Article 131-27, Paragraph 2).

### *5.3. Confiscation*

**Nature.** The confiscation penalty belongs to the category of alternative penalties (Articles 131-6, 10° and 131-14, 6°, Penal Code) and of additional penalties (Article 131-16, 5°, Penal Code; Article 430, Customs Code; Article L. 321-15, Commercial Code) which are some-

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II. The provisions of paragraph I shall apply to undertakings which execute part of the above orders as subcontractors.

times mandatory—in the presence of objects which are defined by law or regulation as dangerous or harmful or whose possession is unlawful (Article 131-21, Paragraph 7, Penal Code)—and sometimes optional. According to the special provisions contained in the Customs Code and the Commercial Code, the confiscation penalty is also sometimes incurred as a principal penalty (Articles 412, 414 and 416, Customs Code; L. 322-5 Commercial Code).

**Domain.** The scope of the different types of confiscation varies according to the penalty incurred.

(1) All offences punishable by up to one year's imprisonment may be subject to confiscation in accordance with Article 131-21 of the Penal Code, irrespective of the subject matter.

The Criminal Code is not the only collection of punitive texts. Thus, undeclared work is provided for and punished by Articles L. 8221-1, L. 8221-3 and L. 8224-1 of the Labour Code. The same applies to the offence of tax evasion<sup>162</sup> or the above-mentioned provisions of the Customs Code.<sup>163</sup>

Only property owned or freely disposed<sup>164</sup> of by the convict is concerned. Furthermore, subject to compulsory confiscation (*infra*; dangerous or harmful objects or objects whose possession is unlawful), confiscation requires linking the offence to seized property (the property is the means of the offence: it has been used to commit the offence or is intended to commit it; the property is the subject of the offence; the property is the proceeds (direct or indirect) of the offence).

(2) In addition to these hypotheses, the Penal Code authorises the confiscation of property whose connection with the offence committed is only presumed.<sup>165</sup>

This only concerns offences punishable by at least five years' imprisonment. The offence must have provided a direct or indirect benefit, which is assessed as such without the law requiring it to be in confor-

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<sup>162</sup> S. Detraz, *Les Sanctions de la Fraude Fiscale à l'Épreuve des Principes Constitutionnels et Européens*: Dr. Fisc. 2014, 625.

<sup>163</sup> Offences punishable by a penalty of less than one year do not fall within the scope of confiscation as provided for in Article 131-21 of the Penal Code. This does not mean that this penalty does not apply. It may be pronounced if a special text so provides.

<sup>164</sup> This concept makes it possible to reach the property of which the sentenced person is not the owner but of which he is the beneficial owner, although neither the law nor the case law has yet provided a uniform and unambiguous definition of the concept.

<sup>165</sup> Article 131-21, Paragraph 5 of the Penal Code.

mity with property liable to confiscation. There is therefore no need to establish that it was acquired with illicit assets. The confiscation of property may be ordered if the person prosecuted does not prove the origin of the property without the investigators having the obligation to bring it into line with the crime committed. Understood in this sense, confiscation may involve property the value of which goes far beyond the profits the person has made from the offence. Thus, all 'unjustified' assets are forfeitable even if the initial profit is less important, or even small. A presumption mechanism naturally implies that the unjustified patrimony is the result of the direct or indirect profit generated by the offence. As a result, confiscation can only relate to what the convicted person has acquired or has had free disposal of during the period of commission of the facts. On the other hand, it does not appear possible to deprive him/her of previously acquired property, even if he/she would not be able to justify it.

(3) In addition, the Penal Code authorises confiscation of (all) assets.<sup>166</sup>

This penalty is provided for the most serious offences specifically listed by law.<sup>167</sup> The most peculiar characteristic of this category of confiscation is the fact that it is incurred as such, without any direct, indirect or even presumed link to the offence. This is the meaning of the judgment of the Criminal Chamber of the Court of Cassation on 8 July 2015.<sup>168</sup> The confiscation of assets refers to all assets owned or freely

<sup>166</sup> Article 131-21, Paragraph 6, Penal Code.

<sup>167</sup> This is the case with regard to crimes against humanity (Articles 213-1, 4<sup>o</sup> and 213-3, 2<sup>o</sup>, Penal Code), terrorism (Article 422-6, Penal Code), trafficking in human beings, procuring and the resulting offences (Article 225-25, Penal Code), corruption of simple minors and organised gangs, dissemination of child pornography images in simple and organised gangs (Article 227-33, Penal Code), offences relating to counterfeit money (Article 442-16, Penal Code), money laundering resulting from a felony or a misdemeanour (Article 324-7, 12<sup>o</sup>, Penal Code), *association de malfaiteurs* with a view to the preparation of an offence punishable by ten years' imprisonment (Article 450-5), and non-justification of resources when the additional penalty of confiscation of assets is incurred for the related offence (Article 321-10-1, Paragraph 2, Penal Code). The law of 9 July 2010 redefined the framework of Article 222-49 of the Penal Code, which already provided for the possible confiscation of the assets of those who commit certain offences against narcotics legislation. The offences of transporting, detaining, offering, selling, acquiring or using illicit narcotic drugs have been added, so that almost all the incriminations provided for in this respect are now concerned (Article 222-49, Paragraph 2, referring to the provisions of Article 222-37).

<sup>168</sup> According to the Court, it follows from the provisions of Article 222-49, Paragraph 2, Penal Code which provides for the confiscation of the property of

disposed of by the person, whatever they may be and especially whatever their date of acquisition.

**Rights of third parties.** The confiscation of property freely disposed of<sup>169</sup> by the sentenced person shall be subject only to the rights of the owner in good faith.

Good faith is presumed. It is therefore up to the prosecution to show that the owner of the thing left to the convict's free disposal is acting in bad faith.

**Nota Bene.** Regarding absence of ignorance of the owner: some seizure decisions suggest a particularly rigorous conception of good faith, opening the door to a more flexible assessment of bad faith. The latter is not limited to the reported evidence of what the owner knew of the fraudulent use that was made of his property or the nature of the offences committed by the person who had the free disposal of his property. It may also result from circumstances that suggest he could not ignore it.<sup>170</sup>

persons guilty of drug offences, that this penalty may be imposed 'without it being necessary to establish that the property has been acquired illegally or that it constitutes the direct or indirect proceeds of the offence', Crim., 8 Jul. 2015, No. 14-86.938.

<sup>169</sup> A person had the vehicle he was driving confiscated for driving it without a licence on the grounds that it had been used for the commission of the offence. The problem was that the said vehicle did not belong to the convicted person but to the SARL of which he was the manager. The company therefore intervened voluntarily before the Court of Appeal in order to obtain its restitution. This approach did not succeed because the accused regularly drove without a licence and because, in addition, though he was not the direct owner of the confiscated vehicle, he was at least free to dispose of it. It is this analysis that the Criminal Chamber of the Court of Cassation validated in a decision of 3 February 2014. See also, Crim., 15 January 2014, No. 13-81.874 on the assessment of the owner's bona fide confiscation requirement (JCP G 2014, 136). Thus understood, bad faith refers to the owner's knowledge of the use that was made of the property—in other words, that it had been used to commit the offence. It is true that it could not be otherwise. The representative of the legal person was the manager responsible for the principal offence—two legal personalities for the same intent, so that the legal person could not ignore the use made of the vehicle.

<sup>170</sup> Crim., 9 Dec. 2014, No. 13-85.150: An investigating judge ordered the seizure of two buildings jointly and severally owned by the accused and his wife. With regard to the latter, who was not prosecuted, it was said that 'sharing her daily life since 1997, knowing his criminal record, she can hardly claim to have ignored the doubtful origin of these funds with regard to the financial situation of her partner, who had lived through a period of unemployment and whose income was not high.' A statement of reasons for the seizure was upheld by the chamber of investigation, while the Criminal Chamber of the Court of Cassation rejected the appeal in that 'in the state of these statements, from which it follows that Mrs Y. could not be regarded as a bona fide owner within the meaning of Article 131-21 of

The victim is a bona fide third party whose property cannot be confiscated (even if it was used to commit the offence) and must be returned.

### **Case of legal persons.**

**Felonies and misdemeanours.** Law No. 2010-768 of 9 July 2010 redefined the legal regime for confiscation from legal persons. Henceforth, the confiscation pronounced against legal persons follows the same legal regime as that applicable to natural persons, subject to the following remarks.

**Petty offences.** The regulation which punishes the offence may provide for certain additional penalties mentioned in Article 131-16 of the Penal Code (Penal Code, Article 131-43). This is the case for the confiscation of ‘the thing which served or was intended to commit the offence or the thing which is the product of it’ (Article 131-16, 5°) as well as that of ‘the animal used to commit the offence or against which the offence was committed’ (Article 131-16, 10°) whose legal regime is modelled on that of Article 131-21 (Article 131-48, Paragraph 5). One of the consequences is notably the possibility of pronouncing the sentence in value terms.

**Confiscation of assets.** The confiscation of assets liable to be imposed on legal persons does not follow the same legal regime as that of natural persons. Penalty is only possible in the case of crimes against humanity (Criminal Code, Article 213-3), certain offences of procuring (Article 225-25) or terrorist acts (Article 422-6).

In customs matters, confiscation is a penalty of a fiscal/administrative (not criminal) nature which is subject to a specific regime defined by the Customs Code.

## **6. Relationship with punitive administrative law**

### *6.1. Parallel criminal and administrative proceedings against the individual head of business*

**Constitutional Council case law.** The *ne bis in idem* principle does not have constitutional value in France (constant solution since 1989<sup>171</sup>). Nevertheless, the principle of necessity (provided for by Article 8 DDHC) may lead to the prohibition of the accumulation

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the Penal Code, and since it is not important whether the person indicted had only undivided rights in the seized real estate, the investigating chamber justified its decision’.

<sup>171</sup> Implicit but certain solution: Cons. const. 28 Jul. 1989, No. 89-260 DC, *Loi*

of prosecution and punitive sanctions. Indeed, ‘the principle of necessity of penalties does not only apply to sentences handed down by the criminal courts, but extends to any sanction having the character of a punishment’.<sup>172</sup> However, this principle ‘shall not preclude the same acts committed by the same person from being prosecuted differently for the purposes of sanctions of a different nature under separate sets of rules’.<sup>173</sup> Thus, accumulation is prohibited only in respect of ‘the same acts’, ‘committed by the same person’, ‘liable to be subject to sanctions which are not of a different nature’.<sup>174</sup> A final criterion assumes that sanctions fall under ‘separate sets of rules’. While this criterion also extends the requirement that proceedings and sanctions be subject to the same order of jurisdiction,<sup>175</sup> it now appears to require only that the ‘two punitive systems protect the same social interests’.<sup>176</sup>

Two clarifications are needed regarding the interpretation and application of these criteria.

Firstly, subject to the decision of 18 March 2015,<sup>177</sup> if the Council finds that the criminal and administrative financial penalties ‘are comparable in amount’, the fact that the criminal court may impose

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*Relative à la Sécurité et à la Transparence du Marché Financier*, JO 1 Aug. 1989 p. 9676.

<sup>172</sup> Ibid. cons. 22.

<sup>173</sup> Cons. const., 18 Mar. 2015, No. 2014-453/454 QPC and No. 2015-462 QPC (EADS).

<sup>174</sup> Cons. 26.

<sup>175</sup> This requirement was presented as a fourth criterion. Affirmed by the Council in 2015, it was challenged from the outset and quickly abandoned. This criterion was based on the duality of jurisdictional orders: the judicial order to which criminal sanctions belong and the administrative order to which part of the administrative sanctions belong. It should be noted that some of the sanctions imposed by the Independent Administrative Authorities (such as the Competition Authority or the Financial Market Authority) are punitive in nature and fall within the judicial order and not within the administrative order. According to this test, therefore, it was sufficient that the proceedings were not within the same order of jurisdiction for accumulation to be permitted.

<sup>176</sup> Recital 25.

<sup>177</sup> Decision cited above in which the Council considered, on the one hand, that ‘the financial penalties imposed by the sanctions commission of the Autorité des Marchés Financiers can be very severe and reach...up to six times those incurred before the criminal court’ and, on the other hand, that the functions of administrative sanctions (taking into account the seriousness of the breaches committed and the benefits or profits, if any, derived from such breaches) are comparable to criminal sanctions (imposed according to the circumstances of the offence and the personality of the perpetrator). It concluded that the facts ‘must be regarded as susceptible to sanctions which are not of a different nature’ (recital 26).

other penalties (imprisonment for natural persons and dissolution for legal persons, besides additional penalties), this is sufficient to conclude that ‘the facts provided for and punished by the aforementioned articles must be regarded as likely to give rise to sanctions of a different nature’ and therefore to consider the accumulation authorised.<sup>178</sup> Thus, the mere fact that the criminal court can impose, in addition to a fine, a prison sentence or an additional penalty is sufficient to allow accumulation.

This approach obliterates the scope of the principle of necessity, as only a few criminal offences do not carry a prison sentence. Moreover, as regards those carrying only a fine, the latter are often accompanied by additional penalties, and even if this is not the case, the fine may still be replaced by one of the alternative penalties listed in Article 131-6 of the Penal Code, in accordance with Article 131-7 of the same Code. Thus, in any event, the criminal court may impose a sentence of a non-monetary nature. This leads the doctrine to hold that the ‘earthquake’ resulting from the *Grande Stevens* decision was only a minor jolt.

This is all the more true since, secondly, the Council affirmed (in the context of tax procedures) that ‘the principle of the necessity of offences and penalties cannot prevent the legislator from laying down separate rules allowing the initiation of procedures leading to the application of several sanctions in order to ensure effective punishment of offences’.<sup>179</sup> Thus, since administrative and criminal procedures (and penalties) ‘make it possible to ensure the protection of the State’s financial interests together with equality before the tax authorities, pursuing common purposes that are both dissuasive and punitive’, ‘the recovery of the necessary public contribution and the objective of combating tax evasion justify the initiation of additional procedures in the most serious cases of fraud’. Consequently, ‘in addition to the inspections on the basis of which the tax authorities may apply financial penalties, it is possible to initiate criminal proceedings under the conditions and procedures provided for by law’.

The Court of Cassation implemented the principles laid down by the Constitutional Council and ruled out the application of Protocol 7 to the CESDH by stating: ‘Article 4 of Protocol No. 7, supplementing

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<sup>178</sup> Cons. const., 14 Jan. 2016, No. 2015-513/514/526 QPC.

<sup>179</sup> Decision No. 2016-545 QPC du 24 Jun. 2016, M. Alec W. et al., *Pénalités Fiscales pour Insuffisance de Déclaration et Sanctions Pénales pour Fraude Fiscale*, cons. 21.

the European Convention on Human Rights, only applies, according to the reservation made by France, to offences falling within the jurisdiction of criminal courts under French law and does not prohibit the imposition of tax penalties in parallel with the penalties imposed by the punitive judge' and that 'contrary to what the plaintiff maintains, this reservation is not challenged by the European Court of Human Rights'. Moreover, it added that 'Article 50 of the Charter of Fundamental Rights does not in itself have the effect of prohibiting, as a matter of principle, the accumulation of tax and criminal penalties'.<sup>180</sup> This decision was issued after the decision of the European Court in case *A and B v. Norway* of November 2016.

Finally, the principle of necessity, as interpreted by the Council, does little to limit accumulation cases.

However, in the case of authorised accumulation, 'the principle of proportionality implies that in any event the aggregate amount of any penalties imposed shall not exceed the higher of one of the penalties incurred'.<sup>181</sup>

Where accumulation is prohibited, the case law of the Constitutional Council requires the legislator either to maintain in force only one of the two procedures or to provide a mechanism for coordinating proceedings.<sup>182</sup>

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<sup>180</sup> Cass. Crim., 22 Feb. 2017, No. 14-82.526; Cass. Crim., 28 Jun 2017, No. 16-81.149; Cass. Crim., 13 Sept. 2017, No. 15-84.823.

<sup>181</sup> Constant case law since the above-mentioned 1989 decision.

<sup>182</sup> This was the case with market abuse. The reform took place with the law of 21 June 2016 (L. No. 2016-819 reforming the system of repression of market abuse). Of all the possible options (decriminalisation, limitation of administrative penalties, etc.), the referral (*aiguillage*) solution was finally chosen in this area—i.e. consultation between the public prosecutor and the French Financial Market Authority (AMF) aimed at avoiding double prosecution. Neither the AMF nor the public prosecutor (Article 705-1 CPP) can initiate proceedings if the other has already taken this initiative against the same person for the same facts (Article L. 465-3-6, I Monetary and Financial Code). In addition, prior to any initiation of public proceedings or notification of a grievance, the public prosecutor or the AMF must inform the other of its intention. The informed authority then has a period of two months to indicate whether or not it intends to institute proceedings for these facts (Article L. 465-3-6, II and III MFC). Silence kept by the informed authority is tantamount to acceptance of the undertaking of the pursuit by the other. On the other hand, if it also wishes to take legal action, there may be a discussion between the two. Failing a waiver by one of the two authorities, the Attorney General of the Paris Court of Appeal is competent to arbitrate. He has two months in which to render his decision, which will be final and cannot be appealed (Article L. 465-3-6, IV MFC). In order to avoid undermining the referral mechanism, the law of 21 June 2016 restricts the possibility of a civil party petition with regard to market abuse.

**Exchange of information and transmission of procedures.**

Criminal prosecution authorities may receive disclosure of documents by independent administrative authorities such as the Competition Authority (Article L. 462-6, Paragraph 2, Commercial Code) or the *Autorité des Marchés Financiers* (Article L. 621-20-1 MFC) who may become aware of criminal acts when carrying out their own supervisory activities.

In tax matters, the evidence gathered in the course of the tax proceedings—in particular through the power to access premises—may be used in concurrent or subsequent criminal proceedings. The judicial authority and the police also require the tax administration to provide information, including information gathered in the course of administrative proceedings.

**Right to silence in administrative proceedings: customs matters.**

Customs (non-judicial) officers may require professionals to provide documents and information even from those who may have taken part in the offence to which these documents relate; moreover, refusal constitutes a fifth-class customs offence (Customs Code, Article 413 bis, § 1). However, the Court of Cassation does not see any violation of Article 6 of the European Convention on Human Rights (Cass. Crim, 16 June 1999, No. 98-83.451); in the same sense, according to the Constitutional Council, ‘Article 65 of the Customs Code ignores neither the principle that no one is bound to accuse himself, which derives from Article 9 of the Declaration of 1789, nor any other right or freedom that the Constitution guarantees’ (Cons. const., 27 Jan. 2012, No. 2011-214 QPC).

### *6.2. Parallel criminal or administrative proceedings against the legal person and against the individual head of business*

Parallel proceedings against the legal person and the head of business on the same facts are permitted. No concentration or coordination of prosecutions is required or organised.

Thus, in tax matters, the solution was expressly affirmed by the Court of Cassation, based in particular on the judgment of the Court

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Indeed, if the alleged victim could initiate public proceedings by filing a complaint with a civil party before the investigating judge or a direct summons to appear before the criminal court, even though proceedings before the AMF are already under way, the problem of double prosecution would arise again. This is the reason why, from now on, a civil party petition is admissible only if the prosecutor has the possibility to prosecute (Article L. 465-3-6, VII and VIII MFC).

of Justice of 5 April 2017: ‘Article 50 of the Charter of Fundamental Rights does not preclude criminal proceedings from being instituted for tax evasion against the natural person, the representative of the legal person who has been subject to tax sanctions for the same facts (cf. the ECJ judgment of 5 April 2017, C-217/15 and C-350/15)’.<sup>183</sup>

As to the possibility of using evidence obtained in the course of administrative proceedings in criminal proceedings, the same rules as those indicated above (see *6.1. Parallel criminal and administrative proceedings against the individual head of business*) apply.

### *6.3. Is the individual liability of the head of business shielded or diminished if the corporation has previously pleaded guilty?*

Liabilities of the legal person and the natural person are independent. Thus, the legal person may conclude a judicial convention of public interest (CJIP, see above) with the public prosecutor (Article 41-1-2 CPP). This does not affect the conditions under which its managers may be held criminally liable or subject to prosecution.

With regard to the procedure for appearance on prior acknowledgement of guilt (CRPC, Article 495-7 CPP seq.), the circular of 2 September 2004<sup>184</sup> states that ‘the new provisions do not exclude the application of the CRPC to a legal entity, which must then be represented by a natural person in accordance with the provisions of Article 706-43 of the Code of Criminal Procedure. Because of the provisions of Article 706-44, which prohibits any coercive measure against the person representing the legal person being prosecuted, only the proceeding of “convocation” may be used. In practice, it may be advisable in the event of the use of the CRPC against a legal person, that only the latter be prosecuted and that the CRPC not be used at the same time against the legal representative of the legal person, even if there is nothing to prevent recourse at the same time to this procedure against the natural person’.

### *6.4. Accumulation of sanctions and proportionality*

As noted above, where accumulation of proceedings and penalties is permitted, this accumulation is referred to as ‘capped’. This means

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<sup>183</sup> Crim., 6 Dec. 2017 – No. 16-81.857.

<sup>184</sup> Crim., 2004-12 E8/02-09-2004.

that it is limited by the principle of proportionality, which requires taking into account the amount of sanctions imposed in relation to the same facts so that the aggregate amount of sanctions imposed does not exceed the legal maximum incurred.



## CHAPTER IV

### GERMANY NATIONAL REPORT

*Prof. Martin Paul Waßmer \**

SUMMARY: 1. Introduction. – 1.1. Debate on the implementation of Art. 3 of the PIF Convention. – 1.1.1. Existing criminal provisions. – 1.1.2. Violation of obligatory supervision. – 1.1.3. Debate on the extension of criminal liability. – 1.2. Debate on corporate criminal liability. – 1.3. Significant cases involving the liability of heads of business. – 2. Relationship with general principles of criminal law. – 2.1. General information on the system of perpetration and complicity. – 2.2. General information on omission liability. – 2.2.1. General description. – 2.2.2. Duty of care. – 2.2.3. Link required between the omission and the commission of the offence. – 2.2.4. *Mens rea*. – 2.2.5. Regulatory offences law. – 2.3. Duty to report an offence. – 2.4. General information on strict liability. – 2.5. Special rules on criminal liability. – 3. Concept and scope of the criminal law responsibilities of heads of business. – 3.1. Liability of heads of business (general information). – 3.2. Personal scope of the liability. – 3.3. Duties to control and supervise. – 3.4 Violation of supervisory duties and the commission of an offence. – 3.4.1. Causal link. – 3.4.2. *Mens rea*. – 3.5. Delegation of control and supervisory duties: scope and limits. – 3.6. Fulfilment of supervisory duties and disciplinary powers. – 3.7. Liability and collective decisions. – 3.8. Relationship with corporate liability. – 3.8.1. Triggering persons. – 3.8.2. Concurrence and accumulation of liabilities. – 3.9. Compliance programmes. – 3.9.1. Role of compliance programmes. – 3.9.2. Obligation to adopt compliance programmes. – 3.9.3. Consequences of failing to adopt compliance programmes. – 4. Defences. – 4.1. Effective powers of supervision and control and liability. – 4.2. Delegation of supervisory powers. – 4.3. Compliance programmes. – 4.4. Third party advice, external auditing and liability of heads of business. – 5. Liability of heads of business and sanctions. – 5.1. Criminal and punitive sanctions. – 5.1.1. Heads of business. – 5.1.2. Corporations. – 5.2. Other sanctions and measures. – 5.2.1. Crim-

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\* University of Cologne.

inal law. – 5.2.2. Regulatory offences law, civil law and administrative law. – 5.2.3. Registration of decisions. – 5.3. Sentencing criteria and guidelines. – 5.3.1. Sentencing criteria. – 5.3.2. Guidelines. – 5.4. Confiscation. – 5.4.1. Criminal law. – 5.4.2. Regulatory offences law. – 5.5. Enforcement practice. – 5.5.1. Criminal law. – 5.5.2. Regulatory offences law. – 6. Relationships with punitive administrative law. – 6.1. Parallel criminal and administrative proceedings against the head of business. – 6.1.1. Trans-procedural use of evidence against the head of business. – 6.1.2. Admissibility and use of foreign evidence against the head of business. – 6.1.3. Administrative investigations and right to silence of the head of business. – 6.2. Multiple and parallel criminal and administrative proceedings against the legal person and the head of business. – 6.2.1. Trans-procedural use of evidence. – 6.2.2. Admissibility and use of foreign evidence. – 6.2.3. Right to silence of the head of business in the proceedings against the legal person. – 6.3. Relationship between liability of the legal person and liability of the head of business. – 6.3.1. Corporation's guilty plea. – 6.3.2. Previous imposition of a regulatory fine against the head of business.

## 1. Introduction

### 1.1. *Debate on the implementation of Art. 3 of the PIF Convention*

In Germany, Art. 3 of the PIF Convention on the liability of heads of business has not been implemented by a new legal provision. The legislator has justified this by the fact that the existing provisions are sufficient, because Art. 3 does not require the introduction of a criminal offence regarding the violation of obligatory supervision.<sup>1</sup> No further explanation was given. The background is the following.

#### 1.1.1. *Existing criminal provisions*

Heads of business and other decision-makers could be held criminally liable on the basis of their intentional acts or omissions as principals (sect. 25 (1) StGB), joint principals (sect. 25 (2) StGB), abettors (sect. 26 StGB) or aiders (sect. 27 (1) StGB), if an intentional PIF offence—for instance, a fraud (sect. 263 StGB)—is committed by a person under their authority acting on behalf of the business. According to jurisprudence,<sup>2</sup> the head of business, if he has

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<sup>1</sup> Bundestag document No. 13/10425, 12.

<sup>2</sup> BGHSt 40, 218, 236 f.; 48, 331, 342; 49, 147, 163 f.

given instructions to an employee, can be not only an abettor, but even an indirect perpetrator (by virtue of the rule of organisation: *kraft Organisationsherrschaft*).<sup>3</sup> On the other hand, a head of business can also be criminally liable for an intentional omission (sect. 13 (1) StGB). According to the prevailing opinion in criminal science,<sup>4</sup> finally confirmed by the Federal Court of Justice (BGH) in 2009 and again in 2012,<sup>5</sup> the head of business is responsible under law to ensure that a company-related crime (*betriebsbezogene Straftat*), committed by a person under his authority, does not occur (so-called criminal-law business employer liability: *strafrechtliche Geschäftsherrenhaftung*). Furthermore, an intentional omission by the head of business or decision-maker is in general equivalent to the realisation of the statutory elements of an offence through a positive act.<sup>6</sup> In such a case, he has failed to fulfil his duty of obligatory supervision. Therefore, he may be punished as a principal or secondary participant.<sup>7</sup> As all PIF offences are intentional offences (see Art. 1 PIF Convention), it is not possible for the head of business or any other decision-maker to be held liable under criminal law for negligent conduct or omission. A criminal liability for negligence presupposes that the negligent commission (e.g. of fraud) is also punishable by law—i.e. that a corresponding criminal negligence offence exists.

### 1.1.2. Violation of obligatory supervision

The criminal liability of the head of business or another decision-maker for an intentional company-related crime, committed by a person under his authority, requires not only proof of causality but also proof of intent (and, in case of fraud, proof of enrichment intent: *Bereicherungsabsicht*). These proofs are often very difficult to provide. Regarding causality, the prevailing opinion demands that by the necessary supervisory measures, the success of a crime would have been prevented ‘with almost certain probability’,<sup>8</sup> since the application of the so-called ‘risk-increase doctrine’ (*Risikoerhöhungslehre*) contradicts current criminal

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<sup>3</sup> Overview *Waßmer*, in: Heidelberger Kommentar zum StGB, 2nd ed. 2015, § 25 marginal no. 38 et seq.

<sup>4</sup> Cf. only *Geneuss* ZIS 2016, 259, 260.

<sup>5</sup> BGHSt 54, 44; BGHSt 57, 42.

<sup>6</sup> Cf. only *Fischer*, StGB, 64nd. ed. 2017, § 263 marginal no. 22.

<sup>7</sup> Cf. only *Waßmer*, Die strafrechtliche Geschäftsherrenhaftung, 2006, p. 336 et seq.

<sup>8</sup> *Waßmer*, Die strafrechtliche Geschäftsherrenhaftung, 2006, p. 321 et seq.

law.<sup>9</sup> Furthermore, with regard to the mental element, usually not only will the proof that the head of business or another decision-maker knew about the possibility of committing the offence be very difficult to conduct, but so too will the proof that he 'wanted' the offence.

In order to overcome these practical difficulties, the German Act on Regulatory Offences (OWiG) contains within sect. 130 OWiG a provision on the 'violation of obligatory supervision in operations and enterprises' that significantly reduces the requirements. The official translation<sup>10</sup> of sect. 130 (1) OWiG is as follows:

Sect. 130 OWiG – Violation of obligatory supervision in operations and enterprises

(1) Whoever, as the owner of an operation or undertaking, intentionally or negligently omits to take the supervisory measures required to prevent contraventions, within the operation or undertaking, of duties incumbent on the owner and the violation of which carries a criminal penalty or a regulatory fine, shall be deemed to have committed a regulatory offence in a case where such contravention has been committed as would have been prevented, or made much more difficult, if there had been proper supervision. The required supervisory measures shall also comprise appointment, careful selection and surveillance of supervisory personnel.

On the one hand, the strict causality requirement is reduced, since it is sufficient that the contravention committed by a person under supervision would have been made 'much more difficult' by proper supervision. On the other hand, not only an intentional, but also a negligent violation of supervisory duties is covered. Finally, committing an offence is a mere objective condition of punishment (*objektive Bedingung der Ahndung*)—that is, intent and negligence on the part of the supervisor need not extend to it.

However, it should be noted that sect. 130 OWiG is a mere administrative offence. The German legislator has not introduced a criminal offence for the breach of the supervisory obligation—i.e. 'upgraded' sect. 130 OWiG—because the head of business could be declared crim-

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<sup>9</sup> Wessels/Beulke/Satzger, Strafrecht Allgemeiner Teil, 47th ed. 2017, marginal no. 297.

<sup>10</sup> Official translation of the German Act on Regulatory Offences in the version of 12.5.2015 provided by Neil Mussett, available at <https://www.gesetze-im-internet.de/owig/index.html>

inally liable if he has intentionally failed to fulfil his duty of supervision and has therefore participated in a company-related crime committed by a person under his authority.

Apart from that, the introduction of a specific criminal offence with regard to the violation of obligatory supervision and based on sect. 130 (1) OWiG—i.e. a further ‘extension’ of criminal liability—would encounter considerable resistance in criminal science. German criminal law is based on the principle of legality and the principle of culpability (cf. Art. 103 German Basic Law (GG); sect. 1 StGB). These principles also apply to the regulatory offences law, whereby the principle of legality follows from the law (sect. 3 OWiG) and the principle of culpability from the jurisdiction of the Federal Constitutional Court.<sup>11</sup> Therefore, serious constitutional and dogmatic objections were raised quite early against the extensive concept of sect. 130 OWiG.<sup>12</sup> It was assumed that the offence is linked to the abstract endangerment of legal interests (*abstraktes Gefährdungsdelikt*).<sup>13</sup> According to the now dominant opinion,<sup>14</sup> these concerns are resolved. Sect. 130 OWiG does not oblige taking meaningful abstract actions, but only avoiding the concrete danger that subordinates commit contraventions that belong to certain areas. Therefore, sect. 130 OWiG is constituted by the concrete endangerment of legal interests (*konkretes Gefährdungsdelikt*). In addition, the objections raised against the reception of the risk-increase doctrine can be overcome by a restrictive interpretation, since the danger must have been realised in the subordinate’s contravention (protective purpose context: *Schutzzweckzusammenhang*).<sup>15</sup>

### 1.1.3. Debate on the extension of criminal liability

In recent decades, there have been debates on whether liability

<sup>11</sup> Cf. only BVerfGE 9, 167, 169.

<sup>12</sup> Schünemann, Unternehmenskriminalität und Strafrecht, 1979, p. 208 et seq.; Thiemann, Aufsichtspflichtverletzung in Betrieben und Unternehmen, 1976, p. 104 et seq.

<sup>13</sup> Thiemann, Aufsichtspflichtverletzung in Betrieben und Unternehmen, 1976, p. 114.

<sup>14</sup> Rogall, in: Karlsruher Kommentar zum OWiG, 5th ed. 2018, § 130 marginal no. 19, 21.

<sup>15</sup> Achenbach, wistra 1998, 298 et seq.; Rogall, in: Karlsruher Kommentar zum OWiG, 5th ed. 2018, § 130 marginal no. 113.

should be extended, in order to clarify the position of the head of business and to eliminate or mitigate causality problems.

The introduction of a specific criminal offence has often been suggested. In the 1970s, not only did the Commission of Experts on Combating Economic Crime<sup>16</sup> and the Interministerial Working Group on Environmental Liability and Criminal Environmental Law<sup>17</sup> support the introduction of a new criminal offence, but the introduction was also recommended by scientists<sup>18</sup> and the 49th German Lawyers' Day (*Deutscher Juristentag*) in 1972.<sup>19</sup> It was argued that traditional criminal offences cannot be applied to economic misconduct due to the division of labour and collectivisation. In 1979, Schünemann<sup>20</sup> suggested amending sect. 13 StGB for criminal offences as well as sect. 8 OWiG for regulatory offences, establishing the risk-increase doctrine. However, in science, the proposals were predominantly rejected since the implementation of the risk-increase doctrine in criminal law was seen as an unacceptable erosion of central principles.<sup>21</sup> Therefore, the German legislator did not take up the proposals.

However, changes were made in 1994 to the regulatory offences law, revising sect. 130 OWiG. Prior to this, the provision presupposed that contravention had been 'prevented' under proper supervision, which required proof that the contravention would have been avoided with near certainty.<sup>22</sup> However, in practice, this proof could hardly be provided. As early as 1983, the Federal Government's draft law on the Second Act to Combat White-Collar Crime proposed an improved 'functional and practicable design' of sect. 130 OWiG,<sup>23</sup> following the recommendations of the Expert Commission on Economic Crime,<sup>24</sup> by implementing the risk-increase doctrine.

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<sup>16</sup> Sachverständigenkommission zur Bekämpfung der Wirtschaftskriminalität, Tagungsberichte Bd. XIV, 1978, p. 30 et seq.

<sup>17</sup> Interministerielle Arbeitsgruppe 'Umwelthaftungs- und Umweltstrafrecht', Arbeitskreis 'Umweltstrafrecht', 1988, p. 78 et seq.

<sup>18</sup> Tiedemann, Welche strafrechtlichen Mittel empfehlen sich für eine wirksamere Bekämpfung der Wirtschaftskriminalität? Gutachten C zum 49. DJT, 1972, p. C 56 et seq.

<sup>19</sup> Verhandlungen des DJT, Vol. II, 1972, M 109.

<sup>20</sup> Schünemann, Unternehmenskriminalität, 1979, p. 207.

<sup>21</sup> Waßmer, Strafrechtliche Geschäftsherrenhaftung, 2006, p. 360 et seq.

<sup>22</sup> BGH wistra 1982, 34.

<sup>23</sup> Bundestag document No. 10/318, 43 et seq.

<sup>24</sup> Sachverständigenkommission zur Bekämpfung der Wirtschaftskriminalität, Tagungsberichte Bd. XIV, 1978, p. 42 et seq.

The Committee on Legal Affairs (*Rechtsausschuss*) of the Bundestag, however, rejected this proposal in 1986 because it would have changed the structure of sect. 130 OWiG, and because difficulties of proof do not justify change.<sup>25</sup> In 1991, the Federal Government's draft law on the Second Law on Combating Environmental Crime took up the proposal again.<sup>26</sup> It was stated that deviations from the requirement of strict causality are not alien even to criminal law; for example, according to the jurisdiction, aiding (sect. 27 StGB) does not require the activity to be the cause of the criminal success of the offence, because it is sufficient to encourage or facilitate the offence.<sup>27</sup> The German Bundesrat took up the proposal and demanded the introduction of a criminal offence, supplementing sect. 130 OWiG.<sup>28</sup> However, the Committee on Legal Affairs declined to do so, but was in favour of the revision of sect. 130 OWiG. For this reason, since 1994 it has been sufficient that the contravention would have been made 'much more difficult' had there been proper supervision.

### *1.2. Debate on corporate criminal liability*

The German legal system only provides for administrative liability. Sect. 30 OWiG, which permits the imposition of regulatory fines, is not limited to specific company-related offences.<sup>29</sup> It applies to all criminal and regulatory offences as a result of which duties incumbent on the legal person or on the association of persons have been violated, or where the legal person or the association has been enriched or was intended to be enriched. All PIF offences are included, not only fraud affecting the EU financial interests (PIF Convention), but also active and passive corruption of officials (First Protocol) as well as money laundering (Second Protocol). The official translation of sect. 30 (1) and (2) OWiG is as follows:

Sect. 30 – Regulatory Fine Imposed on Legal Persons and on Associations of Persons

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<sup>25</sup> Bundestag document No. 10/5058, 37.

<sup>26</sup> Bundestag document No. 12/192, 33.

<sup>27</sup> Bundestag document No. 12/192, 33.

<sup>28</sup> Bundestag document No. 12/192, 38 et seq.

<sup>29</sup> Cf. only *Rogall*, in: Karlsruher Kommentar zum OWiG, 5th ed. 2018, § 130 marginal no. 103 et seq.

(1) Where someone acting

1. as an entity authorised to represent a legal person or as a member of such an entity,

2. as chairman of the executive committee of an association without legal capacity or as a member of such committee,

3. as a partner authorised to represent a partnership with legal capacity, or

4. as the authorised representative with full power of attorney or in a managerial position as procura-holder or the authorised representative with a commercial power of attorney of a legal person or of an association of persons referred to in numbers 2 or 3,

5. as another person responsible on behalf of the management of the operation or enterprise forming part of a legal person, or of an association of persons referred to in numbers 2 or 3, also covering supervision of the conduct of business or other exercise of controlling powers in a managerial position, has committed a criminal offence or a regulatory offence as a result of which duties incumbent on the legal person or on the association of persons have been violated, or where the legal person or the association of persons has been enriched or was intended to be enriched, a regulatory fine may be imposed on such person or association.

(2) The regulatory fine shall amount

1. in the case of a criminal offence committed with intent, to not more than ten million euros,

2. in the case of a criminal offence committed negligently, to not more than five million euros.

Where there has been commission of a regulatory offence, the maximum regulatory fine that can be imposed shall be determined by the maximum regulatory fine imposable for the regulatory offence concerned. If the Act refers to this provision, the maximum amount of the regulatory fine in accordance with the second sentence shall be multiplied by ten for the offences referred to in the Act. The second sentence shall also apply where there has been commission of an act simultaneously constituting a criminal offence and a regulatory offence, provided that the maximum regulatory fine imposable for the regulatory offence exceeds the maximum pursuant to the first sentence.

The introduction of criminal liability has been the subject of lively debate for more than 200 years. In the course of the enlightenment, during the nineteenth century it became generally accepted in the German legal arena that a punishment of legal persons was inappropriate, be-

cause punishment presupposes the capacity to act and the culpability of a natural person.<sup>30</sup> Therefore, neither the particular criminal laws of the German states, nor the Imperial Criminal Code of 1871 (*Reichsstrafgesetzbuch*: RStGB) contained provisions on criminal liability. In 1887, the German Imperial Court (*Reichsgericht*) confirmed that a legal person 'as a fictitious legal entity is deprived of its natural capacity to act and, at the same time, of its criminal responsibility for what its organs act in their representation'.<sup>31</sup> Nevertheless, in 1919, after the First World War, sect. 357 Imperial Fiscal Code (RAO) (the later sect. 393 RAO) was introduced, which established criminal liability of legal persons in tax criminal law, probably due to fiscal interests. However, the provision did not gain any practical significance until it was repealed in 1967, because the German Imperial Court ruled in 1926<sup>32</sup> that the punishment of the management excluded punishment of the legal person.

After the Second World War, the policy debate was revived in West Germany as provisions, which were enacted by the Allied occupation forces, regarding foreign exchange and antitrust law, imposing criminal sanctions against legal persons.<sup>33</sup> In 1953, the German Federal Court of Justice (BGH) considered the provisions, which were regarded as expressions of Anglo-Saxon legal thought, applicable but contrary to the principles and notions of German criminal law since they did not reflect the social-ethical concept of culpability and punishment.<sup>34</sup>

The debate continued during the Great Reform of Criminal Law in the 1950s and 1960s. Following a controversial debate, the Great Criminal Law Commission (*Große Strafrechtskommission*) rejected by a majority the criminal liability of legal persons, but ultimately voted in favour of including at least a provision in the general part of the Criminal Code that would allow 'monetary sanctions'.<sup>35</sup> This was intended to absorb illegal profits and other illegal benefits. Later, the Special Committee (*Sonderausschuss*) of the German Bundestag for the Criminal Law Reform dealt again with the question. After an intensive discussion, a compromise solution was found, implementing an amendment to the OWiG.<sup>36</sup> Sect. 23 OWiG (the later sect. 30 OWiG) was introduced

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<sup>30</sup> Fundamental *Paul Johann Anselm von Feuerbach*, *Lehrbuch des gemeinen in Deutschland geltenden Peinlichen Rechts*, 1801, p. 29.

<sup>31</sup> RGSt. 16, 121, 123 et seq.

<sup>32</sup> RGSt. 61, 92, 95 et seq.

<sup>33</sup> *Jescheck*, ZStW 65 (1953), 211, 217 et seq.

<sup>34</sup> BGHSt 5, 28, 32 et seq.

<sup>35</sup> *Niederschriften der Großen Strafrechtskommission*, Bd. IV, 1958, p. 329 et seq., 333 et seq., 574.

on 1 October 1968 as a general, uniform and conclusive provision to allow regulatory fines to be imposed.

Prior to this, there had already been the possibility to impose administrative fines (*Ordnungsstrafen*) on legal persons, which were regarded not as criminal fines but as 'neutral in value'.<sup>37</sup> In the Weimar Republic, sect. 17 of the Ordinance against Misuse of Economic Power Positions of 2 November 1923 allowed, according to the jurisdiction,<sup>38</sup> the imposition of an unlimited administrative fine on legal persons. During the Nazi era, the possibility of imposing administrative penalties had been greatly expanded to avoid judicial control.<sup>39</sup> In the post-war period, efforts to correct the rule of law led to a distinction being made between criminal offences and mere regulatory offences (*Ordnungswidrigkeiten*). As the need for criminal policy to impose sanctions on companies increased, numerous special provisions were introduced which allowed the imposition of regulatory fines.<sup>40</sup> The legislator took the view that this was not problematic, because it was assumed that a regulatory fine was of an 'aliud-like' nature compared with a criminal fine, and that it was only a 'side effect' of the offence.<sup>41</sup> However, in 1986 sect. 30 OWiG was revised.<sup>42</sup> Since then, it has been a main consequence of the act. Furthermore, today's prevailing opinion assumes that there is no qualitative difference between criminal fines and regulatory fines, but only a quantitative difference ('plus-minus').<sup>43</sup>

In the 1990s, the debate about the introduction of corporate criminal liability was reopened after several major scandals. In July 1997, the German Federal State of Hesse (Bundesland Hessen) presented a draft.<sup>44</sup> In January 1998, the Federal Minister for Justice appointed a commission on the reform of the criminal sanctions system. However, in November 1999, the commission ultimately voted by a majority against the introduction of corporate criminal law.<sup>45</sup> The members con-

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<sup>36</sup> Protokolle Sonderausschuss Strafrechtsreform, p. 397 et seq., 409 et seq., p. 419 et seq., p. 1079 et seq.

<sup>37</sup> Schmitt, Strafrechtliche Maßnahmen gegen Verbände, 1958, p. 70 et seq.

<sup>38</sup> KG Kartell-Rundschau 1929, 213.

<sup>39</sup> Mitsch, in: Karlsruher Kommentar zum OWiG, 5th ed. 2018, § 30 marginal no. 24 et seq.

<sup>40</sup> Bundestag document No. V/1269, 58.

<sup>41</sup> Bundestag document No. V/1269, 58 et seq.

<sup>42</sup> 2. Gesetz zur Bekämpfung der Wirtschaftskriminalität (2. WiKG), BGBl. I 1986, p. 712.

<sup>43</sup> Mitsch, Recht der Ordnungswidrigkeiten, 2nd ed. 2005, § 3 marginal no. 7 et seqq.

<sup>44</sup> Cf. Hamm NJW 1998, 662; Wegner, ZRP 1999, 186, 187 et seq.

sidered the existing regulatory fines to be sufficient and argued that there are considerable dogmatic and constitutional objections to the introduction of criminal fines. Instead, the further development of existing instruments was recommended.

In recent years, the debate has flared up again, as companies can now be held criminally liable in most EU Member States. At the Autumn Conference of the German Justice Ministers in Berlin on 15 November 2012, it was discussed whether the imposition of regulatory fines is 'still sufficient' and 'still appropriate'.<sup>46</sup> In September 2013, the Minister for Justice of the Federal State of North Rhine-Westphalia (Bundesland Nordrhein-Westfalen) presented the draft of a Federal Corporate Criminal Code (*Verbandsstrafgesetzbuch*).<sup>47</sup> This draft was debated controversially.<sup>48</sup> It was not only the necessity of introducing corporate criminal law that was questioned, but also whether the provisions could be integrated into the existing German criminal law. Finally, the proposal was not implemented because the Coalition Agreement of the Grand Coalition (CDU/CSU/SPD) of November 2013 had only promised to 'examine' the introduction of a 'corporate criminal law for multinational corporations'.<sup>49</sup> Whether the criminal liability of legal persons will be introduced in the current legislative period is not clear.

According to the still prevailing opinion,<sup>50</sup> the criminalisation of legal persons is not compatible with the basic categories of criminal law and, with regard to sect. 30 OWiG, not necessary. It is argued that corporations which could not act are neither culpable nor punishable. A corporation cannot suffer and learn from a criminal sanction for the future. Introducing corporate criminal liability would bear the risk that persons acting on the behalf of the corporation could face individual criminal sanctions, and additionally would be burdened with a corporate criminal sanction. The counter-opinion<sup>51</sup> does not share these objections and assumes that corporations act either by an 'original' organisational action,

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<sup>45</sup> Abschlussbericht der Kommission, in: Hettinger (ed.), Reform des Sanktionsrechts, Vol. III, 2002, p. 351, 354 et seq.

<sup>46</sup> [www.justiz.nrw.de/WebPortal/JM/justizpolitik/jumiko/beschluesse/2012/herbstkonferenz12/ind\\_ex.php](http://www.justiz.nrw.de/WebPortal/JM/justizpolitik/jumiko/beschluesse/2012/herbstkonferenz12/ind_ex.php).

<sup>47</sup> [www.strafrecht.de/media/files/docs/Gesetzentwurf.pdf](http://www.strafrecht.de/media/files/docs/Gesetzentwurf.pdf).

<sup>48</sup> Görtz WiJ 2014, 8, 14; Hein CCZ 2014, 75, 76; Hoven ZIS 2014, 19, 23; Leipold NJW-Spezial 2013, 696; Löffelmann JR 2014, 185, 188 et seq; Mitsch NZWiSt 2014, 1 et seq., 5; Schünemann ZIS 2014, 1, 7 et seq; Willem DRiZ 2013, 354 et seq; Witte/Wagner BB 2014, 643, 648; Zieschang GA 2014, 91 et seq.

<sup>49</sup> Cf. 'Deutschlands Zukunft gestalten', Koalitionsvertrag zwischen CDU/CSU und SPD, 27.11.2013, p. 101.

<sup>50</sup> Cf. only Schünemann, ZIS 2014, 1 et seq.

as independent and responsible subjects with a corporate culture, or by the ‘attribution’ of the culpable conduct of the persons acting on their behalf. It is also argued that there is no double jeopardy as the individual persons and the legal person are different legal entities.

### *1.3. Significant cases involving the liability of heads of business*

Cases in which top managers were investigated for offences committed by an employee acting on behalf of the business are rare. Most decisions and judgments do not seem to be published, but there are some available in the media, journals and databases. In many cases, as far as can be seen, only the company was punished for criminal acts.

#### *- Staatsanwaltschaft München I: Penalty notice of 15 December 2008<sup>52</sup>*

The Munich Public Prosecutor’s Office I issued on 15 December 2008, according to sect. 30 (4) OWiG in conjunction with sect. 130 OWiG, a penalty notice and imposed an independent regulatory fine of 395 million euros against Siemens AG. Therefore, the violation of the supervisory duty of the entire board of management was sanctioned. The compliance system of Siemens AG was judged to be insufficient due to the lack of sufficient human resources and the lack of an effective control system for detecting and prosecuting violations. This led to the creation of slush funds (*schwarze Kassen*) in many business areas, which were used to pay bribes. However, only 250,000 euros served as a punishment: the regulatory fine was mainly used to absorb the illegal profits. The penalty notice completed the investigation.

#### *- BGH: Judgment of 17 July 2009 – 5 StR 394/08 = BGHSt 54, 44*

The defendant—the head of the legal department and at the same time head of the internal audit department of the Berliner Stadtreinigungsbetriebe (BSR)—was accused as a participant in a fraud against property owners. He had not informed the management board or the supervisory board of the miscalculation of an employee that he had noticed, although this was possible and reasonable. The BGH confirmed the conviction because the defendant, as head of the inter-

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<sup>51</sup> *Waßmer*, Die Sanktionierung von Auslandsbestechung nach dem OWiG, in: Hoven/Kubiciel (ed.), *Das Verbot der Auslandsbestechung*, 2016, p. 165, 178 et seq.

<sup>52</sup> Cf. <http://www.spiegel.de/wirtschaft/einigung-mit-behoerden-siemens-beendet-schmiergelei-ffaere-mit-milliardenbusse-a-596598.html>.

nal audit department, was obliged, according to sect. 13 (1) StGB, to prevent fraudulent account statements, even if he had not fulfilled the function of a so-called compliance officer, who is responsible for preventing legal violations within the company.

**- *LG Düsseldorf: Decision of 21 November 2011 – 10 Ks 14/11 = wistra 2013, 80***

A fine of 149 million euros was imposed by the Regional Court (*Landgericht*) of Düsseldorf on a corporation in the banking industry pursuant to sect. 30 of the OWiG, because a member of the extended management board committed a criminal offence (assistance in tax evasion). Customer advisors of the corporation had supported clients in their tax evasion on a large scale: the member of the board deliberately promoted tax evasion instead of preventing it.

**- *BGH: Decision of 20 October 2011 – 4 StR 71/11 = BGHSt 57, 42***

The defendant, a foreman in a municipal building yard, had been accused of tolerating the repeated physical abuse of an employee by colleagues during working hours. The BGH stated that the position of a company owner or superior may result in an obligation to prevent criminal offences committed by subordinated employees, but that the obligation is limited to the prevention of company-related criminal offences and does not include acts an employee only commits on the occasion of his activity in the company. The defendant was acquitted, since the criminal offence was not company-related: it was not related to the activity to be carried out within the framework of the employment relationship.

**- *OLG Celle: Decision of 29 March 2012 – 2 Ws 81/12 = NZWiSt 2013, 68***

The two defendants—the head of the internal sales department of a company's sales office and an employee of the planning department in this branch office—were accused of restricting competition through agreements in the context of public bids (sect. 298 StGB). The Higher Regional Court (*Oberlandesgericht*) of Celle did not exclude either the liability pursuant to sect. 130 OWiG or the liability of the company pursuant to sect. 130 OWiG. Therefore, the case was transferred back to the Chamber of the Regional Court (*Landgericht*) of Stade for a new decision as it had not yet been established that a criminal offence under sect. 298 StGB or a regulatory offence under sect. 81 GWB had actually been committed.

**- OLG Karlsruhe: Decision of 26 July 2016 – AK 96/16= LMuR 2016, 214**

The Local Court (*Amtsgericht*) of Waldshut-Tiengen fined the production manager of a sausage production company employing 80 to 100 people 400 euros for violation of obligatory supervision (sect. 130 OWiG). Several sausage samples taken by the food safety authorities indicated a higher fat content than the packaging specified. The Higher Regional Court (*Oberlandesgericht*) of Karlsruhe overturned the decision and referred the case back because it was not clear that the production manager had been instructed by the owner or another authorised person to manage the business in whole or in part (sect. 9 (2) sentence 1 no. 1 OWiG). In this respect, further observations had to be made of the organisation, the significance of the sausage production and the hierarchical position of the production manager.

## **2. Relationship with general principles of criminal law**

### *2.1. General information on the system of perpetration and complicity*

German criminal law follows a differentiated system of participation in intentional offences—i.e. it distinguishes in sect. 25 to 27 StGB<sup>53</sup> between principals and secondary participation (*Täterschaft* and *Teilnahme*). This system, which is based on a restrictive definition of the term ‘participation’, takes into account the different levels of contribution at factual level.<sup>54</sup> In contrast, in the case of negligence offences, German criminal law follows the unified system. According to this,

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<sup>53</sup> Official translation of the German Criminal Code in the version of 10.10.2013 provided by Michael Bohlander, available at <https://www.gesetze-im-internet.de/stgb/index.html>:

Sect. 25 StGB - Principals

(1) Any person who commits the offence himself or through another shall be liable as a principal.

(2) If more than one person commit the offence jointly, each shall be liable as a principal (joint principals).

Sect. 26 StGB - Abetting

Any person who intentionally induces another to intentionally commit an unlawful act (abettor) shall be liable to be sentenced as if he were a principal.

Sect. 27 StGB - Aiding

(1) Any person who intentionally assists another in the intentional commission of an unlawful act shall be convicted and sentenced as an aider.

(2) The sentence for the aider shall be based on the penalty for a principal. It shall be mitigated pursuant to sect. 49 (1).

every person who has made a contribution to the realisation of the offence is then deemed to be a principal. Therefore, the different levels of contribution to the crime are not taken into account until the imposition of the penalty. However, it should be noted that all PIF offences are intentional offences (cf. Art. 1 PIF Convention).

In contrast, German regulatory offences law<sup>55</sup> follows a unified system that applies to intentional offences as well as negligent offences (cf. sect. 14 (1) sentence 1 OWiG). According to this, every person who has made a causal contribution to the realisation of the offence is deemed to be a participant. This is important with regard to sect. 130 OWiG. However, according to the prevailing opinion, participation always presupposes an intentional contribution to the intentional act of another person.<sup>56</sup> This restrictive interpretation is intended to prevent overstretching with regard to criminal law. The (main) participant of the regulatory offence must therefore have committed an unlawful act with intent. In contrast, a culpable act is not required (sect. 14 (3) sentence 1 OWiG, ‘limited accessoriess’: *limitierte Akzessorietät*). If the participant does not have the required special qualification by the offence (for instance, board member), it is sufficient that a participant who makes an intentional contribution has the required qualification (cf. sect. 14 (1) sentence 2 OWiG).

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<sup>54</sup> *Wäßmer*, in: Heidelberger Kommentar zum StGB, 2nd ed. 2015, Vorbemerkung zu §§ 25 ff. marginal no. 1.

<sup>55</sup> Sect. 14 OWiG – Participation

(1) If several persons participate in a regulatory offence, each of them shall be deemed to have committed a regulatory offence. This shall also apply if special personal characteristics (sect. 9 subsect. 1) giving rise to the possibility to impose a sanction pertain only to one participant.

(2) Participation may be sanctioned only if the factual elements of an act set forth in a statute enabling imposition of a regulatory fine are unlawfully fulfilled, or if in cases where an attempt may also be sanctioned, the attempt has at least been made.

(3) If one of the participants does not act reprehensibly, this shall not mean that sanctioning of the others is precluded. If the statute provides that special personal characteristics preclude sanctioning, this shall apply only to a participant who displays such characteristics.

(4) If the statute provides that an act which would otherwise be a regulatory offence is a criminal offence in view of special personal characteristics of the perpetrator, this shall apply only to a participant who displays such characteristics.

<sup>56</sup> BGHSt 31, 309 (311 et seq.); Görtler, in: Göhler, OWiG, 16th ed. 2014, § 14 marginal no. 5b.

## 2.2. General information on omission liability

The German law system provides for omission liability.

### 2.2.1. General description

Within sect. 13 StGB<sup>57</sup> there is a general provision in the German Criminal Code for cases in which the omission to avert a result is treated as an active act (*unechtes Unterlassungsdelikt*). Sect. 13 (1) StGB establishes two conditions.

Firstly, whosoever fails to avert a result which is an element of a criminal provision shall only be liable if he is ‘responsible under law’ to ensure that the result does not occur. ‘Responsible under law’ is the guarantor (*Garant*). In the opinion of the German Federal Constitutional Court, the wording is compatible with the principle of *lex certa*, since jurisprudence and doctrine require a ‘special’ legal obligation and have developed criteria.<sup>58</sup> According to the prevailing opinion,<sup>59</sup> the guarantor status can result from a law, a contract (also a null and void contract, as far as its validity is trusted), a previous endangering behaviour (*Ingerenz*) and a close natural connection (*enge natürliche Verbindung*). There are protectors of legal assets (*Beschützergaranten*) and supervisors of sources of danger (*Überwachergaranten*).

Secondly, the omission has to be ‘equivalent’ to the realisation of the statutory elements of the offence through a positive act (*Entsprechensklausel*). However, according to the prevailing opinion,<sup>60</sup> this condition has no function in the case of ‘pure’ criminal offence of success (*reine Erfolgsdelikte*), since the deliberate cause of success is sufficient. The condition is only relevant for behavioural offences (*verhaltensgebundene Straftaten*) that depend on a specific manner in which they are committed (e.g. treacherous murder).

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<sup>57</sup> Sect. 13 StGB – Commissions

(1) Whosoever fails to avert a result which is an element of a criminal provision shall only be liable under this law if he is responsible under law to ensure that the result does not occur, and if the omission is equivalent to the realisation of the statutory elements of the offence through a positive act.

(2) The sentence may be mitigated pursuant to sect. 49 (1).

<sup>58</sup> BVerfG NJW 1998, 50, 56.

<sup>59</sup> Cf. only *Wessels/Beulke/Satzger*, Strafrecht Allgemeiner Teil, 47th ed. 2017, marginal no. 716 et seq.

<sup>60</sup> Cf. only *Wessels/Beulke/Satzger*, Strafrecht Allgemeiner Teil, 47th ed. 2017, marginal no. 730.

### 2.2.2. *Duty of care*

The German Criminal Code does not contain any general provision about the ‘duty of care’. The duties are based on statutory rules as well as unwritten rules that exist outside criminal law—i.e. in civil law and public law. In addition, in some areas (for instance, compliance), written but non-statutory standards have emerged that indicate which measures shall be taken. The observance of these standards is indicative that the ‘duty of care’ was fulfilled (see 4.3).

Statutory rules are referred to as ‘special standards’.<sup>61</sup> For example, under the German Money Laundering Act (*Geldwäschegesetz*: GwG), there are due diligence obligations for independent traders, banks, insurance companies, etc. (sect. 10 ff. GWG). In the absence of written rules, unwritten rules have to be applied. The ‘general standard’ is the behaviour of a ‘prudent and conscientious person’ from the criminal’s ‘public sphere’ (*Verkehrskreis*). For example, members of the board of directors of a stock corporation (*Aktiengesellschaft*) must exercise the diligence of a prudent and conscientious managing director when conducting their business (cf. sect. 93 AktG). Concretisations provide general principles based on experience (*allgemeine Erfahrungssätze*) and common usage (*Verkehrssitte*). The behaviour of a prudent and conscientious person sets the minimum standard. However, individual abilities must also be taken into account—i.e. special knowledge and special abilities.<sup>62</sup>

Nevertheless, some authors<sup>63</sup> argue that linking criminal liability to the violation of unwritten duties is not compatible with the *lex certa* principle. It is argued that, especially in the case of negligence offences—and the same applies to omissions—the preconditions under which behaviour is punishable by law must be written, as otherwise it would not be possible to foresee whether there is a risk of criminal liability. According to the prevailing opinion,<sup>64</sup> however, even unwritten duties are compatible with the *lex certa* principle.

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<sup>61</sup> Cf. only *Rengier*, Strafrecht Allgemeinen Teil, 9. ed. 2017, § 52 marginal no. 16.

<sup>62</sup> *Roxin*, Strafrecht Allgemeiner Teil, Vol. I, 4th ed. 2006, § 24 marginal no. 53 et seq.

<sup>63</sup> *Duttge*, in: *Münchener Kommentar zum StGB*, Vol. 1, 3rd ed. 2017, § 15 marginal no. 33 et seq.; *Schmitz*, in: *Münchener Kommentar zum StGB*, Vol. 1, 3rd ed. 2017, § 1 marginal no. 56 et seq.

<sup>64</sup> *Bohnert* ZStW 94 (1982), 68, 80; *Herzberg* ZIS 2011, 444, 451 et seq.

In view of the variety of life, it would be impossible to determine all duties.<sup>65</sup>

### 2.2.3. *Link required between the omission and the commission of the offence*

The omission must have ‘caused’ the success. In case of an active action, the prevailing opinion<sup>66</sup> follows the equivalence theory (*Äquivalenztheorie*), according to which the causality is based on the ‘*conditio sine qua non* formula’. However, in case of an omission, the formula has to be reversed, and so-called ‘quasi-causality’ (*Quasi-Kausalität*) applies. It is therefore asked whether the success would not have occurred if the required action had taken place. That’s why it is a hypothetical causality. The formula is often supplemented by the addition ‘with almost certain probability’, to express that in hypothetical processes there is never certainty.<sup>67</sup>

For cases of omission, some authors promote a risk-reduction doctrine<sup>68</sup> (i.e. the opposite of the risk-increase doctrine). According to this, it should suffice for the attribution of success if the required action would have reduced the risk of success. This doctrine must be rejected, as it loosens the causal link (*in dubio pro victima et contra reum*) and transforms crimes constituted by the violation of legal interests into crimes constituted by mere endangerment.<sup>69</sup>

### 2.2.4. Mens rea

Non-genuine criminal offences by omission (sect. 13 StGB) can also be committed intentionally and negligently (cf. sect. 15 StGB).<sup>70</sup> Intent is the will to realise an offence in knowledge of all objective circumstances—in short, knowledge and willingness to realise the offence. There are three forms. First degree intent (*Absicht*) is present if the of-

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<sup>65</sup> *Puppe*, in: Nomos Kommentar zum StGB, 5th ed. 2017, § 13 marginal no. 155.

<sup>66</sup> Cf. only BGH NJW 2010, 1087, 1090; *Rengier*, Strafrecht Allgemeiner Teil, 9th ed. 2017, § 49 marginal no. 13.

<sup>67</sup> BGH St. 37, 106, 127.

<sup>68</sup> Cf. only *Greco* ZIS 2011, 674 et seq.; *Stratenwerth/Kuhlen*, Strafrecht Allgemeiner Teil, 6th ed. 2011, § 13 marginal no. 52 et seq.

<sup>69</sup> *Roxin*, Strafrecht Allgemeiner Teil, Vol. II, 2003, § 31 marginal no. 51.

<sup>70</sup> Sect. 15 – Intent and negligence

Unless the law expressly provides for criminal liability based on negligence, only intentional conduct shall attract criminal liability.

fender wants to achieve the success, second degree intent (*Wissentlichkeit*) if the offender foresees the success as certain. Third degree intent (*Eventualvorsatz*) requires as a cognitive component that the offender has recognised the serious possibility of realisation of the success. The requirements for the voluntary component are in dispute. According to the dominating doctrine,<sup>71</sup> it is sufficient for the offender to take the risk of realisation of the success seriously and to resign (seriousness theory). On the other hand, German jurisdiction<sup>72</sup> demands that the offender accepts the realisation of success (allowance theory), which is obvious if he carries out his project despite extreme danger and leaves the realisation of success to chance. The jurisdiction takes the determination of the voluntative component in economic offences particularly seriously. In these cases, the overall assessment is always decisive.<sup>73</sup> An intentional omission presupposes that the offender is aware of the realisation of the success of the offence, knows the circumstances that justify his duty to act, knows the possibility of averting the success and wants the success to occur.

Negligence is present if the offender causes the success of the offence without recognising or wanting to do so. In this context, it is possible to differentiate between the seriousness of breach of duty of care and predictability.<sup>74</sup> Unconscious negligence is present if the offender fails to take care and thereby causes the success without realising it. Conscious negligence is in place if he considers the success as possible but trusts in non-occurrence, contrary to duty. Gross negligence (*Leichtfertigkeit*) presupposes a very high degree of negligence in objective and subjective terms, and roughly corresponds to gross negligence in civil law (*grobe Fahrlässigkeit*). The perpetrator disregards the imposing possibility of the realisation of the success out of particular carelessness or does not make the simplest and most obvious considerations. In order to ascertain negligence, diligence and predictability are examined in an objective and subjective way (double check).

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<sup>71</sup> *Sternberg-Lieben/Schuster*, in: Schönke/Schröder, StGB, 29th ed. 2014, § 15 marginal no. 73a et seq.

<sup>72</sup> Cf. only BGHSt 36, 1, 9 et seq.; 44, 99, 102.

<sup>73</sup> Cf. only BGHSt 48, 331, 348; BGH NStZ-RR 2008, 239.

<sup>74</sup> Cf. only Rengier, Strafrecht Allgemeiner Teil, 9. ed. 2017, § 52 marginal no. 7 et seq.

### 2.2.5. Regulatory offences law

German regulatory offences law is in general governed by the same principles as criminal law. There exist comparable provisions on omission (sect. 8 OWiG) and on intent and negligence (sect. 10 OWiG). As described in German regulatory offences law, within sect. 130 OWiG exists a special provision on the violation of obligatory supervision in operations and enterprises. This provision covers intentional and negligent violations of obligatory supervision. In addition, the causality requirement is mitigated since it is sufficient that the contravention would have been made much more difficult had there been proper supervision.

### 2.3. Duty to report an offence

Sect. 138 StGB punishes the omission to bring planned offences to the attention of the authorities. It is a genuine criminal offence committed by omission (*echtes Unterlassungsdelikt*), which imposes the duty on everyone to make an effort to report certain offences if he is aware of their planning or commission. There is only a duty to report an offence, however, not a duty to prevent it.<sup>75</sup> Otherwise, there is no general duty to report planned crimes. Sect. 138 StGB is supplemented by sect. 139 StGB, which contains exceptions.

Sect. 138 StGB<sup>76</sup> contains three different offences. Sect. 138 (1)

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<sup>75</sup> Sternberg-Lieben, in: Schönke/Schröder, StGB, 29th ed. 2014, § 138 marginal no. 1.

<sup>76</sup> Sect. 138 – Omission to bring planned offences to the attention of the authorities

(1) Whosoever has credible information about the planning or the commission of the following offences:

1. preparation of a war of aggression (sect. 80);
2. high treason under sections 81 to 83 (1);
3. treason or an endangerment of peace under sections 94 to 96, sect. 97a or sect. 100;
4. counterfeiting money or securities under sect. 146, sect. 151, sect. 152 or counterfeiting debit cards and blank euro cheque forms under sect. 152b (1) to (3);
5. murder under specific aggravating circumstances (sect. 211), murder (sect. 212), genocide (sect. 6 of the Code of International Criminal Law), a crime against humanity (sect. 7 of the Code of International Criminal Law), or a war crime (sect. 8, sect. 9, sect. 10, sect. 11 or sect. 12 of the Code of International Criminal Law);
6. an offence against personal liberty in cases under sect. 232 (3), (4), or (5), sect. 233 (3), each to the extent it involves a felony, sect. 234, sect. 234a, sect. 239a or sect. 239b;

StGB objectively presupposes that certain criminal offences are committed or planned. The offences that trigger the obligation to report are enumerated in a catalogue (No. 1 to 8) that is considered to be un-systematic,<sup>77</sup> since both felonies (*Verbrechen*) (for instance, murder, manslaughter, robbery) and mere misdemeanours (*Vergehen*) (for instance, disclosure of state secrets) are included. The offender must have credible information about the planning or commission at a time when the commission or result can still be averted. Rumours or the possibility of recognition are not sufficient.<sup>78</sup> If the commission or result of the act can no longer be averted, the obligation to report no longer applies.<sup>79</sup> Furthermore, a report ‘in time’ to the authorities or the threatened person must have been omitted. An authority can be considered any government agency whose tasks include hazard-preventing or defensive intervention—e.g. the police.<sup>80</sup> The notification is made in time if it is still possible to prevent the commission or its result—i.e. there is a margin of discretion.<sup>81</sup> Finally, the offender must intentionally refrain from making the notification. Sect. 138 (2) StGB extends the duty to report certain terrorist offences, namely the preparation of a serious violent offence endangering the state (sect. 89a StGB) as well as the forming of terrorist associations in Germany (sect. 129a StGB) and abroad (sect. 129b

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7. robbery or blackmail using force or threat to life and limb (sections 249 to 251 or sect. 255); or

8. offences creating a danger to the public under sections 306 to 306c, sect. 307 (1) to (3), sect. 308 (1) to (4), sect. 309 (1) to (5), sect. 310, sect. 313, sect. 314, sect. 315 (3), sect. 315b (3), sect. 316a or sect. 316c

at a time when the commission or result can still be averted, and fails to report it in time to the public authorities or the person threatened, shall be liable to imprisonment not exceeding five years or a fine.

(2) Whosoever credibly learns

1. of the commission of an offence under sect. 89a or

2. of the planning or commission of an offence under sect. 129a, also in conjunction with sect. 129b (1), 1st and 2nd sentences,

at a time when the commission can still be averted, and fails to report it promptly to the public authorities, shall incur the same penalty. Sect. 129b (1) 3rd to 5th sentences shall apply mutatis mutandis in the case of No. 2 above.

(3) Whosoever by gross negligence fails to make a report although he has credible information about the planning or the commission of an unlawful act, shall be liable to imprisonment of not more than one year or a fine.

<sup>77</sup> Fischer, StGB, 64th ed. 2017, § 138 marginal no. 4.

<sup>78</sup> Heuchemer, in: BeckOK-StGB, 35th ed. 1.8.2017, § 138 marginal no. 11.

<sup>79</sup> BGHSt 42, 86, 88.

<sup>80</sup> Hohmann, in: Münchener Kommentar zum StGB, Vol. III, 3rd ed. 2017, § 138 marginal no. 16.

<sup>81</sup> Hohmann, in: Münchener Kommentar zum StGB, Vol. III, 3rd ed. 2017, § 138 marginal no. 14.

StGB). In these cases, prompt report to the authorities must have been intentionally omitted. It also depends solely on whether the commission of the offence (not the result) is feasible. According to sect. 138 (3) StGB, the grossly negligent omission of a required report is also punishable by law. This is relevant if the offender forgets to report or if there is a mistake with regard to the necessity of the report.<sup>82</sup> A person involved in the commission or planning as principal or secondary participant cannot be punished by sect. 138 StGB.<sup>83</sup>

Sect. 139 StGB<sup>84</sup> contains exceptions. According to sect. 139 (1) StGB, if in cases under sect. 138 StGB the offence has not been attempted, the court may order a discharge. Pursuant to sect. 139 (2) StGB, a clergyman is not obliged to report what has been confided to him. According to sect. 139 (3) StGB, relatives, professional secrecy bearers (for instance, lawyers, defence lawyers and doctors) and their assistants are not obliged to report an offence if they have made earnest efforts to dissuade their relatives, clients or patients from committing

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<sup>82</sup> *Hohmann*, in: Münchener Kommentar zum StGB, Vol. III, 3rd ed. 2017, § 138 marginal no. 20.

<sup>83</sup> Cf. only BGH NJW 1956, 30, 31; BGH StV 2017, 441; *Hohmann*, in: Münchener Kommentar zum StGB, Vol. III, 3rd ed. 2017, § 138 marginal no. 22.

<sup>84</sup> Sect. 139 – Exceptions to liability

(1) If in cases under sect. 138 the offence has not been attempted the court may order a discharge.

(2) A clergyman shall not be obliged to report what has been confided to him in his capacity as a spiritual counsellor.

(3) Whosoever fails to report an offence, if the report would have had to be made against a relative, shall be exempt from liability if he made earnest efforts to dissuade him from committing the offence or to avert the result, unless it is a case of

1. murder (sect. 211 or sect. 212);

2. genocide under sect. 6 No 1 of the Code of International Criminal Law, or a crime against humanity under sect. 7 (1) of the Code of International Criminal Law, or a war crime under sect. 8 (1) No 1 of the Code of International Criminal Law;

3. abduction for the purpose of blackmail (sect. 239a (1)), hostage taking (sect. 239b (1)) or an attack on air or maritime traffic (sect. 316c (1)) by a terrorist organisation (sect. 129a, also in conjunction with sect. 129b (1)).

Under the same conditions an attorney, defence counsel, physician, psychotherapist, or child or youth psychotherapist shall not be obliged to report what was confided to them in their professional capacity. The professional assistants of those persons named in the 2nd sentence above and those persons who work for them as part of their professional education shall not be obliged to report what they learn in their professional capacity.

(4) Whosoever averts the commission or the result of the offence other than by reporting shall be exempt from liability. If the commission or result of the offence does not take place regardless of the contribution of the person obliged to report his earnest efforts to avert it, the result shall suffice for exemption from liability.

the offence or to avert the result; this does not apply to particularly serious offences (catalogue). According to sect. 139 (4) StGB, anyone who averts the commission or result of the offence other than by reporting shall be exempt from punishment. Moreover, anyone who has made earnest efforts to avert the result is exempt from liability if the commission or result of the offence does not take place, regardless of the contribution of the person obliged to report.

#### *2.4. General information on strict liability*

German criminal law does not allow for strict liability offences (see section 2.5, however). According to German understanding, it is self-evident that punishment presupposes culpability and that the offender must be proven culpable.<sup>85</sup> The Federal Constitutional Court has ruled on this in several decisions.<sup>86</sup> The inner reason for the reproach of culpability lies in the fact that man is based on free, responsible and moral self-determination. According to the Federal Constitutional Court,<sup>87</sup> the principle of culpability is constitutionally based on Art. 103 (2) GG. The principle of culpability is also rooted in the dignity and personal responsibility of the individual (laid down in Art. 1 (1) and Art. 2 (1) GG). Finally, the principle of culpability is also an application of the rule of law set out in Art. 20 (3) GG.<sup>88</sup>

The presumption of innocence implies that proof of culpability is required. This presumption is a special application of the rule of law (Art. 20 (3) GG) and is also anchored in Art. 6 (2) of the European Convention on Human Rights (ECHR).<sup>89</sup> According to this, a defendant is presumed innocent until proven culpable. Here, the principle of official investigation applies, which obliges the court to investigate *ex officio* all incriminating and all exonerating circumstances,<sup>90</sup> i.e. the defendant does not have to actively prove his innocence. The presumption of inno-

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<sup>85</sup> Cf. only *Bock*, in: Ambos/König/Rackow (eds), *Rechtshilferecht in Strafsachen*, 2015, § 87b IRG marginal no. 341; *Waßmer*, in: *Münchener Kommentar zum Bilanzrecht*, 2013, § 335 HGB marginal no. 53.

<sup>86</sup> BVerfGE 9, 167, 169; BVerfGE 58, 159, 163; BVerfGE 123, 268, 413.

<sup>87</sup> BGHSt 2, 194, 200.

<sup>88</sup> BVerfGE 20, 323, 331.

<sup>89</sup> Cf. only BVerfGE 74, 358, 370; *von Galen/Maass*, in: *Leitner/Rosenau, Wirtschafts- und Steuerstrafrecht*, 2017, § 46 OWiG marginal no. 11.

<sup>90</sup> *Trüg/Habetha*, in: *Münchener Kommentar zur StPO*, 2016, § 244 marginal no. 47 et seq.

cence is also laid down in Art. 49 of the Charter of Fundamental Rights (CFR) of the European Union.

In regulatory offences law, it also applies that the imposition of a regulatory fine presupposes culpability. According to sect. 1 OWiG, ‘a regulatory offence shall be an unlawful and reprehensible act, constituting the factual elements set forth in a statute that enables the act to be sanctioned by imposition of a regulatory fine’. As in criminal law, ‘reprehensibility’ means personal responsibility for one’s own conduct and presupposes that the perpetrator is capable of recognising the wrong of his act and of acting upon this insight.<sup>91</sup>

Culpability must also be proven in regulatory offences law. However, in a decision from 1959, the Federal Constitutional Court<sup>92</sup> did not object to a former regulatory offence (sect. 23 of the Wirtschaftsstrafgesetz (WiStrG) 1949), which placed the burden of proof on owners or managers. This provision provided that a regulatory fine could be imposed if in the event of contraventions being committed in an enterprise, the owner or manager was unable to prove that he had taken obligatory supervision. The Court argued that the main reason for this was that it was merely a regulatory offence.<sup>93</sup> In addition, there would be a certain presumption that the owner or manager had been aware of the contravention and had not prevented it, at least by neglecting his duty incumbent, so that it would not be unreasonable to wait and see what was put up for discharge.<sup>94</sup> Moreover, unlike criminal law, there is no duty to prosecute regulatory offences.<sup>95</sup> Finally, the fact that the legislator had changed sect. 23 WiStrG 1949 in the meantime, now demanding full proof, did not mean that the provision was contrary to the rule of law.<sup>96</sup> In 1987, the Federal Constitutional Court also stated, referring to the decision of 1959, that not every form of culpability presumption is contrary to rule of law, but that it is ‘a matter of the structuring of the legal facts in individual cases and other circumstances’.<sup>97</sup> Nonetheless, the prevailing opinion today assumes that an assumption of culpability is not only contrary to the rule of law in criminal law, but also in regulatory offences law.<sup>98</sup>

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<sup>91</sup> Rogall, in: Karlsruher Kommentar zum OWiG, 5th ed. 2018, § 1 marginal no. 8.

<sup>92</sup> BVerfGE 9, 167 et seq.

<sup>93</sup> BVerfGE 9, 167, 169.

<sup>94</sup> BVerfGE 9, 167, 170 et seq.

<sup>95</sup> BVerfGE 9, 167, 171 et seq.

<sup>96</sup> BVerfGE 9, 167, 173 et seq.

<sup>97</sup> BVerfG NStZ 1988, 21.

<sup>98</sup> Cf. only *Hörster*, Die strict liability des englischen Strafrechts, 2009, p. 148.

## 2.5. Special rules on criminal liability

Special rules on criminal liability do not exist in German law. The general rules of responsibility apply to all fields. It should be noted, however, that the legislator can design the substantive criminal law as well as the regulatory offences law in such a way that procedural problems of proof are avoided or mitigated. Therefore, results can be achieved which are obtained in other legal systems through 'strict liability'. The following designs are possible:<sup>99</sup>

**Shortening or alteration of the facts to be proved.** As an example of the reduction of difficulties of proof due to changes in the facts, sect. 130 OWiG (violation of obligatory supervision in operations and enterprises) could be cited. It is sufficient that the contravention would have been 'made much more difficult' had there been proper supervision.

**Introduction of offences constituted by abstract endangerment.** With this design, mere preparatory actions can be punished. Abstract dangerous behaviours are much easier to prove, since causality problems do not arise and with regard to intent, knowledge of the suitability of the performed action for damage is sufficient.

**Forming a non-result constituted offence instead of a constituted result.** With this design, the occurrence of success is waived. It is already punishable by criminal law to take action.

**Introduction of negligence offences.** In order to overcome evidentiary difficulties in the case of wilful offences, the negligent commission is made an offence, whereby the offence acts as a 'catch-all offence'. As an example, sect. 264 StGB (subsidy fraud) can be cited, in which gross negligence is also punishable.

**Introduction of duties whose violation is punishable.** Evidence difficulties can be reduced by punishing the violation of reporting, information, documentation, disclosure and cooperation duties. This can already result in a conviction. Evidence of further circumstances is not required.

**Introduction of 'possession crimes'.** In this case, possession of certain dangerous objects is punishable by criminal law in order to avoid evidentiary difficulties. As an example, sect. 29 (1) No. 3 of the Narcotics Act (*Betäubungsmittelgesetz*: BtMG) could be cited.

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<sup>99</sup> Hörster, Die strict liability des englischen Strafrechts, 2009, p. 165 et seq.

### **3. Concept and scope of the criminal law responsibilities of heads of business**

#### *3.1. Liability of heads of business (general information)*

The German criminal law system does not establish the liability of heads of business through a specific provision. Criminal liability can only arise from the general rules (see 1.1). As far as an intentional omission is concerned, the provisions on perpetrators and secondary participants (sect. 25 to 27 StGB) are relevant. Heads of businesses could be held criminally liable if a criminal offence is committed by a person under their authority acting on behalf of the business, on the basis of their personal acts as principals (sect. 25 (1) StGB), joint principals (sect. 25 (2) StGB), abettors (sect. 26 StGB) or aiders (sect. 27 (1) StGB). In the case of an omission (sect. 13 StGB), the so-called criminal-law business employer liability does apply.

In addition, criminal liability may result from criminal provisions that are linked to the violation of special duties. An example of this is sect. 266 StGB (embezzlement and abuse of trust). According to that provision, the organs of legal persons have to safeguard the property interests of the legal person; in the event of an unlawful violation of duty, they may be prosecuted.<sup>100</sup>

A special rule on the responsibility of heads of business exists in German regulatory offences law (see *supra* 1.1.2). Sect. 130 OWiG is a provision on the ‘violation of obligatory supervision in operations and enterprises’. It is a genuine offence committed by omission.

#### *3.2. Personal scope of the liability*

The scope of sect. 130 OWiG is to impose at least a regulatory fine if, with regard to a violation of obligatory supervision, criminal liability is excluded according to the strict general rules. Sect. 130 OWiG significantly reduces the requirements for liability (see 1.1). On the one hand, the strict causality requirement is mitigated, since it is sufficient that the contravention ‘would have been made much more difficult’ by proper supervision. On the other hand, not only intentional but also negligent violations of supervisory duties are covered. Finally, committing an offence is a mere objective condition of sanctioning (*objektive Bedingung*)

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<sup>100</sup> *Waßmer*, in: *Graf/Jäger/Wittig*, *Wirtschafts- und Steuerstrafrecht*, 2nd ed. 2017, § 266 StGB, marginal no. 49.

*der Ahndung*)—i.e. intent and negligence on the part of the supervisor need not extend to it. The regulatory fine could be imposed against the ‘owner’. In addition, a regulatory fine may be imposed against the corporation in accordance with sect. 30 OWiG, because a violation of obligatory supervision pursuant to sect. 130 OWiG is a company-related regulatory offence.

According to sect. 130 OWiG, the supervision duty exists for the owner of an operation or enterprise. Who is the ‘owner’ does not depend on the ownership or capital participation, but on who is responsible for the fulfilment of obligatory supervision.<sup>101</sup> The owner can be a natural person—for instance, in the case of a sole proprietor (*Einzelkaufmann*). In the case of a commercial partnership—for instance, a limited partnership (*Kommanditgesellschaft*)—or a legal person—for instance, a limited liability company (GmbH) or a stock corporation (*Aktiengesellschaft*)—the commercial partnership or legal person itself is the owner.<sup>102</sup> The shareholders may be the owners in their entirety, but they are neither individually nor collectively the normal addressees of sect. 130 OWiG. However, since commercial partnerships or legal persons cannot themselves commit offences, sect. 9 OWiG (acting for another) stipulates that certain natural persons who act on their behalf must be referred to.

Sect. 9 OWiG regulates the so-called ‘liability of organs and representatives’ (*Organ- und Vertreterhaftung*). The provision only applies if certain natural persons act who ‘represent’ a commercial partnership, legal person or another person—i.e. it must be a person who belongs to the ‘management area’.<sup>103</sup> This includes, on the one hand, in accordance with sect. 9 (1) OWiG, persons who act as an entity authorised to represent a legal person or as a member of such an entity (No. 1), as a partner authorised to represent a commercial partnership (No. 2) or as a statutory representative of another (No. 3). On the other hand, in accordance with sect. 9 (2) sentence 1 OWiG, additional persons are included: persons commissioned by the owner or someone otherwise so authorised to manage a business, in whole or in part (No. 1), or persons expressly commissioned to perform on

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<sup>101</sup> *Rogall*, in: Karlsruher Kommentar zum OWiG, 5th ed. 2018, § 130 marginal no. 25.

<sup>102</sup> *Rogall*, in: Karlsruher Kommentar zum OWiG, 5th ed. 2018, § 130 marginal no. 25.

<sup>103</sup> *Rogall*, in: Karlsruher Kommentar zum OWiG, 5th ed. 2018, § 9 marginal no. 3.

their own responsibility duties which are incumbent on the owner (No. 2), if they act on the basis of this commission. According to sect. 9 (3) OWiG, this shall also apply if the legal act which was intended to form the basis of the power of representation or the agency is void—i.e. the person is a *de facto* organ or representative.<sup>104</sup>

### 3.3. Duties to control and supervise

The sanctioning of the violation of obligatory supervision in operations and enterprises by sect. 130 OWiG is generally intended to ensure that sufficient precautions are taken against the commission of company-related contraventions.<sup>105</sup> With the introduction of this provision in 1968 (originally in sect. 33 OWiG, from 1974 on in sect. 130), all former special provisions of state and federal law, which previously provided for the sanctioning of the violation of obligatory supervision in special areas, were repealed.<sup>106</sup> The reasons for the unification were,<sup>107</sup> on the one hand, that the combination of personnel and means of production has considerable advantages for the owner of an operation or enterprise as it expands his scope of action and adds further competences. On the other hand, the division of labour between employees poses a particular danger, since people are often more willing to take risks and behave less in accordance with the rules if they act under pressure from corporate goals and without supervision. Thus, there is a risk that employees will commit offences. It must therefore be ensured that the owner not only benefits from the advantages of the division of labour, but also that he is liable for the disadvantages. For this reason, the owner is under a duty to exercise proper supervision to counteract the specific hazards arising from the employment—i.e. resulting from the opening of a particular source of danger.<sup>108</sup>

Sect. 130 (1) OWiG does not describe which concrete supervisory measures the owner must take. It follows from the text that he is only obliged to carry out ‘proper supervision’ (sentence 1), and that the required supervisory measures shall ‘also’ (i.e. not exclusively) comprise ‘appointment, careful selection and supervision of supervisors’ (sentence 2). Furthermore, the supervisor is always obliged to

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<sup>104</sup> *Valerius*, in: BeckOK-OWiG, 15th ed. 15.04.2017, § 9 marginal no. 53.

<sup>105</sup> Bundestag Document V/1269, p. 67.

<sup>106</sup> Bundestag Document V/1269, p. 67 et seq.

<sup>107</sup> Cf. only *Beck*, in: BeckOK-OWiG, 15th ed. 15.04.2017, § 130 marginal no. 5.

<sup>108</sup> *Waßmer*, Die strafrechtliche Geschäftsherrenhaftung, 2006, p. 385 et seq.

carry out overall supervision.<sup>109</sup> Sect. 130 (1) OWiG does not prescribe a specific organisation according to general opinion: this is a question of the individual case.<sup>110</sup> The supervisory measure must be required—that is, it must be not only a suitable and the most careful means, but also a legally permissible and reasonable means.<sup>111</sup> According to the systematic ‘five-level model’,<sup>112</sup> the owner is obliged to observe the following measures:

- Level 1: Careful selection of employees and supervisors.
- Level 2: Proper organisation and distribution of tasks.
- Level 3: Appropriate instruction and information on tasks and duties.
- Level 4: Adequate monitoring and control, including sampling.
- Level 5: Intervention in case of non-compliance.

The extent of the required supervisory measures is primarily determined by type, size, organisation of the company and monitoring possibilities, but also by the variety and importance of the relevant regulations to be observed and the susceptibility of the company and its employees to violations of regulations.<sup>113</sup> The personal responsibility of employees (*Eigenverantwortung*) and the principle of trust (*Vertrauensgrundsatz*) that applies to the division of labour must also be taken into account.<sup>114</sup> The relationship between the cost of the supervisory measure and the probability of a violation is decisive for reasonableness.

### 3.4. Violation of supervisory duties and the commission of an offence

#### 3.4.1. Causal link

German criminal law always requires a causal link. The supervisor shall only be liable in accordance with the general rules if there is a

<sup>109</sup> BGHSt 25, 158, 163; *Rogall*, in: Karlsruher Kommentar zum OWiG, 5th ed. 2018, § 130 marginal no. 40.

<sup>110</sup> *Beck*, in: BeckOK-OWiG, 15th ed. 15.04.2017, § 130 marginal no. 41.

<sup>111</sup> *Vgl. Wäßmer*, in: *Fuchs* (ed.), *WpHG*, Vor §§ 38–40b marginal no. 77.

<sup>112</sup> *Rogall*, in: Karlsruher Kommentar zum OWiG, 5th ed. 2018, § 130 marginal no. 42.

<sup>113</sup> BGHSt 9, 319, 322 et seq.; BGHSt 25, 158, 163; OLG Stuttgart NJW 1977, 1410; OLG Düsseldorf wistra 1991, 39; OLG Zweibrücken NStZ-RR 1998, 312.

<sup>114</sup> *Rogall*, in: Karlsruher Kommentar zum OWiG, 5th ed. 2018, § 130 marginal no. 51.

causal link between the violation of the supervision duty and the commission of an offence by the subordinate. The type of required causal link depends on the solution of the dispute, as to whether the supervisor who remains unlawfully inactive (sect. 13 StGB) is a principal (sect. 25 StGB) or an aider (sect. 27 StGB).

German jurisdiction traditionally follows, with regard to the distinction between perpetrators and secondary participants, the subjective theory and differentiates between whether the omitting party had a principal's will or a participant's will.<sup>115</sup> Indications for the inner attitude are not only subjective criteria, such as the degree of personal interest in the success of the offence and the will to dominate it, but also objective criteria, such as the extent of the participation in the offence and the domination of the offence. However, this approach results in a case-by-case jurisdiction, which makes it difficult to make a clear distinction.

German science therefore mainly follows the 'doctrine of domination of the offence' (*Tatherrschaftslehre*), and thus an objective theory.<sup>116</sup> The principal is the person who, as a 'central figure', rules or dominates the commission of the offence—i.e. who can run or stop the realisation according to his will. The participant is the person who, as a 'marginal figure', only initiates (abettor) or supports (aider) the realisation of the offence. With regard to the violation of required supervision, it is partly assumed,<sup>117</sup> on the one hand, that supervisors who do not prevent the commission of an offence are, in general, principals. On the other hand, it is also partly assumed<sup>118</sup> that the supervisor can only be punished as an aider. In contrast, the prevailing view<sup>119</sup> is right to assume that even in the case of an omission, the criteria of distinction may be whether the offence is dominated or not. If the supervisor has the power to prevent the commission of the offence, he is a 'central figure', and thus (if there is an agreement between the principals) a joint principal (*Mittäter*) or (without agreement) an additional principal (*Nebentäter*).<sup>120</sup> If he lacks domination of the offence, he cannot pre-

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<sup>115</sup> Cf. only RGSt. 53, 292, 293; 58, 244, 247; BGHSt 2, 150, 151; 43, 381, 396.

<sup>116</sup> Cf. only *Waßmer*, in: *AnwaltKommentar*, 2nd ed. 2015, § 25 StGB marginal no. 21.

<sup>117</sup> Cf. only *Roxin*, *Strafrecht Allgemeiner Teil II*, 2003, § 31 marginal no. 140 et seq.

<sup>118</sup> *Jescheck/Weigend*, *Strafrecht Allgemeiner Teil*, 5th ed. 1996, § 64 III 5.

<sup>119</sup> *Joecks*, in: *Münchener Kommentar zum StGB*, Vol. I, 3rd ed. 2017, § 25 marginal no. 236; *Wessels/Beulke/Satzger*, *Strafrecht Allgemeiner Teil*, 47th ed. 2017, marginal no. 734.

<sup>120</sup> *Waßmer*, *Die strafrechtliche Geschäftsherrenhaftung*, p. 345 et seq.

vent the commission—i.e. he is only a ‘marginal figure’, thus a mere aider. This means the supervisor is the principal if he can ‘prevent’ the commission of the offence, and if there is a ‘success-causality’ in this sense—i.e. a strict causal link. In contrast, he is an aider if he can only ‘complicate’ the commission of the offence.<sup>121</sup> In this sense, in the case of aiding by omission, it can be said that there is a ‘risk reduction’ (in contrast, if the aider actively takes part in the commission, there is a ‘risk increase’).<sup>122</sup>

Within the framework of sect. 130 OWiG, and thus in German regulatory offences law, the causal link can be established in two ways. On the one hand, the causal link exists if proper supervision would have ‘prevented’ the commission of the contravention (first alternative). Therefore, a strict causal link is required in the sense that the contravention would not have been committed ‘with almost certain probability’ (quasi-causality).<sup>123</sup> In practice, however, this alternative is largely meaningless, as this proof can rarely be made. On the other hand, it is sufficient that proper supervision would have made the commission of the contravention ‘much more difficult’ (second alternative). Thus, the legislator has adopted the risk-reduction doctrine.<sup>124</sup> Here too, however, it must be established ‘with almost certain probability’ that proper supervision would have reduced the risk of commission substantially. If that finding is not possible, the supervisor must be acquitted *in dubio pro reo*. Whether proper supervision would have made the commission ‘much more difficult’ is a question of the individual case.<sup>125</sup> This prerequisite is especially lacking in the case of ‘excesses’ (*Exzesstaten*). These are company-related contraventions which lie outside the scope of what can be expected from life experience and in which the possibility of preventing or hindering their commission seems *a priori* unrealistic.<sup>126</sup> Finally, it should be noted that not every violation of obligatory supervision which is

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<sup>121</sup> *Wäßmer*, Die strafrechtliche Geschäftsherrenhaftung, p. 351 et seq.

<sup>122</sup> Cf. *Wessels/Beulke/Satzger*, Strafrecht Allgemeiner Teil, 47th ed. 2017, marginal no. 582.

<sup>123</sup> Cf. only *Beck*, in: BeckOK-OWiG, 15th ed. 15.04.2017, § 130 marginal no. 41.

<sup>124</sup> *Niesler*, in: *Graf/Jäger/Wittig*, Wirtschafts- und Steuerstrafrecht, 2nd ed. 2017, § 130 marginal no. 66.

<sup>125</sup> *Niesler*, in: *Graf/Jäger/Wittig*, Wirtschafts- und Steuerstrafrecht, 2nd ed. 2017, § 130 marginal no. 66.

<sup>126</sup> *Rogall*, in: *Karlsruher Kommentar zum OWiG*, 5th ed. 2018, § 130 marginal no. 112.

causal for the commission is sufficient, but that according to the dominant opinion<sup>127</sup> in the commission of the contravention, the risk of violation of the supervisory obligation must have been realised (so-called protective purpose context: *Schutzzweckzusammenhang*).

### 3.4.2. Mens rea

So far as the criminal liability of the supervisor as perpetrator or secondary participant of a PIF offence is concerned, there must be intent in accordance with the general rules. The supervisor who allows the commission of an offence by a subordinate to happen must have intent with regard to the offence of the subordinate—i.e. he must know about the commission (cognitive component) and he must want it (voluntative component). This presupposes that the supervisor's intent not only encompasses all objective and subjective elements of the offence committed by the subordinate, but also that the intent encompasses the non-intervention, the quasi-causality and the circumstances that justify the position of guarantor.<sup>128</sup> However, all forms of intent are sufficient, so third-degree intent (*Eventualvorsatz*) is sufficient.<sup>129</sup> Therefore, it is sufficient that the supervisor has, on the one hand, recognised the serious possibility of the commission and, on the other hand, taken the risk of the commission seriously and resigned or accepted it. Secure knowledge that the subordinate will commit an offence is not required, but the supervisor must regard the commission as 'probable'. Whether this is the case has to be determined on the basis of the overall circumstances (for instance, previous violations). In any case, it is not sufficient that the supervisor should have known that an offence would be committed.

In practice, however, it is usually very difficult not only to prove that the supervisor knew about the possibility of the commission of a specific offence, but also to prove that he had 'approved' the specific offence.<sup>130</sup> A further complicating factor is the fact that liability is problematic if the offence presupposes the existence of special intentions.<sup>131</sup> For example, in the case of fraud (sect. 263 StGB), there must be enrich-

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<sup>127</sup> Rogall, in: Karlsruher Kommentar zum OWiG, 5th ed. 2018, § 130 marginal no. 118.

<sup>128</sup> Waßmer, Die strafrechtliche Geschäftsherrenhaftung, 2006, p. 331.

<sup>129</sup> Waßmer, Die strafrechtliche Geschäftsherrenhaftung, 2006, p. 331 et seq.

<sup>130</sup> Waßmer, Die strafrechtliche Geschäftsherrenhaftung, 2006, p. 332.

<sup>131</sup> Waßmer, Die strafrechtliche Geschäftsherrenhaftung, 2006, p. 333.

ment intent. Thus, it must be proved that the supervisor himself had enrichment intent or that he knew of the subordinate's enrichment intent.

The responsibility according to sect. 130 OWiG applies to intentional and negligent violations of obligatory supervision. Intention or negligence must refer to the omission of the obligatory supervision measures but not to the commission of the concrete contravention. This follows from the reason that the contravention is a mere 'objective condition of sanctioning'.

An intentional violation of obligatory supervision can be assumed if the supervisor knew that he had to take certain supervisory measures. It is not necessary to know about the contravention, but it is sufficient to know that failure to take certain supervisory measures may result in the risk of commission of a contravention of the type committed by the subordinate.<sup>132</sup> If no supervisory measures have been taken at all, intent is obvious,<sup>133</sup> but even then intent must be proved.<sup>134</sup> In the event of a mistake of fact with regard to the factual existence of the risk of commission of a contravention (e.g. if the supervisor is not aware of the circumstances requiring intervention)<sup>135</sup> or the factual suitability, necessity or reasonableness of supervisory measures,<sup>136</sup> a negligent violation is possible (cf. sect. 11 (1) OWiG). In the event of a mistake of law—in particular, if the supervisor is ignorant of the existence or applicability of a legal provision—he shall not be deemed to have acted reprehensibly if he could not avoid this error (cf. sect. 11 (2) OWiG).

A negligent violation of obligatory supervision can be assumed if the supervisor should have known that the failure to take certain supervisory measures may result in the risk of commission of a contravention of the type committed by the subordinate.<sup>137</sup> In practice, this is often obvious, as the owner must be aware of the situation in his company.<sup>138</sup>

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<sup>132</sup> OLG Frankfurt wistra 1985, 38; OLG Karlsruhe Justiz 1980, 395; *Rogall*, in: Karlsruher Kommentar zum OWiG, 5th ed. 2018, § 130 marginal no. 119.

<sup>133</sup> *Hermanns/Kleier*, Grenzen der Aufsichtspflicht in Betrieben und Unternehmen, 1987, p. 83; *Maschke*, Aufsichtspflichtverletzungen in Betrieben und Unternehmen, 1997, p. 66.

<sup>134</sup> *Rogall*, in: Karlsruher Kommentar zum OWiG, 5th ed. 2018, § 130 marginal no. 119.

<sup>135</sup> *Bohnert/Krenberger/Krumb*, OWiG, 4th ed. 2016, § 130 marginal no. 32.

<sup>136</sup> *Beck*, in: BeckOK-OWiG, 15th ed. 15.04.2017, § 130 marginal no. 72.

<sup>137</sup> Cf. only *von Galen/Maass*, in: *Leitner/Rosenau* (eds), Wirtschafts- und Steuerstrafrecht, 2017, § 130 OWiG marginal no. 67.

<sup>138</sup> Cf. only *Beck*, in: BeckOK-OWiG, 15th ed. 15.04.2017, § 130 marginal no. 73.

### 3.5. *Delegation of control and supervisory duties: scope and limits*

The delegation of tasks to subordinates is typical for companies. In these cases, we speak of vertical delegation. In principle, it is up to the owner to decide whether and to what extent tasks are delegated. However, above a certain company size, the owner must delegate tasks in order to fulfil his duties. The duty to delegate certain tasks arises from the ‘diligence of a prudent and conscientious manager’ or ‘ordinary businessman’ (e.g. sect. 93 (1) AktG; sect. 43 (1) GmbHG).<sup>139</sup> The delegation serves not only to distribute the work, but also to reduce liability, since responsibility for the delegated tasks may also be transferred. However, the delegation does not relieve the owner of his own duties in relation to the operations: he remains the norm addressee and must ensure the fulfilment of duties.<sup>140</sup> Therefore, the continuing obligation to respect company-related duties leads to duties of selection, organisation, instruction, supervision and control.<sup>141</sup> These duties constitute the reverse side of the right to delegate.

Therefore, the owner may also delegate the supervision and control of subordinates to supervisory personnel. This task is not exclusively incumbent on the owner, which can also be derived from sect. 130 (1) sentence 2 OWiG: ‘The required supervisory measures shall also comprise appointment, careful selection and surveillance of supervisory personnel.’ If the owner is able to personally ensure the fulfilment of all duties, the use of supervisory personnel is not required.<sup>142</sup> Otherwise, he must delegate it. Sect. 130 (1) sentence 2 OWiG intends to prevent the owner from invoking that he was not able to exercise his supervisory duties because of the size of the company or for reasons related to his person (e.g. overwork, illness or vacation).<sup>143</sup>

As with all delegations, there are duties to select, organise, instruct and supervise even supervisors. This is expressly stated in sect. 130 (1) sentence 2 OWiG. The owner must select subordinates or persons who do not have to be employees<sup>144</sup> but who are suitable for this task. The

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<sup>139</sup> Schulze NJW 2014, 3484.

<sup>140</sup> Cf. only Tiedemann NJW 1986, 1842, 1845.

<sup>141</sup> Wäßmer, Die strafrechtliche Geschäftsherrenhaftung, 2006, p. 254 et seq.

<sup>142</sup> Vgl. von Galen/Maass, in: Leitner/Rosenau (eds), Wirtschafts- und Steuerstrafrecht, 2017, § 130 OWiG marginal no. 45.

<sup>143</sup> von Galen/Maass, in: Leitner/Rosenau (eds), Wirtschafts- und Steuerstrafrecht, 2017, § 130 OWiG marginal no. 45.

<sup>144</sup> Rogall, in: Karlsruher Kommentar zum OWiG, 5th ed. 2018, § 9 marginal no. 91.

persons have to be personally and professionally qualified. When selecting supervisors, the owner has, with regard to the increased responsibility of these persons, a much greater duty of care than when selecting other persons.<sup>145</sup> In addition, there must be a clear assignment of tasks—i.e. the supervisors must know exactly who, when and where they have to supervise. In practice, the subject and scope of the delegation are often recorded in writing. Furthermore, the owner must instruct all supervisors adequately—that is, make them familiar with the supervisory tasks—unless he can assume sufficient knowledge based on learning and experience.<sup>146</sup>

Finally, the owner must also supervise and control the supervisors—i.e. ensure that they perform their task properly. To this end, the supervisors shall report regularly to the owner on the measures they have taken.<sup>147</sup> In addition, the supervisors and the owner himself must not only perform regular and therefore predictable controls, but also random controls, which are unforeseen.<sup>148</sup> The controls must be carried out in such a way that subordinates must fear the detection of contraventions.<sup>149</sup> In summary, the appointment of supervisors does not end the owner's duty of supervision and control, but merely reduces the intensity.<sup>150</sup>

In addition, it should be noted that there are two types of supervisor, whose assignment has different conditions and consequences.

In accordance with sect. 9 (2) sentence 1 No. 2 OWiG, a (here referred to as) 'qualified' supervisor is expressly commissioned to perform, on his own responsibility, tasks incumbent upon the owner of the company. These tasks include the supervision and control of subordinates.<sup>151</sup> One characteristic feature of a qualified supervisor is the 'express' mandate, which serves legal certainty and transparency. In the interest of the delegates, and to ensure compliance with the duties assumed, clear conditions should be created and an all too easy transfer

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<sup>145</sup> von Galen/Maass, in: Leitner/Rosenau (eds), *Wirtschafts- und Steuerstrafrecht*, 2017, § 130 OWiG marginal no. 45.

<sup>146</sup> von Galen/Maass, in: Leitner/Rosenau (eds), *Wirtschafts- und Steuerstrafrecht*, 2017, § 130 OWiG marginal no. 45.

<sup>147</sup> Beck, in: BeckOK-OWiG, 15th ed. 15.04.2017, § 130 marginal no. 64.1.

<sup>148</sup> Cf. BGHSt 9, 319, 323; BGHSt 25, 158, 163; OLG Köln wistra 1994, 115; Beck, in: BeckOK-OWiG, 15th ed. 15.04.2017, § 130 marginal no. 64.1.

<sup>149</sup> Rogall, in: Karlsruher Kommentar zum OWiG, 5th ed. 2018, § 130 marginal no. 64.

<sup>150</sup> BayObLG NJW 2002, 766.

<sup>151</sup> Rogall, in: Karlsruher Kommentar zum OWiG, 5th ed. 2018, § 9 marginal no. 84.

of responsibility should be counteracted.<sup>152</sup> On the other hand, the mandate must also enable the commissioner to perform the tasks ‘on his own responsibility’: i.e. he must be able to make decisions on his own, having freedom of action and decision-making authority.<sup>153</sup> The required freedom of choice is given if the commissioner is able to take the necessary measures on his own and without asking others, in particular superiors.<sup>154</sup> The reason for these strict conditions is that the mandate justifies a norm addressee’s position of supervisor, which can lead to his liability under criminal law or regulatory offences law.<sup>155</sup> Firstly, this means that the qualified supervisor is at least partly on an equal status with the owner, so that he is responsible in accordance with sect. 130 OWiG. Secondly, the corporation is also responsible in accordance with sect. 30 OWiG, as the qualified supervisor exercises controlling powers in a managerial position, and thus constitutes ‘another person’ within the meaning of sect. 30 (1) No. 5 OWiG.<sup>156</sup> According to the dominant opinion, the compliance officer is also one of the commissioners within the meaning of sect. 9 (2) sentence 1 no. 2 OWiG<sup>157</sup>, and among the representatives of sect. 30 OWiG.<sup>158</sup> This is true if the compliance officer has been expressly commissioned with the performance of control and supervisory tasks on his own.<sup>159</sup>

On the other hand, the supervisor is a (here referred to as) ‘simple’ supervisor if the express mandate to exercise the control and supervisory tasks under his own responsibility is missing. The consequence is, on the one hand, that the simple supervisor is not allowed to make decisions but has to involve the owner. On the other hand, the simple supervisor is not responsible pursuant to sect. 130 OWiG, as his position does not correspond to that of the owner. Finally, he does not belong to the representatives of sect. 30 OWiG, so that in case of a violation of supervisory

<sup>152</sup> *Rogall*, in: *Karlsruher Kommentar zum OWiG*, 5th ed. 2018, § 9 marginal no. 87.

<sup>153</sup> *Rogall*, in: *Karlsruher Kommentar zum OWiG*, 5th ed. 2018, § 9 marginal no. 88.

<sup>154</sup> *Rogall*, in: *Karlsruher Kommentar zum OWiG*, 5th ed. 2018, § 9 marginal no. 88.

<sup>155</sup> BGHSt 58, 10, 13 = BGH NJW 2012, 3385.

<sup>156</sup> Vgl. *Rogall*, in: *Karlsruher Kommentar zum OWiG*, 5th ed. 2018, § 9 marginal no. 88.

<sup>157</sup> Cf. only *Gürtler*, in: *Göhler, OWiG*, 17. ed. 2017, § 9 marginal no. 23.

<sup>158</sup> *Rogall*, in: *Karlsruher Kommentar zum OWiG*, 5th ed. 2018, § 9 marginal no. 88.

<sup>159</sup> *Rogall*, in: *Karlsruher Kommentar zum OWiG*, 5th ed. 2018, § 9 marginal no. 90.

duties, the company's responsibility can only exist if there is an intentional or negligent violation of the owner's obligatory supervision in this regard.

### 3.6. Fulfilment of supervisory duties and disciplinary powers

As soon as the head of business or another supervisor becomes aware of the possible commission of an offence by a subordinate, there are three duties: the duty to clarify the facts, the duty to stop the offence and the duty to sanction the offence.<sup>160</sup> The adoption of these measures also results from sect. 130 (1) sentence 1 OWiG, as the holder is obliged to 'proper supervision'.<sup>161</sup>

The initiation of clarification measures must identify not only the perpetrators and participants involved in the offence but also the causes of the offence. Regarding the 'whether' of the clarification, the supervisor does not have any discretionary powers.<sup>162</sup> In principle, a comprehensive clarification must be carried out, since only this ensures that an offence is not repeated.<sup>163</sup> With regard to the 'how' of the investigation, the owner can initiate internal investigations by internal departments (internal auditing, controlling, compliance and/or legal departments) or by external lawyers and auditors (internal investigations or forensic services). On the other hand, the owner can leave the investigation to the judicial authorities by initiating criminal proceedings by means of criminal complaint or criminal request. The discretionary decision must be based on whichever method appears to be the most appropriate response in the specific case.<sup>164</sup> There is no general duty to file criminal complaints.<sup>165</sup> A duty to involve the judicial authorities (so-called 'reduction of discretionary powers to zero') exists only in exceptional cases, in particular if there is a statutory duty to report, as in the case of an offence from the catalogue of sect. 138 StGB, or if money laundering or terrorist financing is suspected in accordance with sect. 43 GwG. In addition, the

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<sup>160</sup> *Reichert* ZIS 2011, 113, 117 et seq.

<sup>161</sup> *Rogall*, in: *Karlsruher Kommentar zum OWiG*, 5th ed. 2018, § 130 marginal no. 65 et seq.

<sup>162</sup> *Rönnau/Schneider* ZIP 2010, 53, 59; *von Galen/Maass*, in: *Leitner/Rosenau* (eds), *Wirtschafts- und Steuerstrafrecht*, 2017, § 130 OWiG marginal no. 48.

<sup>163</sup> *Reichert*, ZIS 2011, 113, 117.

<sup>164</sup> *Reichert*, ZIS 2011, 113, 118.

<sup>165</sup> Cf. only *Bürkle* CCZ 2010, 4, 10 et seq.; *Waßmer*, in: *Münchener Kommentar zum Bilanzrecht*, 2013, § 333 HGB marginal no. 45, 46.

aspects that speak in favour of performing internal investigations (e.g. duty of care for subordinates; priority of internal clarification; confidentiality; no loss of reputation; risk of sanctions for the company; *nemo tenetur se ipsum accusare*) must be weighed against those who advocate the involvement of the judicial authorities (policy of zero tolerance; more effective information; deterrence; transparency).<sup>166</sup>

If the clarification reveals that an offence is committed, the supervisor must stop it and take precautions to prevent cases of recurrence. For this purpose, it is necessary for the supervisor to ensure that the area in which the offence was committed is subject to constant and specific monitoring—i.e. there are increased duties of supervision.<sup>167</sup> Again, the supervisor has no discretion as to ‘whether’ he intervenes. On the other hand, he has the choice of ‘how’ to intervene if there are several equally promising possibilities.<sup>168</sup>

Finally, the supervisor must sanction the offence appropriately. The sanction has to be clear and noticeable, as the severity determines how conscientiously the subordinates will perform their duties in the future and carelessness may give the impression that violations do not entail any consequences.<sup>169</sup> In addition, in the event of inactivity, the owner himself is exposed to criminal liability, in particular due to participation in the offence (sect. 25-27 StGB), assistance after the fact (sect. 257 StGB) or assistance in avoiding prosecution (sect. 259 StGB).

Regarding the ‘whether’ of sanctioning, the prevailing opinion assumes that there is no margin of discretion, since a sanction has a general and special preventive effect. However, the ‘how’ of the sanction—i.e. the type and amount—is a matter of discretion.<sup>170</sup> On the one hand, there are instruments of sanctions and disciplinary measures available under labour law: extraordinary termination without notice; regular termination within a specified period of time or dismissal for variation of contract; changes in the working conditions; warning notices; company or contractual fines; offsetting against claims for damages; retention of parts of the remuneration. On the other hand, claims for damages under the terms of employment, service and contract for work may be asserted. Finally, in the

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<sup>166</sup> Reichert, ZIS 2011, 113, 117 et seq., 120 et seq.

<sup>167</sup> Rogall, in: Karlsruher Kommentar zum OWiG, 5th ed. 2018, § 130 marginal no. 68.

<sup>168</sup> Rönnau/Schneider ZIP 2010, 53, 60; Reichert ZIS 2011, 113, 118 et seq.

<sup>169</sup> Reichert ZIS 2011, 113, 119.

<sup>170</sup> Reichert ZIS 2011, 113, 117 et seq., 120.

event of serious offences, it is appropriate to initiate criminal proceedings by means of a criminal complaint or criminal request. These sanctions, which must be permissible under labour law in the individual case,<sup>171</sup> can be applied alternatively or cumulatively, depending on the nature and severity of the offence.<sup>172</sup> The decision shall take into account the principle of proportionality and the reasonableness of the sanction. In some cases, reluctance to impose sanctions may also be necessary, in particular if the willingness to cooperate of a person involved is necessary for the clarification of the facts, and this goal can only be achieved against a partial or complete ‘amnesty’.<sup>173</sup>

### *3.7. Liability and collective decisions*

A company’s management regularly consists of several members. In the case of a stock corporation, the executive board is the management body, which may consist of several persons (sect. 76 (1) AktG). Similarly, a limited liability company may have several managing directors (sect. 6 (1) GmbHG). If the management consists of several members, then all are only authorised to manage the company jointly unless the articles of association, the rules of procedure or statutes stipulate otherwise (cf. sect. 77 (1) AktG; sect. 35 (2) sentence 1 GmbHG). All members have a general responsibility—a so-called ‘all-round responsibility’—for the fulfilment of company duties.<sup>174</sup> However, since the members cannot carry out all tasks together, the tasks are divided into departments and delegated.

In the case of company-related violations affecting individual departments (e.g. production, marketing), the responsibility of members who are not internally responsible must be denied on account of the validity of the principle of trust.<sup>175</sup> However, the internal division of responsibilities does not result in an exemption from responsibility but merely alters the weighting of responsibility.<sup>176</sup> The members who are not internally responsible therefore have a duty to supervise,

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<sup>171</sup> Rogall, in: Karlsruher Kommentar zum OWiG, 5th ed. 2018, § 130 marginal no. 65.

<sup>172</sup> Reichert ZIS 2011, 113, 120.

<sup>173</sup> Reichert ZIS 2011, 113, 120.

<sup>174</sup> Cf. Wafmer, in: Münchener Kommentar zum Bilanzrecht, 2013, § 331 marginal no. 18.

<sup>175</sup> OLG Celle NZWiSt 2013, 68, 71.

<sup>176</sup> BGHSt 21, 264, 277.

which is, however, reduced (to a mere duty to observe) and only intervenes on special occasions. The reason for this is that people at the same level are not obliged to carry out general mutual checks due to the lack of subordination.<sup>177</sup> Therefore, an internally not responsible member is only responsible if he recognises that the internally responsible member does not take appropriate action or if he has concrete indications of maladministration. In these cases, there is an obligation to intervene—i.e. the member who is not internally responsible must, as far as possible and reasonable, ensure that the company-based duties are fulfilled.

In the case of cross-departmental matters that relate to basic duties (e.g. accounting)<sup>178</sup> or in which the company as a whole is affected, as in crisis and exceptional situations (e.g. recall of dangerous products),<sup>179</sup> the management is called to act as a whole. Members must therefore decide jointly. In the case of collective decisions, the prevailing opinion assumes that the managers are joint principals.<sup>180</sup> Therefore, in the case of majority voting, any person who has voted in favour of the unlawful decision may be liable on the basis of mutual attribution of votes. However, those who have voted against the unlawful decision are not liable, as there is no mutual decision in this respect.<sup>181</sup> Those who abstain cannot be held responsible either, according to a favourable opinion, even if the vote in favour is reached, since there is a lack of a mutual decision.<sup>182</sup> However, members who have voted or abstained from voting against the unlawful decision may also be held responsible if the unlawful decision is implemented.<sup>183</sup> Because of their general responsibility, these members must, as far as possible and within reason-

<sup>177</sup> Cf. OLG Hamm NJW 1971, 817; OLG Naumburg NZV 1998, 41, 42; *von Galen/Maass*, in: Leitner/Rosenau (eds), *Wirtschafts- und Steuerstrafrecht*, 2017, § 130 OWiG marginal no. 27; *Rogall*, in: *Karlsruher Kommentar zum OWiG*, 5th ed. 2018, § 130 marginal no. 72; *Waßmer*, in: *Münchener Kommentar zum Bilanzrecht*, 2013, § 331 marginal no. 19.

<sup>178</sup> *Waßmer*, in: *Münchener Kommentar zum Bilanzrecht*, 2013, § 331 marginal no. 18.

<sup>179</sup> BGHSt 36, 106, 123.

<sup>180</sup> BGHSt 37, 106, 129; *Knauer*, *Die Kollegialentscheidung im Strafrecht*, 2001, p. 142 et seq.

<sup>181</sup> *Waßmer*, in: *AnwaltKommentar StGB*, 2nd ed. 2015, § 25 marginal no. 73.

<sup>182</sup> *Knauer*, *Die Kollegialentscheidung im Strafrecht*, 2001, p. 206 et seq.; *Waßmer*, in: *AnwaltKommentar StGB*, 2nd ed. 2015, § 25 marginal no. 73; *Joecks*, in: *Münchener Kommentar zum StGB*, Vol. III, 3rd ed. 2017, § 25 marginal no. 258.

<sup>183</sup> *Joecks*, in: *Münchener Kommentar zum StGB*, Vol. III, 3rd ed. 2017, § 25 marginal no. 258; *Waßmer*, in: *AnwaltKommentar StGB*, 2nd ed. 2015, § 25 marginal no. 73.

able bounds, take all measures permitted to prevent the implementation of an unlawful decision. In particular, supervisory boards or the shareholders must be informed. If further action is required, the member must resign if this is necessary in order to avoid criminal liability.<sup>184</sup> If these duties are not fulfilled, the offender may be criminally liable by active action or, if the implementation is not prevented by other persons, by omission.<sup>185</sup>

### 3.8. Relationship with corporate liability

There is no corporate criminal liability under German law, but only a liability under the regulatory offences law. In accordance with sect. 30 OWiG, a regulatory fine can be imposed on a legal person, or an association of persons, if certain persons have committed a company-related offence. The requirements under which a regulatory fine can be imposed are high.

#### 3.8.1. Triggering persons

Sect. 30 (1) OWiG requires that natural persons who have a leading position in certain companies commit certain criminal or regulatory offences.

Only corporations that are drafted as legal persons (e.g. limited liability company (GmbH); stock corporation (AG)), associations without legal capacity or partnerships with legal capacity are included (cf. sect. 30 (1) No. 1-3 OWiG). All partnerships with legal status have been included since 30 August 2002.<sup>186</sup> Previously, only commercial partnerships (general commercial partnership (OHG); limited partnership (KG)) were included. After the jurisprudence acknowledged that civil law partnerships (*BGB-Gesellschaften*) themselves could also be holders of rights and duties, equal treatment became necessary.<sup>187</sup> According to the prevailing opinion, legal persons under public law are also included,

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<sup>184</sup> *Waßmer*, in: Münchener Kommentar zum Bilanzrecht, 2013, § 331 marginal no. 19.

<sup>185</sup> *Joecks*, in: Münchener Kommentar zum StGB, 3rd ed. 2017, § 25 marginal no. 258.

<sup>186</sup> Gesetz zur Ausführung des Zweiten Protokolls v. 19.6.1997 zum Übereinkommen über den Schutz der finanziellen Interessen der Europäischen Gemeinschaften (etc.), BGBl. I 2002, p. 3387.

<sup>187</sup> BT-Drs- 14/8998, p. 8.

since the provision does not contain any restrictions.<sup>188</sup> The federal, state and local governments, on the other hand, do not seem to be sanctionable.<sup>189</sup> In the case of a (partial) universal legal succession, the regulatory fine may be imposed on the legal successor(s) since 30 June 2013 in accordance with sect. 30 (2a) OWiG. Previously, there was a sanction gap, as a fine could only be imposed because of the principle of legality (Art. 103 (2) GG) if identity or ‘near’ identity existed between the former and the new capital composition from an economic point of view.<sup>190</sup>

Firstly, executive organs are included. The person in question must be an entity authorised to represent a legal person or a member of such an entity (No. 1), a chairman of the executive committee of an association without legal capacity or a member of such a committee (No. 2), or a partner authorised to represent a partnership with legal capacity (No. 3). Secondly, since 1 November 1994,<sup>191</sup> certain representatives—namely the authorised representative with full power of attorney or in a managerial position as procura-holder or the authorised representative with a commercial power of attorney (No. 4)—have also been included. This enlargement should counteract the concealment of responsibility.<sup>192</sup> Thirdly, since 30 August 2002, all other persons responsible on behalf of the management, also covering supervision of the conduct of business or other exercise of controlling powers in a managerial position, have been added (No. 5). This includes, in particular, supervisory boards. This addition was made for the implementation of Art. 3 (1) of the Second Protocol to the PIF Convention.<sup>193</sup> In addition, the extension should further counteract the shift of responsibility to subordinate levels.<sup>194</sup>

Not every offence committed by a person who has a leading position is sufficient as a linking offence but, according to sect. 30 (1) sentence 1 OWiG, only offences as a result of which duties incumbent on the legal person or on the association of persons have been

<sup>188</sup> *Rogall*, in: Karlsruher Kommentar zum OWiG, 5th ed. 2018, § 30 marginal no. 35 m.w.N.

<sup>189</sup> *Rogall*, in: Karlsruher Kommentar zum OWiG, 5th ed. 2018, § 30 marginal no. 37 m.w.N.

<sup>190</sup> Vgl. BGHSt 57, 193; *Waßmer* NZWiSt 2012, 187.

<sup>191</sup> 2. Gesetz zur Bekämpfung der Umweltkriminalität (2. UKG), BGBl. I 1994, p. 1440.

<sup>192</sup> BT-Drs. 12/192, p. 32.

<sup>193</sup> BT-Drs. 14/8998, p. 10.

<sup>194</sup> BT-Drs. 14/8998, p. 11.

violated, or where the legal person or the association of persons has been enriched or was intended to be enriched. Thus, only company-related offences are included.<sup>195</sup> The offence must also have been committed culpably, as the corporation is blamed for the natural person's guilt. The most important linking offence is sect. 130 OWiG, since criminal and regulatory offences are frequently committed by subordinates. This makes it possible to hold the corporation liable if an employee has committed an offence and the intentional or negligent violation of obligatory supervision by a person who has a leading position is ascertained. However, this regulatory technique does result in gaps in sanctions if a subordinate has committed a company-related contravention and there is 'only' the violation of obligatory supervision by a person who does not hold a leading position.<sup>196</sup> By delegating the supervision of subordinates to supervisors located below the management level, this sanction gap can be intentionally exploited, especially in larger corporations. In such cases, no regulatory fine can be imposed on the corporation.

Finally, there must be a link to representation—i.e. the person who has a leading position must have acted as an entity authorised to represent a legal person, etc. According to the legal explanation, the principal 'generally' does not act as a representative if he 'acts in his own interest'.<sup>197</sup> Therefore, German jurisdiction has long followed the so-called interest theory,<sup>198</sup> according to which the link to representation exists if the principal acts 'at least also' in the interests of the represented corporation when viewed from an economic point of view, but not if he acts exclusively for his own benefit. However, this differentiation led to a significant reduction in insolvency offences and was hardly feasible in negligence offences, which is why a so-called theory of function was established in legal literature, according to which the principal must have used legal or actual possibilities of action arising from his position.<sup>199</sup> In the meantime, the Federal Court of Justice<sup>200</sup> has abandoned the interest theory and demands action 'in the business circle of the represented' (so-called business circle theory)—i.e. not just 'on occasion'. Acting within the business circle is given if the principal 'acts legally'—that

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<sup>195</sup> BT-Drs. V/1269, p. 60.

<sup>196</sup> Rogall, in: Karlsruher Kommentar zum OWiG, 5th ed. 2018, § 30 marginal no. 92.

<sup>197</sup> BT-Drs. V/1269, p. 61.

<sup>198</sup> Cf. only BGHSt 30, 127, 128 et seq.

<sup>199</sup> Perron, in: Schönke/Schröder, StGB, 29. ed. 2014, § 14 marginal no. 26.

<sup>200</sup> BGHSt 57, 229 = BGH NJW 2012, 2366.

is, acts on behalf of the legal person or brings about binding legal consequences for the legal person on the basis of the existing power of representation.

### 3.8.2. *Concurrence and accumulation of liabilities*

Responsibility of the natural person and responsibility of the corporation must concur. The corporation is only liable if a person who has a leading position within the corporation commits an unlawful and culpable company-related criminal or regulatory offence. However, a sanctioning of the natural person for the linking offence is not mandatory. In accordance with sect. 30 (4) sentence 1 OWiG, a regulatory fine may be assessed independently if proceedings are not commenced, or if such proceedings are discontinued, or if imposition of a criminal penalty is dispensed with. In addition, it is even possible to assess a so-called ‘anonymous’ regulatory fine if the identity of the offender cannot be ascertained but it is clear that one of the corporation’s leaders must have committed the connecting offence.<sup>201</sup> Nevertheless, according to sect. 30 (4) sentence 3 OWiG, the independent assessment of a regulatory fine against the legal person or association of persons shall be precluded where the criminal or regulatory offence cannot be prosecuted for legal reasons—i.e. in the case of a statute of limitation in particular, but also in the case of immunity, extraterritoriality, amnesty or lack of criminal request.<sup>202</sup>

The liability of the corporation according to sect. 30 OWiG does not exclude individual liability. Penalties or regulatory fines may also be imposed on those persons who have leading positions or on the subordinates even if the corporation itself is not fined.

## 3.9. *Compliance programmes*

### 3.9.1. *Role of compliance programmes*

Compliance programmes are designed to ensure that a corporation’s conduct is lawful, i.e. that the corporate organs, representatives and subordinates comply with all legal requirements and prohibitions, as well as

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<sup>201</sup> Vgl. BGH NStZ 1994, 346; *Gürtler*, in: Göhler, OWiG, 17. ed. 2017, § 30 marginal no. 40.

<sup>202</sup> Cf. only *Gürtler*, in: Göhler, OWiG, 17. ed. 2017, § 30 marginal no. 42.

internal guidelines and voluntary codes. For the implementation, a compliance officer is often appointed who acts as a link between management and decision-makers in the departments. By setting up an effective compliance programme, the owner fulfils his legal duty under sect. 130 OWiG to ensure proper supervision. If the compliance programme is effective, it ensures that company-related contraventions by subordinates are prevented, or at least made much more difficult. If subordinates commit company-related contraventions despite this, these could not be avoided by 'proper supervision'. Therefore, an intentional or negligent violation of obligatory supervision within the meaning of sect. 130 OWiG is ruled out, and due to the lack of a linking offence, so too is the imposition of a regulatory fine against the corporation in accordance with sect. 30 OWiG. It is neither possible nor necessary to structure the supervisory measures in such a way that no contravention can occur.<sup>203</sup> In this way, an effective compliance programme ensures that responsibility of the leading persons and the corporation for violations of supervisory duties is eliminated and that liability is 'waived'.<sup>204</sup> However, if there are any doubts about the effectiveness of the compliance programme, at least a negligent violation of obligatory supervision cannot be ruled out.<sup>205</sup>

Therefore, it is not surprising that in recent years, supported by intensified criminal prosecution, companies have increasingly established compliance programmes<sup>206</sup> and employed compliance officers.<sup>207</sup> As an empirical study from 2013<sup>208</sup> indicates, these programmes have led to a significant decline in economic crime in these companies. However, most companies still lack compliance structures. This is partly due to the fact that the considerable effort involved in setting up compliance structures is spared.<sup>209</sup> On the other hand, there are fears that strict internal regulations will not only have considerable disadvantages for the company's business activities but

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<sup>203</sup> *Rogall*, in: Karlsruher Kommentar zum OWiG, 5th ed. 2018, § 130 marginal no. 56.

<sup>204</sup> Cf. only *von Galen/Maass*, in: Leitner/Rosenau (eds), Wirtschafts- und Steuerstrafrecht, 2017, § 130 OWiG marginal no. 44; *Rogall*, in: Karlsruher Kommentar zum OWiG, 5th ed. 2018, § 130 marginal no. 58.

<sup>205</sup> *Von Galen/Maass*, in: Leitner/Rosenau (eds), Wirtschafts- und Steuerstrafrecht, 2017, § 130 OWiG marginal no. 44.

<sup>206</sup> BRAK, Stellungnahme Nr. 9/2013, p. 4.

<sup>207</sup> *Beck*, in: BeckOK-OWiG, 15th ed. 15.04.2017, § 130 marginal no. 126.

<sup>208</sup> *PricewaterhouseCoopers* (ed.), Wirtschaftskriminalität und Unternehmenskultur 2013, 2013, p. 16 et seq.

<sup>209</sup> *Beck*, in: BeckOK-OWiG, 16th ed. 15.07.2017, § 130 marginal no. 126.1.

will also raise the standard for the obligatory supervisory measures to be taken.<sup>210</sup>

Finally, the existence or establishment of a compliance programme can lead to a reduction of regulatory fines (which may be imposed on the owner or the legal person) when a subordinate commits a contravention.<sup>211</sup> This is because both existing and future compliance efforts can be taken into account to reduce regulatory fines. However, this is not mandatory, since the owner of a company is obliged to exercise proper supervision and the establishment of a compliance programme serves only to fulfil this duty. It is therefore proposed that in the future, with respect to companies that have introduced an effective compliance system, fines should be reduced or lifted in order to provide an incentive for companies to seek effective compliance.<sup>212</sup>

### 3.9.2. *Obligation to adopt compliance programmes*

German law does not provide for a general obligation to adopt a compliance programme or even appoint a compliance officer. Sect. 130 OWiG is regarded as the central norm<sup>213</sup> but does not impose a general obligation to introduce compliance programmes.<sup>214</sup> However, the prevailing opinion has long concluded from the obligation for ‘proper supervision’ that at least large companies have a duty to set up an audit department.<sup>215</sup> Today, this is referred to as the establishment of a compliance organisation.<sup>216</sup> The extent to which compliance measures are appropriate depends in particular on the size of the company and the risk aptitude. While, in smaller companies, a distribution of tasks with installed control is sufficient, large compa-

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<sup>210</sup> Beck, in: BeckOK-OWiG, 16th ed. 15.07.2017, § 130 marginal no. 128.

<sup>211</sup> Cf. only von Galen/Maass, in: Leitner/Rosenau (eds), Wirtschafts- und Steuerstrafrecht, 2017, § 130 OWiG marginal no. 44; Gehring/Kasten/Mäger CCZ 2013, 1, 10.

<sup>212</sup> Moosmayer NJW 2012, 3013, 3017.

<sup>213</sup> Bock ZIS 2009, 68, 69.

<sup>214</sup> Niesler, in: Graf/Jäger/Wittig, Wirtschafts- und Steuerstrafrecht, 2nd ed. 2017, § 130 marginal no. 13.

<sup>215</sup> BGH wistra 1982, 34; OLG Köln wistra 1994, 315; Rogall, in: Karlsruher Kommentar zum OWiG, 5th ed. 2018, § 130 marginal no. 56.

<sup>216</sup> von Galen/Maass, in: Leitner/Rosenau (eds), Wirtschafts- und Steuerstrafrecht, 2017, § 130 OWiG marginal no. 44; Rogall, in: Karlsruher Kommentar zum OWiG, 5th ed. 2018, § 130 marginal no. 57.

nies may implicitly be obliged to set up a compliance management system.<sup>217</sup>

For certain companies and business segments, there are statutory requirements for more or less comprehensive organisational duties, in particular, the establishment of a compliance function or risk management system. In this respect, it should be noted that in many companies in Germany, risk management, internal control and compliance are organisationally separated, although the overall aim is to ensure that the relevant rules are complied with.<sup>218</sup>

In accordance with sect. 91 (2) AktG, the executive board of a stock corporation must take appropriate measures—in particular, set up a monitoring system—so that developments that could jeopardise the existence of the company are identified at an early stage. As a result, stock corporations are regularly obliged to set up a risk monitoring system.<sup>219</sup> As a rule, a risk management officer is appointed, who reports regularly to both the executive board and the supervisory board, and records and monitors risks centrally.<sup>220</sup> In addition, according to sect. 4.1.3. of the legally non-binding<sup>221</sup> German Corporate Governance Code (GCGC), ‘[T]he Management Board ensures that all provisions of law and the company’s internal policies are complied with, and endeavours to achieve their compliance by the group entities (Compliance). It shall also institute appropriate measures reflecting the company’s risk situation (Compliance Management System) and disclose the main features of those measures.’

Sect. 33 of the German Securities Trading Act (*Wertpapierhandelsgesetz*: WpHG) establishes organisational duties for investment service providers. In accordance with sect. 33 (1) sentence 2 no. 1 WpHG, appropriate principles must be established; funds must be kept available and procedures set up to ensure that the company itself and its employees comply with the obligations of the WpHG, in particular by establishing a permanent, effective and independent compliance function. Credit institutions are obliged to establish a compliance function as part of the internal control system in accordance with sect. 25a (1) sentence 3 No. 3c of the German Banking Act (*Kreditwesengesetz*: KWG). In accor-

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<sup>217</sup> von Galen/Maass, in: Leitner/Rosenau (eds), *Wirtschafts- und Steuerstrafrecht*, 2017, § 130 OWiG marginal no. 44.

<sup>218</sup> Moosmayer NJW 2012, 3013, 3016.

<sup>219</sup> Oltmanns, in: Heidel (ed.), AktG, 5th ed. 2018, § 91 marginal no. 6.

<sup>220</sup> Oltmanns, in: Heidel (ed.), AktG, 5th ed. 2018, § 91 marginal no. 8.

<sup>221</sup> BGH NJW 2008, 855.

dance with sect. 29 (1) of the German Insurance Supervision Act (*Ver sicherungsaufsichtsgesetz*: VAG), insurance companies must also have an effective internal control system that includes at least a compliance function.

Finally, in accordance with sect. 4 (1) GwG, persons and companies subject to the Money Laundering Act must have an effective risk management system that is appropriate with regard to the type and scope of the business activities in order to prevent money laundering and terrorist financing. In accordance with sect. 4 (2) GwG, risk management comprises a risk analysis (sect. 5 GwG) and internal security measures (sect. 6 GwG). Pursuant to sect. 7 (1) GwG, certain persons and companies must appoint an anti-money laundering officer at management level who is responsible for compliance with the money laundering regulations.

### *3.9.3. Consequences of failing to adopt compliance programmes*

If a company does not have a compliance programme, despite it being required by law, the regulatory authorities may in regulated sectors, such as securities service providers, credit institutions and insurance companies, dismiss the managing directors for lack of suitability.<sup>222</sup>

With regard to criminal law or regulatory offences law, the absence of a compliance programme does not have any immediate consequences. The mere fact that a company has not set up a compliance programme does not constitute a violation of the obligatory supervision pursuant to sect. 130 OWiG.<sup>223</sup> However, if a subordinate commits a company-related contravention, it is obvious that the existence of an effective compliance programme would have made the commission much more difficult. Although appropriate compliance measures cannot rule out the possibility of contraventions within the company, they can significantly reduce the probability. Therefore, even if the participation of the owner in an offence of the subordinate cannot be proved according to general rules (sect. 13, 25 to 27 StGB), there will almost always be a negligent violation of obligatory supervision pursuant to sect. 130 OWiG. This makes it possible to impose a regulatory fine against the corporation in accordance with sect. 30 OWiG.

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<sup>222</sup> Vgl. VG Frankfurt am Main WM 2004, 2157.

<sup>223</sup> Niesler, in: Graf/Jäger/Wittig, Wirtschafts- und Steuerstrafrecht, 2nd ed. 2017, § 130 marginal no. 12.

## 4. Defences

### 4.1. Effective powers of supervision and control and liability

As explained, the owner of a company is obliged to exercise ‘proper supervision’ in accordance with sect. 130 (1) OWiG. The supervisory measures include adequate control and supervision of subordinates. The omission of any supervisory measures is unjustifiable from any point of view. This can also be deduced from sect. 130 (1) sentence 2 OWiG, according to which ‘the required supervisory measures shall also comprise appointment, careful selection and surveillance of supervisory personnel’. The express mention of the supervisory personnel is intended to prevent the holder from invoking that he was unable to exercise his supervisory duties due to the size of the establishment or for reasons relating to his person (see section 3.5).

However, even effective supervisory measures cannot exclude with certainty that contraventions will occur but can only significantly reduce the probability. It is neither possible nor necessary to design the supervision in such a way that no contraventions can occur at all. In general opinion, the supervisory measures must not only be appropriate and necessary, but also reasonable.<sup>224</sup> This applies, on the one hand, to the subordinates and, on the other hand, to the owner. From the subordinate’s point of view, ‘proper supervision’ must preserve human dignity.<sup>225</sup> A ‘total’ surveillance (e.g. through complete video surveillance) would be harassing and would destroy the required relationship of trust between employer and employee. Therefore, law does not permit it.<sup>226</sup> From the owner’s point of view, no measures can be demanded that are unrealistic and disproportionate in terms of costs.<sup>227</sup> In addition, measures that have *a priori* a small chance of success and only represent a ‘poking around in the dark’ are unacceptable.<sup>228</sup> Excessive bureaucratisation of the company and thus excessive impairment of the effectiveness of its activities cannot be demanded.

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<sup>224</sup> Cf. BGH wistra 1986, 222, 223; BayObLG wistra 2001, 478, 479; OLG Düsseldorf NStZ-RR 1999, 151; Beck, in: BeckOK-OWiG, 16th ed. 15.07.2017, § 130 marginal no. 51; von Galen/Maass, in: Leitner/Rosenau (eds), Wirtschafts- und Steuerstrafrecht, 2017, § 130 OWiG marginal no. 35; Rogall, in: Karlsruher Kommentar zum OWiG, 5th ed. 2018, § 130 marginal no. 51.

<sup>225</sup> Rogall, in: Karlsruher Kommentar zum OWiG, 5th ed. 2018, § 130 marginal no. 51.

<sup>226</sup> Beck, in: BeckOK-OWiG, 16th ed. 15.07.2017, § 130 marginal no. 53.

<sup>227</sup> Beck, in: BeckOK-OWiG, 16th ed. 15.07.2017, § 130 marginal no. 54.

<sup>228</sup> OLG Frankfurt am Main VRS 56, 109, 111.

Therefore, the owner can claim that he has taken all necessary and reasonable supervisory measures but that the subordinate's contravention could not be avoided. This is obvious when the subordinate has committed an intentional contravention and deliberately eliminated control mechanisms. The same applies to excesses, the prevention of which is a priori unrealistic.

#### *4.2. Delegation of supervisory powers*

The delegation of control and supervision of subordinates to supervisors cannot relieve the owner of his duties. As outlined (see section 3.5), sect. 130 (1) sentence 2 OWiG states that the 'appointment, careful selection and supervision of supervisory personnel' are part of the required supervisory measures. It is agreed that, despite delegation, the owner shall always exercise overall supervision.<sup>229</sup> This is also shown in sect. 9 (1) and (2) OWiG, according to which the person represented also remains obliged. Therefore, by delegation, the holder cannot fully relieve himself of his duties: delegation does not 'break' responsibility.<sup>230</sup>

As a result, the owner is also subject to supervisory duties with regard to supervisors. As with every delegation, there are duties of selection, organisation, instruction and supervision. If the owner has indications or knowledge that the supervisor is not performing the supervision task properly, he is obliged to intervene. The same applies if there are mistakes in selection, organisation or instruction. This is true for simple and qualified supervisors (with regard to this differentiation, see section 3.5), as there are also supervisory duties if a supervisor has been expressly commissioned to act on his own responsibility. Despite this, qualified supervisors are still subject to overall supervision by the owner, albeit at a reduced level.

In the case of contraventions committed by subordinates, this means that if the supervisor has fulfilled his tasks properly, the owner is not responsible. If a simple supervisor has not fulfilled his tasks properly, the owner is responsible under sect. 130 OWiG if there was a violation of his duties to select, organise, instruct and super-

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<sup>229</sup> BGHSt 25, 158, 163; KG JR 1972, 121, 122; *Rogall*, in: Karlsruher Kommentar zum OWiG, 5th ed. 2018, § 130 marginal no. 40; *Schmidt-Husson*, in: *Hauschka/Moosmayer/Lösler* (eds), *Corporate Compliance*, 3rd ed. 2016, § 6 marginal no. 36.

<sup>230</sup> *Rogall*, in: Karlsruher Kommentar zum OWiG, 5th ed. 2018, § 130 marginal no. 40.

vise. However, there is no violation of supervisory duty if the owner had no reason to doubt that the supervisor fulfils the task correctly and if, at the same time, the owner had ensured that he would be informed as reliably and as early as possible of abuses.<sup>231</sup> If, on the other hand, a qualified supervisor has not fulfilled his tasks properly, he is, being on the same level as the owner, responsible under sect. 130 OWiG. In addition, the owner may have violated his duties to select, organise, instruct and monitor.

#### 4.3. *Compliance programmes*

The goal of a compliance programme is to systematically create the prerequisites for preventing or significantly impeding contraventions and to identify and deal with contraventions that have already occurred. Therefore, the focus is on risk analysis, deviation analysis, dealing with exceptional situations and the resolution as well as the prevention of non-compliance situations. In this context, all measures and processes to ensure compliance with the rules constitute a compliance management system.<sup>232</sup> In this respect, non-statutory (minimum) standards have emerged that indicate which measures shall be taken to systematically set up, maintain, monitor and improve a compliance organisation. The observance of the standard indicates that those responsible for the company have fulfilled their 'duty of care' (see section 2.2.2).

Compliance management systems do not have to be designed in a uniform way but can take into account the specific characteristics of the organisation (size, structure, activities, products, specific risks, etc.). In Germany, the following standards are important:<sup>233</sup>

Standard for Compliance Management Systems (TR CMS 101:2015), supplemented by a Compliance Guide (TR CMS 100:2015), both published by TÜV Rheinland.<sup>234</sup>

Auditing Standard 980 (IDW PS 980), published by the Institute of

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<sup>231</sup> Schmidt-Husson, in: Hauschka/Moosmayer/Lösler (eds), *Corporate Compliance*, 3rd ed. 2016, § 6 marginal no. 38.

<sup>232</sup> Wegner PStR 2014, 19.

<sup>233</sup> Vgl. Ziegler, in: Blum/Gassner/Seith (eds), OWiG, 2016, § 130 marginal no. 36 et seq.

<sup>234</sup> TÜV Rheinland (ed.), *Compliance-Management-Systeme, Standard und Leitfaden* TR CMS 101:2015 und TR CMS 100:2015, 2015.

Public Auditors in Germany (ISW)<sup>235</sup> and considered a reference framework to meet the minimum standards of an effective compliance system for companies with more than 700 employees and annual sales of more than 100 million euros.<sup>236</sup>

Risk management according to the Committee of Sponsoring Organizations of the Treadway Commission (at present, *COSO-Internal Control 2013*), which is examined from a three-dimensional view of the company and its risk management system (so-called COSO-cube: company objectives, components, organisational structure).

ISO 19600 (Compliance Management Systems) and ISO 31000 (Risk Management), published by the International Organization for Standardization (ISO); IDW PS 980 and ISO 19600, and ISO 19600 and ISO 31000, complement each other.<sup>237</sup>

If a compliance management system meets a standard, the owner's liability is in general excluded.<sup>238</sup> If there are any doubts, a negligent violation of the supervisory duty cannot be ruled out. Regular certifications prove whether the standard is met. For example, by having the system audited in accordance with IDW PS 980, companies receive proof that their system is appropriate and effective.<sup>239</sup> As a result, more and more companies are having compliance management systems set up and certified in order to reduce liability for the management and the company and to counter possible allegations of culpable violations of organisational duties.<sup>240</sup>

#### *4.4. Third party advice, external auditing and liability of heads of business*

The use of an external auditor does not exclude the responsibility of the owner for offences committed in the audited area. In practice, exter-

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<sup>235</sup> Institut der Wirtschaftsprüfer (ed.), IDW Verlautbarungen zu Governance, Risk und Compliance: IDW PS 980, IDW PS 981, IDW PS 982, IDW PS 983, IDW Praxishinweis 1/2016, IDW PH 9.980.1, 2017.

<sup>236</sup> Ziegler, in: Blum/Gassner/Seith (eds), OWiG, 2016, § 130 marginal no. 38.

<sup>237</sup> Ziegler, in: Blum/Gassner/Seith (eds), OWiG, 2016, § 130 marginal no. 42.

<sup>238</sup> Cf. only Ziegler, in: Blum/Gassner/Seith (eds), OWiG, 2016, § 130 marginal no. 36.

<sup>239</sup> Cf. only Schmidt, in: Hauschka/Moosmayer/Lösler (eds), Corporate Compliance, 3rd ed. 2016, § 45 marginal no. 14; Wegner PStR 2014, 19.

<sup>240</sup> Schmidt, in: Hauschka/Moosmayer/Lösler (eds), Corporate Compliance, 3rd ed. 2016, § 45 marginal no. 13.

nal auditing of financial statements is usually carried out by an auditor who prepares an audit report (sect. 321 of the German Commercial Code (HGB)) and then issues a corresponding audit opinion (sect. 322 HGB). In this respect, however, the contents of the auditing are important. The audit report must not only report on the type, scope and result of the audit (sect. 321 (1) sentence 1 HGB), but also on any detected inaccuracies or violations of legal regulations, as well as facts that indicate serious violations (sect. 321 (1) sentence 3 HGB: the so-called 'great duty to speak'). However, the auditor does not have to search for evidence of criminal offences, but only report if he discovers signs of irregularity<sup>241</sup> (e.g. unusual transactions; unexplained payments).<sup>242</sup> Contrary to popular public opinion, external auditing is not a mistrust audit. Sect. 317 (1) sentence 1 HGB states that the audit of financial statements shall only be conducted in such a way that inaccuracies and violations are detected in the case of 'conscientious professional conduct', whereby a 'critical attitude' (IDW PS 200.17) and the risk of manipulated sales revenue (IDW PS 210) must be taken into account. The purpose of the investigation is not to uncover offences;<sup>243</sup> therefore, external auditing is no guarantee that the financial statements and reports are accurate.

Nevertheless, in practice, the owner's responsibility with regard to accounting offences (in particular, sect. 331 HGB) is usually severely limited if he has delegated bookkeeping and accounting, as usual, to accountants or tax consultants. In this case, as with every delegation, there are duties of selection, organisation, instruction and supervision. Therefore, if suitable persons have been selected and instructed, the supervisory measures are usually limited to supervision and control.<sup>244</sup> Due to the lack of expert knowledge, it will usually be impossible for the owner to carry out the control himself, so he has to rely on the external auditor's judgment. Unless the owner has concrete indications of irregularities, he will regularly lack intent.<sup>245</sup> In practice, evidence of the of-

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<sup>241</sup> Waßmer, in: Münchener Kommentar zum Bilanzrecht, 2013, § 332 HGB marginal no. 2.

<sup>242</sup> Waßmer, in: Münchener Kommentar zum Bilanzrecht, 2013, § 332 HGB marginal no. 14.

<sup>243</sup> OLG Karlsruhe WM 1985, 940, 943; *Spatscheck/Wulf* DStR 2003, 173, 178; Waßmer, in: Münchener Kommentar zum Bilanzrecht, 2013, § 332 HGB marginal no. 2.

<sup>244</sup> Waßmer, in: Münchener Kommentar zum Bilanzrecht, 2013, § 331 HGB marginal no. 18.

<sup>245</sup> Waßmer, in: Münchener Kommentar zum Bilanzrecht, 2013, § 332 HGB marginal no. 112.

fence will only succeed if the owner has actively intervened in accounting—e.g. to brighten up the economic situation.

## 5. Liability of heads of business and sanctions

### 5.1. *Criminal and punitive sanctions*

With regard to sanctions, a distinction must be made between heads of business (organs, representatives) and the corporation. In addition, confiscation is at least in part a sanction under German law (see section 5.4).

#### 5.1.1. *Heads of business*

A head of business can be held criminally liable as a principal or secondary participant (sect. 25–27 StGB) if he has committed or been involved in an intentional offence (cf. 1.1). In this respect, there is responsibility not only for active action but also for omission, in particular for not intervening against offences committed by subordinates. The punishment and the scope of penalties threatened by the respective criminal provision are decisive for the sanctioning.

For example, fraud (sect. 263 (1) StGB) is punishable by imprisonment not exceeding five years or by a fine. This also applies to the attempt (sect. 263 (2) StGB). In especially severe cases, the penalty shall be imprisonment from six months to ten years (sect. 263 (3) sentence 1 StGB). An especially serious case typically occurs if the offender (cf. sect. 263 (3) sentence 2 Nos. 1 to 5 StGB) acts on a commercial basis or as a member of a gang; causes a major financial loss or acts with the intent of placing a large number of persons in danger of financial loss; places another person in financial hardship; abuses his powers or his position as a public official; or pretends that an insured event has happened. If the offender acts on a commercial basis and as a member of a gang, he shall be liable to imprisonment from one to ten years, in less serious cases from six months to five years (sect. 263 (5) StGB). The framework of penalties mentioned applies to principals (sect. 25 StGB) and abettors (sect. 26 StGB). For aiders (sect. 27 (1) StGB), the penalty is to be reduced according to sect. 49 (1) StGB (sect. 27 (2) sentence 2 StGB). In the case of an omission, the sentence may be mitigated pursuant to sect. 49 (1) StGB (sect. 13 (2) StGB). This also applies to the attempt (sect. 23 (2) StGB). The mitigation pursuant to sect. 49

(1) StGB is based on the legal framework of penalties, wherein various stages are provided for.

Since 24 August 2017,<sup>246</sup> sect. 44 (1) sentence 1 StGB provides that if a person has been sentenced for a criminal offence, the court may, in addition, impose a temporary driving ban as an ancillary punishment, prohibiting the person from driving any class of motor vehicle or a specific class on public roads for a period from one to six months. According to sect. 44 (1) sentence 2 StGB, the driving ban can now be imposed even if the offence was not committed in connection with the driving of a motor vehicle or in violation of the duties of a driver, in particular if it appears to be necessary to influence the offender or to defend the legal system or to avoid the imposition of a custodial sentence or its enforcement. The temporary driving ban is a special preventive warning and reflection punishment.<sup>247</sup> However, it is not yet possible to assess the practical significance of the driving ban for offences that are not related to driving.

If the head of business's responsibility is excluded in accordance with the general rules of criminal law, he may be held liable under sect. 130 OWiG for a violation of obligatory supervision. Sect. 130 (1) OWiG stipulates that the head of business must be the owner of the company (or be on an equal basis with the owner in accordance with sect. 9 OWiG) and that a subordinate must have committed a company-related contravention which would have been prevented or substantially impeded by appropriate supervision. With regard to a criminal offence, the regulatory offence may carry a regulatory fine not exceeding one million euros in accordance with sect. 130 (3) sentence 1 OWiG. With regard to a regulatory offence, in accordance with sect. 130 (3) sentence 3 OWiG, the maximum regulatory fine shall be determined by the maximum regulatory fine imposable for the regulatory offence. This shall also apply in accordance with sect. 130 (3) sentence 4 OWiG in the case of a violation simultaneously carrying a criminal penalty and a regulatory fine, provided that the maximum regulatory fine imposable exceeds the maximum pursuant to sect. 130 (3) sentence 1 OWiG.

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<sup>246</sup> Gesetz zur effektiveren und praxistauglicheren Ausgestaltung des Strafverfahrens, BGBl. I 2017, p. 3202.

<sup>247</sup> v. Heintschel-Heinegg, in: BeckOK-StGB, 35th ed. 1.8.2017, § 44 marginal no. 1.

### 5.1.2. Corporations

A regulatory fine may be imposed on legal persons or associations of persons pursuant to sect. 30 (1) OWiG if one of their organs or representatives has committed a company-related offence. Pursuant to sect. 30 (2) sentence 1 OWiG, the regulatory fine shall amount in the case of a criminal offence committed with intent to not more than ten million euros (No. 1), and in the case of a criminal offence committed negligently to not more than five million euros (No. 2). This fine framework has been in force since 30 June 2013<sup>248</sup> and was previously limited to a maximum of one million euros, or rather 500,000 euros. The tenfold increase has been imposed in order to raise the maximum amount to a level that is ‘effective, proportionate and deterrent’.<sup>249</sup>

Also effective from 30 June 2013, sect. 30 (2) sentence 2 OWiG was introduced, according to which, if an act refers to this provision, the maximum amount of the regulatory fine shall be multiplied by ten for the offences referred to in the act. Such a reference was created within sect. 130 (3) sentence 2 OWiG. As a consequence, in the event of a violation of supervision by intent which led to a criminal offence, a fine of ten million euros (in the case of an intentional offence) or five million euros (in the case of a negligent offence) will be imposed (instead of only one million euros or 500,000 euros respectively). This substantial increase was justified by the fact that intentional violations of obligatory supervision can cause considerable economic damage.<sup>250</sup>

Pursuant to sect. 30 (2) sentence 2 OWiG, the maximum regulatory fine that can be imposed for the commission of a regulatory offence shall be determined by the maximum regulatory fine imposable for the regulatory offence concerned. This shall also apply in accordance with sect. 30 (2) sentence 4 OWiG, where there has been commission of an act simultaneously constituting a criminal and a regulatory offence, provided that the maximum regulatory fine imposable for the regulatory offence exceeds the maximum pursuant to sect. 30 (2) sentence 1 OWiG.

The financial benefit is also absorbed in accordance with sect. 17 (4) OWiG in respect of regulatory fines imposed.<sup>251</sup> The assessment

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<sup>248</sup> Achtes Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen, BGBl. I 2013, p. 1738.

<sup>249</sup> Bundestag document No. 17/11053, 21.

<sup>250</sup> Bundestag document No. 17/11053, 23.

<sup>251</sup> Sackreuther, in: BeckOK-OWiG, 16th ed. 15.7.2017, § 17 marginal no. 116.

of a regulatory fine incurred by the legal person or association shall, in respect of one and the same offence, preclude a confiscation pursuant to sect. 73 or sect. 73a StGB or pursuant to sect. 29a OWiG (cf. sect. 30 (5) OWiG).

## 5.2. *Other sanctions and measures*

With regard to other sanctions and measures, German law distinguishes between natural persons and legal persons and associations of persons.

### 5.2.1. *Criminal law*

In criminal law, the court may impose, according to sect. 70 StGB, an order for professional disqualification from one year to five years against a natural person who has been convicted of an unlawful act committed in abuse of his profession or trade or in gross violation of the attendant duties. The disqualification is not limited to certain offences. It may cover the engagement in a profession, branch of profession, trade or branch of trade. The disqualification intends to protect the public from the risks which may arise from further engagement.<sup>252</sup> Despite the serious consequences, the order is, according to the prevailing opinion, a pure measure of incapacitation.<sup>253</sup> In practice, the stigmatising effect counteracts social rehabilitation.<sup>254</sup>

The requirement for an order of professional disqualification is that the offender has either been convicted or has not been convicted solely because he was proved to have acted in a state of insanity. This also holds true if a state of insanity cannot be ruled out. Furthermore, a comprehensive evaluation of the offender and the offence must show that by further engagement in the profession or trade, there is a danger that the perpetrator will commit serious unlawful acts of the kind committed (sect. 70 (1) sentence 1 StGB), and that the use of the measure is not disproportionate to the seriousness of the offence committed or expected to be committed (sect. 62 StGB). The disqualification order may be made in permanence if there is reason to believe that the statutory maximum period will not suffice to avert

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<sup>252</sup> BVerfG BeckRS 2003, 24274.

<sup>253</sup> OLG Karlsruhe StV 1993, 403, 404.

<sup>254</sup> *Waßmer*, in: AnwaltKommentar StGB, 2nd ed. 2015, § 70 marginal no. 2.

the danger posed by the offender (sect. 70 (1) sentence 2 StGB). In addition, if there are cogent reasons for assuming that an order of professional disqualification will be ordered, the judge may, by order, disqualify the accused on a provisional basis (sect. 132 a (1) sentence 1 StGB). However, the order of professional disqualification has gained little practical significance because it is a drastic measure and it is very difficult to assess the danger of repetition.<sup>255</sup>

### 5.2.2. *Regulatory offences law, civil law and administrative law*

In contrast, regulatory offences law does not provide for an order of professional disqualification. This applies equally to natural persons, legal persons and associations of persons. However, there is a wide range of instruments available for countering any commission of an offence. These instruments are used exclusively to prevent dangers.

First of all, there is the possibility of a trade ban, whereby an authority can order a disqualification of a profession or trade. The central regulation is sect. 35 GewO, which applies to so-called 'stationary trades' (*stehende Gewerbe*)—i.e. trades that are not classified as either travel trades or market trades. Accordingly, the competent authority shall prohibit the engagement in an activity in whole or in part if facts demonstrate the unreliability of the trader or of a person entrusted with the management of the company, provided that the prohibition is necessary to protect the general public or the persons employed. A prohibition is 'necessary' if milder means (e.g. warning letters) are not sufficient for protection. A complete ban is *ultima ratio* and only considered an exception (e.g. in case of mental illness).<sup>256</sup> In addition, administrative regulations enable prohibition of other trade activities, in particular travel trades (sect. 59 GewO), catering trades (sect. 15 of the Restaurant Act (*Gaststättengesetz*: GastG)) and craft trades (sect. 16 (3) of the Crafts Code (*Handwerksordnung*: HWO)). For the duration of insolvency proceedings, the trade ban is temporarily excluded in accordance with sect. 12 GewO if the unreliability is largely due to the disorderly financial circumstances.

Furthermore, it is possible to prohibit the use of facilities. The competent authority may, for example, prohibit the use of commercial installations at any time on account of risks to the public interest, in accor-

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<sup>255</sup> *Waßmer*, in: AnwaltKommentar StGB, 2nd ed. 2015, § 70 marginal no. 5.

<sup>256</sup> *Ambs*, in: Erbs/Kohlhaas, Strafrechtliche Nebengesetze, 213th delivery March 2017, § 149 GewO marginal no. 6.

dance with sect. 51 GewO. According to sect. 20 of the Federal Emission Control Act (BImSchG), the operation of installations subject to approval may be banned in whole or in part, or decommissioning or disposal ordered, insofar as the operation entails immediate dangers. According to sect. 25 BImSchG, corresponding powers of the competent authority exist for installations that do not require approval.

Moreover, in the event of a threat to the public interest, the liquidation of a legal person or association as a measure under civil or administrative law is possible. This can be considered a ‘death penalty’. Which provision applies depends on the legal form: stock corporation (sect. 396 AktG), private limited company (sect. 62 GmbHG), cooperative (sect. 81 GenG), association (sect. 43 BGB) or foundation (sect. 87 BGB). In practice, these regulations have only been relevant in one case so far.<sup>257</sup> There are plenty of reasons for a restrained application: the pre-conditions are very high; dissolution is subsidiary to other measures, in particular the dismissal of directors; regulations can be revoked by insolvency and the establishment of successor companies; and dissolution has serious social and economic consequences.<sup>258</sup>

Finally, sect. 3 and sect. 17 No. 1 and 2 of the Association Act (*Vereinsgesetz*) permit the prohibition of a business association if it is directed against the constitutional order or against the idea of international understanding or violates state-protecting criminal provisions. This intends to prevent any circumvention of bans in the interest of national security.<sup>259</sup> An ordinary liquidation procedure does not normally lead to the rapid and effective destruction of a company, since the liquidation is regularly carried out by its organs, which poses a danger for misuse of the company’s assets.

### 5.2.3. *Registration of decisions*

In accordance with sect. 3 No. 1 of the Federal Central Register Act (*Bundeszentralregistergesetz*: BZRG), legally binding decisions by which a German court has recognised a criminal offence are entered in the Federal Central Register maintained by the Federal Office of Justice (BfJ). The so-called ‘certificate of conduct’ (*Führungszeugnis*) con-

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<sup>257</sup> KG JW 1937, 1270.

<sup>258</sup> Rogall, in: Karlsruher Kommentar zum OWiG, 5th ed. 2018, § 30 marginal no. 128.

<sup>259</sup> Wache, iin: Erbs/Kohlhaas, Strafrechtliche Nebengesetze, 210th delivery September 2016, § 17 VereinsG marginal no. 1.

tains fines of more than 90 daily units and prison sentences of more than three months, according to sect. 32 (2) No. 5 letter a BZRG. The same shall apply in accordance with sect. 32 (2) No. 8 BZRG for measures of rehabilitation or incapacitation and ancillary penalties. In addition, the certificate of conduct for authorities (sect. 30 (5) and sect. 31 BZRG) includes all convictions which were committed in connection with the engagement in a trade or the operation of an economic enterprise, if the certificate is intended for certain administrative decisions (cf. sect. 149 (2) No. 1 GewO)—e.g. admission to a trade.

A legally imposed regulatory fine of more than 200 euros is entered in the central trade register in accordance with sect. 149 (2) No. 3 GewO, which is also kept by the Federal Office of Justice (BfJ). The aim is to ensure effective protection for the general public.

In addition, several federal states have introduced corruption and contract registers in recent years, which can be used to exclude traders and companies from public contracts. However, the conditions for registration differ. In the federal state of North Rhine-Westphalia, for example, a misconduct is to be entered in the register if it is listed in the catalogue of sect. 5 (1) of the Anti-Corruption Act NRW (KorruptionsbG NRW).<sup>260</sup> The catalogue covers many economic and tax offences, including fraud, subsidy fraud, corruption and tax evasion. According to sect. 5 (2) KorruptionsbG NRW, the registration is not only made in the event of a criminal conviction, but also for the duration of a criminal proceeding or regulatory fining proceeding if there is no reasonable doubt about a ‘serious misconduct’ in view of the evidence.

At the federal level, on the other hand, all plans to establish a central register failed for a long time.<sup>261</sup> Finally, on 1 June 2017, the Bundestag passed a resolution to introduce a nationwide competition register.<sup>262</sup> The register, which will be maintained by the Federal Cartel Office (*Bundeskartellamt*), should be operational by 2020. The registers of the federal states will then be deleted. In particular, legally enforceable convictions, orders to impose penalties or regulatory fines for certain offences will, in accordance with the revised sect. 123 (1) and (4) of the German Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen*)

<sup>260</sup> Gesetz zur Verbesserung der Korruptionsbekämpfung und zur Errichtung und Führung eines Vergaberegisters in Nordrhein-Westfalen (Korruptionsbekämpfungsgesetz – KorruptionsbG) of 16.12.2004, GV NRW 2005, p. 8.

<sup>261</sup> Cf. only BT-Drs. 16/9780; rejecting Beschlussempfehlung und Bericht des Ausschusses für Wirtschaft und Technologie (9. Ausschuss), BT-Drs. 11/11312.

<sup>262</sup> Gesetz zur Einführung eines Wettbewerbsregisters und zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen of 18.7.2017, BGBl. I 2017, p. 2739.

gen: GWB), necessarily lead to exclusion from competition. The offences include not only corruption, terrorist financing, money laundering, withholding of social security contributions and tax evasion, but also fraud and subsidy fraud insofar as these offences are directed against the EU budget or against budgets managed by the EU or on its behalf. The prosecution authorities will be obliged to inform the Federal Cartel Office electronically. The obligation to make an enquiry will normally apply to orders with a value of 30,000 euros or more. However, registration will not automatically lead to exclusion from a tender procedure. Rather, the contracting authorities must examine within their discretionary powers and decide whether a company is excluded.

### 5.3. *Sentencing criteria and guidelines*

#### 5.3.1. *Sentencing criteria*

In criminal law, the punishment is determined in three steps.<sup>263</sup> In a first step, the legal framework of penalties to which the judge is bound (basic offence, qualification, privilege; especially serious cases; less serious cases) is determined.

In a second step, the classification of the offence in the framework is carried out by assessing the unlawfulness and guilt, in accordance with sect. 46 StGB. According to the so-called 'margin theory',<sup>264</sup> this is an act of discretion. The scope is limited downwards by the 'already' guilt-appropriate punishment, and upwards by the 'still' guilt-appropriate punishment. According to sect. 46 (1) sentence 1 StGB, the guilt of the offender—i.e. the unlawfulness, which can be graded according to its severity<sup>265</sup>—is the basis for sentencing. Sect. 46 (1) sentence 2 StGB stipulates that the effects which the sentence can be expected to have on the offender's future life in society shall be taken into account (for instance, loss of employment)<sup>266</sup>—i.e. aspects of prevention.<sup>267</sup> According to sect. 46 (2) sentence 1 StGB, when sentencing, the court shall

<sup>263</sup> Cf. only *von Heintschel-Heinegg*, in: BeckOK-StGB, 35th ed. 1.8.2017, § 46 marginal no. 3 et seq.

<sup>264</sup> BGHSt 7, 28, 32; BGHSt 20, 264, 266 et seq.

<sup>265</sup> *Kühl*, in: Lackner/Kühl/Heger, StGB, 28. ed. 2014, § 46 marginal no. 23.

<sup>266</sup> *Waßmer*, in: Graf/Jäger/Wittig (eds), Wirtschafts- und Steuerstrafrecht, 2nd ed. 2017, § 266 StGB marginal no. 276.

<sup>267</sup> *Kühl*, in: Lackner/Kühl/Heger, StGB, 28. ed. 2014, § 46 marginal no. 26 et seq.

weigh the circumstances in favour of and against the offender. Sect. 46 (2) sentence 2 StGB contains a catalogue of aspects to be considered: the motives and aims; the attitude reflected in the offence and the degree of force of will in its commission; the degree of the violation of the offender's duties; the *modus operandi* and the consequences caused by the offence to the extent that the offender is to blame for them; the offender's prior history and his personal and financial circumstances; his conduct after the offence, particularly his efforts to make restitution for the harm caused, as well as the offender's efforts at reconciliation with the victim. Sect. 46 (3) StGB stipulates that circumstances which are already statutory elements of the offence must not be considered (prohibition of double exploitation). For example, in the case of fraud (sect. 263 StGB), the intention to enrich must not be taken into account.

In a third step, the type and amount of punishment are determined. This includes the choice between imprisonment and a fine, the consideration of warning, deferment and discharge, as well as suspended sentence. The classification of the case has to be based on the average case, whereby it has to be noted that the vast majority of offences achieve only a relatively low degree of severity due to the wide penalty frameworks.<sup>268</sup> A fine is imposed by sect. 40 StGB according to the daily unit system, whereby the court shall determine the amount of the daily unit, taking into consideration personal and financial circumstances. The court shall typically base its calculation on the actual average one-day net income or the average income achievable in one day. A daily unit shall not be set at less than one euro and not at more than 30,000 euros.

Once the sentence has been determined, follow-up decisions may be necessary, in particular measures of rehabilitation and incapacitation.

In regulatory offences law, the fine is also determined in three steps. In a first step, the legal framework for regulatory fines is determined.<sup>269</sup> Sect. 17 (1) OWiG states that the fine shall not be less than five euros and, unless otherwise provided by statute, shall not exceed 1,000 euros. According to sect. 17 (2) OWiG, if the law threatens to impose a regulatory fine for intentional and negligent action without distinction as to the maximum regulatory fine, the maximum sanction for a negligent action shall not exceed half of the maximum regulatory fine imposable.

In a second step, the classification of the offence in the framework is carried out by assessing unlawfulness and guilt in accordance with

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<sup>268</sup> BGHSt 27, 2, 4 et seq.

<sup>269</sup> Cf. only Bohnert/Krenberger/Krumm, OWiG, 4th ed. 2016, § 17 marginal no. 1 et seq.

Sect. 17 (3) OWiG, whose three criteria are based on sect. 46 StGB.<sup>270</sup> Sect. 17 (3) sentence 1 OWiG states that the significance of the offence and the charge faced by the perpetrator shall form the basis for the assessment. The objective significance is given first and foremost, and thus takes precedence over the subjective charge. It depends on the content and scope of the act. The degree and extent of endangerment or impairment of the legal goods shall be decisive.<sup>271</sup> The assessment criteria are:<sup>272</sup> the frequency of similar violations; the type of execution; and the duration. The objective significance is also relevant for the subjective charge. The more serious it is, the more serious the charge will be.<sup>273</sup> In addition, special subjective circumstances can increase or decrease the charge.<sup>274</sup> For example, relevant predicate offences increase the charge, while confession, insight and remorse alleviate it. According to sect. 17 (3) sentence 2 OWiG, the perpetrator's financial circumstances shall also be taken into account. In practice, the financial circumstances are regarded as an equally important factor in the event of serious offences.<sup>275</sup> The financial circumstances arise from the income and assets at the time the fine is imposed, taking into account debts and alimony obligations.<sup>276</sup> Other circumstances may be taken into account at a lower level.<sup>277</sup> In this way, the effects on the public<sup>278</sup> or the perpetrator's lack of regret<sup>279</sup> can be taken into account. However, the presumption that the employer will reimburse the regulatory fine does not justify a higher fine.<sup>280</sup> Apart from that, the prohibition of double exploitation (sect. 46 (3) StGB) also applies to regulatory offences.<sup>281</sup>

In a third step, the amount of the regulatory fine is determined. In this context, all burdening and exonerating circumstances, as well as the perpetrator's financial circumstances, must be taken into account and

<sup>270</sup> Bohnert/Krenberger/Krumb, OWiG, 4th ed. 2016, § 17 marginal no. 7.

<sup>271</sup> Görtler, in: Göhler, OWiG, 17th ed. 2017, § 17 marginal no. 16.

<sup>272</sup> Bohnert/Krenberger/Krumb, OWiG, 4th ed. 2016, § 17 marginal no. 9.

<sup>273</sup> Görtler, in: Göhler, OWiG, 17th ed. 2017, § 17 marginal no. 17.

<sup>274</sup> Katalog bei Bohnert/Krenberger/Krumb, OWiG, 4th ed. 2016, § 17 marginal no. 11.

<sup>275</sup> Görtler, in: Göhler, OWiG, 17th ed. 2017, § 17 marginal no. 22.

<sup>276</sup> Mitsch, in: Karlsruher Kommentar zum OWiG, 5th ed. 2018, § 17 marginal no. 87.

<sup>277</sup> Görtler, in: Göhler, OWiG, 17th ed. 2017, § 17 marginal no. 15, 26 et seq.

<sup>278</sup> Bohnert/Krenberger/Krumb, OWiG, 4th ed. 2016, § 17 marginal no. 12.

<sup>279</sup> Görtler, in: Göhler, OWiG, 17th ed. 2017, § 17 marginal no. 26a.

<sup>280</sup> Mitsch, in: Karlsruher Kommentar zum OWiG, 5th ed. 2018, § 17 marginal no. 56.

<sup>281</sup> Bohnert/Krenberger/Krumb, OWiG, 4th ed. 2016, § 17 marginal no. 23.

weighed against each other. Sect. 17 (4) OWiG also provides for absorption of the financial benefit. Absorption of the advantage constitutes the ‘base’ of the sanction on which the regulatory fine is imposed, if necessary beyond the statutory maximum.

### 5.3.2. Guidelines

Guidelines on fines exist in areas where very high fines can be imposed. For antitrust law, the Guidelines for the Setting of Fines in Cartel Administrative Offence Proceedings<sup>282</sup> should be mentioned. In exercising its discretionary powers and in accordance with sect. 81 (7) GWB, the Bundeskartellamt (BKartA) laid down guidelines by which it will proceed against companies and associations of companies in assessing the punitive element of fines imposed for ‘serious’ cartel administrative offences. For securities trading, in February 2017 the German Federal Financial Supervisory Authority (BaFin) issued the WpHG-Administrative Fine Guidelines II.<sup>283</sup> These guidelines supplement the previous Guidelines (I) from November 2013.

In addition, for areas in which low fines are frequently imposed, there are catalogues of fines that take into account the need for schematic legal consequences in case of minor offences. They have the advantage of easy handling, but the disadvantage, on the other hand, that all cases are treated in the same way. The most important catalogue is that of road traffic law.<sup>284</sup>

### 5.4. Confiscation

Confiscation is envisaged in criminal law and regulatory offences law. In some cases, it is a punishment; in others, it is a preventive measure *sui generis* or a measure of incapacitation.

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<sup>282</sup> Leitlinien für die Bußgeldzumessung in Kartellordnungswidrigkeitenverfahren (25.6.2013), <https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Leitlinien/Bekanntmachung%20-%20Bu%C3%9Fgeldleitlinien-Juni%202013.html>.

<sup>283</sup> WpHG-Bußgeldleitlinien II (February 2017), <https://www.bafin.de>.

<sup>284</sup> Anlage 1 zu § 1 Abs. 1 der Verordnung über die Erteilung einer Verwarnung, Regelsätze für Geldbußen und die Anordnung eines Fahrverbotes wegen Ordnungswidrigkeiten im Straßenverkehr vom 14.3.2013 (BGBl. I p. 498), zuletzt durch Art. 3 der Verordnung vom 18.5.2017 (BGBl. I p. 1282) geändert (Bußgeldkatalog-Verordnung, BKatV).

#### 5.4.1. Criminal law

In criminal law, confiscation of what was obtained by an offence is provided for in sect. 73 et seq. StGB, which was redesigned as of 1 July 2017 by a major reform.<sup>285</sup> The former so-called *Verfall* is now termed *Einziehung* (confiscation). The new provisions apply retroactively to all criminal proceedings which had not been concluded by 1 July 2017. To the extent that the confiscation of a particular object is impossible, the court shall order the confiscation of a sum of money which corresponds to the value of what was obtained, unless this is excluded (cf. sect. 73c, 73d, 73e StGB). The collection of the monetary value is also possible (sect. 76 StGB).

The confiscation of what was obtained by principals and secondary participants shall be mandatorily ordered in accordance with sect. 73 (1) StGB. The court shall order the confiscation of what was obtained ‘by’ (*durch*) an unlawful act or ‘for’ (*für*) it. In contrast to the former *Verfall*, in which the entirety of what had been obtained was seized in accordance with the so-called gross principle (*Bruttoprinzip*)—i.e. without any expenses being taken into account<sup>286</sup>—now, using the *Einziehung* principle, what had been obtained less expenses is determined in two steps.<sup>287</sup> Therefore, a softened gross principle applies. In a first step, what was obtained is to be determined purely from an objective point of view (*rein gegenständlich*), oriented on the enrichment law (*Bereicherungsrecht*) of the German Civil Code (Bürgerliches Gesetzbuch: BGB). In a second step, the extent or value of what was obtained is determined, taking into account expenses. Although, by the former *Verfall*, the principal or secondary participant was often deprived of more than he had received, the jurisprudence always denied a punitive character and regarded it as a preventive measure *sui generis* and a quasi-conditional compensation measure.<sup>288</sup> The same will also apply to the new confiscation. In addition, in accordance with sect. 73 (2) StGB, the confiscation shall extend to benefits derived from what was obtained—i.e. fruits of the law and benefits of use.<sup>289</sup> In accordance with sect. 73 (3), the order may also extend to objects which the principal or secondary

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<sup>285</sup> BGBI. I p. 872.

<sup>286</sup> Cf. only BGH wistra 2010, 477, 479; *Waßmer*, in: Fuchs (ed.), WpHG, 2nd ed. 2016, § 38 marginal no. 220.

<sup>287</sup> Bundestag document No. 18/9525, 56 (62).

<sup>288</sup> BGHSt 47, 260, 265; BVerfG NJW 2004, 2073; critical *Eser*, in: Schönke/Schröder, StGB, 29. ed. 2014, § 73 marginal no. 2, 4.

<sup>289</sup> *Heuchemer*, in: BeckOK-StGB, 35th ed. 1.8.2017, § 73 marginal no. 29.

participant has acquired by way of sale of an object (No. 1) as replacement for its destruction, damage or forcible loss or on the basis of a surrogate right (No. 2).

Furthermore, since 1 July 2017, by sect. 73a StGB, so-called ‘extended confiscation’ (*Erweiterte Einziehung*) has become generally possible. Sect. 73a (1) StGB states that the court shall order the confiscation of objects if they have been obtained by or on behalf of another unlawful act. This should make it possible to confiscate illegally acquired assets even if their origin cannot be ascertained from a specific offence. The extended confiscation shall not be punitive.<sup>290</sup> The legislator<sup>291</sup> wanted to create an effective way of absorbing illegal profits, in particular to combat organised crime; the continuation of an illegal asset allocation shall be prevented and thus the incentive to commit offences shall be removed. At the same time, capital for further offences shall be withdrawn, and so a general preventive effect<sup>292</sup> shall be achieved.

In accordance with sect. 73b StGB, it is also possible to confiscate what was obtained by third parties. This form of confiscation is not considered a punishment but only ‘profit absorption in line with interests’.<sup>293</sup> Confiscation shall be ordered, on the one hand, in accordance with sect. 73b (1) sentence 1 No. 1 StGB, if the principal or secondary participant has acted ‘for’ the third party—i.e. in particular for a legal person or association of persons. On the other hand, in accordance with sect. 73b (1) sentence 1 no. 2 StGB, confiscation is also possible if what was obtained has been transferred free of charge or for no legal reason (letter a) or has been transferred, and the third party has recognised or should have recognised that it stems from an unlawful act (letter b). The same shall apply in accordance with sect. 73b (1) sentence 1 No. 3 StGB if obtained property has been transferred to the third party as an heir (letter a) or beneficiary of the compulsory portion or legacy holder (letter b).

Finally, sect. 74 et seq. StGB provides for the confiscation of the products, means and objects of the offence. The new law no longer distinguishes between the punitive character and the security character as a ‘mixed institution’.<sup>294</sup> Here, too, the value can be recovered as a substitute if confiscation is impossible (cf. sect. 74c StGB) and, where appli-

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<sup>290</sup> BVerfG NJW 2004, 2073.

<sup>291</sup> Bundestag document No. 12/989, 1.

<sup>292</sup> *Heuchemer*, in: BeckOK-StGB, 35th ed. 1.8.2017, § 73a marginal no. 1.

<sup>293</sup> *Heuchemer*, in: BeckOK-StGB, 35th ed. 1.8.2017, § 73a marginal no. 1.

<sup>294</sup> *Heuchemer*, in: BeckOK-StGB, 35th ed. 1.8.2017, § 74 marginal no. 28.

cable, retroactively (sect. 76 StGB). The actions of organs or representatives of a legal person or association of persons are attributed (cf. sect. 75 StGB), whereby confiscation can take place against the corporation.

Under the new law, confiscation of the products and means of the offence is permissible as a punishment if it is an intentional offence (sect. 74 (1) StGB).<sup>295</sup> In addition, it is necessary that the principal or secondary participant acted at least with diminished responsibility.<sup>296</sup> Apart from that, he must be the owner of the items (sect. 74 (3) sentence 1 StGB). The confiscation of objects of the offence has to be in accordance with special provisions (sect. 74 (2) StGB). In this respect, sect. 264 (6) sentence 2 StGB permits the confiscation of goods which have been acquired at a lower price through subsidy fraud.<sup>297</sup> Even in these cases, the principal or secondary participant must be the owner of the items (sect. 74 (3) sentence 2 StGB).

In addition, sect. 74a StGB permits the confiscation of the products, means and objects of the offence of third parties. This form of confiscation is similar to punishment,<sup>298</sup> which is why constitutional objections are widespread.<sup>299</sup> The basic condition is that the third party has either contributed by being at least grossly negligent of the fact that the items have been used as a means of offence or object of an offence (No. 1), or that the third party has acquired the items in a reprehensible manner in the knowledge of circumstances that would have permitted confiscation (No. 2). In addition, it is necessary that the items belong to the third party.

Sect. 74b (1) StGB permits confiscation for security reasons, even if the principal or secondary participant has acted without guilt (No. 1), or if the items belong to a third party not involved in the act (No. 2). In the event of a third-party confiscation, an appropriate compensation will be paid from the public treasury (sect. 74b (2) StGB). Compensation is excluded, except for hardship, in three cases: firstly, if the third party, at least by gross negligence, contributed to the fact that the items were used as a means of the offence or were the object of an offence; secondly, if the third party has acquired the items dishonestly with knowledge of circumstances that would have allowed their confiscation; and thirdly, if

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<sup>295</sup> *Heuchemer*, in: BeckOK-StGB, 35th ed. 1.8.2017, § 74 marginal no. 23.

<sup>296</sup> *Heuchemer*, in: BeckOK-StGB, 35th ed. 1.8.2017, § 74 marginal no. 23.

<sup>297</sup> *Perron*, in: Schönke/Schröder, StGB, 29. ed. 2014, § 264 marginal no. 84.

<sup>298</sup> *Heuchemer*, in: BeckOK-StGB, 35th ed. 1.8.2017, § 74a marginal no. 1.

<sup>299</sup> Cf. only *Julius ZStW* 109 (1997), 58, 86.

confiscation without compensation would be lawful on the basis of provisions outside criminal law.

Finally, sect. 76a StGB allows for an independent confiscation procedure (so-called ‘objective procedure’<sup>300</sup>) if, for reasons of fact, no person can be prosecuted or convicted of the offence.

#### 5.4.2. Regulatory offences law

The regulatory offences law also provides for confiscation. In order to simplify the application of the law, the absorption is in principle carried out with the regulatory fine.<sup>301</sup> Therefore, according to sect. 17 (4) sentence 1 OWiG, the regulatory fine shall exceed the financial benefit that the perpetrator has obtained from commission. If the statutory maximum does not suffice for that purpose, in accordance with sect. 17 (4) sentence 2 OWiG, it may be exceeded. In the prevailing opinion, unlike the former *Verfall* in criminal law, the absorption of benefits is carried out in accordance with the so-called net principle (*Nettoprinzip*)<sup>302</sup>—i.e. a netting takes place in which costs and other expenses incurred are deducted from the obtained amount.

If the perpetrator has gained something for an act or arising out of an act, and if a regulatory fine has not been imposed on him, in accordance with sect. 29a (1) OWiG, confiscation of a sum up to the amount of the advantage gained may be ordered. This provision was also amended. As in criminal law, what was obtained is now to be determined in two steps.<sup>303</sup> In the case of a confiscation against third parties, according to sect. 29a (2) OWiG, it is also possible to confiscate a sum up to the amount corresponding to the value obtained.

The regulatory offences law also provides for the confiscation of items in sect. 22 et seq. OWiG. Contrary to criminal law, confiscation is only permissible if it is expressly permitted by law. As in criminal law, confiscation has different purposes.

Finally, sect. 29 OWiG permits the confiscation of items from a legal person or an association of persons if an organ or representative has acted.

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<sup>300</sup> *Heuchemer*, in: BeckOK-StGB, 35th ed. 1.8.2017, § 76a marginal no. 1.

<sup>301</sup> *Heuchemer*, in: BeckOK-StGB, 35th ed. 1.8.2017, § 74 marginal no. 23.

<sup>302</sup> BGH NJW 2017, 2565, 2567; *Wäßmer*, in: Fuchs (ed.), WpHG, 2nd ed. 2016, § 39 marginal no. 341.

<sup>303</sup> Bundestag document No. 18/9525, 56, 62.

## 5.5. Enforcement practice

There are no official statistics in Germany that comprehensively record the actual level of penalties or regulatory fines imposed on managers or corporations for the commission of PIF offences. Nevertheless, the available statistics show that the penalties and regulatory fines are generally mild, since the frameworks are far from being exhausted.

### 5.5.1. Criminal law

The penalties imposed by courts are based on the prosecution statistics published annually by the Federal Statistical Office (*Statistisches Bundesamt*). In 2015, 88,894 persons were sentenced for (general) fraud (sect. 263 (1) StGB), comprising 83,256 persons for simple fraud (sect. 263 (1) StGB) and 5,638 persons for serious cases (sect. 263 (3) and (5) StGB).<sup>304</sup> Under general criminal law 85,972 persons were sentenced: 73,618 to a fine (85.6 per cent), 12,354 to prison (14.4 per cent). In 9,661 cases (78.2 per cent), the courts suspended the enforcement of the sentence for a probationary period.<sup>305</sup>

Of the 12,354 imprisonments, 2,619 were for under six months (21.1 per cent), 1,406 were for six months (11.4 per cent), 1,977 ranged from six to nine months (16 per cent), 2,341 from nine to twelve months (18.9 per cent), 3,217 from one to two years (26 per cent), 503 from two to three years (4.1 per cent), 253 from three to five years (2 per cent) and 38 from five to ten years (0.3 per cent).<sup>306</sup> This means that 67.5 per cent of all imprisonments were up to one year and the penalty framework (simple fraud: up to five years) was far from being exhausted.

For the 73,618 fines, 7,327 were under 15 daily units (10 per cent), 26,402 ranged from 16 to 30 (35.9 per cent), 34,530 from 31 to 90 (46.9 per cent), 5,025 from 91 to 180 (6.8 per cent), 324 from 181 to 360 daily units (0.4 per cent), and more than 361 daily units were imposed in just ten cases (0.01 per cent).<sup>307</sup> This means that 92.3 per cent of the fines reached only up to 90 daily units, whereupon the sentenced person is not deemed to have a criminal record.

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<sup>304</sup> Statistisches Bundesamt (ed.), *Rechtspflege Strafverfolgung 2015*, p. 25, 37.

<sup>305</sup> Statistisches Bundesamt (ed.), *Rechtspflege Strafverfolgung 2015*, p. 92 et seq.

<sup>306</sup> Statistisches Bundesamt (ed.), *Rechtspflege Strafverfolgung 2015*, p. 160 et seq.

<sup>307</sup> Statistisches Bundesamt (ed.), *Rechtspflege Strafverfolgung 2015*, p. 196.

### 5.5.2. Regulatory offences law

The Federal Office of Justice (*Bundesamt für Justiz*) collects all decisions on regulatory fines for the central trade register (*Gewerbezentralregister*). Sect. 149 (2) No. 3 of the Trade Code (GewO) provides that decisions on regulatory fines are to be entered for a regulatory offence which a) is committed in connection with the operation or activity of a commercial enterprise or b) is carried out by a representative within the meaning of sect. 9 OWiG or by a person expressly designated as the person responsible in a legal provision. A further prerequisite is that the fine amounts to more than 200 euros.

The Federal Office of Justice maintains partial registers for natural persons as well as legal persons and associations. However, the partial register for natural persons only indicates the type of business in which a regulatory fine was imposed. Therefore, it is not clear whether fines were imposed according to sect. 130 OWiG. In 2015,<sup>308</sup> 34,046 registrations were made in accordance with sect. 149 (2) No. 3 GewO: 8,897 fines of up to 300 euros (25.9 per cent), 18,818 fines from 300 up to 1,000 euros (54.7 per cent), 5,772 fines from 1,000 up to 5,000 euros (16.8 per cent), 483 fines from 5,000 up to 20,000 euros (1.4 per cent), 51 fines from 20,000 up to 50,000 euros (0.15 per cent) and 25 fines of over 50,000 euros (0.07 per cent).

The partial register for legal persons and associations contains decisions on regulatory fines pursuant to sect. 30 OWiG. In 2015,<sup>309</sup> 2,907 registrations were made in accordance with sect. 149 (2) No. 3 GewO: 507 fines of up to 300 euros (17.4 per cent), 1,396 fines from 300 up to 1,000 euros (48 per cent), 738 fines from 1,000 up to 5,000 euros (25.4 per cent), 171 fines from 5,000 up to 20,000 euros (5.9 per cent), 32 fines from 20,000 up to 50,000 euros (1.1 per cent) and 63 fines of over 50,000 euros (2.2 per cent). Therefore, the framework of up to ten million euros is not even approached in the vast majority of cases.

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<sup>308</sup> Bundesamt für Justiz (ed.), *Übersicht über die Eintragungen im Gewerbezentralregister (Teilregister für natürliche Personen)*, as at: 31.12.2016, table 01.

<sup>309</sup> Bundesamt für Justiz (ed.), *Übersicht über die Eintragungen im Gewerbezentralregister (Teilregister für juristische Personen und Personenvereinigungen)*, as at 31.12.2016, table 01.

## 6. Relationship with punitive administrative law

### 6.1. Parallel criminal and administrative proceedings against the head of business

In German law, either a regulatory fining proceeding or a criminal proceeding must be carried out, whereby criminal proceedings take precedence in case of a criminal offence.<sup>310</sup> That priority is secured by several regulations.

Pursuant to sect. 35 (1) OWiG, the administrative authorities shall be responsible for prosecuting and punishing regulatory offences (primary jurisdiction). If the administrative authority has evidence that the act is a criminal offence, it must hand the matter over to public prosecution (sect. 41 (1) OWiG). Conversely, the public prosecution office has to return the matter to the authority if it refrains from criminal proceedings (sect. 41 (2) OWiG).

In criminal proceedings, the public prosecution office is responsible for prosecuting the offence in accordance with sect. 40 OWiG, even from the legal point of view of a regulatory offence. The administrative authority must therefore submit a preliminary investigation. This primary jurisdiction of the public prosecution office is only breached by way of exception—e.g. by sect. 82 of the Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*: GWB) and sect. 96 of the Energy Industry Act (*Energiewirtschaftsgesetz*: EnWG).

In addition, the public prosecution office may, in accordance with sect. 42 (1) sentence 1 OWiG, take over prosecution of a regulatory offence until a fine decision has been issued if a criminal offence connected with the regulatory offence is being pursued (secondary jurisdiction). Such a connection exists, in accordance with sect. 42 (1) sentence 2 OWiG, if, with regard to the same offence, someone is accused of both a criminal offence and a regulatory offence, or if a person is accused of a criminal offence and another of a regulatory offence. However, according to sect. 42 (2) OWiG, the public prosecution office shall take over prosecution only for the purpose of accelerating the proceedings or on account of the factual connection or if, for other reasons, it is deemed appropriate for the investigation.

In the course of regulatory fining proceedings, in accordance with sect. 81 OWiG, criminal proceedings shall be initiated if the court finds

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<sup>310</sup> Cf. only *Seith*, in: Blum/Gassner/Seith (eds), OWiG, 2016, § 41 marginal no. 1.

that the act can also be interpreted as a criminal offence. In this case, the person concerned shall be informed of the change in the legal assessment at the request of the public prosecution office or *ex officio* (sect. 81 (1) sentence 2 and (2) sentence 1 OWiG). Upon this information, the person concerned shall have the legal status of a defendant (sect. 81 (2) sentence 2 OWiG). The hearing shall be adjourned if the court finds it necessary or if the defendant requests it. The hearing shall be interrupted if the court considers this to be necessary or if the defendant so applies (sect. 81 (2) sentence 3 OWiG). In further proceedings, the special provisions of the regulatory fining proceedings shall no longer apply (sect. 81 (3) sentence 1 OWiG). Thus, a further charge is no longer necessary, but the court changes the aspect and the form of the proceedings by its own decision.<sup>311</sup>

Sect. 82 OWiG regulates the reverse case if the court carries out criminal proceedings and the indictment contains a regulatory offence or if there is a mere regulatory offence. According to sect. 82 (1) OWiG, the court shall also evaluate the offence referred to in the indictment from the legal point of view of a regulatory offence. In accordance with sect. 82 (2) OWiG, the special provisions of the OWiG shall apply in further proceedings, where the court admits the indictment for a main hearing only from the legal point of view of a regulatory offence.

Finally, sect. 83 OWiG contains rules for mixed proceedings. In accordance with sect. 83 (1) OWiG, the procedural simplifications provided for the fining proceedings shall apply to the procedural part relating to the regulatory offence. The reason for this is that the simplification of procedures should be maintained despite the connection.<sup>312</sup>

#### *6.1.1. Trans-procedural use of evidence against the head of business*

With the transition to criminal proceedings, only the provisions of the Code of Criminal Procedure (*Strafprozessordnung*: StPO) apply. According to sect. 81 (3) sentence 2 and half-sentence 1 OWiG, evidence taken up to that point in the presence of the person concerned may also be used if it has been taken pursuant to the special provisions of the OWiG. In this case, witnesses and experts do not have to be questioned again, documents do not have to be read out again, and a site inspection

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<sup>311</sup> Bohnert/Krenberger/Krumm, OWiG, 4th ed. 2016, § 81 marginal no. 2.

<sup>312</sup> Lutz, in: Karlsruher Kommentar zum OWiG, 5th ed. 2018, § 83 marginal no. 1.

does not have to be repeated.<sup>313</sup> The reason for this is a principle of German criminal procedure law according to which trial proceedings must take place in the presence of the accused. Exploitation of evidence which took place without the defendant and did not give him the opportunity to question evidence would not be acceptable.<sup>314</sup>

However, pursuant to sect. 81 (3) sentence 2 and half-sentence 2 OWiG, this shall not apply to a simplified taking of evidence. This concerns cases in which the taking of evidence must be repeated in accordance with the rules of criminal procedure:

Replacement of the examination of a witness, of an expert or of another person concerned by a reading aloud of the records regarding a previous examination or of documents containing a written statement made by them (sect. 77a (1) OWiG).

Reading out statements by authorities and other agencies regarding their official observations, investigations and knowledge, as well as regarding those of their staff, even if the preconditions contained in sect. 256 StPO do not apply (sect. 77a (2) OWiG).

Obtaining a statement from an authority by telephone and stating its substantial content at the main hearing (sect. 77a (3) OWiG).

Stating the substantial content of a document (sect. 78 (1) sentence 1 OWiG).

Including a statement in the record, if the person concerned, a defence counsel and the representative of the public prosecution office have taken cognisance of the wording of the document or had an opportunity to do so (sect. 78 (1) sentence 2 OWiG).

It should also be noted that evidence is excluded if its use is prohibited. However, there are only a few legal prohibitions on use of evidence in German law. For example, according to sect. 136a (3) sentence 2 StPO, statements which were obtained using prohibited interrogation methods (for instance, torture) shall not be used. There is no general rule in German law as to when an unwritten prohibition is to be assumed. Prohibitions can result from the rule of law, the imperative of a fair procedure and fundamental rights.<sup>315</sup> According to the theory of legal spheres, in case of the violation of a standard,

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<sup>313</sup> *Seitz/Bauer*, in: Göhler, OWiG, 17. ed. 2017, § 81 marginal no. 23.

<sup>314</sup> *Lutz*, in: Karlsruher Kommentar zum OWiG, 5th ed. 2018, § 81 marginal no. 26.

<sup>315</sup> Vgl. *Wäßmer*, in: Fuchs (ed.), WpHG, 2nd ed. 2016, § 40 marginal no. 49.

it must be ascertained on a case-by-case basis whether the violation substantially affects the legal sphere of the party concerned.<sup>316</sup> The theory of protective purpose examines whether the violated standard is intended to exclude an unlawfully obtained result of the evidence from use of evidence.<sup>317</sup> Today's prevailing opinion is based on the theory of interest consideration, according to which, in each case, a comprehensive weighing of the interests of prosecution against the individual interests concerned is required.<sup>318</sup> This means that only serious and deliberate violations by the prosecution authorities lead to a prohibition on use of evidence, not merely negligent or clumsy violations.<sup>319</sup>

Finally, it is important that procedural errors or violations of prohibitions on collection of evidence do not have a remote effect. The 'fruit of the poisonous tree' doctrine is, unlike in the Anglo-American area, not recognised by the prevailing opinion.<sup>320</sup> Insights gained through unlawful measures may be used as a so-called 'trace approach' (*Spurenansatz*) for obtaining new evidence.<sup>321</sup> The jurisdiction argues that it is unacceptable that a procedural error paralyses the entire criminal procedure, and that an effective fight against crime requires a limitation of the effects of violation.<sup>322</sup> Only in the case of particularly serious violations, such as illegal housing surveillance,<sup>323</sup> for example, is it not permitted to make use of the trace approach.

#### *6.1.2. Admissibility and use of foreign evidence against the head of business*

In criminal proceedings, sect. 261 StPO states that the principle of free evaluation of evidence applies. This principle also applies in regulatory fining proceedings via sect. 46 (1) OWiG. In order to establish the truth, under sect. 244 (2) StPO, the court shall, *proprio motu*, extend the taking of evidence to all facts and means of proof relevant to the decision.

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<sup>316</sup> BGHSt 11, 213, 215 et seq.

<sup>317</sup> *Rudolphi* MDR 1970, 92, 97 et seq.

<sup>318</sup> BGHSt 47, 172, 179; BVerfG NJW 2009, 3225; *Rogall* NStZ 1988, 385, 392.

<sup>319</sup> Cf. only BGH wistra 2010, 231.

<sup>320</sup> Cf. only *Roxin/Schünemann*, Strafverfahrensrecht, 29. ed. 2017, § 24 marginal no. 60.

<sup>321</sup> BGHSt 27, 355, 358.

<sup>322</sup> BGHSt 34, 362, 364 et seq.

<sup>323</sup> BVerfGE 109, 279, 332.

In regulatory fining proceedings, sect. 77 (1) sentence 1 OWiG also stipulates that the court is obliged to investigate the truth. However, according to sect. 77 (1) sentence 2 OWiG, the court shall also refer to the importance of the matter. The court should not be obliged to exhaust every source of knowledge down to the last remnant even in the simplest case.<sup>324</sup>

In the context of the taking of evidence, findings from foreign proceedings may also be introduced, in particular through the testimony of witnesses and the reading out of documents. The use of evidence is only excluded if a legal prohibition exists or if the consideration of interests exceptionally indicates that the individual interests of the accused outweigh the interests of persecution.

In German law, with sect. 393 (2) sentence 1 of the Fiscal Code (*Abgabenordnung*: AO), there exists a legal prohibition on the use of taxation procedures. Where, during criminal proceedings, the public prosecutor's office or the court learns from tax records of facts or evidence which the taxpayer, in compliance with his obligations under tax law, revealed to the revenue authority before or in ignorance of the initiation of criminal proceedings, this knowledge may not be used against him for the prosecution of an act that is not a tax crime. However, it is possible to exploit further facts or evidence that have only been ascertained on basis of the tax records.<sup>325</sup> In addition, in accordance with sect. 393 (2) sentence 2 AO, the prohibition of use shall not apply if there is a compelling public interest (sect. 30 (4) no. 5):

- (a) felonies and wilful serious offences against life and limb or against the state;
- (b) economic crimes, which are likely to substantially disrupt the economic order or to substantially undermine general confidence in the integrity of business dealings or the orderly functioning of authorities and public institutions;
- c) if disclosure is necessary to correct publicly disseminated incorrect facts.

Finally, sect. 161 (2) StPO must be observed. According to this section, personal data that have been obtained as a result of a measure taken pursuant to another statute may only be used as evidence

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<sup>324</sup> *Hettenbach*, in: BeckOK-OWiG, 16th ed. 15.7.2017, § 77 marginal no. 1.

<sup>325</sup> *Bachler*, in: BeckOK-StPO, 27. ed. 1.1.2017, § 393 AO marginal no. 11.

to clear up an offence without the consent of the person affected by the measure if such a measure could have been ordered (so-called ‘hypothetical reserve intervention’: *hypothetischer Ersatzeingriff*).<sup>326</sup> This prohibition is intended to prevent circumvention of the strict provisions of criminal proceedings and regulatory fining proceedings. However, only data from authoritative measures which have no equivalent in the StPO or OWiG are excluded. In addition, the prohibition of use of evidence is also invalidated by the fact that findings may be used as a ‘trace approach’ for obtaining new evidence.<sup>327</sup>

### 6.1.3. *Administrative investigations and right to silence of the head of business*

In case of regulatory fining proceedings, at the commencement of the first examination the person concerned shall be informed of the regulatory offence with which he is charged and of the applicable law provisions, and shall be advised that the law grants him the right to respond to the charges or not to make any statement (sect. 136 (1) sentence 1 StPO in conjunction with sect. 46 (1) OWiG). This applies not only to the first examination by a court, but also to the first examination by an administrative authority (sect. 163a (3) sentence 2 StPO), which, in the course of regulatory fining proceedings, takes on the role of the public prosecutor’s office (sect. 46 (2) OWiG). Apart from that, mere hearing of the person concerned is sufficient for regulatory fining proceedings—in contrast to criminal proceedings—in accordance with sect. 55 (1) OWiG. The hearing may take the form of an oral hearing, or may provide the opportunity to make a written statement by sending a questionnaire.<sup>328</sup> The reason for this simplification is that regulatory fining procedures are geared towards accelerated execution, the degree of unlawfulness is lower and the sanctions are less severe.<sup>329</sup> However, the person concerned must always, even in cases of a mere hearing, be informed of the accusation and of the right to silence.<sup>330</sup> Thus, the person concerned is entitled to a comprehensive right to silence which is based

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<sup>326</sup> BT-Drs. 16/5846, p. 64.

<sup>327</sup> *Waßmer*, in: Fuchs (ed.), WpHG, 2nd ed. 2016, § 40 marginal no. 32.

<sup>328</sup> *Straßer*, in: BeckOK-OWiG, 16th ed. 1.7.2017, § 55 marginal no. 23 et seq.

<sup>329</sup> *Schulz*, in: Blum/Gassner/Seith (eds), OWiG, 2016, § 55 marginal no. 1.

<sup>330</sup> *Straßer*, in: BeckOK-OWiG, 16th ed. 1.7.2017, § 55 marginal no. 38 et seq.

on the *nemo tenetur* principle and the guarantees of fair proceedings laid down in Art. 6 ECHR.<sup>331</sup>

If the right to silence is not instructed, there is, according to the prevailing opinion in the literature, as in criminal proceedings, a prohibition on the use of statements unless it is certain that the person concerned was aware of the right without being instructed.<sup>332</sup> However, the jurisdiction has left it open as to whether a prohibition exists in regulatory fining proceedings.<sup>333</sup> Nevertheless, this is supported by the fact that the person concerned shall be guaranteed a fair trial and shall not be taken by surprise.<sup>334</sup> However, there is no prohibition of use if the person concerned spontaneously made a statement prior to the instruction.<sup>335</sup>

If an official supervisory procedure (for instance, in the area of securities supervision) coincides with a regulatory fining procedure, the supervisory procedure must be carried out in accordance with the provisions on the regulatory fining procedure.<sup>336</sup> In particular, the right to silence of the person concerned shall not be undermined by a request for information under supervisory law (so-called ‘prohibition of role reversal’: *Verbot der Rollenvertauschung*).<sup>337</sup> If this aspect is disregarded, there is a prohibition on the use of evidence obtained in supervisory procedure.<sup>338</sup>

## 6.2. Multiple and parallel criminal and administrative proceedings against the legal person and the head of business

In German law, integrated proceedings must be conducted against the organ or representative on the one hand, and against the legal person or association of persons on the other.

German law provides for a concentration of proceedings. The decision on a regulatory fine pursuant to sect. 30 OWiG shall in principle be

<sup>331</sup> *Monka*, in: BeckOK-StPO, 27. ed. 1.1.2017, § 136 marginal no. 7.

<sup>332</sup> Cf. only *Bohnert/Krenberger/Krumm*, OWiG, 4th ed. 2016, § 46 marginal no. 83.

<sup>333</sup> BGHSt 38, 214, 228; OLG Oldenburg VRS 1988, 286.

<sup>334</sup> *Lutz*, in: Karlsruher Kommentar zum OWiG, 5th ed. 2018, § 55 marginal no. 16.

<sup>335</sup> BGH NJW 1990, 461; *Monka*, in: BeckOK-StPO, 27. ed. 1.1.2017, § 136 marginal no. 22.

<sup>336</sup> *Waßmer*, in: *Fuchs* (ed.), WpHG, 2nd ed. 2016, § 40 marginal no. 30.

<sup>337</sup> *Waßmer*, in: *Fuchs* (ed.), WpHG, 2nd ed. 2016, § 40 marginal no. 30.

<sup>338</sup> *Waßmer*, in: *Fuchs* (ed.), WpHG, 2nd ed. 2016, § 40 marginal no. 31.

taken uniformly with the decision on the criminal or regulatory offence committed by the organ or representative.<sup>339</sup> Sect. 30 (4) OWiG only allows independent (isolated) proceedings if criminal or regulatory fining proceedings are not commenced, or if such proceedings are discontinued, or if imposition of a criminal penalty is dispensed with. Sect. 444 (1) sentence 1 StPO stipulates that if, in criminal proceedings, a decision has to be given on imposition of a regulatory fine against a legal person or an association of persons, the court shall order their participation in the proceedings in respect of the offence. According to sect. 88 (1) OWiG, the same applies to regulatory fining proceedings. If an administrative authority decides on the assessment of a regulatory fine against a legal person or an association, that authority shall also be competent to order participation in the proceedings and the appointment of an attorney or of any other person who may be appointed as defence counsel (sect. 444 (1) StPO). Implementing regulations can be found in the Guidelines for Criminal Procedure and Penalty Proceedings (*Richtlinien für das Strafverfahren und das Bußgeldverfahren*: RiStBV). The legal person or association shall have the status of a subsidiary participant (*Nebenbeteiligter*).<sup>340</sup> Sect. 444 StPO secures the right to a hearing (Art. 103 (1) GG), which is also guaranteed to a legal person or association of persons.<sup>341</sup>

In criminal proceedings, the consolidation takes place as follows. If the accused is part of the management, the public prosecutor checks whether the imposition of a regulatory fine against the legal person or association is also possible (No. 180a (1) sentence 1 RiStBV). In this case, the organs or representatives are to be heard in the preparatory proceedings (No. 180a (1) sentence 2 RiStBV). In the indictment or in the petition for a criminal order, the prosecutor then applies for the participation of the legal person or association, in particular if the imposition of a regulatory fine opens up the possibility of taking appropriate account of the economic circumstances, also with regard to the advantage obtained by the offence (No. 180a (2) sentence 1 RiStBV). In the indictment, the prosecutor announces the request for a regulatory fine to be imposed, and in the request for a criminal order he applies for this (No. 180a (2) sentence 3 RiStBV). This is particularly relevant in cases

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<sup>339</sup> Schmidt, in: Karlsruher Kommentar zur StPO, 7th ed. 2013, § 444 marginal no. 1.

<sup>340</sup> OLG Hamm NJW 1973, 1851, 1852.

<sup>341</sup> Inhofer, in: BeckOK-StPO, 27. ed. 1.1.2017, § 444 marginal no. 2.

of white-collar crimes (No. 180a (2) sentence 3 RiStBV). The same applies to regulatory fining proceedings.

Separate proceedings are generally inadmissible, which shall be observed at each stage of proceedings.<sup>342</sup> If criminal proceedings are pending against an organ or representative, the basis for independent proceedings is withdrawn. However, this does not immediately lead to the invalidity of an independent procedure. Only an objection constitutes an obstacle to proceedings.<sup>343</sup> The same shall apply *mutatis mutandis* in case of pending regulatory fining proceedings.<sup>344</sup> If proceedings against an organ or representative have been concluded in a legally binding manner, the subsequent imposition of a regulatory fine against the legal person or association of persons is not possible.<sup>345</sup> If both proceedings have been concluded separately and in a legally binding manner, the decisions are legally incorrect but not void.<sup>346</sup> In this case, however, it is possible to reopen the proceedings (sect. 85 OWiG).<sup>347</sup>

#### 6.2.1. *Trans-procedural use of evidence*

In criminal and regulatory fining proceedings, sect. 261 StPO provides for the principle of free evaluation of evidence (cf. section 6.1.2). The extent to which the court is obliged to clarify facts depends on the circumstances and the previous course of proceedings. Evidence gathered in administrative proceedings against the legal person or association of persons may also be significant. However, the findings made there are not binding; rather, the court always conducts a hearing of evidence, the result of which is decided by the court on the basis of free conviction. The court is not even bound by declarations in final criminal judgments relating to the defendant's previous criminal offences.<sup>348</sup> In the event of a transition from regulatory fining proceedings to criminal

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<sup>342</sup> *Rogall*, in: Karlsruher Kommentar zum OWiG, 5th ed. 2018, § 30 marginal no. 179.

<sup>343</sup> *Rogall*, in: Karlsruher Kommentar zum OWiG, 5th ed. 2018, § 30 marginal no. 180.

<sup>344</sup> *Rogall*, in: Karlsruher Kommentar zum OWiG, 5th ed. 2018, § 30 marginal no. 181.

<sup>345</sup> *Rogall*, in: Karlsruher Kommentar zum OWiG, 5th ed. 2018, § 30 marginal no. 182.

<sup>346</sup> BGH wistra 1990, 67.

<sup>347</sup> *Rogall*, in: Karlsruher Kommentar zum OWiG, 5th ed. 2018, § 30 marginal no. 184.

<sup>348</sup> BGHSt 43, 106, 107 = BGH NJW 1997, 2828.

proceedings, pursuant to sect. 81 (3) sentence 2 OWiG, the evidence taken up to that point in the presence of the person concerned may also be used (cf. 6.1.1).

### *6.2.2. Admissibility and use of foreign evidence*

In proceedings against an organ or representative, information obtained in other proceedings (for instance, in administrative proceedings) may be introduced and taken into account by the hearing of evidence (reading out of documents, hearing of witnesses, statements). This also applies the other way around—i.e. in proceedings against the legal person or association of persons. However, use is excluded if there is a legal prohibition or the individual interests outweigh the pursuit interests (cf. section 6.1.1). In addition, there is a legal prohibition on the use of findings from taxation procedures (cf. section 6.1.2). Finally, with regard to the usability of evidence from non-punitive measures, sect. 161 (2) StPO is relevant (cf. section 6.1.2).

### *6.2.3. Right to silence of the head of business in the proceedings against the legal person*

The organ or representative who is prosecuted for a criminal or regulatory offence has his own constitutionally protected right to silence in unified criminal or regulatory fining proceedings. This results from his position as defendant and from the *nemo tenetur* principle.<sup>349</sup>

On the other hand, the legal person or association of persons in criminal proceedings has, as a subsidiary participant, only a simple statutory right to silence resulting from the equivalence with a defendant (in preliminary proceedings sect. 444 (2) sentence 2, 432 (2), 163a (3) sentence 2, 136 (1) sentence 2 StPO; in main proceedings sections 444 (2) sentence 2, 433 (1), 243 (4) sentence 1 StPO). The same applies to regulatory fining proceedings (sect. 46 (1) OWiG). The right to silence of the legal person or association of persons is exercised by its governing bodies and is not tied to representation in proceedings. The governing bodies have the same status as the defendant and must not be forced into the role of witnesses.<sup>350</sup>

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<sup>349</sup> Vgl. von Galen/Maass, in: Leitner/Rosenau, Wirtschafts- und Steuerstrafrecht, 2017, § 30 OWiG marginal no. 75.

<sup>350</sup> BGHSt 9, 250, 251 = BGH NJW 1956, 1448; OLG Frankfurt GA 1969, 124.

It is controversial whether the legal person or association of persons is also entitled to an independent, constitutionally protected right to silence on the basis of the *nemo tenetur* principle. This is important if the same facts are investigated in various preliminary proceedings against different individual defendants, if the legal person or association is only involved in one procedure as a subsidiary participant, and if the organs are to be used as witnesses in another procedure.<sup>351</sup> In a decision of 26 February 1997,<sup>352</sup> the German Federal Constitutional Court expressly rejected an independent right to silence, since the *nemo tenetur* principle is based on the principle of human dignity (Art. (1) GG) and is therefore not transferable to legal persons; moreover, a regulatory fine imposed on a legal person does not contain a charge of guilt or ethical disapproval but should only compensate for the benefits derived from the act. Today, this jurisdiction is predominantly criticised,<sup>353</sup> as the law on silence might also be based on the constitutional principle of the rule of law (Art. 20 (3) GG), the principle of equality (Art. 3 GG) and the fundamental right to property (Art. 14 GG). Furthermore, in view of the fine framework of sect. 30 (2) OWiG, which has been increased, and in view of the will of today's legislature, which for reasons of deterrence goes beyond mere compensation, it can be assumed that the argumentation of the Federal Constitutional Court is no longer in accordance with the current legal situation.<sup>354</sup> Finally, the case law of the European Court of Justice and the European Court of Human Rights confers on legal persons a right to silence based on Art. 6 (1) ECHR.<sup>355</sup> According to the German Federal Constitutional Court, however, the case-law of both courts must be taken into account when interpreting national law.<sup>356</sup> It does not matter whether the governing body also acts as a litigant in the proceedings, since the right to silence is linked to its function.<sup>357</sup> The right to silence ap-

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<sup>351</sup> Vgl. von Galen/Maass, in: Leitner/Rosenau, Wirtschafts- und Steuerstrafrecht, 2017, § 30 OWiG marginal no. 77.

<sup>352</sup> BVerfGE 95, 220, 242 = BVerfG NJW 1997, 1841.

<sup>353</sup> Rogall, in: Karlsruher Kommentar zum OWiG, 5th ed. 2018, § 30 marginal no. 209.

<sup>354</sup> Vgl. von Galen/Maass, in: Leitner/Rosenau, Wirtschafts- und Steuerstrafrecht, 2017, § 30 OWiG marginal no. 78.

<sup>355</sup> Cf. Minoggio wistra 2003, 121, 125 et seq.

<sup>356</sup> Cf. only BVerfG NJW 3428, 3433.

<sup>357</sup> Rogall, in: Karlsruher Kommentar zum OWiG, 5th ed. 2018, § 30 marginal no. 209.

plies not only in the case of a subsidiary participation according to sect. 444 StPO, but also in relation to the questioning of an organ or representative as witness in another procedure insofar as the facts are identical.<sup>358</sup>

However, previous governing bodies may not, in contrast to active bodies, invoke the right to silence.<sup>359</sup> They may therefore be heard as witnesses, as well as other persons belonging to the legal person or association of persons. According to sect. 55 StPO, they are only entitled to refuse to answer any questions the reply to which would subject them or one of their relatives to the risk of being prosecuted for a criminal or regulatory offence.<sup>360</sup>

### *6.3. Relationship between liability of the legal person and liability of the head of business*

#### *6.3.1. Corporation's guilty plea*

German law does not exclude or diminish the individual liability of an organ or representative by virtue of the corporation's guilty plea. Rather, the imposition of a regulatory fine on a legal person or association presupposes that one of the organs or representatives—i.e. one of the persons named in sect. 30 (1) nos. 1 to 5 OWiG—has committed a criminal or regulatory offence. The imposition of the penalty or regulatory fine on the representative shall be independent of the imposition of the fine on the legal person or association of persons.

However, there are three peculiarities. Firstly, in practice, the option of imposing an isolated regulatory fine (sect. 30 (4) sentence 1 OWiG) is used frequently. This applies to cases in which criminal proceedings or regulatory fining proceedings have not been commenced, are discontinued or are dispensed with. Therefore, the proceedings against the person responsible are often suspended on the basis of an agreement between the parties involved, and only a regulatory fine is imposed on the corporation. This consensual solution is very popular because it avoids time-consuming investigations, ty-

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<sup>358</sup> Cf. *von Galen/Maass*, in: Leitner/Rosenau, Wirtschafts- und Steuerstrafrecht, 2017, § 30 OWiG marginal no. 79.

<sup>359</sup> BVerfG BB 1975, 1315.

<sup>360</sup> *Rogall*, in: Karlsruher Kommentar zum OWiG, 5th ed. 2018, § 30 marginal no. 209.

ing up resources and any public hearings with media attention that damage the reputation of a corporation and its decision-makers.<sup>361</sup> Thus, the criminal defence regularly works intensively on suspending proceedings against the defendants.

Secondly, it is possible to impose a so-called anonymous regulatory fine on a legal person or association. This applies to cases in which the identity of the offender—for instance, of a fraud (sect. 263 StGB) or a violation of obligatory supervision (sect. 130 OWiG)—cannot be identified, but it is certain that one of the persons named in sect. 30 (1) Nos. 1 to 5 OWiG is guilty. In these cases, it is certain that an organ or representative has committed the offence; therefore, a regulatory fine can be imposed on the corporation. That is why, in appropriate cases, the governing bodies may attempt to prevent the identification of the person responsible, thereby ensuring that only a regulatory fine is imposed on the corporation.<sup>362</sup>

Thirdly, the imposition of a regulatory fine shall not give rise to double punishment. This would be possible in the case of a so-called one-man corporation, where the person concerned acted in the capacity of both managing director and sole shareholder. In such cases, if the natural person has been sanctioned, a regulatory fine will not be imposed against the corporation.<sup>363</sup>

### *6.3.2. Previous imposition of a regulatory fine against the head of business*

The previous imposition of a regulatory fine is always taken into account in German law. In this context, a distinction must be made as to whether the regulatory fine has been imposed by a criminal court or by a prosecuting authority.

In accordance with sect. 84 (2) sentence 1 OWiG, a legally binding court judgment on the offence as a regulatory offence also precludes its prosecution as a criminal offence. The same applies pursuant to sect. 84 (2) sentence 2 OWiG for a legally binding court order. The court's decision has a barring effect.<sup>364</sup> A prosecution is only possible within the

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<sup>361</sup> *Cordes/Reichling* NJW 2016, 3209, 3210.

<sup>362</sup> *Schmitt-Leonardy*, in: Blum/Gassner/Seith (eds), OWiG, 2016, § 30 marginal no. 58.

<sup>363</sup> *Schmitt-Leonardy*, in: Blum/Gassner/Seith (eds), OWiG, 2016, § 30 marginal no. 60.

framework of a reopening. The reopening of proceedings to the disadvantage of a person, under sect. 85 (3) sentence 1 OWiG in conjunction with sect. 362 StPO, is only possible under very strict conditions, and only for the purpose of creating a conviction in accordance with criminal law:

1. If a document produced as genuine, for the defendant's benefit, at the main hearing was false or forged.
2. If a witness or expert, when giving testimony or an opinion for the defendant's benefit, was guilty of wilful or negligent violation of the duty imposed by the oath, or of wilfully making a false, unsworn statement.
3. If a judge or lay judge participated in drafting the judgment who was guilty of a criminal violation of his official duties in relation to the case.
4. If the person acquitted makes a credible confession, in or outside the court, that he committed the criminal offence.

According to sect. 85 (3) sentence 2 OWiG, the reopening for this purpose shall also be permissible if new facts or items of evidence have been submitted which, separately or in conjunction with former evidence taken, are apt to substantiate conviction for a felony.

According to sect. 84 (1) OWiG, if a regulatory fining notice has become legally effective, the same offence can no longer be prosecuted as a regulatory offence. However, prosecution as a criminal offence is still possible. It is irrelevant whether new circumstances have subsequently become known or the nature of the offence was simply misjudged.<sup>365</sup> In accordance with sect. 86 (1) sentence 1 OWiG, if the person concerned is subsequently sentenced in criminal proceedings for the same act, the regulatory fining notice shall be rescinded to this extent. According to sect. 86 (2) OWiG, amounts of money which have been paid or collected on the basis of the rescinded regulatory fining notice shall be first deducted from an assessed criminal fine, then from the incidental consequences ordered which obligate the offender to effect payment and, lastly, from the costs of the criminal proceedings. The decisions shall be rendered in the judgment or in another final decision (sect. 86 (3) OWiG). Sect. 86 OWiG thus provides a simplified reopening pro-

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<sup>364</sup> OLG Stuttgart NZV 1997, 91, 92; *Ganter*, in: BeckOK-OWiG, 16th ed. 15.7.2017, § 84 marginal no. 15.

<sup>365</sup> *Seitz/Bauer*, in: Göhler, OWiG, 17. ed. 2017, § 84 marginal no. 13.

cedure.<sup>366</sup> This enforces the principle of sect. 21 (1) sentence 1 OWiG, according to which only criminal law shall be applied if an act is a criminal offence and a regulatory offence.

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<sup>366</sup> *Lutz*, in: Karlsruher Kommentar zum OWiG, 5th ed. 2018, § 86 marginal no. 1.



## CHAPTER V

# THE NETHERLANDS NATIONAL REPORT

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## 1. Criteria for imputation of criminal law responsibilities of heads of business and their theoretical justifications

### 1.1. Historical overview

‘A criminal offence can only be committed by a natural person. The fiction of legal personality does not apply to criminal law.’<sup>1</sup>

These words, derived from the explanatory memorandum of the Dutch Penal Code of 1886 (*Wetboek van Strafrecht*; hereafter DPC), are indicative of the vision of the legislator of 1881 regarding the possibility of criminal liability of legal persons. They also clearly reflect the notion of *universitas delinquere non potest* as advocated by Von Savigny.<sup>2</sup> As a consequence, the individuals making up the organs of the judicial person were personally held accountable in case of any corporate misconduct.<sup>3</sup> After all, all alleged corporate criminal acts were, in reality, deemed to be acts of those individuals. This vision was held until the 1930s when the classic *laissez-faire* economic approach began to make way for a more interventionist state. For a state that no longer chose to limit itself to creating the preconditions for individual freedom but actively wanted to regulate and influence social and socioeconomic life in a time of deep economic crisis, ignoring the legal person and its economic power became impossible. It had to be accepted as an independent subject of punitive law.<sup>4</sup> As a consequence, the paradigm in legal theory shifted and started to accept juristic persons as legal realities instead of mere legal fictions.

The envisaged careful introduction of corporate criminal liability was, however, interrupted by the outbreak of the Second World War and its associated occupation legislation. Yet, despite its rash introduction into Dutch law, corporate criminal liability has remained ever since,

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<sup>1</sup> H.J. SMIDT, *Geschiedenis van het Wetboek van Strafrecht*, Band I, revised and supplemented by J.W. Smidt (H.D. Tjeenk Willink, Haarlem 1891) 450.

<sup>2</sup> F.C. VON SAVIGNY, *System des heutigen Römischen Rechts*, Band II (Veit Berlin 1840) 312.

<sup>3</sup> The way in which these provisions were shaped evolved over time, each time reflecting the current point of view on incorporation and management responsibility.

<sup>4</sup> J.A.E. VERVAELE, ‘Historische ontwikkeling van het bijzonder Strafrecht’, in: F.G.H. KRISTEN *et al.* (eds), *Bijzonder strafrecht. Strafrechtelijke handhaving van sociaal-economisch en fiscaal recht in Nederland*, (Boom Lemma Publishers, The Hague 2011), 13-21; D. ROEF, TH. DE ROOS, ‘De strafrechtelijke aansprakelijkheid van de rechtspersoon in Nederland: rechtstheoretische beschouwingen bij enkele praktische knelpunten’, in: M. FAURE, K. SCHWARZ (eds), *De strafrechtelijke en civielrechtelijke aansprakelijkheid van de rechtspersoon en zijn bestuurders* (Intersentia, Antwerp/Groningen 1998) 54-77.

without any real criticism. Moreover, the specific provisions on individual criminal liability of leading figures within corporations are still modelled after this predominantly administrative occupation legislation.<sup>5</sup> The first major post-war application is in the Economic Offences Act of 1950 (*Wet op de Economische Delicten*; hereafter EOA), which enabled corporate criminal liability for—and restricted it to—economic offences. It also prolonged the liability of those that ordered or actually directed these corporate offences. In 1976, a general provision on corporate criminal liability was introduced, the current Article 51 DPC, creating corporate criminal liability for all offences. This article reads as follows:

1. Criminal offences can be committed by natural persons and legal persons.
2. If an offence is committed by a legal person, criminal proceedings may be instituted and the punishments and other measures provided for by law may be implemented where appropriate:
  - a) against the legal person; or
  - b) against those who ordered the commission of the offence (*opdrachtgeven*), as well as those who actually directed the prohibited act (*feitelijk leidinggeven*); or
  - c) against both those named under (a) and (b).
3. For the purpose of the application of the above paragraphs, legal persons shall be deemed to include an unincorporated company, a partnership, a shipping company and a capital asset set aside for a special purpose (*doelvermogen*).

Strikingly, this generalisation did not cause much debate, nor did the way in which this provision shaped the liability of leading officials or the fact that procedural safeguards were not greatly developed.<sup>6</sup> After all, despite the lack of clear criteria for imposing liability, corporate criminal liability did not give rise to major issues in legal practice. For the legislator, the generalisation was simply a ‘last step’ to be taken.

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<sup>5</sup> Even though the concept of *feitelijk leidinggeven* can be found in one (insignificant) law dating just prior to the Nazi invasion, the 1937 *Vestigingswet Kleinbedrijf*, as amended by *Stb.* 1939, 639 X, owes its fame to the occupation legislation.

<sup>6</sup> R.A. TORRINGA, *Strafbaarheid van rechtspersonen* (dissertation University of Groningen, Gouda Quint, Arnhem 1984) 66: ‘What makes the history of the introduction of corporate criminal liability so fascinating, is that almost every step of the development has been taken in the delusion or even in assertive assurance that nothing new was going on.’

Therefore, there was no need for a ‘profound theoretical contemplation’.<sup>7</sup> As such, the legislator showed great confidence in the prosecution policy of the Prosecutor’s Office as well as the ability of the judiciary to reach a well-considered and appropriate outcome in each individual case.

At the same time, the legislator focused mainly on the liability of corporations, leaving individual criminal liability of natural persons mostly unattended. This also reflected the then dominant view in criminology that, when it comes to corporate criminality, one should focus on the rotten barrel and not look for individual rotten apples.<sup>8</sup> According to Brants and Brants, this can be easily explained. Offences that were prosecuted under the EOA were mostly of a regulatory nature, in which context it was deemed more appropriate to prosecute corporations rather than individuals, as the offences were either committed with the aim of benefiting the corporation or were violations directly related to the company’s business operations. As a consequence, case law on ordering and actually directing started off quite slowly. Most of the relevant case law is from the 1980s when the Prosecutor’s Office discovered this provision as an effective instrument to tackle fraud, a crime that is primarily committed for personal and not corporate gain. In many cases, the juristic person serves as a mere vehicle for the fraud and is left deprived afterwards.<sup>9</sup>

### *1.2. Implementation of the PIF Convention*

Based on the above, it comes as no surprise that the provision of Article 51 DPC also seemed well equipped to tackle fraud with EU funds. According to the Dutch legislator, no specific legislative action was required, as Article 3 of the PIF Convention on the liability of heads of business was already fully implemented through Article 51 (2) DPC.<sup>10</sup> The latter provision is, according to Article 5:1 (3) General Ad-

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<sup>7</sup> KAMERSTUKKEN II 1975/76, 13 655, nr. 3, 8; TORRINGA (n 6) 67.

<sup>8</sup> This does not mean that corporate criminal liability was fully embraced by all. A very prominent scholar who always retained reservations is Remmelink, as legal entities, in his view, did not truly fit into the ‘moral community’ of criminal law (J. REMMELINK, *Mr. D. Hazewinkel-Suringa’s Inleiding tot de studie van het Nederlandse Strafrecht* (Gouda Quint, Deventer 1996) 159–160).

<sup>9</sup> C.H. BRANTS, K.L.K. BRANTS, *De sociale constructie van fraude* (dissertation University of Amsterdam, Gouda Quint, Arnhem 1991) 149.

<sup>10</sup> Commission (EC), ‘Annex to the Report from the Commission. Implementation of the Convention on the Protection of the European Communities’

ministrative Law Act (*Algemene wet bestuursrecht*; hereafter GALA) also applicable to administrative proceedings. While the jurisprudence from the administrative courts on corporate and individual liability is very interesting, as it seems to be developing at a much faster rate than its criminal law counterpart, the main focus of this report will be on criminal law *stricto sensu*, as all PIF offences are enforced through criminal law.<sup>11</sup>

### 1.3. General overview of relevant case law

As previously stated, fraud is what sparked the use of Article 51 (2)(b) DPC. Because Article 51 (2)(b) refers to those who are actually directing criminal offences, this provision was expected, and has proven to be, successful in piercing corporate veils and ‘unveiling’ fraudulent criminal networks, as it focuses on *de facto* rather than *de jure* power (for more on this, see Part 3). As such, fraudsters could no longer hide behind straw persons who were appointed as formal directors in order to evade liability.<sup>12</sup>

Moreover, in the early days, the use of Article 51 (2)(b) DPC remained limited to cases of active management involvement in criminal activities. As such, defining case law on the limits of liability under this provision developed rather late.<sup>13</sup> The first and also defining case on passive involvement in criminal corporate activities is the case against various members of the board of directors of N.V. Slavenburg’s bank.

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Financial Interests and its Protocols. Article 10 of the Convention’, SEC (2004) 1299, 103.

<sup>11</sup> For an overview of the relevant provisions, see Commission (EC), ‘Annex to the Report from the Commission. Implementation of the Convention on the Protection of the European Communities’ Financial Interests and its Protocols. Article 10 of the Convention’, SEC (2004) 1299, 78–116. Whereas the Commission (EC), ‘Report from the Commission. Implementation of the Convention on the Protection of the European Communities’ Financial Interests and its Protocols. Article 10 of the Convention’, COM (2004) 709 final, 7, mentions that none of the member states fully complies with the PIF instruments, Annex (n 10), 52 states that, with regard to Article 3 of the PIF Convention, the Netherlands is completely in line with the requirements set by this provision. Commission (EC), ‘Second Report from the Commission. Implementation of the Convention on the Protection of the European Communities’ Financial Interests and its Protocols. Article 10 of the Convention’, COM (2008) 77 final, 13, shows that the Netherlands has now transposed all relevant provisions.

<sup>12</sup> See, most prominently, Supreme Court 16 June 1981, NJ 1981, 586 (Papa Blanca).

<sup>13</sup> BRANTS, BRANTS (n 10) 149; A. MULDER, ‘Feitelijke leiding geven aan de verboden gedraging, indien het strafbaar feit door een rechtspersoon in begaan’, *TVVS. Maandblad voor Ondernemingsrecht en Rechtspersonen* 1988, Vol. 31 (8) 214.

In short, the allegations against the Slavenburg bank and its top management boil down to facilitating tax evasion, money laundering and mortgage fraud; all violations were prosecuted as forgery (*valsheid in geschrifte*; Art. 225 DPC). Founded in 1925, this small bank followed an aggressive but successful growth strategy in the decades after the Second World War. It became a dominant player by offering credit under riskier conditions and to less solvent debtors. Moreover, it was willing to offer financial services to more unconventional businesses (e.g. the then infamous Casa Rosso in the Amsterdam red light district). Yet the corporate structure did not evolve at the same pace as the company's size; nor were proper checks and balances in place. As a consequence, senior management lost its grip over the company, which had developed into a jumble of autonomous empires. At the same time, management kept pushing for higher targets and came down hard on those who failed to achieve them. In a sense, the board still tried to run the company like the small comprehensive bank it once was, even though it had simply outgrown that phase. The result was a rather fickle involvement of the bank's top management, ranging from a complete lack of interest in certain dossiers to micromanagement of others. These conditions proved a fertile breeding ground for large-scale fraud which—like everything else in the bank—showed no general strategy or *modus operandi* but rather took on different forms wherever it occurred.<sup>14</sup> Key questions were if and to what extent the members of the board of directors could be held responsible for these fraudulent acts of the bank: whether these acts could be attributed to the bank itself was never seriously doubted. In this case, the Supreme Court ruled that actually directing requires *dolus eventualis*, which means that one can only direct offences of which one has knowledge. Culpable ignorance does not suffice,<sup>15</sup> wilful blindness excluded. This means that one can only direct offences of which one is more or less aware (see Part 3 for a more in-depth analysis of this knowledge requirement). It is also this knowledge that activates and determines the scope of the duty of care to put an end to these criminal activities (once again, see Part 3 for further details). The outcome of this case is widely seen as a defeat for the prosecution as the courts ruled that

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<sup>14</sup> For further reference, see M.J. HORNMAN, *De strafrechtelijke aansprakelijkheid van leidinggevenden van ondernemingen. Een beschouwing vanuit multidimensionaal perspectief* (dissertation Utrecht University, Boom juridisch 2016) 3–5, 145–147, from which this description is derived.

<sup>15</sup> Supreme Court 16 December 1986, *NJ* 1987, 321 and 322/AA 1987, 167–175 (Slavenburg II).

the suspects were either unaware of these fraudulent acts or did enough to stop them. More specifically, the The Hague Court of Appeal ruled that, in light of the culpability principle, criminal liability could not be predicated upon the argument that ‘the bank was organised in the way it was’,<sup>16</sup> even though it could be argued that these gross institutional insufficiencies lie at the heart of the reproach of the bank’s board of directors.<sup>17</sup>

Whilst the The Hague Court of Appeal’s line of reasoning has been subject to criticism, it has been reaffirmed by the Amsterdam Court of Appeal in the Ahold accounting fraud. Ahold’s CEO and CFO had signed false control letters that misrepresented the company’s control over a daughter company and handed these letters over to the company’s accountant. They also signed side letters that reflected the real situation, but those were only given to the joint venture partners, thereby deceiving the accountant while reassuring the company’s partners. One of the defendants stated that he did not properly read the documents, nor properly understood their content, before signing them, and was therefore unaware of their fraudulent nature. Whilst the Court of Appeal condemned him for doing so, it did agree that the board members were expected to read numerous documents and found that one cannot expect them to have in-depth knowledge of all applicable accounting rules. ‘Criminal law cannot result in risk-liability’, was the Court’s final conclusion.<sup>18</sup>

A few years ago, the financial sector was once again under scrutiny. This time a specialised London based branch of the Rabobank, the largest bank of the Netherlands, was accused of manipulating the Libor interest rates, together with a number of other major European banks. Whether the Dutch management was aware—let alone understood the complexities—of these transactions remains unclear to this day. After investigation, the Prosecutor’s Office assumed this was most likely a conspiracy of rogue employees and, even though the bank’s supervision mechanisms were not up to standard, found insufficient support for a criminal prosecution against (leading) individuals in the Netherlands. As a consequence of this scandal, the bank’s CEO resigned. The case against the bank itself ended in an out-of-court settlement.<sup>19</sup> A complaint

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<sup>16</sup> The Hague Court of Appeal 2 December 1987, *NJ* 1988, 433.

<sup>17</sup> More extensively on this, see HORNMAN (n 14).

<sup>18</sup> Amsterdam Court of Appeal 28 January 2009, ECLI:NL:GHAMS:2009:BH1971.

<sup>19</sup> <https://www.rabobank.com/nl/float/libor/index.html> and <https://www.om.nl/actueel/nieuwsberichten/@32206/rabobank-betaalt-70/>.

against this settlement and the decision not to prosecute individuals was rejected by the Court of Appeal.<sup>20</sup> It also found insufficient support for a criminal prosecution.

The CEO of chemical company Chemie-Pack was initially not so lucky when he was prosecuted after an explosion and heavy fire that destroyed his business due to the use of a blowtorch by an employee in the proximity of highly inflammable chemicals. However, the court ruled that whilst the company consistently disregarded safety and environmental regulations, it could not be established that the CEO was aware of the use of the blowtorch even though this had become standard procedure within the company in order to prevent pipelines from freezing. As a consequence, the court ruled that the CEO could not be held responsible for causing the explosion and fire.<sup>21</sup>

The most extensive and well-known fraud with EU funds in the Netherlands is the so-called European Social Fund scandal that occurred in the late 1990s/early 2000s. As a result of this, the Netherlands had to reimburse all the unjustly received subsidies from the European Regional Development Fund (ERDF), and several prosecutions—relatively minor in relation to the widespread nature of the fraud—were instigated; their outcome is unclear.<sup>22</sup> Unfortunately, there are no reliable empirical data on the number of prosecutions and convictions for EU-related fraud. Fraud is an overarching term that is not used in the official statistics of the *Centraal bureau voor de Statistiek* (Statistics Netherlands). Fraud can therefore be prosecuted under many labels, such as deceit, forgery, money laundering, crimes against public order (e.g. membership of a criminal organisation), etc. Furthermore, crimes committed against the interests of the EU are not registered as a separate subcategory in these statistics. As a consequence, the scope of fraud with EU funds in the Netherlands remains unclear. Nonetheless, there are sporadic media reports and press releases from the Prosecutor's Office that indicate that

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<sup>20</sup> The Hague Court of Appeal 19 May 2015, ECLI:NL:GHDHA:2015:1204. The Court of Appeal also doubted whether such a prosecution would be successful, because most people involved were subject to simultaneous administrative, criminal and parliamentary investigations in numerous countries. During these investigations, they were forced to make potentially self-incriminating statements, the consequences of which could not be undone.

<sup>21</sup> District Court Breda 21 December 2012, ECLI:NL:RBBRE:2012:BY7000 and 's-Hertogenbosch Court of Appeal 22 April 2016, ECLI:NL:GHSHE:2016:1597.

<sup>22</sup> For a more in-depth analysis of this scandal, see R.M. KRUG, *Gemakkelijk geld. Kroniek van de problemen met het Europees Sociaal Fonds in Nederland* (dissertation Radboud University, privately printed 2014).

investigations are under way and that prosecutions are being instigated.<sup>23</sup>

#### 1.4. Recent developments

Even though corporate criminal liability and liability of company directors have existed in the Netherlands for a number of decades without much turbulence, several recent developments deserve special attention as they reflect a change in the perception and prosecution of white-collar crime. Firstly, it has been widely signalled that there is an increase of punitiveness towards fraud, (socio-)economic and environmental offences. This has resulted in higher sanctions in legal statutes,<sup>24</sup> higher sentences in legal practice<sup>25</sup> and a growing resentment in society against out-of-court settlements for corporate misconduct (the last, by the way, for several reasons). Partly, this is due to resentment against corporations and their directors getting off easily (class justice). On the other hand, there is also wide-ranging criticism over the stand-still in the development of case law and the absence of proper judicial oversight over record-breaking out-of-court settlements,<sup>26</sup> especially since many of these settlements are reached in a combined action between Dutch and foreign (mostly American) regulatory agencies. The harshest point of criticism, however, is the absolute lack of transparency on how these settlements are calculated.<sup>27</sup> Many argue that some of them might even exceed the

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<sup>23</sup> See, for example, <https://www.volkskrant.nl/binnenland/aanhoudingen-om-miljoenenfraude-esf-gelden~a3788693/>; <https://www.om.nl/@88906/doorzoeken/>.

<sup>24</sup> See, for example, KAMERSTUKKEN II 2006/07, 30 800 VI, nr. 90; KAMERSTUKKEN II 2012/13, 33 685, nr. 3 (which explicitly refers to abuse of EU funds as an argument for reform).

<sup>25</sup> <https://fd.nl/economie-politiek/1198526/strafrechtexpert-tijd-dat-bestuurderwegkomt-met-taakstraf-of-boete-is-voorbij>.

<sup>26</sup> See, for example, C. VAN ASPEREN DE BOER, M. VAN DUIVENBODE, 'Schikkingscultuur in fraudezaken ondermijnt de rechtsontwikkeling', *Nederlands Juristenblad* 2014, Vol. 89 (10) 641-646; M.J. BLOTEWIJK, M. FERNANDEZ-BERTIER, 'Out-of-Court Criminal Dispute Resolution in the Netherlands, Belgium and the U.S.', *Tijdschrift voor Sanctierecht & Onderneming* 2015, Vol. 5 (2/3) 95–107; M. PHEIJFFER, 'Aanpak financieel-economische criminaliteit: sch(r)ikken!', *Strafblad* 2014, Vol. 12 (2) 90–96; A. VERBRUGGEN *et al.*, *Onderneming en strafbaar feit* (Sdu, The Hague 2017) 92.

<sup>27</sup> For instance, the press release regarding the Libor settlement on the Prosecutors Office website was less than 35 lines. See <https://www.om.nl/vaste-onderdelen/zoeken/@32206/rabobank-betaalt-70/> and (in English) <https://www.om.nl/vaste-onderdelen/zoeken/@32207/rabobank-pays-dutch/>.

maximum penalty that could be imposed by law, or at least the sentence that would be imposed by a judge.<sup>28</sup>

Moreover—but in close connection to the above—there seems to be another shift in prosecutorial policy. Until very recently, when settling the case against the corporation, criminal defence lawyers could arrange, as part of the plea agreement, for the natural persons involved in the offence not to be prosecuted. Nowadays, such a deal has become much harder, as Dutch prosecutors seem to have embraced the US Yates memorandum,<sup>29</sup> and are not only opting for the prosecution of individuals, but are also expecting the settling company to hand over all incriminating evidence as part of the deal.<sup>30</sup>

## 2. Relationship with general principles of criminal law

### 2.1. Perpetration and participation in Dutch law

Articles 47 to 51 DPC (see annex for an English translation) provide for a differential system of participation that distinguishes between perpetration and various modes of participation.<sup>31</sup> Perpetration applies when one person commits a crime, either directly (physically) or indirectly ('functionally'),<sup>32</sup> by himself, thus personally fulfilling all elements of

<sup>28</sup> C. VAN ASPEREN DE BOER, M. VAN DUIJVENBODE, 'Openheid in schikkingspraktijk OM', *Nederlands Juristenblad* 2015, Vol. 90 (1) 21–22; T.R. VAN ROOMEN, A. VERBRUGGEN, 'Internationale trends in preventie, detectie en represie van corruptie', *Tijdschrift voor Sanctierecht & Onderneming* 2017, Vol. 7 (4) 158; K.J.C. VRIEND, 'De hoge en bijzondere transactie; een pleidooi voor rechterlijke controle op de afdoening buiten geding', *Tijdschrift voor Bijzonder Strafrecht & Handhaving* 2016, Vol. 3 (4) 194–204.

<sup>29</sup> <https://www.justice.gov/archives/dag/file/769036/download>.

<sup>30</sup> VERBRUGGEN *et al.* (n 26) 91.

<sup>31</sup> For a more extensive description of the Dutch system of perpetration and participation (with a focus on responsibility for international crimes), see M. CUPIDO, M. HORNMAN, W. HUISMAN, 'Dutch Report on Individual Liability for Business Involvement in International Crimes', *Revue International de Droit Pénal* 2017, Vol. 88 (1) 223–255.

<sup>32</sup> Contrary to many other legal systems, Dutch criminal law has two forms of what is generally described as indirect perpetration: *doen plegen* and *functioneel plegen*. The former shows great similarities with the German concept of *unmittelbare Täterschaft*, as it requires the direct perpetrator to be an innocent agent, in the sense that he cannot be punished for whatever reason. As such, Dutch law does not demand that the direct perpetrator was used as an unknowing and will-less tool. The direct perpetrator can be fully aware of the criminal nature of his actions. The decisive determination is whether there is a reason for being unpunishable. Any reason will do—for instance, lacking the required capacity (*kwaliteit*) to commit the offence (J. DE HULLU, *Materieel strafrecht. Over alge-*

the crime definition. All situations in which multiple persons are engaged in criminal conduct are labelled as participation. The responsibility of participants—or accessories—is derivative of the responsibility of the perpetrator, which means that the criminal responsibility of participants only arises when the perpetrator has in fact prepared, attempted or committed a crime. This is known as the principle of dependency (*accessoriteit*).<sup>33</sup> Further distinction can be made between direct participation and indirect participation. Direct participants are those who jointly fulfil all the elements of the crime: as such, they are on the same level as the perpetrator—i.e. co-perpetration and indirect perpetration (*doen plegen*). Indirect participants—i.e. instigators and aiders—are generally more dependent on the perpetrator, as they have less control over how the acts of participation will unfold.<sup>34</sup> As a consequence, there are several provisions in the DPC on the responsibility of indirect participants in case the perpetrator, despite the acts of the indirect participant, does not commit the offence, goes much further, or goes in a completely different direction than the participant anticipated.<sup>35</sup> As aiders are seen not as principals but as less blameworthy secondary participants who have a more subsidiary role, several exceptions apply. First of all, aiding is only punishable in the case of a (choate or inchoate) crime (*misdrijf*), not in the case of a misdemeanour (*overtreding*; Art. 48 DPC). Moreover, there is a mandatory reduction of the maximum sentence by one third (Art. 49 DPC). Besides the traditional forms of participation set out in Articles 47 and 48 DPC, Article 51 (2) DPC allows for the prosecution of those who either ordered (*opdrachtgeven*) or actually directed (*feitelijk leidinggeven*) offences committed by a legal person. The former is perceived to assume a more initiating role and closer involvement than the latter.<sup>36</sup> The scope

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*mene leerstukken van strafrechtelijke aansprakelijkheid naar Nederlands recht* (Wolters Kluwer, Deventer 2015) 473–475). This form of indirect perpetration is seen as a form of participation. *Functioneel plegen* on the other hand, is seen as a form of perpetration. For a clear overview of the differences between functional perpetration and the concept of *Organisationsherrschaft*, see H. VAN DER WILT, ‘On Functional Perpetration in Dutch Criminal Law. Some Reflections Sparked Off by the Case against the Former Peruvian President Alberto Fujimori’, *Zeitschrift für Internationale Strafrechtsdogmatik* 2009, Vol. 4 (11) 615–621.

<sup>33</sup> DE HULLU (n 32) 438.

<sup>34</sup> D.H. DE JONG, ‘Vormen van strafbare deelname’, in: J.B.J. VAN DER LEIJ (eds), *Plegen en deelnemen* (Wolters Kluwer, Deventer 2007) 115.

<sup>35</sup> Article 46a, 47(2), and 49(4) DPC. However, *dolus eventualis* will smoothen most cases of diverging intent (see DE HULLU (n. 32) 444–447, 466–467, 476, 481–482, 493–495, 504–505).

<sup>36</sup> R. VAN ELST, *Strafbare rechtpersonen en hun leidinggevers* (Ars Aequi Libri Nijmegen 1997) 66; DE HULLU (n 32) 502–503; E. SIKKEMA, ‘De strafrechtelijke aansprakelijkheid van leidinggevenden in Nederland’, in: E. SIKKEMA, P. WAETER-

of *feitelijk leidinggeven* is broader, as it also encompasses forms of passive involvement—i.e. not intervening where management should have intervened. It is basically uncontested that ordering is nothing more than a specific form of the more comprehensive notion of actual directing.<sup>37</sup> As a consequence, it is hardly ever used in legal practice and will not be touched upon any further in this report.

In addition to these general forms of participation, various forms of participation or indirect involvement are penalised as separate offences. For instance, benefitting from a crime by obtaining certain objects or profits can be qualified as money laundering, especially when its criminal origin is concealed (Art. 420bis and 420quater DPC); and, even without being directly personally involved in the commission of group crimes, one can be liable for membership of a criminal organisation—i.e. an organisation that seeks to commit crimes (Art. 140 DPC).<sup>38</sup> This requires that the accused had positive knowledge (*onvoorwaardelijk opzet*) of the organisation's criminal purpose and actively participated in this organisation through acts that either served or were directly related to the realisation of the criminal purpose.<sup>39</sup>

Like criminal law, administrative law uses a differentiated participation system, albeit with a more restricted scope of potential offenders. Next to those who either physically or functionally perpetrated the offence, regular administrative law only allows for the sanctioning of co-perpetrators and of those who ordered or actually directed the acts of a corporation (Art. 5:1 GALA). Administrative tax offences also fall under this provision, but do allow for the prosecution of aiders and inciters for certain misdemeanours. Criminal tax offences are subject to the general participation system of criminal law. Whilst there used to

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INCKX (eds), *De strafrechtelijke verantwoordelijkheid van leidinggevenden – in de economische context – Preadvies voor de jaarvergadering van de Nederlands-Vlaamse Vereniging voor Strafrecht 2010*, (Wolf Legal Publishers, Nijmegen 2010) 66; S.N. DE VALK, *Aansprakelijkheid van leidinggevenden* (dissertation University of Groningen, Kluwer, Deventer 2009) 426.

<sup>37</sup> VAN ELST (n 36) 66; DE HULLU (n 32) 508; SIKKEMA (n 36) 67; H.D. WOLSWIJK, 'Feitelijk leidinggeven en opdracht geven', in: J.B.J. VAN DER LEIJ (ed), *Plegen en deelnemen* (Kluwer, Deventer 2007) 111.

<sup>38</sup> L.F.H. ENNEKING et al., *Zorgplichten van Nederlandse ondernemingen inzake internationaal maatschappelijk verantwoord ondernemen: Een rechtsvergelijkend en empirisch onderzoek naar de stand van het Nederlandse recht in het licht van de UN Guiding Principles*, (Boom Juridische uitgevers 2016) 227–228; F.G.H. KRISTEN, 'Maatschappelijk verantwoord ondernemen en strafrecht', in: A.J.A.J. EIJSBOUTS et al. (eds), *Maatschappelijk verantwoord ondernemen* (Wolters Kluwer, Deventer 2010) 151–155.

<sup>39</sup> KRISTEN (n 38) 154.

be substantial differences between administrative and criminal tax law, and general criminal law itself, regarding the interpretation and application of notions of substantive law, these have almost all disappeared. All these domains are now converging, and both the tax and the criminal divisions of the Supreme Court are trying to align their jurisprudence.<sup>40</sup>

In light of the focus of this report, only functional perpetration (*functioneel plegen*) and actually directing (*feitelijk leidinggeven*) will be taken into further account, as they lend themselves more easily to an omission-based approach than others and were specifically designed to deal with heads of business.

## 2.2. *Omission liability*

Like many other legal systems, Dutch law distinguishes between provisions that penalise active or positive acts (*commissiedelict*) and those that penalise failures to act (*omissiedelict*); both can be further differentiated into temporary (*aflopend delict*) and enduring offences (*voortdurend delict*). Dutch law also recognises that certain criminal acts that would normally require a positive act, like killing another person, can, under certain conditions, be fulfilled through an omission (*oneigenlijk omissiedelict*)—e.g. by denying food to a baby.<sup>41</sup> Whilst there is no general provision on omissions, it is held that omissions can only be punished if there was an obligation to act—i.e. a duty of care (*zorgplicht*).<sup>42</sup> Clearly this raises issues from a legality perspective, as these duties of care are open norms and therefore quite undetermined, both in substance and with regard to their addressees. Critics state that there is a real risk that the person concerned will subsequently have to find out from the court what efforts he should have undertaken in order to evade liability, while there was no clarity on this prior to his actions. It is up to the accused to find this out for himself, in the hope that this interpretation will

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<sup>40</sup> See, for example, Supreme Court 1 December 2006, ECLI:NL:HR:2006:AU7741, *BNB* 2007, 151 (denouncing the attribution of intent from one natural person to another) and Supreme Court, 3 October 2017, ECLI:NL:HR:2017:2542 (on fiscal arguable positions). As a consequence, with the exception of Article 69 (4) State Taxes Act (*Algemene wet inzake rijksbelastingen*; further STA) that prohibits prosecuting tax crimes as forgery (Art. 225 DPC), there are no relevant special diverging rules on liability.

<sup>41</sup> DE HULLU (n 32) 77–79, 81–82.

<sup>42</sup> E. GRITTER, ‘Functioneel daderschap: dogmatische inbedding en praktische uitwerking’, in: E. GRITTER (ed.), *Opstellen Materieel Strafrecht* (Ars Aequi Libri, Nijmegen 2009) 15; H.D. WOLSWIJK, ‘Strafbaar nalaten: een zorgplicht minder’, in: A. HARTEVELD *et al.* (eds), *Systeem in ontwikkeling. Liber amicorum G. Knigge* (Wolf Legal Publishers, Nijmegen 2005) 547–565.

not turn out to be (evidently) incorrect.<sup>43</sup> Nonetheless, open norms and duties of care are the norm in regulatory law and probably will continue to be for a long time, especially when it comes to norms that are enforced through administrative law where the weight of the culpability and legality principle is already more limited to begin with.<sup>44</sup> In most cases, it is possible to fill in this open norm using explanatory memoranda, guidelines from governmental or professional (supervisory) agencies, jurisprudence and legal literature. It also must be kept in mind that many regulatory provisions are created in consultation with the sector to which they apply. As a consequence, their content cannot come as a complete surprise.

Because there is no general provision, the scope and nature of the duty of care will have to be determined on a case-by-case approach in which the specific duty of care provision is decisive. As a consequence, there is no general norm for the required *mens rea*. In some cases, intent will be required; other provisions will settle for negligence, whereas misdemeanours (*overtredingen*) and administrative offences are strict liability provisions. Here, culpability is presumed, but can be rebutted by an absence of all blameworthiness plea (see Part 4 for more on the latter).

In theory, the foregoing also holds true for causality. In this regard, too, the specific provision is decisive, albeit that the overall criterion for causality is always the same: can the alleged consequence reasonably be attributed to the defendant? In essence, this test boils down to a multi-factorial approach that takes into account all the well-known causality theories, the specific underlying offence and the legal interests it protects, the accused's *mens rea*, and the endangering character of the defendant's actions.<sup>45</sup> In this regard, *conditio sine qua non* is an important but not decisive factor. If the defendant's prior actions seriously raised the risk of the consequence setting in, then causality can be established, even if it remains unclear whether there was a *conditio sine qua non* relationship.<sup>46</sup>

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<sup>43</sup> B.J.V. KEUPINK, *Daderschap bij wettelijke strafrechtelijke zorgplichtbepalingen. Over het gedragingsbestanddeel 'zorgen' in het materiële strafrecht* (dissertation Erasmus University Rotterdam, Wolf Legal Publishers, Nijmegen 2011) 399–400.

<sup>44</sup> F.G.H. KRISTEN, 'Het materieelstrafrechtelijk legaliteitsbeginsel', in: F.G.H. KRISTEN *et al.* (eds), *Bijzonder strafrecht. Strafrechtelijke handhaving van sociaal-economisch en fiscaal recht in Nederland* (Boom Lemma, The Hague 2011) 325–331.

<sup>45</sup> DE HULLU (n 32) 188–189. The reasonable attribution test was originally developed in private law, but now applies to all areas of Dutch law.

<sup>46</sup> Supreme Court 30 September 2003, ECLI:NL:HR:2003:AF9666, NJ 2005, 69.

Some modes of liability under Dutch law lend themselves more easily to an omission-based approach than others. Especially, functional perpetration and actually directing are relevant in this regard. Whilst these modes of liability encompass both active and passive involvement,<sup>47</sup> liability is normally based (at least in part) on the inadequacy of supervision.<sup>48</sup> In particular, the Supreme Court has accepted that a functional perpetrator's failure to fulfil the level of care that can reasonably be expected to prevent criminal acts from occurring (due diligence) can be regarded as acceptance of these acts.<sup>49</sup> Similar phrases are known from earlier jurisprudence on actually directing.<sup>50</sup> Indirect perpetration and instigation require that the accused acted as *auctor intellectualis*. On this account, omission-like constructions, whilst theoretically possible, seem highly unlikely in practice. In contrast, aiding through omission is more probable. It is accepted that one can aide through omission by creating an opportunity—for instance, by allowing access to a location or person.<sup>51</sup> The main issue in such cases will be to prove that these supportive acts were *intentionally* omitted.<sup>52</sup> Also for co-perpetration, establishing the accused's criminal intent will be the principal focus in cases of omission. Dutch criminal law does not require that co-perpetrators are physically present when the offence is committed.<sup>53</sup> Thus, co-perpetration by omission is theoretically possible, yet the requirement of making an *essential* contribution seems to limit establishing liability on the basis of passive conduct.

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<sup>47</sup> For actually directing, this was recently reaffirmed by the Supreme Court in its judgment of April 2016. See Supreme Court 26 April 2016, ECLI:NL:HR:2016:733, *NJ* 2016, 375.

<sup>48</sup> See, for example, Supreme Court 16 December 1986, *NJ* 1987, 321 and 322/AA 1987, 167–175. Cp. G. KNIGGE, 'Doen en laten; enkele opmerkingen over daderschap', *Delikt & Delinkwent* 1992, Vol. 22 (2) 132, 139, who states that the required promoting of acts (see Part 3 for further detail) will normally be the result of a combination of commissions and omissions.

<sup>49</sup> Supreme Court 21 October 2003, ECLI:NL:HR:2003:AF7938, *NJ* 2006, 328; Supreme Court 8 December 2015, ECLI:NL:HR:2015:3487, *NJ* 2016, 23.

<sup>50</sup> Supreme Court 20 November 1984, *NJ* 1985, 355 (NCB); Supreme Court 16 December 1986, *NJ* 1987, 321 and 322/AA 1987, 167–175 (Slavenburg II).

<sup>51</sup> See, for example, Supreme Court 16 August 2005, ECLI:NL:HR: 2005:AT6058, *NJ* 2005, 490.

<sup>52</sup> Supreme Court 14 April 2015, ECLI:NL:HR:2015:949, *NJ* 2015, 338

<sup>53</sup> Supreme Court 17 November 1981, *NJ* 1983, 84.

### 2.3. *Notification requirements*

According to Article 161 of the Dutch Code of Criminal Procedure (*Wetboek van Strafvoerdering*; hereafter DCCP), anyone who bears knowledge of an offence is allowed to report this offence. However, there is no general obligation to do so, with the exception of severe criminal offences (Art. 160 DCCP)—i.e. crimes against the security of state that endanger lives, crimes against life itself, and rape—or (under certain conditions) for public bodies or servants. The latter are obliged to come forward and notify the judicial authorities in case (i) they bear knowledge of embezzlement, forgery or the acceptance of bribes committed by another public servant; or (ii) the crime was committed by a public servant who used his position as a public servant to commit the offence; or (iii) the crime consists of misusing funds or regulations of which the proper use or execution was commissioned onto a public servant (Art. 162 DCCP). The aforementioned obligation does not apply if this would expose the individual himself, or a person in relation to whom he could claim testimonial privilege, to criminal prosecution (Art. 162 (3) DCCP). Notwithstanding this formal obligation to report, reality shows a more nuanced picture. Public bodies grant themselves a certain level of discretion in this regard and sometimes choose to deal with these offences internally and not report them.<sup>54</sup>

As such, there is a notification requirement for PIF offences for public officials. There is no similar obligation for the private sector. However, Dutch law does impose several notification requirements or duties of care upon companies or persons engaging in certain economic activities that could encounter PIF offences. Most of these requirements are directed against financial institutions and serve either to prevent or to help discover criminal activity.<sup>55</sup> For example, there is an obligation to notify the Dutch Finance Intelligence Unit<sup>56</sup> in case of so-called ‘unusual transactions’ (*ongebruikelijke transacties*) in order to prevent money laundering and the financing of terrorism.<sup>57</sup> Furthermore, com-

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<sup>54</sup> E. KOLTHOFF, ‘Publiek integriteitsonderzoek door private partijen’, in: P. PON-SAERS *et al.* (eds), *Outsourcing policing* (Maklu, Antwerp 2015) 165.

<sup>55</sup> Not all of these obligations relate to financial institutions. See, for example, the Prevention Abuse of Chemicals Act (*Wet voorkoming misbruik chemicaliën*) which imposes a number of notification requirements on ‘operators as mentioned in Regulation (EC) No 273/2004 of the European Parliament and of the Council of 11 February 2004 on drug precursors’.

<sup>56</sup> <https://www.fiu-nederland.nl/en>, last visited 29 November 2017.

<sup>57</sup> Violating such a notification obligation sometimes leads to a large settlement.

panies can be required to do client research and trace the identity of the ‘ultimate beneficial owner’ (UBO) before concluding a business deal, or to intensify client research in case of a ‘politically exposed person’ (PEP).

#### 2.4. Limitations to liability

Whilst not explicitly mentioned in the DPC,<sup>58</sup> the notion of *nulla poena sine culpa*—also known as the principle of personal liability—lies at the heart of Dutch criminal law. Individuals can only be held responsible for crimes to which they made a contribution (*actus reus*) with a guilty mind (*mens rea*). This does not imply that an individual must always act with either intent, recklessness or negligence—as such, there is no prohibition on strict liability *per se*; but in its landmark judgment on this issue, the Supreme Court has ruled that criminal liability cannot be established in the absence of all blameworthiness (*afwezigheid van alle schuld*).<sup>59</sup> A complete lack of guilt is irreconcilable with criminal responsibility. An accused can only be liable if he could have acted differently and thus can be blamed for not doing so.<sup>60</sup> Dutch law allows for this minimum level of culpability to be presumed to be present. Thus, it is not up to the Prosecutor’s Office to prove that this threshold is met, but if during the course of the proceedings it turns out to be likely (*aannemelijk*) that this minimum level of culpability is lacking, the accused can no longer be held liable nor be punished.<sup>61</sup>

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See, for example, <https://www.om.nl/actueel/nieuwsberichten/@96507/groothandel-leverde/> (in Dutch) regarding a wholesale company in agricultural and horticultural products that accepted a two-million-euro settlement to avoid prosecution on money laundering and aiding in the production of hemp.

<sup>58</sup> Recently, it has been codified in Dutch administrative law in Article 5:41 GALA, but one can debate whether this principle and the legality principle have the same weight in administrative law as they have in (core) criminal law. In the regulatory field, judicial protection seems to rely more on the procedural safeguards like the principles of good governance and less on substantive principles like legality and culpability.

<sup>59</sup> According to Article 120 of the Dutch Constitution, judges are not allowed to assess whether Acts of Parliament are in accordance with the constitution. This is left up to both houses of parliament.

<sup>60</sup> Supreme Court, 14 February 1916, *NJ* 1916, 861; E. GRITTER, *Effectiviteit en aansprakelijkheid in het economisch ordeningsrecht* (dissertation University of Groningen, Boom Juridische uitgevers, The Hague 2003) 125; E.H.A. VAN LUIJK, *Het schuldbeginsel in het Nederlandse strafrecht. Een verkenning aan de hand van de geschiedenis van het Nederlandse strafrecht, de kentekenaansprakelijkheid en het EVRM* (dissertation University of Groningen, Ridderprint BV, Ridderkerk 2015) 448.

<sup>61</sup> DE HULLU (n 32) 375–376.

Following this thought, the Supreme Court has also held that individual criminal responsibility for criminal offences committed by a group or a legal person cannot and may not be based on the accused's mere membership of that group<sup>62</sup> or on the mere fact that he is in charge of that legal person.<sup>63</sup> Criminal responsibility will always require at least some kind of guilt and a legally relevant contribution, active or passive, to the commission of the crime. As such, vicarious liability in the strict sense is not allowed.<sup>64</sup>

Notwithstanding these general starting points, the principle of personal liability has acquired a somewhat different meaning in Dutch law in recent decades. Originally, it was also strongly linked to the notion of *nulla poena sine actione*, or, more precisely, a predominantly physical interpretation of the concept of a 'criminal act'.<sup>65</sup> However, as this interpretation slowly began to make way for a broader understanding, creating space for various forms of indirect perpetration and, eventually, the acceptance of corporate criminal liability, the two notions began to grow apart. Currently, neither interpretation of the *nulla poena* principle is seen as irreconcilable with either corporate criminal liability or the liability of heads of business. If one is willing to embrace the idea that acting through another is in no way substantially different from direct personal action, and if one is likewise willing to accept that culpability does not necessarily refer to a mental state, as is the case if blameworthiness is defined as 'could have acted differently', both corporate and hierarchical accountability are in line with these principles. Therefore, in the Netherlands, the principle of personal liability does not entail—as has been feared by Ligeti—that 'criminal liability of heads of business remains mere law in the books that will never be applied'.<sup>66</sup> Article 51 (2) DPC is definitely neither a dead letter nor a paper tiger, but has

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<sup>62</sup> However, this does not mean that being a member of that group cannot amount to a separate offence, i.e. membership of a criminal organisation (Art. 140 DPC). This provision does not require that the accused was directly involved in the commission of a crime. Instead, it suffices that the accused intentionally contributed to a group's criminal endeavour in a more general sense in order to further actions.

<sup>63</sup> Supreme Court 24 Augustus 2004, ECLI:NL:HR:2004:AP1508.

<sup>64</sup> In this report, the terms vicarious liability and strict liability are used in the meaning as set out by A.C. MICHAELS and R.G. SINGER in the *Encyclopaedia of Crime & Justice*, Volume 4, J. DRESSLER (ed.), (Macmillan Reference, New York 2002) 1541, 1622–1625.

<sup>65</sup> A.M. van WOENSEL, *In de daderstand verheven* (dissertation University of Amsterdam, Gouda Quint, Arnhem 1993) 7–16 and 42–43.

<sup>66</sup> K. LIGETI, 'Criminal liability of heads of business', in: Z. ĐURDEVIĆ (ed.),

been applied regularly, in particular in relation to economic crimes and fraud.

Moreover, the *de facto* meaning of the culpability principle for legal practice must not be exaggerated. Even though the European Court of Human Rights (hereafter ECtHR) defines important procedural preconditions *for* the determination of liability, it does not set forward any general limitations *on* liability.<sup>67</sup> Whilst the Dutch Supreme Court does set forward such a limitation with the *nulla poena sine culpa* principle, it does so primarily on a theoretical level: its practical implications remain hard to determine as there is no static lower limit for liability. The minimum degree of culpability that is required—the threshold for liability—is determined by courts on a case-by-case approach based on the circumstances of the case and the value that society attributes to the guilt principle following its shared sense of justice.<sup>68</sup> In this regard, strict liability regulatory offences take a special position.<sup>69</sup> ECtHR and European Court of Justice (hereafter ECJ) case law do not prohibit strict liability or reversed onuses—presumptions of facts or law—as long as it remains possible for the accused to rebut the underlying presumption of blameworthiness.<sup>70</sup> Moreover, such provisions are frequently used and generally accepted in Dutch regulatory law. The only limitation is that the presumption of responsibility must remain within reasonable limits.<sup>71</sup> While the importance of what is at stake is an impor-

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*Current issues in European criminal law and the protection of EU financial interests* (Austrian Association of European Criminal Law, Zagreb 2006) 91.

<sup>67</sup> VAN LUIJK (n 60) 364–365, 386–387, 431–432: there is no substantive guilt principle laid down in the ECHR; nor does Article 7 ECHR oblige the inclusion of subjective elements in either crime definitions or conditions for perpetration and participation (see a.o. ECtHR 29 October 2013, application no. 17475/09, par. 70 (*Varvara v. Italy*)).

<sup>68</sup> VAN LUIJK (n 60) 241, 435, 438.

<sup>69</sup> This does not remain limited to the culpability principle. With regard to the principle of legality, the ECtHR is more lenient in allowing the use of vague terms in regulations when the addressees are professional parties, as they can be held to higher standards (KRISTEN (n 44) 325–331), as well as more extensive interpretations of acts regarding socio-economic activities. With regard to outsourcing, see, a.o. ECtHR 28 June 2011, application no. 577/11 (*Het Financieele Dagblad v. The Netherlands*).

<sup>70</sup> J.H. BLOMSMA, *Mens rea and defences in European criminal law* (dissertation Maastricht University, Intersentia, Cambridge 2012) 224–225; DE HULLU (n 32) 213–215; VAN LUIJK (n 59) 323–365, 387, 397–404; SIKKEMA (n 36) 90–91. See a.o. ECtHR 7 October 1988, application no. 10519/83 (*Salabiaku v. France*); ECtHR 25 September 1992, application no. 13191/87 (*Pham Hoang v. France*).

<sup>71</sup> ECtHR 30 March 2004, application no. 53984/00 (*Radio France a.o. v.*

tant weight factor in that regard,<sup>72</sup> this importance has to be judged from various angles. It is not just the perspective of the defendant that is decisive. Other considerations, such as the importance of effective law enforcement, also have to be taken into account.<sup>73</sup>

### **3. Concept and scope of the criminal law responsibilities of heads of business**

#### *3.1. General: two modes of liability*

As mentioned in Part 2, Dutch law knows various modes of liability in both criminal and administrative law that are well-suited to address heads of business in relation to their responsibility for acts of subordinates. However, only two of them truly resemble the notion of hierarchical accountability: functional perpetration (*functioneel plegen*) and actually directing (*feitelijk leidinggeven*). Whilst only the latter is mentioned in the actual reports from the Commission and the working paper annexed to it, both modes of liability could serve well in holding leading officials accountable for acts of their subordinates.

Functional perpetration is seen as the older of the two concepts, even though both modes of liability have roots dating back prior to the current Penal Code of 1886. Functional perpetration can be seen as the Dutch equivalent of the notion that also lies at the basis of indirect perpetration: *qui facit per alium, facit per se* ('he who acts through another, acts himself'). It is generally seen as a 'jurisdictional artefact' that blossomed as a consequence of the increase in regulatory laws in the 1930s.<sup>74</sup> Laws that regulate economic activities such as selling, building, operating, exporting, etc., lend themselves well to a more abstract interpretation of the notion 'act' that also includes acting through the intervention of another person. Yet, this interpretation still places the functional perpetrator at the same level as the direct physical perpetrator. Being able to act through another person requires power over that person. It is this notion of power that lies at the heart of functional perpetration.

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*France*); European Commission of Human Rights 10 December 1991, application no. 16641/90 (*A.G. v. Malta*).

<sup>72</sup> VAN LUIJK (n 59) 18–19, 328–347, 364–368, 397–404, 449–450.

<sup>73</sup> E. GRITTER, 'Toerekening van opzet of schuld in het fiscale boeterecht: legitimatie en achtergronden', *Delikt & Delinkwent* 2001, Vol. 41 (4) 371; VAN LUIJK (n 60) 404.

<sup>74</sup> VAN DER WILT (n 32) 616.

tration and creates a responsibility for the acts of others,<sup>75</sup> in most cases subordinates.

Whereas functional perpetration is generally seen as an issue of legal interpretation,<sup>76</sup> actually directing has a more explicit foundation as a distinct *sui generis* form of participation in Article 51 (2) DPC. This form of participation differs from all others because it specifically demands that a corporation can be identified as the offender, thus as perpetrator or participant. The actual director is reproached for directing these offences committed by the corporation. Therefore, this form of liability corresponds more to the concept of *respondeat superior* ('let the master answer'), holding management officials accountable for the actions of their corporation.<sup>77</sup>

Whilst the two modes of liability show great similarity, especially when it comes to criteria for *actus reus*, the distinction between perpe-

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<sup>75</sup> DE HULLU (n 32) 159.

<sup>76</sup> KNIGGE (n 48) 129, 132; G. KNIGGE, H.D. WOLSWIJK, *Het materiële strafrecht* (Wolters Kluwer, Deventer 2015) 298; W.H. VELLINGA, F. VELLINGA-SCHOOTSTRA, 'Eenheid in daderschap?' in: A.E. HARTEVELD *et al.* (eds), *Systeem in ontwikkeling. Liber amicorum G. Knigge* (Wolf Legal Publishers, Nijmegen 2005) 527.

<sup>77</sup> The nature and level of involvement required for actually directing have long been debated. To a certain extent, this discussion is still reflected in the various English translations used for the term *feitelijk leidinggeven*. Nearly every publication on this topic in English uses another terminology and voices a different kind of involvement. De Doelder uses the phrase 'actually giving guidance to the forbidden action' (H. DE DOELDER, 'Criminal Liability of Corporations: A Dutch Update', in: U. SIEBER *et al.* (eds), *Strafrecht und Wirtschaftsstrafrecht: Dogmatik, Rechtsvergleich, Rechtstatsachen* (Tiedemann-Festschrift, Carl Heymanns, Munich 2008) 563–576). Keulen and Gritter translate *feitelijk leidinggeven* as 'actually controlling the commission of the offence' (B.F. KEULEN, E. GRITTER, 'Corporate Criminal Liability in The Netherlands', in: M. PIETH *et al.* (eds), *Corporate criminal liability: Emergence, convergence, and risk* (Springer, Dordrecht 2011) 177–191). Van der Wilt opts for a literal translation as 'factual or *de facto* leadership' (VAN DER WILT (n 32)). Whilst the last is in itself correct, this description emphasises the accused's position within the corporation—being one of *de facto* leadership—rather than the actual conduct that is required in order to be criminally liable. In my view, the requisite conduct is best reflected in Van Strien's translation of 'actually directing' (A.L.J. VAN STRIEN, *De rechtspersoon in het strafproces. Een onderzoek naar de procesrechtelijke aspecten van de strafbaarheid van rechtspersonen* (dissertation Leiden University, Sdu Uitgeverij, The Hague 1996). The *feitelijk leidinggever* does more than give subtle guidance: he directs the events, either implicitly, explicitly or from behind the scenes. Having said that, it is accepted that the actual course of events may differ to a certain extent from the behaviour that was anticipated, taken into account or even foreseen. Moreover, the actual director does not have to fully control the corporation's behaviour, nor is it required that those who physically commit the offences are aware of the fact that they are silently supported by an actual director.

tration and participation has two major implications that are relevant for this research. The first is that there is an inevitable consequence for the required *mens rea* (see below). The second is that, in order to be a perpetrator—unlike the case with participation—one must also personally be the addressee of the legal norm, otherwise the accused lacks the required capacity to violate the legal norm by himself. In the field of economic regulatory law, the addressee is often ‘the licensee’ (*vergunninghouder*), ‘the taxable person’ (*belastingplichtige*) or ‘the one that operates an establishment’ (*drijver van de inrichting*). In many cases, only the legal person will qualify as such and not the heads of business. As a consequence, these officials cannot be prosecuted as functional perpetrators, but only as actual directors.

### 3.2. *Actus reus*

Functional perpetration requires that the suspect had the power of decision over whether or not the acts occurred (disposal) and that these acts belonged to the realm of activities which the accused, as becomes apparent from the general course of daily events, accepted or used to accept (apparent approval).<sup>78</sup> The latter also includes situations in which the defendant did not live up to the duty of care that could reasonably be expected in order to prevent the alleged acts from occurring.<sup>79</sup>

Whilst actually directing covers active forms of endorsing committing offences, just like the word directing presumes, it also encompasses more indirect forms of involvement as well as passive engagement.<sup>80</sup> Besides actively and effectively controlling and steering the corporation’s behaviour, actually directing also includes situations where the illegal acts are a foreseeable and inevitable consequence of the general policy set out by the actual director—for instance, by imposing such a tight time schedule that respecting rest periods or safety regulations becomes nearly illusory.<sup>81</sup> Furthermore, it covers situations in which the accused contributed to the offence to such an extent that he must be regarded as the person taking the initiative for the illegal conduct. A clear example of the latter is a case in which the director of a small airport implicitly suggested to a subordinate that it would be a good idea to mislead the autho-

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<sup>78</sup> Supreme Court 23 February 1954, *NJ* 1954, 378.

<sup>79</sup> Supreme Court 21 October 2003, ECLI:NL:HR:2003:AF7938, *NJ* 2006, 328; Supreme Court 8 December 2015, ECLI:NL:HR:2015:3487, *NJ* 2016, 23.

<sup>80</sup> Supreme Court 26 April 2016, ECLI:NL:HR:2016:733, *NJ* 2016, 375.

<sup>81</sup> See, for example, Supreme Court 22 March 1983, *NJ* 1983, 502.

rities about the necessity of granting an exemption to the ban of night flights, an insinuation that the subordinate took to heart.<sup>82</sup> Passive involvement can generate liability when the actual director (i) knows the corporation is engaging or will engage in criminal activities, and (ii) omits to take measures to either halt or prevent the occurrence or continuance of these activities, despite (iii) being authorised, or at least able, and (iv) reasonably bound to do so. Under these circumstances, which form the threshold for liability, the manager can be considered having deliberately promoted the prohibited acts.<sup>83</sup> As such, the distinction between active and passive involvement is not without consequences. In the case of direct involvement, the accused will be bound to intervene personally and effectively from the outset. In the case of passive involvement, an obligation to intervene arises only once the accused becomes aware of the misconduct. Moreover, his duty of care will be shaped by what he knows about the nature, scope and severity of the criminal behaviour that is taking place within the corporation.

### 3.3. *Mens rea*

From a dogmatic perspective, because it is a form of perpetration, the functional perpetrator is seen as committing the acts himself, albeit through the behaviour of someone else. As a consequence, it must be established that he personally meets the *mens rea* requirements as set out in the offence at hand, should such mental elements for liability be mentioned. The mere observation that the defendant failed to take into account the necessary duty of care is therefore not automatically sufficient to impose criminal liability. After all, this does not automatically entail that the functional perpetrator grossly disregarded his duty of care, let alone did so intentionally.<sup>84</sup> There has been a recent shift in jurisprudence in that sense. Traditionally, the concept of acceptance entailed a subjective criterion of *dolus eventualis*,<sup>85</sup> which required that

<sup>82</sup> Supreme Court 10 February 1987, *NJ* 1987, 662.

<sup>83</sup> Supreme Court 16 December 1986, *NJ* 1987, 321 and 322/AA 1987, 167–175 (Slavenburg II).

<sup>84</sup> D.R. DOORENBOS, ‘Schuldige rechtspersonen in de risico-maatschappij. Toerekenen, toerekenen en nog eens toerekenen’, in: P.H.P.H.M.C. VAN KEMPEN *et al.* (eds), *Levend strafrecht. Strafrechtelijke vernieuwingen in een maatschappelijke context. Liber amicorum Ybo Buruma* (Kluwer, Deventer 2011) 147–148; M.J. HORNMAN, ‘Concretisering van redelijke toerekening; invulling van de Drijfmestriteria in de feitenrechtspraak’, *Delikt & Delinkwent* 2010, Vol. 40 (3) 392; SIKKEMA (n 36) 46.

<sup>85</sup> See VAN ELST (n 36) 33–34; KNIGGE (n 48) 141; VAN WOENSEL (n 65) 96–98;

the functional perpetrator at least tolerated the crime committed by the physical perpetrator. However, in more recent case law, the Supreme Court has stipulated that acceptance also includes not taking reasonable measures of care to prevent criminal conduct. By interpreting acceptance in more objective terms, the Supreme Court significantly broadened the concept of functional perpetration.<sup>86</sup> However, the Supreme Court continues to stress that any *mens rea* standard required by the underlying offence should always be fulfilled by the functional perpetrator personally.<sup>87</sup> Liability of natural persons cannot be established vicariously, which means that *dolus* or *culpa* can never be attributed to a leading official.

In the Netherlands, participation always requires intent. One cannot cooperate or incite by accident. In this regard, Dutch law demands that participants act intentionally both in relation to their participation and in relation to the crimes for which they stand trial (so-called ‘double intent’).<sup>88</sup> If the underlying offence itself does not require intent, but is a misdemeanour or settles for *culpa*, then intent remains limited to the act of participation,<sup>89</sup> which, in case of actually directing, means that the accused has to be aware of the act that is being committed or is bound to be committed by the legal person. The accused does not have to know that the corporate act also amounts to an offence, but he does have to be aware of the act itself. After all, one cannot direct actions of which one is not aware.<sup>90</sup> In a nutshell, it must be established that the accused can be said to have intentionally promoted the illegal conduct of the corporation.<sup>91</sup> The decisive determination is whether the manager—although, as mentioned above, authorised and reasonably obliged to do so—failed to take measures to prevent or end the act of the legal

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H.D. WOLSWIJK, ‘Functioneel daderschap en IJzerdraadcriteria’, *Delikt & Delinkwent* 2001, Vol. 31 (10) 1089.

<sup>86</sup> Supreme Court 21 October 2003, ECLI:NL:HR:2003:AF7938, *NJ* 2006, 328; Supreme Court 8 December 2015, ECLI:NL:HR:2015:3487, *NJ* 2016, 23; E. GRITTER, ‘Functioneel plegen door een natuurlijk persoon’, in: J.B.J. VAN DER LEIJ (ed), *Plegen en deelnemen* (Kluwer, Deventer 2007) 22; DE HULLU (n 32) 162–163; M. KESSLER, ‘Beschikkingsmacht centraal bij functioneel plegen. Beschouwingen naar aanleiding van het drijfmestarrest’, in: B.F. KEULEN *et al.* (eds), *Pet af. Liber amicorum D.H. de Jong* (Wolf Legal Publishers, Nijmegen 2007) 205–206; DE VALK (n 36) 410.

<sup>87</sup> Dating back to Supreme Court 23 February 1954, *NJ* 1954, 378.

<sup>88</sup> DE HULLU (n 32) 443–447; KNIGGE – WOLSWIJK (n 76) 261–266.

<sup>89</sup> DE HULLU (n 32) 444–445; KNIGGE – WOLSWIJK (n 76) 262.

<sup>90</sup> MULDER (n 13) 216, 219; D.R. DOORENBOS, ‘Slecht leiding geven’, in: A.A. FRANKEN, TH.J. KELDER (eds), *Sporen in het strafrecht. Liber amicorum Jan Sjöcrona* (Kluwer, Deventer 2014) 33, 40.

<sup>91</sup> Supreme Court 16 December 1986, *NJ* 1987, 321 and 322/AA 1987, 167–175 (Slavenburg II).

person, and willingly accepted the considerable possibility that the prohibited act would occur. This means that he knew and accepted that the corporation was or would become involved in criminal activity. Having said that, actually directing does not require in-depth knowledge of the alleged criminal conduct. Detailed knowledge about when, where and how the offence is committed is not necessary.<sup>92</sup> It suffices that the actual director knows that the illegal act or a similar illegal act is taking place, or is about to take place. At the same time, knowledge still entails more than a vague feeling that something within the corporation might be wrong.<sup>93</sup> Ignorance due to poor management does not suffice, no matter how blameworthy that ignorance might be.<sup>94</sup> Yet wilful blindness is not excused,<sup>95</sup> though this standard is difficult to meet in large and/or complex businesses in which top management's involvement in day-to-day activities is limited. Case law on this issue is, in my view, quite lenient, letting senior managers of large corporations get away with serious disregards of their duties.<sup>96</sup> For instance, in the Ahold accounting fraud case, one of the accused was acquitted of intentionally defrauding documents because he allegedly did not read and/or understand the control and side letters he signed and therefore claimed he was unaware of their misleading character.<sup>97</sup>

In sum, the *mens rea* requirement for actually directing differs strongly from functional perpetration. When it comes to culpability offences or misdemeanours, the latter can be liable even if he is not aware but could and should have known about them. For actually directing, this does not suffice. Here, the knowledge standard still stands, as was recently reaffirmed by the Supreme Court.<sup>98</sup>

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<sup>92</sup> VAN ELST (n 36) 59–60; DE HULLU (n 32) 507.

<sup>93</sup> C.H. BRANTS, 'Slavenburg en de grenzen van het strafrecht', *Recht en kritiek* 1988, Vol. 14 (1) 52.

<sup>94</sup> D.R. DOORENBOS, 'Daderschap en aansprakelijkheid van leidinggevenden', in: D.R. DOORENBOS *et al.* (eds), *Onderneming en sanctierecht. Handhaving van financieel toezichtrecht, in het bijzonder onder de Wft en Pw* (Kluwer, Deventer 2013) 170; HORNMAN (n 14) 441.

<sup>95</sup> Supreme Court, 13 January 2004, ECLI:NL:HR:2004:AN9177, NJ 2005, 63; MULDER (n 13) 218; SIKKEMA (n 36) 77; DE VALK (n 36) 432–433.

<sup>96</sup> For more detail on this issue, see HORNMAN (n 14) and M.J. HORNMAN, 'Feitelijk leidinggeven. Hoe een weinig vernieuwend arrest toch veel nieuws kan brengen; een kritische beschouwing', *Tijdschrift voor Bijzonder Strafrecht & Handhaving* 2016, Vol. 3 (3) 128–139.

<sup>97</sup> Amsterdam Court of Appeal 28 January 2009, ECLI:NL:GHAMS:2009:BH1971 (Ahold accounting fraud; CFO Fahlin).

<sup>98</sup> Supreme Court 26 April 2016, ECLI:NL:HR:2016:733, NJ 2016, 375.

### 3.4. *De facto position of control*

The criminal liability of functional perpetrators and actual directors is based on their *de facto* leading position within an organisation. Holding an official (*de jure*) position is not required,<sup>99</sup> nor in itself sufficient for imposing liability.<sup>100</sup> The decisive circumstance is whether the accused held a position that enabled him to intervene and halt or promote the illegal act. After all, the reproach is not that the accused held a leading position within the company that committed an offence, but that he was one of the ones that advanced (*bewerkstelligen* or *bevorderen*) the commission of that offence using his internal position within the corporate hierarchy.<sup>101</sup> Therefore, a senior leading position is not necessary; lower level management can also qualify as long as the manager has power over the criminal act that was committed either by (in case of actual directing) or on behalf of (in case of functional perpetration) the corporation.

### 3.5. *Delegation, division of tasks, supervision and responsibility*

While delegation is allowed, it is not without limitations, nor without problems. Delegation will, in principle, shift responsibility to the subordinate, making him primarily accountable for all criminal activity of which the required countermeasures fall within his scope of authority.<sup>102</sup> However, delegation does not (at least in theory) alter the fact that the superior still has *de jure* authority and *de facto* power to intervene. Therefore, the key question is whether a superior is bound to intervene or whether he may rely on his subordinate. In general, it seems that where a subordinate has been specifically entrusted to act, such actions will no longer be expected of the superior. Only if it becomes clear—either along the way or from the outset—that the subordinate is unable or unwilling to respond adequately, must the superior step in:<sup>103</sup> otherwise, the primary responsibility lies with the subordinate. A clear ex-

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<sup>99</sup> Supreme Court 16 June 1981, *NJ* 1981, 586.

<sup>100</sup> Supreme Court 24 August 2004, ECLI:NL:HR:2004:AP1508.

<sup>101</sup> In that sense, this form of liability has to be distinguished from Article 140 (3) DPC, which penalises leaders of so-called criminal organisations just for being leaders.

<sup>102</sup> See, for example, Supreme Court 16 June 1981, *NJ* 1981, 586; DE HULLU (n 32) 504; HORNMAN (n 14) 62–64, 209; SIKKEMA (n 36) 68; WOLSWIJK (n 37) 84–85, 90–91.

<sup>103</sup> District Court Rotterdam 18 April 1986, *NJ* 1986, 666; Court of Appeal, The Hague 2 December 1987, *NJ* 1988, 433.

emption is made when the subordinate is personally involved in criminal conduct. In that case, delegation to subordinates or a division of tasks has no meaning and the superior will be bound to intervene personally from the start, or as soon as he gains knowledge of the offence.<sup>104</sup>

Both delegation and division of tasks are subject to a reasonableness test, which entails a normative assessment.<sup>105</sup> As a consequence, delegating responsibilities will also require a delegation of the corresponding authorisation; the subordinate is otherwise set up for failure. Moreover, delegation and division of tasks will be rejected if these concern responsibilities relating to the corporation's core activities or activities that could endanger the company's existence.<sup>106</sup> Such key responsibilities can neither be delegated nor left completely to other members of the corporation's directing mind. At a minimum, the accused must keep a proverbial finger on the corporation's pulse and monitor such activities from a distance. Finally, even if delegation and/or a division of tasks is accepted, courts may still find that by delegating or dividing tasks, especially crucial ones, the accused knowingly accepted the significant risk that certain illegal conduct could occur (*dolus eventualis*).<sup>107</sup>

While delegation as such will not discharge the superior, it can create a (potentially impregnable) hurdle to establish liability. After all, all forms of complicity in crimes require that the accused is, at least to a certain degree, aware of the criminal conduct committed by those in the lower ranks of the corporation's hierarchy. For actually directing, it has been reaffirmed several times that one can only direct criminal acts of which one is aware. Considering that delegation potentially reduces the possibilities of the superior to gain such knowledge, delegation may still effectively shield him from liability.

An issue which is expected to be heavily debated in the near future is that of supervision. Old, but still leading, case law from the 1980s gives the impression that there is no real, or at least no far-reaching, duty to supervise subordinates. In the Slavenburg case (mentioned in Part 1),

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<sup>104</sup> Supreme Court 16 June 1981, NJ 1981, 586; HORNMAN (n 14) 65–68.

<sup>105</sup> DE HULLU (n 32) 507.

<sup>106</sup> See, for example, District Court, Rotterdam 6 February 2014, ECLI:NL:RBROT:2014:1436.

<sup>107</sup> See, for example, District Court, Overijssel 25 June 2015, ECLI:NL:RBOVE:2015:2999. In this regard, there seems to be a slight distinction between administrative and criminal law. The latter is more likely to use the *dolus eventualis* approach, whereas administrative courts are more inclined to simply refuse delegation from the outset.

the board of directors of the former Slavenburg bank issued several orders to put an end to the bank's 'supporting activities' related to tax evasion and money laundering and entrusted one of its members as the accountable manager. The board did not take any follow-up action. It did not verify whether the orders were being followed and/or had the desired effect; nor did it request the accountable manager to inform the other members of the board about the progress that was being made. According to the Court of Appeal, neither the board as a whole nor the CEO personally, were bound to do so. As long as there were no signs to the contrary, the board members were allowed to presume that all was taken adequate care of by those directly responsible.<sup>108</sup> Given the widespread and systematic nature of the 'supporting activities', one could argue that it was highly unlikely this conduct would simply be terminated overnight and that close monitoring should surely be in place. Yet, a negligence standard (*culpa*) for actually directing had just prior been clearly rejected by the Supreme Court,<sup>109</sup> a decision that was reaffirmed in 2016.<sup>110</sup> As a consequence, ignorance due to poor management is insufficient to create liability, a view that still has the support of various prominent scholars.<sup>111</sup> It is hardly disputable that slack supervision qualifies as poor management. In the wake of the recent case law on functional perpetration which broadened the scope of acceptance, the question has risen whether a similar interpretation should be applied to actual directing,<sup>112</sup> a question that the Supreme Court, as mentioned, has answered in the negative. Nonetheless, one cannot deny that jurisprudence in this regard seems to be 'on the move'.<sup>113</sup> After all, poor or a complete lack of supervision could, under certain conditions, qualify as wilful blindness. At this moment, however, it is unclear what those conditions are. In this regard, lower case law, especially in the administrative field,

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<sup>108</sup> The Hague Court of Appeal 2 December 1987, *NJ* 1988, 433.

<sup>109</sup> Supreme Court 19 November 1985, *NJ* 1985, 125 and 126 (Slavenburg I); Supreme Court 16 December 1986, *NJ* 1987, 321 and 322/AA 1987, 167–175 (Slavenburg II).

<sup>110</sup> Supreme Court 26 April 2016, ECLI:NL:HR:2016:733, *NJ* 2016, 375.

<sup>111</sup> DOORENBOS (n 90); DE HULLU (n 32) 504, 506–507.

<sup>112</sup> Conclusion of Advocate-General Vellinga to Supreme Court 14 February 2012, ECLI:NL:HR:2012:BU8789, *NJ* 2012, 133; C.M.I. VAN ASPEREN DE BOER, 'Feitelijk leidinggeven in besluiten van AFM, DNB en NMa langs de strafrechtelijke meetlat (Deel I)', *Tijdschrift voor Sanctierecht & Compliance* 2014, Vol. 4 (1) 19–30; A.N. KESTELOO, *De rechtspersoon in het strafrecht*, (Kluwer, Deventer 2013) 102–104.

<sup>113</sup> J.T.C. LELIVELD in his annotation to Court of Appeal, The Hague 19 May 2015, ECLI:NL:GHDHA:2015:1204, *NBSTRAF* 2015, 119 (Rabobank Libor, Article 12 DCCP procedure).

seems to have become more demanding, holding heads of business to a higher duty of care;<sup>114</sup> yet, at the same time, recent jurisprudence is very limited and mostly related to small companies, where it is much harder to successfully claim that one was unaware of illegal corporate conduct.

### *3.6. Responsibility for collective decisions*

Even though Dutch criminal law rejects collective accountability, responsibility for taking part in joint decisions is accepted. When a group of managers collectively has participated in a decision-making process or later endorsed a decision, all persons belonging to this group will be liable because of their active endorsement of this decision and its follow-up actions. Because such a collective decision is seen as active involvement in committing the offence, a division of tasks or a delegation of responsibilities will not impede liability as long as the criminal behaviour can be traced back to that joint decision. All of those involved at a management level will be more or less equally bound to put an end to those criminal activities, irrespective of any division of tasks they may have made amongst them selves. Also, they will be liable for *all* of the criminal activity that flows from that one decision—even for criminal acts of which they were completely unaware.<sup>115</sup>

Having said that, it is generally accepted that corporate officials who oppose criminal behaviour, but are overruled or outvoted by others, lack the required *mens rea*. At the same time, merely distancing oneself from the offences by not participating will not always be sufficient to escape liability. Whether one is still bound to intervene depends on the circumstances of the case.<sup>116</sup> Even though this issue has not expli-

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<sup>114</sup> The Trade and Industry Appeals Tribunal has put forward that a head of business ‘should be aware of the main activities of the legal entity under his control’, and that he is ‘reasonably bound to take measures to ensure those main activities from being in violation of the law. If he fails to do so, he accepts that those illicit actions will occur’ (Trade and Industry Appeals Tribunal, 7 March 2016, ECLI:NL:CBB:2016:54 and October 2017, ECLI:NL:CBB:2017:326 and, 327).

<sup>115</sup> Supreme Court 16 June 1981, *NJ* 1981, 586; HORNMAN (n 14) 66. Probably with the exception of acts that were unforeseeable or highly unlikely. In addition, it must be mentioned that this rule was developed in a case dealing with clear collective criminal intentions to commit large-scale fraud. It remains to be seen whether the same will hold up in cases where the accused’s criminal intentions are less explicit.

<sup>116</sup> For a rare example, see Court of Appeal, Amsterdam 5 March 2004, ECLI:NL:GHAMS:2004:AO5069, where the Court of Appeal argued that the accused was not bound to intervene once senior management decided to push through its decision after obtaining legal advice.

citily emerged in case law, various scholars have argued that, in case of serious offences, corporate officials are obliged either to intervene and halt the offences, resign their position as executives, or inform the authorities in order to evade liability.<sup>117</sup>

### 3.7. Corporate criminal liability

As stated above, the criminal liability of corporate officials is closely linked to the liability of legal entities, both historically and substantively. Corporate criminal liability is a prerequisite for the liability of the actual director, who only comes into view after it has been established that the corporation has committed an offence.<sup>118</sup> Following the Supreme Court's 2003 *Drijfmeest* judgment,<sup>119</sup> criminal liability of legal entities depends on whether the offence can reasonably be attributed or imputed<sup>120</sup> (*toerekenen*) to the legal entity. This has to be assessed by taking into account all circumstances of the case. Attribution is considered reasonable if the (illegal) conduct took place 'within the sphere' or 'scope' of the legal entity. Conduct can be considered to have taken place in the sphere of the legal entity *inter alia* if:

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<sup>117</sup> SIKKEMA (n 36) 73–74; H.D. WOLSWIJK (n 37) 92. Also *vide* the paragraph on Notification Requirements in Part 2.

<sup>118</sup> This does not mean, however, that the corporation is also prosecuted, can be prosecuted (for example, because the legal person ceased to exist) or can be punished (for example, because it can invoke a justification or excuse). All that is required is that the corporation can be identified as the offender.

<sup>119</sup> Supreme Court, 21 October 2003, ECLI:NL:HR:2003:AF7938, NJ 2006, 328. The following description of the *Drijfmeest* judgment is largely based on M.J. HORNMAN, E. SIKKEMA, 'Corporate Intent: In Search for a Theoretical Foundation for Corporate Mens Rea', in F. DE JONG *et al.* (eds), *Overarching Views of Crime and Deviancy; Rethinking the Legacy of the Utrecht School* (Eleven International Publishing, The Hague 2015) 293–297.

<sup>120</sup> The exact meaning of the term *toerekenen* has been heavily debated in legal doctrine. Some interpret the Supreme Court's approach as a classical derivative model in which corporate criminal liability is derived from the liability of its associated members. I do not support this interpretation. It should be noted that the Supreme Court speaks of the attribution of the (criminal) act and not of the attribution of the actions of natural persons. As such, the criteria set out by the Supreme Court for corporate criminal liability encompass elements of both a derivative model and a model of organisational fault (E. GRITTER, 'Duidelijkheid omtrent corporatief daderschap. Enige beschouwingen naar aanleiding van het Drijfmeest-arrest', *Tijdschrift voor Onderneming en Strafrecht* 2004, Vol. 2 (2) 31–38; for a further analysis in English, see HORNMAN, SIKKEMA (n 119)).

- 1) the act was committed by someone who is employed by or works for the legal entity;<sup>121</sup>
- 2) the act was part of the normal business activities of the legal entity;
- 3) the legal entity benefited from the act; or,
- 4) the legal person had the power to decide whether or not the criminal conduct occurred and accepted either this conduct or similar behaviour. Acceptance also includes the failure to fulfil the level of care that could reasonably be requested from the corporation in view of the prevention of the alleged criminal acts.

These criteria are neither cumulative nor exclusive, but are mere relevant factors that can be used to determine corporate criminal liability. In the end, it is the overall reasonableness test that is decisive. In theory, this means that meeting one of the listed criteria could be sufficient to establish liability: in reality, courts often assess all of them.<sup>122</sup> In that assessment, most weight seems to be attached to the second and fourth criteria, whilst the first and third criteria are considered to be in themselves quite weak and non-determinative.

This framework allows for attributing the acts of any individual who is in any way associated with the corporation to the legal entity. Thus, on an *actus reus* level, Dutch law does not require the involvement of the legal entities' 'directing minds'.<sup>123</sup> As such, the scope of so-called 'triggering persons'<sup>124</sup> is substantial. However, in reality, attribution is more restricted. Acts that are completely unrelated to the *de facto* activities of the corporation will not be attributed to the corporation. A similar yet more debated question relates to the liability of corporate groups. The *Driftest* framework on the attribution of the *actus reus* of individuals to a corporate entity was developed by the Supreme Court in a case dealing with several individuals working for one legal

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<sup>121</sup> In this regard, it suffices that it can be established that the acts were committed by a person working on behalf of the legal person. It is not necessary that this person can also be identified.

<sup>122</sup> HORNMAN (n 84) 370-401. Punitive administrative law shows a slightly different picture (see HORNMAN (n 14) 49).

<sup>123</sup> It is debated whether this also holds true for the most heinous offences. H. VAN DER WILT, 'Corporate Criminal Responsibility for International Crimes: Exploring the Possibilities', *Chinese Journal of International Law* 2013, Vol. 12 (1) 66–77, holds a strong argument that core international crimes require closer involvement and awareness of the corporation's leadership (for more on this, see CUPIDO *et al.* (n 31)).

<sup>124</sup> Terminology derived from A. VALENZANO, "Triggering Persons" in 'Ex Crimine' Liability of Legal Entities', in: D. BRODOWSKI *et al.* (eds), *Regulating corporate criminal liability* (Springer, Heidelberg 2014) 95–107.

person. However, most companies consist of multiple legal persons—and, especially with regard to fraud, raising a smokescreen of legal persons is a frequently used tactic. This means that cases of corporate involvement in PIF offences are more likely to deal with corporate groups consisting of separate legal entities. This is not without legal significance, because these groups will, as a whole, most likely lack legal personhood, and therefore cannot be punished as such: only the individual legal entities can.<sup>125</sup> Moreover, just as natural persons in general cannot be held responsible for the behaviour and intentions of others, legal persons are not responsible for the acts and intentions of another legal entity belonging to the same group or taking part in the same business deal. Each legal person bears his own legal responsibility. Thus, when a group of corporations is involved, the question is not only whether the acts and intentions of individuals can be attributed, but also to whom they can be attributed, and whether the acts and intentions of one legal entity can be attributed to another.<sup>126</sup>

Finally, the mere fact that an act can be attributed to the legal entity does not automatically imply that the corporation also acted with the required *mens rea*. This requires a separate analysis.<sup>127</sup> Corporate *mens rea* can be established through the attribution of the intentions of one or more associated individuals to the corporation (the so-called aggregation model), but it can also be founded on organisational deficiencies or policies (the organisational fault model). A combination of these two approaches is also possible.<sup>128</sup> In general, corporate *mens rea* can be established without the involvement of the corporation's directing minds;

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<sup>125</sup> For more on this, see KRISTEN (n 38) and HORNMAN (n 14) 259–271.

<sup>126</sup> Especially with regard to so-called international joint ventures, where Dutch companies operate jointly with a local private or state-owned company, attribution to the Dutch company might prove difficult, as the Dutch company might lack the required *de facto* power over the acts of the daughter company. For some examples, see W. HUISMAN, *Business as usual? De betrokkenheid van ondernemingen bij internationale misdrijven* (inaugural lecture VU University Amsterdam, Eleven International Publishing, The Hague 2010); more in-depth on this issue (with a focus on international core crimes) is M. CUPIDO, M. HORNMAN, W. HUISMAN, 'Holding business leaders accountable for international crimes: how to tackle remoteness?', in: L.F.H. ENNEKING et al. (eds), *Corporate Responsibility, Human Rights and the Law. Accountability and International Business Operations* (Routledge, London 2019).

<sup>127</sup> Supreme Court 21 October 2003, ECLI:NL:HR:2003:AF7938, NJ 2006, 328, para 3.5.

<sup>128</sup> Supreme Court 26 April 2016, ECLI:NL:HR:2016:733, NJ 2016, 375, para. 3.4.2; for more on this, see HORNMAN, SIKKEMA (n 119); HORNMAN (n 14) 52–55.

nor is it required that those who performed the *actus reus* on behalf of the legal entity are also the ones that had the *mens rea*.<sup>129</sup>

Once corporate criminal liability has been established, both the legal entity and the natural persons contributing to the corporate offence can be prosecuted and punished. Both are held equally accountable under Article 51 DPC. Hence, corporate criminal liability does not hamper, diminish or alter individual responsibility.

### *3.8. Influence of compliance programmes and/or officers*

Whilst administrative regulations regarding the financial services sector might push for the adoption of a compliance programme or to appoint a compliance officer,<sup>130</sup> no such general obligation exists under criminal law. As follows from the above, managers are—depending on the nature of the offence, the moment they gain knowledge, and whether they are prosecuted as a functional perpetrator or actual director—bound to take either preventive or reactive measures in order to prevent or halt offences. Those measures have to be effective from an objective point of view, but management is free to choose which measures it wants to take. The duty of care, however, will always be a duty of (strong) commitment, not one of result.<sup>131</sup> The scope of this duty of care is defined by the accused's *de facto* position within the corporate hierarchy, his possibilities to intervene, the nature and gravity of the underlying offence, the accused's knowledge, and his assessment of the available information. *Communis opinio* is that it is neither for the government nor the judiciary to prescribe how management should solve its affairs. As a consequence, there is broad consensus on the existence of a duty of care to intervene, but it remains unclear when a manager can claim that he has done enough in order to evade liability.<sup>132</sup> After all, doing too little to stop the offences could qualify as acceptance. So, with regard to compliance, management can opt for the introduction of a compliance programme and compliance officers, but it is not bound to

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<sup>129</sup> Supreme Court 29 April 2008, ECLI:NL:HR:2008:BB8977, NJ 2009, 130.

<sup>130</sup> See, for example, Art. 22 Besluit marktmisbruik Wft.

<sup>131</sup> HORNMAN (n 14) 69.

<sup>132</sup> In my dissertation, I set out various archetypes of organisations and managerial positions within them in order to further elaborate this duty of care based on insights for organisational theory and criminology (see HORNMAN (n 14)). It remains to be seen, however, whether legal practice will embrace approaches like these.

do so under domestic criminal law, nor will these measures automatically get the head of business off the hook. Should the existence of a compliance programme be brought forward as a defence—which thus far has never been the case—courts will most likely scrutinise the programme. A mere formal compliance programme on paper will not suffice to evade or reduce liability. In case the programme does have true substance, then such a programme could potentially limit or block liability because of the strong link with due diligence: this aspect will be elaborated on in Part 4.

## 4. Defences

### 4.1. General

Like all other defendants, heads of business can invoke all justifications and excuses provided by law without limitations: most of them are, however, very unlikely to be applicable in a PIF offence-related context. Insofar as they could be applicable—for example, in case of necessity or duress (Art. 40 DPC)—such a defence can only be successful if the head of business was not responsible for creating the emergency situation in the first place. How this doctrine of *culpa in causa* (or own fault) will undermine a defence depends on the circumstances of the case. Sometimes this is judged with leniency: for instance, a self-defence plea by a person who knowingly enters into a situation that could turn violent will not automatically be denied, even though escalation was foreseeable. The rationale behind this is apparent: every individual should be free to move around and no one should be denied that right because of aggressive threats by others.<sup>133</sup> In other cases, like self-intoxication, a stricter norm applies.<sup>134</sup> With regard to economic activities, the argument that it was too expensive to comply with regulations will easily be rebutted as a lack of resources does not release the accused of his obligation to obey the law, especially since it was his free choice to engage in these activities in the first place.

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<sup>133</sup> DE HULLU (n 32) 329–331.

<sup>134</sup> DE HULLU (n 32) 349–351; J. BIJLSMA, ‘Drank, drugs en culpa. Zelfintoxicatie en culpa in causa: pleidooi voor een voorzienbaarheidseis’, *Delikt & Delinkwent* 2011, Vol. 41 (6) 654–678.

#### 4.2. Lack of power or supervision

The justification for allocating liability along hierarchical lines within an organisation, as is the case with functional perpetration and actually directing, depends on the possibilities the person has to exercise control over the organisation and the persons within it.<sup>135</sup> As such, a lack of *de facto* power is irreconcilable with the essence of these modes of liability. It is the combination of power and knowledge that creates and shapes, but also limits, the duty of care.<sup>136</sup> Without these pillars, the sheer foundation of liability falls apart. As a consequence, there can be no liability without or beyond power, which would also be in flagrant violation of the culpability principle. Therefore, in most cases, a lack of power defence would not and should not qualify as an excuse for not living up to the duty of care (*schulduitsluitingsgrond*), but rather for contesting that there was a violation of this duty in the first place. At the same time, in order for such a defence to be successful, the lack of power should be grounded in objective factors beyond the accused's control—for instance, when the necessary measures go beyond the authority of the accused, which is especially important for those in middle management. Furthermore, the lack of power should not be the accused's own fault: poor management qualities will not exculpate the head of business.

A different picture arises when it comes to supervision. As previously stated, for actually directing, it remains unclear to what extent the duty of care also embodies a duty to supervise. If this is the case, then a violation of this duty could result in liability. If this is not the case, then the accused can simply claim he was unaware of the criminal conduct, even in cases where this ignorance was largely the consequence of his own underachieving.<sup>137</sup> In this regard, a clear distinction must be made between heads of business of smaller companies and middle managers on the one hand, and senior management officials of large corporations on the other. The first category is much more involved in operational activities and is in closer cooperation with the operational level. Ignorance on their part will be less understandable and excusable than ignorance on the part of the senior managers in large companies. Because case law has shown that courts are very cautious about not violat-

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<sup>135</sup> M.A.P. BOVENS, *The Quest for Responsibility: Accountability and Citizenship in Complex Organisations* (Cambridge University Press, Cambridge 1998) 78–80.

<sup>136</sup> HORNMAN (n 14) 82, 431–432.

<sup>137</sup> DOORENBOS (n 90) 30; HORNMAN (n 14) 441, 449.

ing the culpability principle, any doubt in this regard favours the accused, making those at the top of large corporations extremely favoured. Unfortunately, this attention to the culpability principle does have the side effect that, from a liability perspective, it is a good thing not to have too much power or knowledge, as either will only increase the duty of care.<sup>138</sup> As a consequence, the manager who gravely disregards his duties has only a slim chance of gaining knowledge of criminal conduct. For the ‘average’ manager who does a decent job, this chance already increases, but it is the dedicated manager who goes beyond what others do and who really monitors the events in his company, who runs the greatest risk of becoming aware of unwanted conduct and seeing his duty of care to stop such events being activated.<sup>139</sup>

#### *4.3. Delegation and supervision*

As stated above, criminal law allows for delegation and shifting of responsibilities provided that these tasks are delegated in a reasonable manner and not meant to evade liability. The latter would be the case if, for instance, one were to delegate only the responsibility but not the required authority to intervene properly should such action be required. As mentioned in Part 3 and the previous paragraph, legitimate delegation will make the person to whom those tasks are delegated the primary responsible person. His seniors will only be bound to intervene if this person falls short or is himself part of the problem. As such, managers cannot simply hide behind their subordinates by delegating unwanted responsibilities. Yet, because courts are hesitant to base liability on deficiencies in corporate structures, and the manager who delegates tasks will most likely become less involved in those tasks and therefore be less informed, such an evasive tactic which, in theory, should not hold up, might still be effective in practice, especially since—as has been repeatedly mentioned—it is still under intense debate whether and to what extent a manager is bound to exercise proper supervision.

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<sup>138</sup> HORNMAN (n 14) 448.

<sup>139</sup> HORNMAN (n 14) 467–468.

#### 4.4. Due diligence

Compliance and other due diligence measures can have their effects on various aspects of the criminal proceeding. In Dutch criminal law, measures like these could be an indication that the corporation and/or its leading officials really did their best to prevent criminal conduct. If these measures reach the level where one could say that the accused did everything that was in his power in order to prevent such criminal conduct—thus stating that he took all measures that could be expected of him—this would qualify as an absence-of-all-blameworthiness defence, which impedes liability (see Part 2 for further detail). Such an observation could impact the procedure in various ways. First and foremost, it could be relevant for the prosecutors' discretionary decision whether or not to prosecute the offence (enshrined in Article 167 DCCP). From a substantive law perspective, such a defence could be either (i) a denial of *actus reus*, as there was no violation of the duty of care; (ii) a denial of *mens rea*, in which case there would be a violation of the duty of care but this would not have been done intentionally or recklessly; or (iii) a denial of blameworthiness, thus claiming there was a valid excuse for his actions.<sup>140</sup> While the legal outcome will depend on the exact nature of the defence and the underlying offence, the bottom line is that the accused cannot be punished. Finally, should the level of care just fall short of evading liability, the measures taken could still have a mitigating effect on the sentence.

#### 4.5. Third-party advice or review

Because nobody is all-knowing, relying on professional third parties for their advice, review or approval is a common practice in society. In criminal law, such advice, etc., could be relevant with regard to mistake-of-law (and even fact) defences or cases where the defendant claims to have done everything within his power in order to respect the law. Both of these defences qualify as an absence-of-blameworthiness defence. In

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<sup>140</sup> In this regard, there could be a small distinction between (i) and (iii). In order to counter *actus reus*, it would suffice that the accused reached the level of care that could reasonably be expected in order to prevent the criminal conduct that occurred. For (iii), a slightly stricter rule seems to apply. Here, it is required that the accused took *all* measures that could be expected, even though the latter probably is also subjected to a reasonableness test. In the end, whether there is sufficient ground for liability will be decisive.

order for advice, review or approval from a third party to absolve a defendant, certain criteria have to be met. First of all, the defendant has to be in good faith and must have provided the third party with full, sufficient and proper information. One cannot claim to have sincerely relied on statements by a third party knowing that the foundations upon which these arguments are made are either incorrect or otherwise questionable. Furthermore, in order for the defendant to have acted in ‘an excusable unconsciousness’ (*verontschuldigbare onbewustheid*) with regard to his unauthorised conduct, he must have relied on the advice<sup>141</sup> of a person or body to whom such authority can be attributed and thus that the accused could reasonably rely on the validity of this advice. Relevant factors in this regard are: the position of the accused within the company; the independence and impartiality of the advisor; the specific area and level of expertise of the advisor; the complexity of the matter for which advice is sought; and the way and circumstances under which the advice was obtained and given.<sup>142</sup> Following from this, approval by an external auditor could diminish or absolve liability. From a substantive law perspective, such a defence could have the same effect as (i), (ii) and (iii) mentioned in the previous paragraph.<sup>143</sup> Whether or not the third party itself is liable for any wrongdoing is not relevant in this regard: after all, criminal liability is not a matter of communicating vessels. With regard to mistake-of-fact defences, whether the mistake was excusable will be decisive, as there can be no culpable ignorance (*verwijtbare onwetendheid*). This is a predominantly normative assessment which also takes into consideration whether the accused exercised due care in order to avoid this mistake and whether or not he held a special position or had, or should have had, special knowledge (*Garantenstellung*).<sup>144</sup>

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<sup>141</sup> There is no specific case law on the role of external auditors, but there is a consistent line of jurisprudence on relying on advice from public officials, public bodies and third parties (e.g. legal experts and tax consultants).

<sup>142</sup> Supreme Court 4 April 2006, ECLI:NL:HR:2006:AU4664, *NJ* 2007, 144; Supreme Court 26 February 2008, ECLI:NL:HR: 2008:BC0813, *NJ* 2008, 148; B.F. KEULEN, ‘Adviezen en rechtsdwaling’, *Ondernemingsrecht* 2011, Vol. 12 (7) 276–282; R.M.I. LAMP, ‘De bestuurder, zijn advocaat en de strafrechter. Beschouwing naar aanleiding van de Content- en McGregor-zaken’, *Tijdschrift voor Financieel Recht* 2007, Vol. 9 (3) 56–61; M. MUSSCHE, *Vertrouwen op informatie bij bestuurlijke taakvervulling* (dissertation Erasmus University Rotterdam, Kluwer, Deventer 2011) 170–197.

<sup>143</sup> The relevance of (ii) must not be underestimated, as both forgery (Art. 225 DPC) and publishing untrue financial documents (Art. 336 DPC) require intent.

<sup>144</sup> DE HULLU (n 32) 364–365.

## 5. Sanctions

### 5.1. General

With the exception of aiders who receive a mandatory reduction of the maximum penalty (Art. 49 (1) DPC), Dutch law makes no distinction between offenders when it comes to sentencing. In the Dutch criminal system, sanctions are divided into two categories: punishments (*straffen*), which seek to denounce, retribute, deter and rehabilitate; and measures (*maatregelen*), which do not aim for retribution but seek to protect the public, restore the status quo and/or compensate victims for their grief and suffering. According to Article 9 DPC, the principal punishments are imprisonment, detention, community service and the fine. The additional punishments are disqualification from certain rights, forfeiture and publication of the judgment. Measures that can be imposed on heads of businesses are—insofar as are relevant for this research—withdrawal from circulation, confiscation of unlawfully obtained gains and compensation for the victim. Besides remedial sanctions, the only sanction known to administrative law with a punitive component is the fine (Art. 5:40 GALA).

There are no official sentencing guidelines in the Netherlands. However, the Prosecutor's Office and various administrative regulatory bodies do have several, mostly internal, guidelines, and there are non-binding judiciary 'points of orientation' that are used by criminal courts. If these prosecutorial guidelines have been made public, which is the case with regard to many PIF-related offences, then the Prosecutor's Office is also bound to adhere to them as long as they relate to policy choices,<sup>145</sup> i.e. dismissal of procedures, *una via* related decisions, etc. With regard to the nature and severity of the sentence, many of these guidelines highlight important factors that have to be taken into consideration. For instance, the money laundering guidelines mention (repeated) recidivism, categories of offenders (e.g. mules, facilitators, etc.), and the amount of money that was being laundered.<sup>146</sup> However, these guidelines still leave a lot of flexibility. Moreover, it must be borne in mind that these guidelines do not bind the courts; nor are the courts bound by their internal 'points of orientation' or sentences imposed in

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<sup>145</sup> Recently one of the administrative authorities was also obligated by the Trade and Industry Appeals Tribunal to disclose its internal fines policy (Trade and Industry Appeals Tribunal, 13 September 2017, ECLI:NL:CBB:2017:309). The tribunal also took this policy into account when assessing the imposed fine.

<sup>146</sup> Richtlijn voor strafvordering witwassen (2015R052).

earlier similar cases. So, if the prosecutor decides to call for a more severe sentence than is deemed appropriate according to the guidelines, then he will probably have some explaining to do in court, but that will be all, as it is for the judge(s) to impose the sentence. Whilst empirical evidence is lacking, there are numerous signals coming from the field stating that there is an increase in punitiveness in this regard.<sup>147</sup>

### 5.2. *Highlighted sanctions*

Complementary to the general framework set out above, several specific sanctions deserve special attention. The first is the disqualification from certain rights, primarily because there is a limited list of rights that can be denied. In short, this list—as far as it is relevant—boils down to no longer being allowed to serve as a public servant or to exercise a certain profession. The Economic Offences Act mentions various other additional punishments and measures, such as revoking licenses, suspension of business activities and placing the business under legal restraint. However, these sanctions can only be imposed if an economic offence has been committed. All PIF offences fall under the general Penal Code and therefore do not qualify for these sanctions.

However, any company that wants to compete in a public tender must be able to submit a certificate of conduct (*Verklaring Omtrek het Gedrag*: VOG), which can (and most likely will) be denied if a corporation or senior members of its staff have engaged in criminal activity. Furthermore, administrative law (the Bibob Act) allows for the (preventive) repeal or denial of licenses if there are serious doubts regarding the integrity of a legal entity or natural persons associated with it.<sup>148</sup>

Dutch law only allows for confiscation of unlawfully obtained gains from criminal offences (*strafbare feiten*): gains from administrative offences are excluded (Art. 36e DPC).<sup>149</sup> While the confiscation procedure has characteristics of a civil proceeding, it is still seen as a fol-

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<sup>147</sup> See Part 1 for further analysis and references.

<sup>148</sup> For more extensive discussion of this issue, see D.R. DOORENBOS, ‘Integer ondernemen – met een strafblad’, in: I.P. ASSCHER-VONK *et al.* (eds), *Onderneming en Integriteit* (Kluwer, Deventer 2007) 235–250, who also refers to the old procurement Directive 2004/18/EG which already excluded convicted candidates and tenderers. It is also noteworthy that neither the VOG test nor the Bibob check pays attention to administrative offences; only criminal offences are taken into consideration.

<sup>149</sup> For tax offences, a special regime is in place (Art. 74 STA). However, this provision is subject to a restrictive interpretation. Only if the offences exclusively qualify as tax offences does this distinct procedure apply. See Supreme Court, 29

low-up and integral part of the principal criminal proceeding.<sup>150</sup> Confiscation is allowed in order to seize unlawfully obtained gains from (i) offences of which the person has been convicted; (ii) other offences of which there is sufficient indication (*voldoende aanwijzingen*) that they have been committed by the convicted person; and (iii) offences which the convicted person himself has not necessarily been convicted, but wherein it is probable that these or other offences in some way led to unlawful advantage for the convicted person. The last, however, requires that the person from whom the gains are confiscated must himself be convicted of a crime sanctioned by a maximum penalty of at least the fifth category (currently 82,000 euros; Art. 23 (4) DPC). Whilst most do, it is not necessary that the PIF offence itself meets this criterion.<sup>151</sup> Any crime will do. The rationale behind (iii) is that in many cases, besides (i) and (ii), it will be very difficult to prove a direct relationship between the offence and the illicit gains, even when those gains can be traced back to a variety of offences but the actual involvement of the accused in those offences remains unclear. Therefore, (iii) opts for a different approach. Instead of trying to find out how much the accused gained from his illegal conduct, one looks at his entire estate and then tries to figure out how much of it can be accounted for by legitimate sources of income. The rest is then presumed to be acquired through criminal conduct.<sup>152</sup> In light of the presumption of innocence, this assumption only holds up if the state can demonstrate that the accused has previously been actively involved in serious criminal offences.

As such, there are possibilities to confiscate gains under third parties, including legal persons, provided that the person under whom the gains are confiscated has at least been convicted of other serious offences. Nonetheless, especially within a corporate setting, illicit gains can easily end up in the pockets of those other than the direct offender, e.g. by transferring them to other companies within the corporate group or to the natural persons hiding behind the corporate veil. Disentangling

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March 2011, ECLI:NL:HR:2011:BO2639, and 25 March 2014, ECLI:NL:HR:2014:693, NJ 2014, 410, both on offences that also amounted to money laundering.

<sup>150</sup> D. EMMELKAMP *et al.*, *De ontnemingsmaatregel* (Wolters Kluwer, Deventer 2016) 69.

<sup>151</sup> See Commission (EC), ‘Annex to the Report from the Commission. Implementation of the Convention on the Protection of the European Communities’ Financial Interests and its Protocols. Article 10 of the Convention’, SEC (2004) 1299, 25.10.2004, 60–62, 78–116. In Annex Table 7 on page 93, reference is made to two provisions in the State Tax Act and the Custom Act which do not in themselves meet this criterion.

<sup>152</sup> EMMELKAMP *et al.* (n 150) 6–7.

individual corporate involvement within corporate groups has proven to be difficult, especially when the involvement of each of the companies remains unclear,<sup>153</sup> and even more so when the nature of the cooperation between these corporations is not apparently criminal in nature.<sup>154</sup> As a consequence, the natural and/or legal persons who end up with the gains might not ever be prosecuted themselves, nor might they meet the criteria for (ii) and (iii). The presumption of innocence embodied in Article 6 (2) ECHR therefore fully applies, yet it is eminently clear that they benefitted from the illegal conduct. For these reasons, jurisprudence has allowed for confiscation against such ‘innocent’ third parties, albeit under strict conditions. After all, the ECtHR has ruled that confiscation is only allowed for gains that were ‘actually obtained’.<sup>155</sup> The mere fact that the accused is the sole owner of the company is insufficient to confiscate from this individual or legal person as a third party.<sup>156</sup> Whilst the Supreme Court has not laid down explicit rules in this regard, the Leeuwarden Court of Appeal has stated that such confiscation is only allowed if a) this person had a significant degree of control over the legal person, b) this person could dispose of its assets, and c) the illicit gains made by the legal person also stretched, or could stretch, to the personal benefit of the third party, e.g. because of increasing stock value or by sharing capital in a foreign bank account to which it has access.<sup>157</sup> A similar approach is followed by the Supreme Court with regard to the recently introduced joint and several liability (Art. 36e (7) DPC).<sup>158</sup> Following the ECtHR criterion that only actually obtained gains can be confiscated, it

<sup>153</sup> A.L.J. VAN STRIEN, intervention, in: *Verslag van de op 11 juni 2010 te Amsterdam gehouden algemene vergadering over: Maatschappelijk verantwoord ondernemen* (Handelingen Nederlandse Juristen-Vereniging 2010–2) (Kluwer, Deventer 2011) 48–50.

<sup>154</sup> Cp. BRANTS (n 93) 55; BRANTS, BRANTS (n 9) 149: the more the defendant company is embedded into the legitimate economic structures of society, the harder it becomes to establish criminal liability of that corporation and those within it.

<sup>155</sup> ECtHR 1 March 2007, application no. 30810/03 (*Geerings v. the Netherlands*), para. 47.

<sup>156</sup> Supreme Court 8 May 2001, ECLI:NL:HR:2001:AB1522, NJ 2001, 507; cp. Supreme Court 22 May 2012, ECLI:NL:HR:2012:BW5645, NJ 2012, 348.

<sup>157</sup> EMMELKAMP *et al.* (n 150) 43–44. This judgment has not been published. The considerations were, however, quoted when this case came before the Supreme Court relating to other issues. See Supreme Court 6 February 2007, JOW 2007, 12.

<sup>158</sup> The rationale behind this provision is that participants in criminal offences should not be able to benefit from the fact that it cannot be proven who gained what. By creating a strong incentive—making them liable for the whole sum instead of just their share—the legislator expects that these participants will eventually open up so that their fair share can be confiscated. See EMMELKAMP *et al.* (n 150) 42.

ruled that such liability is only in place where there is a common advantage to which each of the parties involved has access, and as such is able to hand over the whole sum of illicit gains to the government. Otherwise a proportionate settlement is more in order,<sup>159</sup> such as 25 per cent each in the case of four participants.

## 6. Relationship with punitive administrative law

### 6.1. *Ne bis in idem*

Whilst Article 51 (2) DPC allows for the prosecution and punishment of both the legal person and its leading officials—it even does so in separate or consecutive proceedings<sup>160</sup>—this cumulation is subject to certain limitations.<sup>161</sup> First of all, there is the notion of *una via* (see *infra*), which is especially relevant for cases dealing with taxation. If a criminal charge in its autonomous meaning as interpreted by the ECtHR can be addressed through both criminal law and administrative law, the government may only use one of these tracks. It is not allowed to combine or switch them.

Secondly, the *ne bis in idem* principle has to be respected. This principle is laid down in Articles 68 DPC, 5:43 GALA, 14 of the International Covenant on Civil and Political Rights (hereafter ICCPR), 4 of Protocol No 7 annexed to the ECHR, and 50 of the Charter of Fundamental Rights of the European Union (hereafter the Charter). With regard to the ICCPR and the seventh Protocol, the Netherlands has not only made a reservation but has also abstained from ratifying the protocol ever since.<sup>162</sup> As such, the case law of the ECtHR was never directly applicable to the Dutch interpretation of the *ne bis in idem* principle, even though it has served as an inspiration for the Su-

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<sup>159</sup> Supreme Court 7 April 2015, ECLI:NL:HR:2015:878, NJ 2015, 522; EMMELKAMP *et al.* (n 150) 42–43.

<sup>160</sup> Supreme Court 6 December 1988, NJ 1989, 497; Supreme Court 26 April 2016, ECLI:NL:HR:2016:733, NJ 2016, 375, para. 3.2; KESTELOO (n 112) 81–85; F.W.C. DE GRAAF, *Meervoudige aansprakelijkheidstelling. Een analyse van rechtsfiguren die aansprakelijkheidstelling voor meer dan één strafbaar feit normeren* (dissertation VU University Amsterdam, Boom juridisch, The Hague 2018) 278–281.

<sup>161</sup> The same holds true if the accused leading official is prosecuted as a perpetrator or participant under Articles 47 or 48 DPC, instead of as an orderer or actual director under Article 51 (2) DPC.

<sup>162</sup> <https://archive.is/20120530085352/http://www.unhchr.ch/tbs/doc.nsf/73c66f02499582e7c1256ab7002e2533/0f57e08b1f1 80210c1256aa1003805f8?OpenDocument#selection-271.100-295.120>; KAMERSTUKKEN II 2004/05, 29 800 VI, nr. 9.

preme Court.<sup>163</sup> However, it is debatable whether this persistent view can still be upheld after the opinion of Advocate General Campos Sánchez-Bordona in the Menci case. According to the Advocate General, Article 50 and the provisions on the interpretation of the Charter explicitly lay down a minimum level of protection: the meaning and scope of Charter rights must either correspond to or exceed the ECtHR interpretation of similar rights enshrined in the Convention. In that regard, neither the ECJ nor national judicial authorities applying EU law are bound by any reservations, declarations or lack of ratification by member states.<sup>164</sup> As a consequence, the Netherlands would be fully bound to Article 4 of Protocol No 7.

‘In order to consider the meaning of the same/*idem*,’ according to Vervaele, ‘it may be asked whether the legal definition of the offences should be considered as the basis of the definition of the term the same (*idem*), or should it be the set of facts (*idem factum*)?’<sup>165</sup> In its current Dutch interpretation, a judge must take into account several factors when assessing whether facts are the same. First of all, one must consider the legal nature of the facts. According to the Supreme Court, if the charges are not covered by the same offence, the degree of difference between the offences may be relevant, in particular with regard to (i) the legal interest which the various offences are intended to protect and (ii) the maximum penalties imposed on these offences, as these maximum sentences reflect the nature of the accusation and the qualification as a crime or misdemeanour. Secondly, one must take into consideration the behaviour of the suspect. If the indictments do not describe the same behaviour, the degree of difference in the behaviours may be important, both with regard to the nature and the apparent scope of the behaviours and with regard to the time, the place and the circumstances in which they were performed.<sup>166</sup> Based on an analysis of the Supreme Court’s case law, Borgers states that the emphasis in the Netherlands is clearly on the legal nature of the facts as the most important, if not decisive, factor.<sup>167</sup> This emphasis has been criticised, as it appears to

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<sup>163</sup> DE GRAAF (n 160) 256.

<sup>164</sup> Opinion of the Advocate General Campos Sánchez-Bordona, 12 September 2017, C 524/15, Menci Luca, ECLI:EU:C:2017:667, para. 57.

<sup>165</sup> J.A.E. VERVAELE, ‘Ne Bis In Idem: Towards a Transnational Constitutional Principle in the EU?’, *Utrecht Law Review* 2013, Vol. 9 (4) 212.

<sup>166</sup> Supreme Court 1 February 2011, ECLI:NL:HR:2011:BM9102, NJ 2011, 394; DE GRAAF (n 159) 256–263.

<sup>167</sup> M.J. BORGERS, annotation to Supreme Court 25 September 2012, ECLI:NL:HR:2012:BX5012, NJ 2013, 176.

be out of line with ECtHR and ECJ case law, which is said to opt for a purely factual approach to the concept of ‘same facts’.<sup>168</sup> According to Borgers—who, by the way, doubts whether these arguments actually hold up, as differences seem to be much smaller if one looks at the way they are applied by these supranational courts—the Supreme Court must not have found these arguments convincing either, as it has maintained this approach ever since.<sup>169</sup>

In the concluding remarks of their country report on *ne bis in idem* in the Netherlands, Klip and Van der Wilt state: ‘It is our understanding that the most prominent issue regarding the application of the principle *ne bis in idem* is the interpretation of “the same (set of) facts”. As long as that is not decided on an international level, disputes may arise.’<sup>170</sup> As shown above, not much has changed fifteen years later, and the interpretation of the same (set of) facts is still under intense debate. Thus, while the principle might be widely supported, this does not mean it is interpreted in the same way by all member states, the ECtHR and the ECJ.

## 6.2. Legal entity and head of business: two separate subjects of law

The *ne bis in idem* principle is only applicable in respect of sanctions that are imposed on the same person. As such, it does not necessarily hinder the consecutive or cumulative prosecution of a legal entity and its leading officials with regard to the same facts.<sup>171</sup> After all, these are two separate and independent subjects of law with their own legal personality. Therefore, these prosecutions do not concern the same person.<sup>172</sup> Whilst this distinction certainly holds true for large corporations, it is debatable whether such a rigid approach would still be reasonable with regard to heads of small businesses. In cases concerning small businesses, the distinction between natural and legal person becomes somewhat artificial, as the two coincide to a great extent.

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<sup>168</sup> See a.o. J.W. OUWERKERK, ‘Het feitsbegrip bij ne bis in idem en eendaadse samenloop: Tussen nationale uitlegging en internationale verplichtingen’, *Delikt & Delinkwent* 2012, Vol. 42 (6) 490–507; Y. BURUMA, annotation to Supreme Court, 1 February 2011, ECLI:NL:HR:2011:BM9102, *NJ* 2011, 394; J.M. REIJNTJES, annotation to Supreme Court 6 March 2012, *NJ* 2012, 448.

<sup>169</sup> BORGERS (n 167); cp. DE GRAAF (n 160) 269–282.

<sup>170</sup> A. KLIP, H. VAN DER WILT, ‘The Netherlands Non bis in idem’, *Revue internationale de droit pénal* 2002/3, Vol. 73 1137.

<sup>171</sup> KLIP, VAN DER WILT (n 170) 1092–1093.

<sup>172</sup> KLIP, VAN DER WILT (n 170) 1108.

Nevertheless, Dutch courts are very hesitant to identify both legal subjects as one (*vereenzelviging*). In two recent cases, for instance, the Trade and Industry Appeals Tribunal found that imposing an administrative fine on both the legal entity and its sole shareholder (who was fined as an actual director) did not violate the *ne bis in idem* principle, as they were two separate subjects of law. It did, however, take this circumstance into consideration as a relevant factor when reconsidering the amount of the fine.<sup>173</sup> This approach—choosing a clear and pragmatic, yet from a dogmatic point of view, questionable, solution to what is a complex theoretical issue—is typical of the way Dutch courts deal with this problem. Whilst this specific case concerned an administrative proceeding, similar practical routes have previously been chosen by both the fiscal and the criminal division of the Supreme Court. In a case concerning a fiscal administrative penalty imposed on a depleted legal entity where an out-of-court settlement (*transactie*) was already reached between the managing directors, who were also major shareholders, and the Prosecutor's Office, the fiscal division ruled that, given these circumstances, imposing a considerable fine would violate ‘the principle of an equitable appraisal of interests’ (*beginsel van een evenredige belangenafweging*), as the same individuals would once again be affected in their financial assets.<sup>174</sup> In a criminal case where the Court of Appeal applied Article 9a DPC (guilty verdict without imposing a penalty) on an actual director whose company had previously been convicted for the same offences, the Supreme Court ruled that the *ne bis in idem* principle had not been violated because the Court of Appeal deliberately decided not to impose a second penalty.<sup>175</sup>

The essence of these cases is that the *ne bis in idem* principle is rarely directly applied because of the hesitancy to identify two legal subjects as one. The only case which is indisputably accepted as dealing with one and the same person is that of the one-person business, where the entrepreneur exercises his business by operating through a legal per-

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<sup>173</sup> Trade and Industry Appeals Tribunal, 25 January 2017, ECLI:NL:CBB:2017:14, and 26 July 2017, ECLI:NL:CBB:2017:284.

<sup>174</sup> Supreme Court, 20 June 1990, NJ 1990, 811. In a more recent case, the Criminal Division of the Supreme Court (judgment of 3 March 2015, ECLI:NL:HR:2015:434, NJ 2015, 256) argued that a second criminal prosecution for driving under the influence following an earlier administrative obligation to install a so-called alcohol-lock would be ‘in violation of the principles of a proper procedural order’ (*in strijd met de beginselen van een goede procesorde*). This latter description seems to have become the more common phrase.

<sup>175</sup> Supreme Court, 19 March 2002, ECLI:NL:HR:2002:AD7004, NJ 2002, 581.

son of which he is the sole employee. In all other cases, the principle is applied through analogy and, in most cases where potential *ne bis in idem* issues seem to loom on the horizon, courts opt for creative solutions in order to evade them.

### 6.3. Parallel, concentrated and consecutive proceedings

Whether parallel or consecutive proceedings can be initiated, and whether sanctions can be cumulated, will depend on the nature and aims of those procedures and sanctions. Following the *ne bis in idem* principle, no problems arise as long as one of them is not—in its autonomous meaning (see *supra*)—punitive in nature. Thus, a combination of a remedial sanction under administrative or tax law, such as a supplementary taxation for lost tax returns (*naheffingsaanslag*), and the imposition of a fine, under either criminal, administrative or tax law, is allowed even in separate procedures. However, if both procedures or sanctions are punitive in nature and therefore must be regarded as a criminal charge in the autonomous meaning of Article 6 ECHR, this would amount to a violation of the *ne bis in idem* principle.

In such cases, the *una via* principle applies, meaning that the public authorities have to choose between either administrative proceedings or enforcement through criminal law, as the choice of one blocks the use of the other (Art. 243 (2) DCCP; Art. 5:44 GALA). Which route is deemed more appropriate is elaborated in detail in the binding guidelines mentioned in Part 5, and sometimes even in the legislation itself.<sup>176</sup> As a consequence, there is little discretion for the authorities. Where there is discretion, it is up to the administrative authorities and the Prosecutor's Office to coordinate their activities if they do not want to impede each other, because one will bind the other.<sup>177</sup> Nonetheless, transnational parallel proceedings still form a largely virgin territory.<sup>178</sup> All Articles referred to address decisions and actions by Dutch authorities. The *ne bis in idem* principle mentioned in Article 68 (2) DPC does take foreign judgments into account, but only once they have become *res judicata* and only with regard to judgments in criminal courts.<sup>179</sup> Decisions

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<sup>176</sup> E.g. Article 69 (4) STA.

<sup>177</sup> A. VERBRUGGEN *et al.* (n 26) 99–100.

<sup>178</sup> For a more in-depth analysis of this issue, see M. LUCHTMAN, *Transnationale rechtshandhaving. Over fundamentele rechten in de Europese strafrechtelijke samenwerking* (inaugural lecture Utrecht University, Boom juridisch, The Hague 2017).

<sup>179</sup> Moreover, in case a sentence has been imposed, it must also have been

and sanctions from administrative courts or regulatory agencies are excluded.<sup>180</sup> Therefore, in the transnational field, the legal protection of corporations and heads of business is still lagging. Nevertheless, it is to be expected that a suitable outcome will eventually be reached, either through analogical application of the current legislative framework or by building upon contemporary Supreme Court jurisprudence (also see *supra*).

#### *6.4. Use of evidence and defence rights*

In the Netherlands, evidence gained in the course of an administrative and/or criminal proceeding can, in principle, be used in other proceedings, and vice versa, provided that such use does not interfere with defence rights. Thus, evidence found during a routine administrative supervision or a follow-up fine investigation is acceptable in a criminal court, just as evidence that was contemplated in a criminal investigation can be used in an administrative proceeding, should an administrative settlement be more suitable, or (especially in tax cases) prescribed. Moreover, an initial administrative proceeding can turn into a criminal one should suspicion of a criminal offence arise.<sup>181</sup> Nor are there any restrictions on using evidence that was gained in an investigation of the legal person in a separate investigation of its leading officials, or vice versa. It is also not relevant whether evidence was gained in a domestic or a foreign procedure. Because of the system of mutual recognition within the EU, raising questions concerning the legality and/or accuracy of evidence belonging to the latter category, or other irregularities or lack of safeguards, might even be more difficult due to the principles upon which transnational cooperation in the EU is founded, most notably the principle of mutual trust in each other's legal systems and proceedings.<sup>182</sup> In the pretrial research phase, it is also possible to use the criminal

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enforced in full in order for the *ne bis in idem* principle to take effect. For the rationale behind this, see KLIP, VAN DER WILT (n 170) 1111–1112.

<sup>180</sup> See more extensive discussion, see VERVAELE, (n 165) 211–229 and KLIP, VAN DER WILT (n 170) 1091–1137.

<sup>181</sup> VERBRUGGEN *et al.* (n 26) 47–53; M.J. BORGERS, ‘De onderzoeksfasen: toezicht, controle en opsporing’, in: F.G.H. KRISTEN *et al.* (eds), *Bijzonder strafrecht. Strafrechtelijke handhaving van sociaal-economisch en fiscaal recht in Nederland* (Boom Lemma, The Hague 2011) 475–494.

<sup>182</sup> For a more in-depth analysis of this issue, see M.C. VAN WIJK, *Cross-border evidence gathering. Equality of arms within the EU?* (dissertation Utrecht University/University of Luxembourg, Eleven International Publishing, The Hague 2017).

and the administrative track at the same time, even after suspicions of a criminal offence have arisen, provided that there is no *détournement de pouvoir* or a violation of the *nemo tenetur* principle.<sup>183</sup> Thus, all the rights that the defendant would have had in a criminal investigation must also be respected while exercising these administrative powers, the latter, of course, being no surprise, as both can amount to a criminal charge within the meaning of Article 6 ECHR. With regard to the *nemo tenetur* principle, it must be mentioned that both the EOA and administrative law entail various provisions that oblige companies or individuals to comply with the authorities and/or grant information which could potentially incriminate them, including testimonial or communicative evidence. The latter obligation could violate this principle. The Supreme Court has therefore ruled that there is no prohibition to impose a fine if the accused refuses to hand over such information in order to impose a remedial tax measure, regardless of whether this information has an existence independent of the will of the suspect, provided that the accused is guaranteed that such evidence will not be used for any punitive measures.<sup>184</sup>

### 6.5. Enforcement through administrative or criminal law?

The question of whether provisions should be enforced through administrative or via criminal law has been, and still is, subject to intense debate in the Netherlands.<sup>185</sup> In a 2005 government memorandum regarding the sanctions system (*sanctiestelsel*), the government stated that this decision should be based on the premise that ‘the nature and seriousness of the fact’ should determine the choice of the appropriate settlement regime. In concrete terms, this meant that administrative law was seen as the instrument to enforce minor and simple violations which occurred on a frequent basis and where the sanction to be imposed was relatively low and there was little at stake for

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<sup>183</sup> VERBRUGGEN *et al.* (n 26) 53–57.

<sup>184</sup> Supreme Court 12 July 2013, ECLI:NL:HR:2013:BZ3640, NJ 2013, 435. The complaint against this decision was dismissed by the ECtHR. Decision 9 July 2015, application no. 784/14 (*Van Weerelt v. the Netherlands*).

<sup>185</sup> See a.o. ADVIES VAN DE AFDELING ADVISERING VAN DE RAAD VAN STATE AAN DE MINISTER VAN VEILIGHEID EN JUSTITIE INZAKE SANCTIESTELSELS, *Stc.* 14 September 2015, nr. 30, 280; H.E. BRÖRING, ‘Keuze voor een sanctiestelsel: bestuurlijke boete of bestuurlijke strafbeschikking?’ *RegelMaat* 2017, Vol. 32 (5) 317–335; N.G.H. VERSCHAREN, ‘(Buitengerechtelijke) strafrechtelijke, bestuursrechtelijke, duale of dubbele handhaving?’ *Tijdschrift Praktijkwijzer Strafrecht* 2017, Vol. 23 (3) 128–136.

the person concerned.<sup>186</sup> Just a few years later, in a 2008 memorandum, a major policy shift took place and a completely different, nearly opposing framework was adopted. The nature and seriousness of the alleged facts were no longer decisive; whether there is a so-called open or closed context would be.<sup>187</sup>

An open context refers to the enforcement of general rules that apply equally to everyone. Furthermore, open contexts lack a specialised enforcement body that fully concentrates on the enforcement of one specific type of regulation. Conversely, a closed context refers to the existence of a more or less structural and often fairly intensive relationship of supervision in which the duties of the enforcement body remain limited to just one set of regulations, e.g. *Autoriteit Financiële Markten* (Dutch Authority for the Financial Markets) and *De Nederlandsche Bank* (Dutch Central Bank). As a result, these enforcement agencies are highly specialised, thoroughly informed and very familiar with their field, and their field is familiar with them. In a closed context, it is therefore deemed better to enforce regulations through administrative law and its specialised enforcement agencies. In open contexts, the preference is given to criminal law.<sup>188</sup>

Thus, where previously the perpetrator's behaviour—and, more particularly, the nature, seriousness, extent and complexity thereof—would be decisive for the appropriate enforcement regime, this is now no longer the case. It is no longer about finding an appropriate regime that does justice to the seriousness of the alleged actions, but about finding an appropriate regime that fits best—or makes it easier—from an enforcement perspective. So, while in 2005 it seemed to be a matter of principle—criminal law is appropriate if the nature, seriousness and magnitude of violations call for a more robust and morally loaded type of enforcement—in 2008 the reasoning shifted and pragmatic arguments have come to be decisive, more or less irrespective of the seriousness of the underlying offence. As a consequence, sanctions imposed by administrative authorities and courts sometimes exceed by far the penalties that would be imposed by criminal courts. Thus far, PIF offences have always been considered to belong to the realm of the open context, and have also been used as an argument to call for further reform of criminal

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<sup>186</sup> KAMERSTUKKEN II 2005/06, 29 849, nr. 30.

<sup>187</sup> KAMERSTUKKEN II 2008/09, 31 700 VI, nr. 69.

<sup>188</sup> M.J.A. DUKER, 'Vervolging en berechting', in: F.G.H. KRISTEN *et al.* (eds), *Bijzonder strafrecht. Strafrechtelijke handhaving van sociaal-economisch en fiscaal recht in Nederland* (Boom Lemma Publishers, The Hague 2011) 511–514.

law (meaning more severe sanctions).<sup>189</sup> However, if a specialised supervisory mechanism or authority were to be introduced, this perspective could change and the legislator might opt for a closed context system under administrative law.

## ANNEX I

### *Relevant provisions from Dutch Penal Code*

#### **Article 47**

1. The following persons are liable as perpetrators of a criminal act:

(1) those who commit a criminal offence, either personally or jointly with another or others, or cause a criminal offence to be committed;

(2) those who, by means of gifts, promises, abuse of authority, use of violence, threat or deception or by providing the opportunity, means or information, intentionally solicit the commission of a crime.

2. With regard to the last category, only those actions intentionally solicited by them and the consequences of such actions are to be taken into consideration.

#### **Article 48**

The following persons are liable as accessories to a serious offence:

(1) those who intentionally assist during the commission of the serious offence;

(2) those who intentionally provide the opportunity, means or information necessary to commit the serious offence.

#### **Article 49**

1. In case of aiding, the maximum penalty is reduced by one third.

2. In case the maximum penalty is a life prison sentence, the maximum penalty for aiding will be 20 years' imprisonment.

3. The additional penalties for aiding a crime are the same as those for committing the crime.

4. In determining the penalty, account may only be taken of those

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<sup>189</sup> KAMERSTUKKEN II 2012/13, 33 685, nr. 3.

crimes that the aider intentionally enabled or promoted, as well as the consequences of these crimes.

### Article 51

1. Criminal offences can be committed by natural persons and legal persons.
2. If an offence is committed by a legal person, criminal proceedings may be instituted and the punishments and other measures provided for by law may be implemented where appropriate:
  - a) against the legal person; or
  - b) against those who ordered the commission of the offence (*opdrachtgeven*), as well as those who actually directed the prohibited act (*feitelijk leidinggeven*); or
  - c) against both those named under (a) and (b).
3. For the purpose of the application of the above paragraphs, legal persons shall be deemed to include: an unincorporated company, a partnership, a shipping company and a capital asset set aside for a special purpose (*doelvermogen*).

### ANNEX II

#### *Relevant provisions from General Administrative Law Act*

##### Article 5:1

1. In this Act, 'violation' means an act violating a rule laid down by or pursuant to law.
2. 'Violator' means the person committing a violation or participating in its commission.
3. Violations can be committed by natural persons and by juristic persons. Articles 51.2 and 51.3 of the Penal Code apply *mutatis mutandis*.

## CHAPTER VI

### POLAND NATIONAL REPORT

*Dr Witold Zontek \**

SUMMARY: 1. Introduction. – 1.1. Debate on the implementation of Art. 3 of the PIF Convention. – 1.2. Debate on corporate criminal liability. – 1.3. Significant cases involving the liability of heads of business. – 2. Relationship with general principles of criminal law. – 2.1. General information on the system of perpetration and complicity. – 2.2. General information on omission liability. – 2.3. Duty to report an offence. – 2.4. General information on strict liability. – 2.5. Special rules on liability. – 3. Concept and scope of the criminal law responsibilities of heads of business. – 3.1. Liability of heads of business (general information). – 3.2. Personal scope of the liability. – 3.2.1. Under the general rules of perpetration and complicity. – 3.2.3. Under Art. 296 of the Criminal Code. – 3.3. Duties to control and supervise. – 3.3.1. Under the general rules of perpetration and complicity. – 3.3.2. Under Art. 296 of the Criminal Code. – 3.4. Violation of supervisory duties and the commission of an offence. – 3.4.1. Causal link. – 3.4.2. *Mens rea*. – 3.5. Delegation of control and supervisory duties: scope and limits. – 3.6. Fulfilment of supervisory duties and disciplinary powers. – 3.7. Liability and collective decisions. – 3.8. Relationship with corporate liability. – 3.8.1. Triggering persons. – 3.8.2. Concurrence and accumulation of liabilities. – 3.9. Compliance programmes (general application). – 4. Defences. – 4.1. Effective powers of supervision and control and liability. – 4.2. Delegation of supervisory powers. – 4.3. Compliance programmes as a defence. – 4.4. Third-party advice, external auditing and liability of heads of business. – 5. Liability of heads of business and sanctions. – 5.1. Criminal and punitive sanctions. – 5.2. Other sanctions and measures. – 5.3. Sentencing criteria. – 5.4. Confiscation. – 5.5. Enforcement practice. – 6. Relationship with punitive administrative law. – 6.1. Parallel criminal and administrative proceedings against the head of business. – 6.1.1. Trans-procedural use of evidence against the head of business. – 6.1.2. Admissibility and use

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of foreign evidence against the head of business. – 6.1.3. Administrative investigations and right to silence of the head of business. – 6.2. Multiple and parallel criminal and administrative proceedings against the legal person and the head of business. – 6.2.1. Right to silence of the head of business in proceedings against the legal person. – 6.3. Relationship between liability of the legal person and liability of the head of business.

## 1. Introduction<sup>1</sup>

### 1.1. Debate on the implementation of Art. 3 of the PIF Convention

Poland has not enacted a single specific provision regarding the liability of heads of business (HoB) (as described in Art. 3). It was deemed unnecessary in general criminal law because of regulations already present on preparation, attempt, incitement, assistance, joint perpetration, perpetration by order and perpetration by directing, as well as criminal liability for omission (principal and secondary complicity). Crimes in the Polish legal system are constructed in a relatively general manner, allowing broad liability for perpetration; crimes drafted in a very complex, detailed and casuistic manner are very rare. For example, the general crime of fraud is worded in a way that allows the prosecution of a variety of individuals responsible for the disadvantageous disposition of property by another: ‘Whoever, with the purpose of gaining a material benefit, induces another person to disadvantageously dispose of personal or someone else’s property by misleading this person or by exploiting this person’s error or incapability to duly understand the undertaken action, is subject to the penalty’. During the implementation procedure of the PIF Convention (and later on with regard to other crimes either suggested or demanded in international agreements), it has been the very consistent position that the general principles of criminal liability and the legislative tradition of rather general wording of particular criminal provisions do not require additional forms of complicity or new casuistic solutions.

Due to the Polish legislative tradition, implementation of the Convention’s requirements was conducted in a twofold manner: the introduction or amendment of particular criminal provisions, and adding or processing some definitions (e.g. in the Fiscal Criminal Code, a new

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<sup>1</sup> All translations of the Polish Criminal Code are based on A. WOJTASZCZYK, W. WRÓBEL, W. ZONTEK, *Criminal Code-Kodeks Karny* (Przepisy dwujęzyczne, Warsaw 2014).

definition of the taxpayer was introduced to cover beneficiaries of EU funds).<sup>2</sup>

### 1.2. Debate on corporate criminal liability

In Poland, the liability of corporations is provided for in the Statute on Liability of Corporate Entities for Acts Prohibited Under a Penalty of 2002 (with significant amendments from 2005). Corporate liability is provided for a list of crimes committed by its representatives. That list covers all PIF crimes (fraud, corruption and money laundering) since the enactment of the statute and its amendments in 2005 (required due to a ruling of the Constitutional Court from 3 November 2004, K 18/03). The Constitutional Court, in its ruling, indicated that criminal liability is just one of several ways of holding someone liable and imposing means of a repressive character. Not every repressive form of liability must necessarily be deemed criminal. From that perspective, regardless of the label attached by the legislator or doctrine of a particular mode of liability, if it has repressive features, a constitutional standard characteristic of criminal liability must be provided (*nullum crimen sine lege certa stricta*). As the title of the statute indicates, the liability is not called 'criminal'—which was a very premeditated decision during the legislative process—but still provides for acts prohibited under a penalty. It is commonly claimed in the doctrine that this statute introduced a *sui generis* kind of liability which is indeed repressive but not purely criminal. A description of *sensu largo* criminal liability is also used. That is why it is hard to answer unambiguously the question of whether in Poland a criminal or an administrative liability is provided for corporations. The safest but still apt description of the liability would be to consider it as a hybrid form of responsibility, having both classical criminal and administrative elements.<sup>3</sup>

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<sup>2</sup> Generally, see F. PRUSAK, 'Zakres związania polskiego prawa karnego konwencją Unii Europejskiej w zakresie ochrony interesów finansowych Wspólnot Europejskich', *Prokuratura i Prawo* 6 (2009) 5–25.

<sup>3</sup> See, for example, B. MIK, 'Charakter prawnego odpowiedzialności podmiotów zbiorowych w świetle ustawy z dnia 28 października', *Przegląd Sądowy* 7/8 (2002) 49–65; W. WRÓBEL, 'Odpowiedzialność karna podmiotów zbiorowych (Projekt nowych uregulowań)', *Państwo i Prawo* 9 (2005) 3–16; H. SKWARCZYŃSKI, 'Odpowiedzialność podmiotów zbiorowych jako nowy rodzaj odpowiedzialności za czyny zagrożone pod groźbą kary', *Monitor Podatkowy* 2 (2004) 85–86; M. CZYŻAK, 'Karnoadministracyjne, karnoskarbowe i quasi-karne formy odpowiedzialności podmiotów zbiorowych', *Wojskowy Przegląd Prawniczy* 1 (2004) 38; B. NITA, 'Model odpowiedzialno-

It may seem unusual, but there was no countrywide expert debate at all before introducing the liability of corporations in 2002. The justification of the statute presented by the government was rather desultory and focused on a claim that it was required by the Convention. The first academic conference dedicated solely to this topic was held in Jastrzębia Góra on 12–14 October 2003 (thus after the statute had already entered into force).<sup>4</sup> Also, the parliamentary debate did not generate any quote-worthy material. However, after the statute entered into force, a significant number of publications (papers as well as monographs and commentaries) were dedicated to it. One aspect of their subject matter was the reconstruction of the model on which the liability was based and the character of the liability, i.e. criminal or not. The main issue with the statute was that it was something entirely new to the classic division of criminal/administrative/civil liability. It was considered a *sui generis* liability which may never be unanimously qualified to one of the said groups. However, it is quite clear that it is not an administrative liability, because the procedure is conducted pursuant to the Code of Criminal Procedure and common courts are the proper forum rather than administrative authorities. It seems that it has, however, been agreed upon that the liability is somewhat repressive in character and adopts several classic criminal law rules and procedures. Another aspect was how to deal with it in practice and what consequences in a criminal trial there are for an individual, and subsequently the entity (right to defence counsel, the presumption of innocence, etc.). Rather promptly, the Constitutional Court addressed many of the issues raised in its ruling from 3 November 2004, K 18/03. Afterwards, a new wave of papers, mostly commenting on the ruling, appeared.

As to the policy debate, it was rather a matter of implementing the Convention than a methodical debate on the issue of whether such a form of liability was necessary, considering the economic situation at that time in Poland. Looking at the statistics for the last 15 years, one may conclude that this kind of liability was not a question of any need articulated by law enforcement or the administration of justice. There have been between five and thirty cases a year, with 6–14 convictions (compared to around 300,000 convictions annually).

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ci podmiotów zbiorowych za czyny zabronione pod groźbą kary', *Państwo i Prawo* 6 (2003) 17–33; B. NAMYSŁOWSKA, *Gabrysiak, Odpowiedzialność karna osób prawnych* (Warsaw 2003).

<sup>4</sup> See *Odpowiedzialność podmiotów zbiorowych. Konferencja Jastrzębia Góra 12–14 października 2003 r. Apelacja Gdańsk – wydanie specjalne 2003.*

### *1.3. Significant cases involving the liability of heads of business*

There are no quote-worthy cases regarding HoB. The main criminal cases are related to simple tax evasion, fraud by deception or causing damage by abuse of trust in business transactions, which do not bring any ground-breaking changes in perception of this sort of liability.

## **2. Relationship with general principles of criminal law**

### *2.1. General information on the system of perpetration and complicity*

Polish law provides a system of criminal complicity applicable to all offences (Art. 116). The provisions of the General Part of this Code apply to other statutes providing for criminal liability, unless these statutes explicitly provide otherwise. The following ways of complicity are provided by the Code:

1) Joint perpetration. A person committing a prohibited act jointly and upon mutual agreement with another person is liable for perpetration.

2) Perpetration by ordering. A person who orders another person to commit such an act by exploiting this person's dependence on him is liable for perpetration.

3) Perpetration by directing. A person who directs the commission of a prohibited act by another person is liable for perpetration.

4) Incitement. Whoever, wanting another person to commit a prohibited act, persuades this person to do so, is liable for incitement.

5) Assistance. Whoever, intending another person to commit a prohibited act, facilitates it by his conduct, especially by providing instruments, conveyance, counsel or information, is liable for assistance; whoever by his conduct facilitates commission of a prohibited act by another person, in defiance of a legal, special duty not to allow commission of such a prohibited act, is also liable for assistance.<sup>5</sup>

These modes of participation in a crime are reserved only for criminal law, to which a general part of criminal code applies. In case of punitive administrative law, due to a lack of any sort of general part, all means of participation in a wrongdoing must be precisely provided by a relevant statute. In several cases of administrative liability (not, how-

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<sup>5</sup> See P. KARDAS, M. DĄBROWSKA-KARDAS, in: A. Zoll, W. Wróbel (eds) *Kodeks karny. Część ogólna. Tom I. Komentarz do Art. 1–52 [commentary to Art. 18 of the Criminal Code]* (cz.1, Warsaw 2017).

ever, related to the PIF Convention), administrative sanctions are imposed when a company violates laws regulating particular activities. Such a broad description of grounds for liability may *per se* incorporate all potential ways of complicity by the said company management. The entire board of directors may jointly decide upon violation, or a CEO may order a bookkeeping department to counterfeit a document reflecting the company's activity on the market.

## *2.2. General information on omission liability*

The Polish Criminal Code provides a general basis for criminal liability for omission in case of result (consequence) crimes. The objective aspect of crime (*actus reus*) consists in bringing about a specific consequence, i.e. it includes both the conduct and its consequence. The latter means a change in the existing reality that needs to occur (independently from the conduct itself) if a specific consequence crime is to be committed, as such change is explicitly referred to in a statutory description of such a crime. The provision regarding the general basis for omission liability is as follows:

Art. 2. Only a person having a legal, specific duty to prevent a consequence from happening is subject to criminal liability for a consequence crime committed by omission.

In case of formal crimes, the commission of which does not require the occurrence of any consequence/result, it is possible to commit them by omission only when, from a linguistic point of view, a verb describing the criminal activity also may mean passivity. In almost all such cases, a provision explicitly provides a verb that is accompanied by negation or antonym, e.g. 'does not provide', 'does not reveal', 'evades', 'avoids', etc.

In case of result crimes, a duty of care must be specific and of legal character. It may stem from a normative act, employment agreement, civil law contract, public authority decision, court ruling or even a voluntary undertaking of a certain activity.

Criminal liability for omission has a purely normative aspect. There is no empirical causal link between one's passivity and the occurrence of a result. This means that we observe the behaviour of a potential perpetrator only according to legal standards and his duties. The accompanying evaluation of risk occurrence is based on the ontological danger, which is not caused by the perpetrator. The commonly accepted norma-

tive method of establishing the liability for omission requires proving the following:

- 1) The perpetrator, in fact, has a specific legal duty to prevent a particular consequence from happening.
- 2) The perpetrator's conduct needs to be unlawful, i.e. it should violate rules of conduct that were to be applied in the given circumstances. Such violation should consist of omitting the performance of an expected action, i.e. the rules of conduct demanded action, but the perpetrator has failed to act; violation of the rules of conduct must be significant and blameworthy (not every infringement may lead to liability).
- 3) From the very beginning (*ex ante*), the need to undertake the expected action and the risk of consequence happening without such expected action should be objectively foreseeable.
- 4) The risk of occurrence of an unwanted result needs to be significant (high, or at least above average).
- 5) It should be established that preventing the consequence has been objectively possible, i.e. the causal knowledge suggests that there was at least one possible action within the perpetrator's duties that could have prevented the consequence from happening.
- 6) It should be established whether undertaking the expected action would have prevented the consequence. This is done by considering whether the consequence would have happened had the perpetrator acted in conformity with the binding rules of conduct.<sup>6</sup>

### *2.3. Duty to report an offence*

The Polish Code of Criminal Procedure provides for a general civic duty to report a crime prosecuted *ex officio* if one has information about

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<sup>6</sup> See, generally, T. SROKA, *Odpowiedzialność karna za niewłaściwe leczenie. Problematyka obiektywnego przypisania skutku* (Warsaw 2013); M. KRÓLIKOWSKI, 'Odpowiedzialność za przestępstwo skutkowe przez zaniechanie', *Monitor Prawniczy* 3 (2006) 154–160; W. PATRYAS, *Zaniechanie. Próba analizy metodologicznej*, (Poznań 1993); M. BIELSKI, 'Naruszenie reguł ostrożności czy nadmierna ryzykowność zachowania jako właściwe kryterium prawnokarnego przypisania skutku', *Czasopismo Prawa Karnego i Nauk Penalnych*, Rok VIII 1 (2004) 25–46; M. BIELSKI, 'Prawnokarne przypisanie skutku w postaci konkretnego narażenia na niebezpieczeństwo – uwagi na marginesie postanowienia Sądu Najwyższego z dnia 3 czerwca 2004 r., V KK 37/04', *Przegląd Sądowy* 4 (2005) 119–133; M. BIELSKI, 'Obiektywne przypisanie skutku przestępstwa w przypadku kolizji odpowiedzialności za skutek', *Państwo i Prawo* 10 (2005) 75–89.

its perpetration. State and local government institutions which, in connection to their operations, learn that a criminal offence prosecuted *ex officio* has been committed shall be obliged to inform the police or a public prosecutor thereof immediately. Also, they are obliged to take the necessary steps until the arrival of the officials of a body authorised to prosecute such criminal offences, or until that body issues a suitable order, to prevent the effacing of traces and evidence of the criminal offence.

However, the above duty in some cases goes beyond just a civic character and a failure to perform it is sanctioned. Article 240 § 1 of the Criminal Code provides that:

Whoever, having reliable information about a punishable preparation, attempt or the commission of a prohibited act provided for in [a list of Articles follows] or a crime of a terrorist character, fails to report it promptly to a law enforcement authority responsible for prosecuting crimes, is subject to the penalty of deprivation of liberty for up to three years.

Crimes indicated in the above provision include murder, unlawful deprivation of liberty, hostage-taking, crimes against peace, humanity and war crimes, but not economic crimes.

The code explicitly provides that whoever has abstained from reporting a crime, reasonably assuming that the law enforcement authority knows about the prepared, attempted or committed prohibited act, does not commit a crime. A person who has prevented the commission of the prepared or attempted prohibited act provided for by Art. 240 also does not commit a crime (§2).

In the case where someone has abstained from reporting a crime out of fear of that criminal liability would threaten himself or his immediate family member is not subject to a penalty (§3).

Thus it is clear that in case of potential self-incrimination, the code provides a circumstance excluding his/her liability. It is neither an excuse nor a justification, but a legislator's decision based on criminal policy rather than constitutional aspects of the privilege against self-incrimination. The phrase 'is not subject to penalty' means that investigation into such a case shall never be instigated; if it has been, it shall be discontinued.<sup>7</sup>

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<sup>7</sup> See Art. 17 sec. 1 Polish Code of Criminal Procedure.

#### 2.4. General information on strict liability

If one understands strict liability offences as regulatory in nature, lacking a true *mens rea* ingredient—i.e. prosecution is required only to prove *actus reus* but in relation to one or more elements of the *actus reus* there is no *mens rea* element to prove—then, in the scope of criminal law, there are no such offences. In the already mentioned ruling of the Constitutional Court of 3 November 2004, K 18/03, it was indicated that every repressive liability must be based upon the prerequisite of attributability, which is constituted by the possibility/ability to conform one's behaviour to the law (fault). It was also raised that it stems from the principle of presumption of innocence.

However, the principle of *nullum crimen sine culpa* is identified by the doctrine of criminal law as stemming directly from human dignity, which prevents the state from punishing individuals for behaviour that they had no fair opportunity to avoid.<sup>8</sup>

It seems that, from a constitutional point of view, there is no possibility of introducing strict liability crimes. Criminal liability must be based upon a violation of a standard of care which must be attributable and foreseeable; one must also be able to contradict the indictment.

#### 2.5. Special rules on liability

In Poland, there is a separate Code of Fiscal Crimes which modifies part of the general rules of criminal liability because of the specificity of tax law. The system of liability for so-called fiscal crimes is deemed a separate model.<sup>9</sup> However, it refers in many cases to the general part of the Criminal Code, as well as to the basic rules of the Code of Criminal Procedure. The general principles of liability for fiscal crime are largely the same as in the case of a regular crime, but there are some significant differences:

1) The Criminal Code does not provide an excuse based on mistake in relation to punishability (only in relation to unlawfulness, justification or excuse, and in relation to an element constituting a crime). The Fiscal Criminal Code provides such an excuse, instead of an excuse based on mistake in relation to unlawfulness; it can be rather easily explained: in

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<sup>8</sup> See A. BARCZAK-OPLUSTIL, *Zasada koincydencji winy i czynu w kodeksie karnym* (Kraków 2016).

<sup>9</sup> See, generally, P. KARDAS, G. ŁABUDA, T. RAZOWSKI, *Kodeks karny skarbowy* (Komentarz, Warsaw 2017).

case of criminal liability connected to taxation, not being aware of a legal obligation to pay taxes or to keep tax records does not constitute an issue. The more important question is what forms of tax evasion or failure in the bookkeeping department are penalised.

2) The Fiscal Criminal Code provides a specific form of ending the investigation, voluntary submission to liability, the sense of which is derived from the benefits provided by paying the due tax as soon as possible. It is not a conviction with all of the concomitant negative consequences.

3) Liability for an attempt contrary to the Criminal Code is limited and, in case of a fiscal crime with a maximum penalty not exceeding one year of deprivation of liberty or a more lenient penalty, may be applied only if the code explicitly provides for it.

4) A fine imposed for a fiscal crime may be enforced not only for the perpetrator but also for another individual or legal entity if they gained a benefit from committing a crime and the perpetrator was the proxy or subordinate.

5) Contrary to the Criminal Code, the Fiscal Criminal Code provides many more prerequisites for extraordinary aggravation of penalty.

### **3. Concept and scope of the criminal law responsibilities of heads of business**

#### *3.1. Liability of heads of business (general information)<sup>10</sup>*

Polish criminal law does not provide a general provision establishing the liability of a supervisor (based on the concepts known from civil law: *culpa in eligendo* or *culpa in custodiendo*). If the issue is not covered by one of the complicity (principal or secondary) regulations, or may not be subsumed under a general provision providing broad liability even for lone perpetration, a supervisor may not be held liable for a crime committed by his subordinates. For example, if a CEO by his conduct facilitates the commission of a prohibited act by another person, in defiance of a legal, special duty not to allow the commission of such a prohibited act, he is liable for assistance to that crime (if intent can be proved).

The closest criminal regulation which resembles the general liability

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<sup>10</sup> See, generally, Chapters 7 and 12 in R. Zawłocki (ed.), *Prawo karne gospodarcze. System Prawa Handlowego* (Tom 10, Warsaw 2012).

ty of heads of business as a separate concept is Art. 296 of the Criminal Code, providing a crime of causing damage by abuse of trust in business transactions:

Art. 296. § 1. Whoever, being obliged by a statutory provision, decision of a competent authority or a contract to manage the financial matters or business activity of a natural person, juridical person or an organisational entity without a legal personality, inflicts substantial material damage upon such person or entity by abusing the granted authority or failing to fulfil the incumbent duties, is subject to the penalty of deprivation of liberty for between three months and five years.

It covers only situations in which either a real damage occurs or (§2) an immediate danger of inflicting substantial material damage occurs. It may, of course, be a derivative effect of a crime committed by a subordinate, but it does not directly make a HoB liable in every case their subordinate commits a crime.

If, for example, such an employee counterfeits a document in order to save himself from being fired for neglecting his duties, it is highly plausible that despite the criminal character of his act the company will not suffer any damage. However, if he tries to bribe a public official in order to win a public tender and, due to that, the company is subsequently excluded from tenders, his supervisor may be held liable for the omission in supervision leading to a substantial loss for the company.

Another group of crimes directly linked to the HoB is those related to debtor/creditor relations (Arts. 300–302). The Code provides explicitly that whoever manages the financial matters of a juridical person, a natural person, a group of persons or an organisational entity without a legal personality, pursuant to a statutory provision, decision of a competent authority or a contract, or just actually manages such matters for someone else, is liable for the crimes provided for in Arts. 300–302 as a debtor or creditor. The above-mentioned crimes are connected to business relations and solvency law. For example, a person who, facing the threat of insolvency or bankruptcy and being unable to satisfy the claims of all his creditors, satisfies only the claims of some of the creditors or provides security only for the claims of some of the creditors, and thereby acts to the detriment of other creditors, is liable for a crime. Pursuant to Art. 308 of the Criminal Code, it is possible to hold the CEO of a company who either directly decides upon illegal preferences towards one of the creditors or colludes with his subordinates (e.g. bookkeeping depart-

ment) to do so. It is, however, important to indicate that Arts. 300–302 concern intentional crimes, so unintentional neglecting of one's duties does not constitute one of them.

The last group of criminal offences related to HoB liability comprises those provided for in the Fiscal Criminal Code. Almost all of them penalise the actions of a taxpayer or another individual upon whom tax obligations of different sorts are vested. Moreover, Art. 9, § 3 of the Fiscal Criminal Code provides explicitly that an individual who manages the financial matters of a juridical person, a natural person or an organisational entity without a legal personality pursuant to a statutory provision, decision of a competent authority or a contract, or just actually manages such matters for someone else, is liable for fiscal crimes and fiscal transgressions just as a perpetrator is. In these cases, general principles of perpetration and complicity (similar to those covered by the Criminal Code) also apply. For example, it is a fiscal crime to mislead a proper tax authority by providing it with information contrary to the real state of affairs or concealing that state which may result in receiving an undue tax return. This may be committed by an HoB who endorses such information being passed according to the organisational scheme of a company.

Henceforth I will be describing the liability of an HoB in a twofold manner: generally (considering general rules of perpetration and complicity) and specifically (focusing on Art. 296 of the Criminal Code).

### *3.2. Personal scope of the liability*

#### *3.2.1. Under the general rules of perpetration and complicity*

The scope of liability pursuant to the Fiscal Criminal Code (FCP), considering individuals who manage the financial matters of another, is broad, covering different types of manager: those having their precise statutory duties (e.g. members of the board of directors, supervisory board, a proxy of a company, internal auditor). In this perspective, however, it is difficult to imagine the liability of shareholders of a limited liability company or stockholders of a stock-offering company because there is no statutory provision vesting any duties or obligations regarding managing financial matters on those persons. They are not taxpayers in this understanding.

The above applies to liability for debtor/creditor crimes.

In other crimes of general application, the liability of the HoB for crimes committed by a subordinate is possible provided that some form

of complicity is proven. Most of the crimes in the Polish legal system are intentional, so additional subjective elements of the HoB must be proved.

### *3.2.2. Under Art. 296 of the Criminal Code*

The scope of liability pursuant to Art. 296 of the Criminal Code is rather broad, considering every possible unlawful damage caused to the entity. The prerequisites for the liability are also broad: abusing the granted authority or failing to fulfil the incumbent duties may take various forms in contemporary corporate governance.

The subject of the potential liability is an individual who manages the financial matters or business activity of another. It is understood as having duties and obligations covering care for entrusted property in order to secure it from damage, destruction or loss; prevention from diminishing the assets; and management of these assets in a way which leads to an increase in their worth or economic scale. Managing in this context requires the power to have a real influence on the decision-making process in the designated area. Management performed by an individual described by the provision in question needs to be almost identical to the powers of his principal in every aspect, including decision-making towards the entire structure of an entity (e.g. a company). Such a person must be empowered to undertake actions regarding the assets of the company, concluding contracts, encumbrance of property, representing the interest of the principal before the administration of justice and state authorities, managing human resources, etc. However, the evaluation of that person's endeavours must be done by considering the scope of the given authority and the structure of the entity, especially if it is a more complicated organism (like a stock company, holding or transnational group of companies).

Pursuant to that provision, shareholders of a limited liability company or stockholders of a stock-offering company are excluded from its application because currently there is no statutory provision vesting any duties or obligations regarding managing financial matters or business activity in those persons. If they join the board of directors or undertake management pursuant to a separate contract, then they may be liable.

### *3.3. Duties to control and supervise*

#### *3.3.1. Under the general rules of perpetration and complicity*

Every criminal liability in the Polish legal system is based upon legal duties, which incorporate a variety of standard of care regimes. Some of them (like those related to taxes) are provided by statutes and regulations; others stem from developed standards and rules governing a particular branch of social relations (e.g. medicine, traffic, commerce). It is difficult to describe those regimes in general without analysing a case in question. Obviously, the statutory duties are more tangible and, in many cases, precise enough to establish a framework for the liability of a supervisor for his subordinate's mistakes resulting in the criminal liability of both. However, in some cases, the statutory duty is framed in a very general way—e.g. 'to manage the assets of a company'—but it is made more and more precise in different internal regulations, employment or management contracts, etc. Within those documents, the duties may be very detailed; such a general duty may also be different depending on the area of business (banking, managing a medical facility, managing a petrol company, etc.). The specificity of the branch determines the real scope of a manager's duties.

For omission liability, the duty must be statutory and specific, which means that the competence to make it precise may stem from a general statutory obligation; the best example is a doctor who, according to Polish law, has some general duties regarding patients, which are then specified in that doctor's employment contract. If a president of a board orders his employee to counterfeit a document and send it to a tax office, which the latter does, both are liable for a crime of counterfeiting a document and using such document as an authentic one (Art. 270 Criminal Code). The HoB may also facilitate the commission of a crime by his subordinate in defiance of a legal, special duty not to allow the commission of such a prohibited act (Art. 18 § 3 Criminal Code).

#### *3.3.2. Under Art. 296 of the Criminal Code*

As the provision explicitly provides, the basis for the liability is abusing the granted authority or failing to fulfil the incumbent duties. The scope of authority and duties may be provided for by a statute (as is the case with regard to board members, the supervisory board, etc.) or by a management contract. However, the authority/duties are

in most cases described in a very general manner, thus in practice they need to be specified in particular cases of management. The most general and abstract framework is the standard of a 'good and reasonable manager', which at least provides for a threshold of meticulousness far above the average. Particular duties/authority must be considered according to the branch of business, including the legal framework, tradition and longstanding practice in the particular area of commerce. Every manager must be empowered within a rational scope of sovereignty in decision-making, including a tolerance for mistakes and missed decisions. The level of that tolerance is described by the particular branch of business and the risks characteristic of the profession (food factory vs. hedge fund). The duties/authority, at least in theory, must secure that if one acts according to them, the risk of the behaviour does not exceed a certain level of social tolerability.

### *3.4. Violation of supervisory duties and the commission of an offence*

#### *3.4.1. Causal link*

##### *3.4.1.1. Under the general rules of perpetration and complicity*

General liability, according to complicity principles, depends on the particular case.

Assistance and incitement do not require the actual perpetrator to commit a crime in which he was assisted or incited. It is sufficient to link the persuasion with the decision of an individual to commit a crime he was incited to. The same is true of assistance: an objective facilitation of a prohibited act must be linked to the action of the person assisting, e.g. providing another person with tools. Assistance by omission must also be linked with the actions of a person assisting, but only on a normative level (defiance of duties must make the commission easier).

In case of joint perpetration or perpetration by directing a result crime, the consequence constituting an element of a crime must be attributed to both perpetrators.

In case of perpetration by the ordering of a result crime, the consequence constituting an element of a crime must be attributed to the principal perpetrator and the act of the principal perpetrator must be attributed to the person giving orders.

When it comes to consequence crimes committed by action, there are two separate aspects of objective attribution of consequence: ontolo-

gical/empirical/causal and normative.<sup>11</sup> In case of result crimes, the following consequence attribution test must be performed:

- 1) Is there a scientifically established, general causal connection between such conduct and such consequence, i.e. is there a regularity that conduct A normally and usually causes consequence B?
- 2) Is the particular conduct and consequence an example of such general regularity, i.e. there is a general causal connection between conduct A and consequence B, but are the conduct and the consequence in question really an example of such a situation?
- 3) The perpetrator's conduct needs to be unlawful, i.e. it should violate rules of conduct that were to be applied in the given circumstances and, as a result, create a highly unacceptable danger/risk of causing a criminal consequence, i.e. instigating causal process leading to a criminal consequence.
- 4) From the very beginning (*ex ante*), the creation of such an unacceptable danger/risk of causing a criminal consequence should be objectively foreseeable, i.e. there should be an objective possibility of foreseeing the creation of such an unacceptable danger/risk at the moment the perpetrator started to act.
- 5) It should be established that the highly unacceptable danger/risk the perpetrator has created by violating rules of conduct has actually brought about the consequence. This is done by considering whether the consequence would have happened had the perpetrator acted in conformity with the binding rules of conduct.
- 6) It should be established that the rules and legal norms that the perpetrator has violated had been specifically designed to prevent the consequence the perpetrator has caused, i.e. it should be established whether the violation of rules was actually relevant with regard to the consequence.

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<sup>11</sup> T. SROKA, Odpowiedzialność (n 5), *passim*, S. Tarapata, 'Głos w sprawie 'niebezprawnego naruszenia reguł postępowania z dobrem prawnym (o przypadku tzw. 'plonującego anioła)', *Czasopismo Prawa Karnego i Nauk Penalnych* 2 (2013) 25–42; M. Bielski, 'Naruszenie reguł ostrożności czy nadmierna ryzykowność zachowania jako właściwe kryterium prawnokarnego przypisania skutku', *Czasopismo Prawa Karnego i Nauk Penalnych*, Rok VIII (2004) 1, s.25–46, *ibid.* 'Obiektywne przypisanie skutku przestępstnego w przypadku kolizji odpowiedzialności za skutek', *Państwo i Prawo* 10 (2005) 75–89; M. Małecki, 'Ustawowa regulacja kryteriów przypisania skutku (analiza wybranych uwag krytycznych)', *Państwo i Prawo* 8 (2015) 91–103.

### *3.4.1.2. Under Art. 296 of the Criminal Code*

In the case of Art. 296 of the Criminal Code, the damage is a consequence of the crime, so it must be attributed to the HoB. As previously mentioned, due to the specificity of said crime, not only must the crime of a subordinate be linked with the HoB's behaviour, but so too must the damage resulting from that crime that harms the company. It may happen that the crime of a subordinate is attributable to the HoB but the damage, due to some extraordinary circumstance or intervention of a third party, is not.

### *3.4.2. Mens rea*

#### *3.4.2.1. Under the general rules of perpetration and complicity*

In case of principal complicity, every accomplice to the prohibited act is liable within the limits of his intentional or unintentional behaviour, irrespective of the liability of other accomplices.<sup>12</sup> This means in practice that it may be that an HoB orders his subordinate to undertake a behaviour which constitutes non-compliance with carefulness required in the given circumstances and he might have foreseen the possibility of the commission of a crime due to that violation, but the subordinate realises that it is a crime and accepts that or even intends to proceed. In such a case, provided that a particular crime is penalised as both intentional and unintentional, the HoB is liable for unintentional perpetration and the principal perpetrator for intentional perpetration.

Considering the most general aspect of this sort of liability, its form depends on whether the supervisor intends commission of the crime—i.e. wants to commit it or, foreseeing the possibility of its commission, accepts it—or, without having an intent of its commission, commits it due to non-compliance with carefulness required in the given circumstances, although he has foreseen or might have foreseen the possibility of its commission. His state of mind determines whether he may be held liable for intentional or unintentional crime (if the law provides an unintentional counterpart).

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<sup>12</sup> Article 21 of the CC.

### 3.4.2.2. Under Art. 296 of the Criminal Code

Considering the liability pursuant to Art. 296 of the Criminal Code, a crime may be committed both intentionally and unintentionally. This means that, according to the Polish Criminal Code, the perpetrator intends commission of the crime—i.e. wants to commit it or, foreseeing the possibility of its commission, accepts it—or, without having an intent of its commission, commits it due to non-compliance with carefulness required in the given circumstances, although he has foreseen or might have foreseen the possibility of its commission. Proving the subjective element of a crime is one of the most difficult issues in the criminal trial, especially if we consider the complex structure of management and decision-making.

### 3.5. Delegation of control and supervisory duties: scope and limits

Considering corporations (limited liability companies and stock offering companies), their statutes may incorporate the division of competences within the corporation, providing explicitly who is responsible for what part of the business. This limitation, however, applies only to internal relationships: limitations are not in force outside the company.<sup>13</sup> This means that a board member may, for example, be responsible only for human resources in the company but remains a board member with all statutory privileges and rights and obligations towards the outside world. He may sign general documents (including court documents, powers of attorney) according to the representation rules accepted in the company even if his tasks within the structure are described differently. This may influence the HoB's criminal liability, but not in every aspect. Some provisions make the board member responsible for performing certain duties (including annual reporting to the registry court or to the tax office) and it may be irrelevant that the internal division of tasks puts someone else in charge of that.<sup>14</sup> However, the problem

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<sup>13</sup> Article 204 of the Commercial Companies Code.

§ 1. The power of a member of the management board to conduct the affairs of the company and represent the company shall embrace all actions of the company, whether in court or out of court.

§ 2. The right of a member of the management board to represent the company may not be restricted with a legal effect with respect to third parties.

<sup>14</sup> Article 208 of the Commercial Companies Code.

§ 2. Each member of the management board shall have the right and duty to conduct the company's affairs.

which may appear is relevant *mens rea*. If a crime is intentional and a particular board member genuinely did not know what was happening in a division not under his supervision, he may be at most held criminally liable for an unintentional crime. There is a statutory scope of board members' obligations which may not be limited. However, in other cases, a board member may contend that he was not responsible for a particular part of the business, thus he had no powers or information in that regard.

The situation is slightly different when a board member would like to delegate some responsibilities. He is free to do that, but with the reservation that it may not necessarily prevent him from potential liability for the mischiefs of the said subordinate. Despite the delegation, it is still his duty to act according to the legal requirements. For example, a board member must present the register court with an annual balance sheet: naturally, in almost every case, this is outsourced to the bookkeeping office (internal or external), but nevertheless it is a board member who will be responsible for failing to provide the document regardless of his subordinate's or another contractor's fault. Also, the only issue here may be the *mens rea* required for a crime in question. In extreme cases of some sort of *in blanco* delegation of duties to subordinates, it may be proved that the HoB foresaw the possibility of its commission, accepted the possibility of perpetration by that subordinate and, by his actions, facilitated that by omission.

### *3.6. Fulfilment of supervisory duties and disciplinary powers*

If the crime of the subordinate is either attributable under general principles to the HoB or may lead to his liability for Art. 296 of the Criminal Code, there are very limited options to exclude liability. Of course, immediate removal of the subordinate and subsequent actions leading to remedy of the situation would be considered as goodwill and motivation in penalty imposition. It may also indicate a lack of intent on the side of the HoB. Also, Art. 296 of the Criminal Code, for example, provides that if the perpetrator has voluntarily redressed the

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§ 3. Each member of the management board may, without a prior resolution of the management board, conduct the company's affairs within the ordinary course of the company's business.

§ 7. Any member of the management board may revoke the commercial power of attorney.

full damage, the court may apply extraordinary mitigation of the penalty or even waive its imposition.

Some criminal provisions explicitly provide impunity clauses, as in case of bank fraud: if the perpetrator has voluntarily prevented the use of the financial support or payment instrument, renounced the subsidy or public procurement, or satisfied the claims of the harmed party before criminal proceedings have been instituted, he is not subject to a penalty. In corruption cases, the perpetrator who has reported giving or offering a bribe to a law enforcement authority responsible for prosecuting crimes and who has disclosed all the substantive circumstances of the crime before this authority has learned about it is not subject to a penalty.

### *3.7. Liability and collective decisions*

There are no special rules of attributing liability in cases of collective decisions. The participation of each board member, for example, must be evaluated, considering his intent or defiance of duties in the context of the decisions of the remaining ones. It may be a case of joint perpetration. If the rules of objective attribution of a result in the case of result crimes allow ascribing the responsibility for said consequence to him, considering the context, there are no obstacles to criminal liability. The problem may appear if the voting took the form of a secret ballot. It may be impossible to prove who was in favour of a decision that led to a crime.

In these cases, it seems that not only substantive law principles but also principles governing criminal procedure—mainly the principle providing a rule that irremovable doubts shall be resolved in favour of the accused—are crucial.

### *3.8. Relationship with corporate liability*

#### *3.8.1. Triggering persons*

The Statute on Liability of Corporate Entities for Acts Prohibited Under a Penalty of 2002 (with significant amendments from 2005) is based on the identification model. This means that an individual acting on behalf and for the benefit of the entity must be found guilty in order to trigger the procedure against the entity (by a final and non-appealable judgment convicting that person, a judgment conditionally discontinuing the criminal proceedings or criminal fiscal proceedings against that person, a ruling to grant that person the right to voluntarily submit to pen-

alty, or a court ruling to terminate the proceedings against that person due to circumstances preventing him from being punished).

The entity is liable if one of the following individuals commits a crime from the list provided in the statute (Art. 3) and if such a criminal behaviour brought or might have brought a benefit (material or immaterial) to that entity:

- 1) A person acting on behalf or for the benefit of a collective entity or pursuant to an obligation to represent it, making decisions on its behalf or enforcing internal control or by exceeding his authority or failing to fulfil his duties.
- 2) A person allowed to perform actions due to exceeding authority or failing to fulfil duties by a person referred to in 1.
- 3) A person acting on behalf or for the benefit of a collective entity with knowledge and consent of a person referred to in 1.
- 4) An entrepreneur who directly cooperates with the entity in pursuing a legal goal.

A collective entity shall be held liable if the offence was committed as a result of (Art 5):

- 1) at a minimum, a lack of due diligence in selecting the individual referred to above in points 2 and 3 or, at a minimum, a lack of due supervision of that person on the part of a body or representative of the collective entity.
- 2) the internal organisation of the collective entity that did not prevent an offence committed by the person referred to above in points 1 or 4 if it could have been prevented had the body or representative of the collective entity applied the due diligence required in the circumstances in question.

### *3.8.2. Concurrence and accumulation of liabilities*

The liability or lack of liability of a collective entity in accordance with the provisions of this Act does not preclude civil liability for the damage caused, administrative liability or the individual legal liability of the person committing an offence. This means that it may be possible to commence additional administrative or civil proceedings against the entity or other individuals acting for its benefit regardless of the proceedings undertaken pursuant to the act. Also, the court trying the entity shall independently adjudicate on factual and legal issues within the scope of the petition to punish the entity. However, the criminal court's

final and non-appealable judgment convicting that person, or a judgment conditionally discontinuing the criminal proceedings or criminal fiscal proceedings against that person, or a ruling to grant that person the right to voluntarily submit to penalty, or a court ruling to terminate the proceedings against that person due to circumstances preventing him from being punished, providing the basis for liability of the entity, is binding. Thus, during subsequent proceedings against the entity, the court must not decide that the initial crime of an individual was never in fact committed. It is possible, however, to evaluate the factual surroundings and legal environment of an entity's decision-making process differently from how it was done during the initial criminal trial of the individual.

### *3.9. Compliance programmes (general application)*

Currently, compliance programmes have a limited legal basis in banking law and insurance law, where particular statutes (or recommendations of the Polish Financial Supervision Authority) provide a duty to implement internal and external regulations ensuring risk control.<sup>15</sup>

In other fields of business, preparing this kind of document is only voluntary. It seems that in the field of criminal liability, compliance programmes may have a very limited impact on a case. Of course, the HoB may claim that there was a valid and professional compliance programme implemented by the company which was to ensure that a particular mischief would not happen. If it happened anyway, it might be argued that it was independent of the HoB. However, this is only a partial excuse and other circumstances will be investigated. It may seem that a valid compliance programme has a much bigger influence on the liability of collective entities when considering one of the liability-triggering conditions: when an offence was committed as a result of the operations of an organisation of the collective entity in such a manner that did not prevent an offence being committed by a relevant individual. In that case, providing the prosecutor's office with a compliance programme may fully justify the entity by showing that the internal organisation was impeccable and the crime in question was the unforeseeable excess of an employee.

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<sup>15</sup> M. KOZAK, *Programy compliance jako narzędzie skutecznego wdrażania prawa konkurencji – metoda kija i marchewki?* [https://www.1pkpk.wz.uw.edu.pl/working\\_papers/Kozak\\_Compliance.pdf](https://www.1pkpk.wz.uw.edu.pl/working_papers/Kozak_Compliance.pdf).

## 4. Defences

### 4.1. *Effective powers of supervision and control and liability*

As a clear majority of economic crimes (including Convention ones) are intentional, so if an HoB claims an effective lack of control it simultaneously excludes his intent. A person cannot desire a crime to happen if he is not aware of the risk of its commission.

In rare cases of intentional crimes, however, a certain level of lack of control may be deemed to be to the detriment of the HoB, because it can be indicated that he accepted the commission of crimes by his subordinates by not implementing any remedies to his powerlessness.

In case of unintentional crimes, lack of control may be an excuse but is strongly dependent on the scope and wording of the legal duty in that area of commerce. It may be claimed that an HoB actually did not have, but should have had, effective control over supervision. To put it in another way, he should have guaranteed himself better supervision and management tools while it was objectively possible, as well as demanded that people do a better job.

#### 4.1.1. *Under Art. 296 of the Criminal Code*

Art. 296 § 4 of the Criminal Code provides for an unintentional counterpart ('If the perpetrator of the crime provided for in § 1 or 3 acts unintentionally, he is subject to the penalty of deprivation of liberty for up to 3 years'). Claiming that the HoB had no effective control over employees, for example, due to the organisational scheme of the company or other arrangements, may be a justification for his omissions only provided that he had no further legal duty to assure a more complex supervision. It may be indicated that although he did not have relevant control/supervisory tools, he should have provided them.

The same arguments apply to liability for fiscal crimes, because the subjective basis for the liability of an HoB is worded almost identically to that pursuant to Art. 296 of the Criminal Code.

### 4.2. *Delegation of supervisory powers*

In the cases of both the general rules of perpetration and complicity and Art. 296 of the Criminal Code, formal delegation of duties may be an excuse or even a justification provided that it was not contrary to the legal obligations of a person delegating. For instance, a board member in a limited liability company may defend himself by arguing sub-dele-

tion provided that, according to the relevant provisions of the Code of Commercial Companies, he offered due diligence in both shaping the rules of delegation and subsequent supervision. Of course, the criminal law shall not prevent companies from adopting complex structures with a variety of delegation principles, but there are some inherent functions of the board which may not be discharged. In the remaining scope, probably the more complex the structure of the company, the greater chance the HoB will claim that he did not violate any safeguard rules: thus, even with due diligence, it was not objectively foreseeable that a subordinate may commit a crime.

#### *4.3. Compliance programmes as a defence*

To ensure compliance, programmes work for the benefit of the HoB: though they may not necessarily provide an excuse every time, they will—especially in cases of unintentional crimes—impact the scope of the penalty, even allowing the application of extraordinary mitigation of penalty. The HoB, simply by implementing a compliance programme, shows due diligence, approvable motivation and genuine endeavour to limit potential damage that may be caused by a crime or by the perpetration itself. According to the Criminal Code, while imposing a penalty, the court especially takes into account the perpetrator's motivation and manner of conduct, the type and degree of violation of the perpetrator's duties, the type and extent of the negative consequences of the crime, the characteristics and personal conditions of the perpetrator, the perpetrator's way of life prior to the commission of the crime and his behaviour after the commission of the crime, especially his efforts to redress the damage or to satisfy a public sense of justice in any other form.

#### *4.4. Third-party advice, external auditing and liability of heads of business*

According to the Bookkeeping Act, the entity's manager shall be liable for the fulfilment of duties related to accounting, including supervisory duties specified in the statute, and where certain duties related to accounting are entrusted to another person or to an entrepreneur (professional accountant) with their consent. The acceptance of responsibility by another person or an entrepreneur shall be confirmed in writing. Formally, it only broadens the liability for bookkeeping crimes to the accountant (arg. ex Art. 9 § 3 FCP: a natural person or an organisational entity without a legal personality managing financial matters of another

pursuant to a contract is liable for fiscal crimes and fiscal transgressions as a perpetrator). In reality, especially when the entity is a company and there is a professional accountant or accounting firm hired, the supervisory abilities of the HoB are significantly limited. Practice shows that in cases of petty fiscal crimes or transgressions, tax offices indict accountants rather than the HoB.

## 5. Liability of heads of business and sanctions

### 5.1. *Criminal and punitive sanctions*

Depending on the particular crime, the penalties may be the following:

1) A fine imposed at daily rates by indicating a number of daily rates and the value of one daily rate; unless a statute provides otherwise, the number of daily rates shall not amount to fewer than ten or more than 540; in case of commercial crimes and debtor/creditor crimes, a daily rate of up to 3,000 may be imposed. When determining the value of the daily rate, the court takes into consideration the perpetrator's income, personal and family conditions, financial situation and income perspectives; the value of one daily rate may not amount to less than PLN 10 or more than PLN 2,000.

2) Limitation of liberty lasting no less than one month and not more than two years. This consists of:

- the obligation to perform unremunerated, supervised work for community purposes for 20 to 40 hours per month;

- the obligation to remain in a place of permanent residence or other designated place, under electronic supervision;

- a deduction of 10 per cent to 25 per cent of one's monthly remuneration for work for a court-designated community purpose;

- other duties, but this is not applicable in case of commercial crime.

3) Deprivation of liberty lasting no less than a month and no more than 15 years. In case of presenting counterfeited VAT invoices for over 10 million PLN, the penalty provided for that crime may be up to 25 years' deprivation of liberty.

In case of a fiscal crime, the following penalties are provided:

1) a fine imposed at daily rates by indicating a number of daily rates and the value of one daily rate; unless a statute provides otherwise, the number of daily rates shall not amount to fewer than 10 or more than

720 rates. When determining the value of the daily rate, the court takes into consideration the perpetrator's income, personal and family conditions, financial situation and income perspectives; the value of one daily rate may not amount to less than 1/30 of the minimum monthly salary in the country or more than 400 times that.

2) limitation of liberty lasting no less than one month and not more than two years. This consists of:

- the obligation to perform unremunerated, supervised work for community purposes for 20 to 40 hours per month;
- the obligation to remain in a place of permanent residence or other designated place under electronic supervision;
- a deduction of 10 per cent to 25 per cent of one's monthly remuneration for work for a court-designated community purpose.

3) Deprivation of liberty lasting no less than five days and no more than aggravated 15 years.

Fiscal transgressions other than fiscal crimes are punished by a fine of an amount from one tenth up to 20 times the minimum monthly salary in the country.

As to the punitive administrative sanctions scattered around the Polish legal system, pecuniary penalty is dominant. Depending on the branch in question, the fine may be for up to five million PLN. The system is rather random and not as structured as in criminal law.

## *5.2. Other sanctions and measures*

The Polish legal system provides a selection of penal measures targeting repression, compensation and/or (public) protection.

The ones provided in the Criminal Code (relevant to commercial crimes) are the following:

1) Deprivation of public rights, consisting of the loss of active and passive voting rights with regard to public authority offices, professional and economic self-government authorities, loss of the right to participate in the administration of justice and to perform a function in public and local and professional self-government authorities and institutions, as well as loss of held military rank and reversion to the rank of private. The deprivation of public rights also includes the loss of medals, decorations and honorary titles and the loss of capacity to acquire them during the period of the deprivation of rights. The court may impose the deprivation of public rights while sentencing to the penalty of deprivation of liberty for a period of no less than three

years for the commission of a crime driven by motivation deserving special condemnation.

2) Prohibition from occupying a specific position, practising a specific profession or operating a specific business activity if, during the commission of a crime, the perpetrator has abused his position or the practised profession, or has shown that his further occupation of such a position or practising such a profession poses a threat to substantive, legally protected interests. The court may impose a prohibition to operate a specific business activity while sentencing for a crime committed in relation to operating such a business activity if its further operation poses a threat to substantive, legally protected interests.

3) Prohibition on entering gambling facilities and engaging in gambling games is imposed while sentencing for a crime committed in relation to the organisation of or participation in gambling games.

4) Publication of the sentence if it is expedient, especially due to the social impact of the sentence, unless it infringes the harmed party's interests.

The penal measures provided in the Fiscal Criminal Code (relevant to commercial crimes) are the following:

- 1) Voluntary submission to liability.
- 2) Forfeiture of items, imposed only if explicitly provided for in the Code.
- 3) Collecting the equivalence in value of items undergoing forfeiture.
- 4) Forfeiture of material benefit.
- 5) Collecting the equivalence in value of material benefit.
- 6) Prohibition from occupying a specific position, practising a specific profession or operating a specific business activity; this may be imposed only in case of perpetration of a certain crime
- 7) Publication of the sentence.
- 8) Deprivation of public rights.

### *5.3. Sentencing criteria*

The most relevant sentencing guidelines regarding HoBs are, in my opinion, the following:

- Perpetrator's motivation and manner of conduct.
- The type and degree of violation of the perpetrator's duties.
- The type and the extent of negative consequences of the crime.

- The characteristics and personal conditions of the perpetrator.
- The perpetrator's way of life prior to the commission of the crime and his behaviour after the commission of the crime, especially his efforts to redress the damage or to satisfy the public sense of justice in any other form.
- Positive results of mediation between the harmed party and the perpetrator or the settlement they have reached during the proceedings held before a court or a public prosecutor.

It is also worth mentioning that the court may apply extraordinary mitigation of the penalty in exceptional situations, when even the lowest penalty provided for a crime would be incommensurately severe, especially if:

- 1) the harmed party and the perpetrator have reconciled, the damage has been redressed or the harmed party and the perpetrator have agreed on the manner of redressing the damage; or
- 2) due to the perpetrator's demeanour, he has taken efforts to redress or prevent the damage.

Perpetration with intent to gain a material benefit also constitutes a basis for a fine collateral to the penalty of deprivation of liberty provided.

In case of fiscal crimes, the system of sentencing guidelines, in general, resembles that provided above with a special focus on fiscal duties. However, the general part of the Fiscal Criminal Code provides for a set of very complex and numerous specific guidelines, including a broad catalogue of mitigating and aggravating factors, rules of extraordinary mitigation and aggravation, etc. It is mostly determined by the scope of tax evasion.

Considering the practice of fiscal crimes, it is still the primary goal of the state to get the evaded tax back. Thus a dominant solution implemented in the vast majority of cases is voluntary submission to liability, a mechanism that allows avoiding conviction. The perpetrator, while filing a motion to submit himself to liability, needs to pay the evaded tax, a fine in an amount at least one third of the minimum monthly salary in the country (usually the fine is higher, individually negotiated with the tax office) and a lump sum cost of the proceedings. If a particular crime provides for the forfeiture of certain objects, it is also mandatory to hand them over to the tax office.

#### *5.4. Confiscation*

Forfeiture is provided in the Criminal Code as a general solution in case of perpetration that brings any kind of benefit. The following assets are subject to forfeiture:

- 1) Items that have been derived directly from crime.
- 2) Items that have served to commit a crime or have been intended to serve in the commission of a crime.
- 3) Material benefit, even indirectly gained from committing a crime, or its equivalence in value.
- 4) Enterprise from which material benefit of significant value was gained, even indirectly, or which served to commit a crime or to conceal benefits gained beforehand.

In case of joint ownership, the forfeiture applies to a share belonging to the perpetrator or its equivalence in value.

It may operate against third parties if a property constituting a benefit derived from committing a crime has been, effectively or under any legal title, transferred to another natural person, juridical person or organisational entity without a legal personality. It is deemed that the items remaining in the autonomous possession of that person or organisational entity, and other property rights that person is entitled to, belong to the perpetrator unless the circumstances attendant to the acquisition of such property could not have given rise to the assumption that it has been even indirectly obtained by means of a prohibited act.

As to the collective entities, forfeiture regards:

- 1) objects derived, even indirectly, from an offence or used or intended to be used to commit an offence;
- 2) financial benefits derived, even indirectly, from an offence;
- 3) the equivalent of the objects or financial benefits derived, even indirectly, from an offence.

However, the forfeiture shall not be adjudged if the object or financial benefit or their equivalent is to be returned to another entitled entity.

#### *5.5. Enforcement practice*

The practice of forfeiture is difficult to establish unambiguously. Statistics do not allow determination of the amount of forfeited property in cases related to HoBs. Generally, it is indicated that every year around 200 million PLN worth of property is forfeited (the court rulings contain such a decision towards approximately 20,000 convicts a

year).<sup>16</sup> However, after amendments were introduced to the Criminal Code (implementing Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union), the scope of forfeiture is expected to be significantly higher due to provisions extending its scope and making it easier.

## 6. Relationship with punitive administrative law

### 6.1. Parallel criminal and administrative proceedings against the head of business

Provided that the normative description of both an offence and an administrative misconduct allows for one act or omission to fulfil their definition (being sufficiently similar or identical), it is allowed to impose both types of sanction in parallel. However, this may infringe the principle of *ne bis in idem* and the principle of proportionality. As yet, there is no clear picture in this regard. The problem has been analysed by the Polish Constitutional Court on several occasions in individual cases. Generally parallel (simultaneous) sanctioning is not unconstitutional as such. It however requires the criminal court to take into account the consequences imposed in another proceeding (civil or administrative) when imposing the criminal sanction in order not to exceed the overall proportionality of all sanctions (ruling of the Constitutional Court from 21 October 2014 P 50/13).

Administrative and criminal proceedings may be run in parallel and there are no rules on their concurrence. Criminal and administrative enforcement systems are parallel. However, some misconducts are described in a normative sense both as an administrative transgression and a criminal offence. In that situation, if the elements of a crime are met, the proper investigatory authority is by law obliged to commence criminal proceedings even if the proper administrative authority has already commenced the administrative proceedings within its powers. In those situations, there is no place for any discretionary decision about which path to choose. It may also happen that the administrative authority will not inform the prosecution authority of misconduct that may also

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<sup>16</sup> See governmental information in the draft of the amendment to the Criminal Code implementing Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union. <http://www.konsultacje.gov.pl>.

constitute a crime and which is dealt with during ongoing administrative proceedings. It is often because the administrative authority has its own responsibilities and providing information or further cooperation with, for example, the Prosecutor's Office may prolong the administrative case or add a significant amount of work. It is also possible that the administrative authority does not recognise the potential perpetration due to a lack of expertise in the criminal law area. There are solid and coherent decisions of the Administrative Courts that pending criminal proceedings do not present a reason to suspend the administrative proceedings in a particular case. This means that there may be parallel criminal and administrative cases.<sup>17</sup>

#### *6.1.1. Trans-procedural use of evidence against the head of business*

There is no limitation on transferring evidence from an administrative procedure into a criminal one. However, in case of witnesses, they must be put on the stand again during a criminal trial (it does not exclude use of technical devices enabling interrogation to be conducted remotely on the basis of a simultaneous direct transmission of image and sound.)

#### *6.1.2. Admissibility and use of foreign evidence against the head of business*

If evidence is not inadmissible according to Polish regulations, it may constitute the basis of fact-finding. However, it must be verified whether the evidence is solid and reliable; this is done according to general rules of the evaluation of evidence.

#### *6.1.3. Administrative investigations and right to silence of the head of business*

During administrative proceedings, the party is obliged to cooperate and provide all required evidence. However, the general rules of the Code of Administrative Procedure provide explicitly that a witness may refuse to answer a question if the answer could bring about a risk of criminal investigation towards him or his immediate family.

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<sup>17</sup> See a comprehensive description of that issue in A. BŁACHNIO-PARZYCH, *Zbieg odpowiedzialności karnej i administracyjno-karnej jako zbieg reżimów odpowiedzialności represyjnej* (Warsaw 2016).

## *6.2. Multiple and parallel criminal and administrative proceedings against the legal person and the head of business*

The liability or lack of liability of a collective entity in accordance with the provisions of this Act does not preclude civil liability for the damage caused, administrative liability or the individual legal liability of the person committing an offence. The most recent opinion of the Constitutional Court considers parallel sanctioning not to be unconstitutional *per se* but as requiring the Criminal Court to take into account the consequences imposed in another proceeding (civil or administrative) when imposing the criminal sanction in order not to exceed the overall proportionality of the sanction as a whole. Furthermore, it seems conceivable that in some extreme cases the court will continue to strike down provisions that *in abstracto* allow imposing several sanctions for the same act/omission, justifying it by saying that they do not allow a potential lowering of the sanction for the above reasons.

### *6.2.1. Right to silence of the head of business in proceedings against the legal person*

There is no specific rule regarding the liability of collective entities. The HoB as a witness may therefore decline to answer a question if such an answer might expose the witness or closest relatives by blood or affinity to liability for a criminal or fiscal offence (Art. 183 CCP). One must remember that the procedure against the legal entity may be instigated only after the final and valid conviction of an individual provided in provision cited beforehand.

## *6.3. Relationship between liability of the legal person and liability of the head of business*

As was described in section 3.8 above, the entity is not held liable for a failure to supervise its managers. From this perspective, the entity is not liable in the broadest possible way – thus the Supreme Court has consistently ruled. This means that the criminal liability of a CEO of a company in Poland does not trigger the liability of the entity.

## CHAPTER VII

# PROCEDURAL SAFEGUARDS FOR HEADS OF BUSINESS IN LIGHT OF THE ECtHR AND CJEU CASE LAW

*Dr András Csúri and Prof. Michiel Luchtman \**

SUMMARY: – 1. Presumption of innocence. – 1.1. The case law of the ECtHR on the compatibility between presumptions of fact and law and the presumption of innocence in criminal cases. – 1.2. The relationship between presumption of innocence and modes of criminal liability based on lack of supervision or control. – 1.3. The presumption of innocence and heads of business – concluding remarks. – 2. Privilege against self-incrimination. – 2.1. The case law of the ECtHR on the privilege against self-incrimination in criminal matters. – 2.2. The case law of the CJEU on the privilege against self-incrimination in competition proceedings. – 2.3. The right of heads of business to remain silent in the context of administrative or criminal investigations against the legal entity. – 2.4. The potential use of evidence gathered in a previous investigation against the legal entity in a subsequent criminal proceeding against the individual head of business. – 2.5. The privilege against self-incrimination and heads of business – concluding remarks. – 3. Principle of *ne bis in idem*. – 3.1. The case law of the European Courts (ECtHR and CJEU) on the principle of *ne bis in idem*. – 3.2. Overview and critical assessment of the case law of the ECtHR and of the CJEU on the compatibility of ‘dual track enforcement systems’ with the principle of *ne bis in idem*. – 3.2.1. ECtHR’s new approach in *A. and B. v. Norway*. – 3.2.2. Follow-up in European Union. – 3.3. Overview and critical assessment of the case law of the ECtHR and of the CJEU on the relationship between individual liability and corporate liability in the context of *ne bis in idem*. – 3.4. Results with respect to *ne bis in idem*.

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\* This chapter was concluded on 5 March 2018.

## 1. Presumption of innocence

### 1.1. The case law of the ECtHR on the compatibility between presumptions of fact and law and the presumption of innocence in criminal cases

Overview. Article 6 (2) of the European Convention on Human Rights (ECHR) states, ‘Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law’. The presumption of innocence governs criminal proceedings in their entirety. It is a core principle of the criminal justice process, aiming to protect the individual against the improper use of coercive state power, thereby preventing wrongful convictions.

The European Court of Human Rights (ECtHR, the Court) has ruled extensively on the presumption of innocence. The meaning of Article 6 (2) was elaborated in *Barberà, Messegué and Jabardo v. Spain*.<sup>1</sup> Accordingly, the presumption is violated if a judicial decision reflects an opinion that the accused is guilty without him previously been proved guilty according to law. The presumption requires from the members of a court not to start a case with the preconceived idea that the accused committed the offence; the burden of proof is on the prosecution and any doubt should benefit the accused (*Barberà, Messegué and Jabardo v. Spain* paras 77 and 91). The presumption is violated if a judicial decision reflects an opinion that the accused is guilty without him previously been proved guilty according to law. For the presumption to be meaningful, certain procedural safeguards are required. Notably, the prosecution must prove the case in trial; the defendant has the right to be heard; and it is unlawful to base a conviction solely on the defendant’s silence.<sup>2</sup>

The ECtHR has also held that a person’s right in a criminal case to be presumed innocent is not absolute, since presumptions of fact or law

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<sup>1</sup> ECtHR, 6 December 1988, *Barberà, Messegué and Jabardo v. Spain*, appl. no. 10590/83.

<sup>2</sup> This also shows the close relationship of the presumption of innocence to the privilege against self-incrimination and the right to silence. The ECtHR first dealt in *John Murray v. United Kingdom* with the issue of drawing subsequent adverse inferences from the applicants’ failure to answer when questioned by the police. See also S Peers, T Hervey, J Kenner, A Ward (eds), *The EU Charter of Fundamental Rights* (CH Beck-Hart-Nomos 2015) 1306; U Karpenstein, F Meyer (eds) *Konvention zum Schutz der Menschenrechte und Grundfreiheiten: EMRK* (CH Beck, München 2015) 200–214; S Lamberigts, *The Presumption of Innocence (and the Right to be Present at Trial)*. Directive. <https://europeanlawblog.eu/2016/05/03/the-presumption-of-innocence-and-the-right-to-be-present-at-trial-directive/>.

operate in every criminal law system and are not prohibited in principle by the Convention (*Salabiaku v. France*<sup>3</sup> para 28; *Falk v. The Netherlands* (Dec.)).<sup>4</sup> Accordingly, the Contracting States may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or negligence (*Salabiaku v. France*, § 27; *Janosevic v. Sweden* para 100). However, the Contracting States are required to confine these presumptions within reasonable limits and to strike a balance between the importance of what is at stake and the rights of the defence (*Salabiaku v. France* para 28; *Radio France and Others v. France* para 24; *Janosevic v. Sweden* para 101). In other words, the means employed have to be reasonably proportionate to the legitimate aim (*Janosevic v. Sweden* para 101).

### **Case law**

In the following, the analysis focuses on selected cases before the ECtHR, which might prove to be useful in the context of the liability of heads of business.

The Court had held in *Salabiaku v. France* that a person's right in a criminal case to be presumed innocent (and to require the prosecution to bear the onus of proving the allegations against him/her) is not absolute, since presumptions of fact or law are not prohibited in principle by the Convention (*Salabiaku v. France* para 28). National criminal systems operate on such presumptions, especially with regard to taxation and traffic offences. Accordingly, 'the Contracting States may, under certain conditions, penalise a simple or objective fact as such, irrespective of whether it results from criminal intent or from negligence' (*Salabiaku v. France* para 27; see also *Janosevic v. Sweden* para 104). That said, the means employed have to be reasonably proportionate to the legitimate aim pursued (*Falk v. The Netherlands* (Dec.); *Salabiaku v. France* para 28; *Västberga Taxi Aktiebolag and Vulic v. Sweden*<sup>5</sup> para 113; *Janosevic v. Sweden*<sup>6</sup> para 101).

In *Janosevic v. Sweden*, the main question concerned whether instituting enforcement proceedings of administrative sanctions imposed on objective grounds prior to a court determination of the dispute violated the right to presumption of innocence. The competent Swedish tax authority discovered certain irregularities in the tax re-

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<sup>3</sup> ECtHR 7 October 1988, *Salabiaku v. France*, appl. no. 10519/83.

<sup>4</sup> ECtHR 2004-XI, *Falk v. The Netherlands*, appl. no. 66273/01.

<sup>5</sup> ECtHR, *Västberga Taxi Aktiebolag and Vulic v. Sweden*, appl. no. 36985/97.

<sup>6</sup> ECtHR, 21 May 2003 (final), *Janosevic v. Sweden*, appl. no. 34619/97.

turns of the applicant's taxi firm and invited him to submit comments. Janosevic challenged the audit report, but the authorities subsequently increased his liability in accordance with domestic rules and ordered him to pay tax surcharges on objective grounds (*Janosevic v. Sweden* para 68). In a subsequent criminal proceeding, Janosevic was sentenced to imprisonment for tax fraud primarily based on information obtained by the tax authority during its audit and statements made by the applicant in his tax returns. The applicant claimed that his right to be presumed innocent was breached by the fact that the Tax Authority's decisions concerning tax surcharges were enforced prior to a determination by a court of his liability to pay them (*Janosevic v. Sweden* para 99).

The Court held that the presumptions applied in Swedish law with regard to surcharges were confined within reasonable limits (*Janosevic v. Sweden* para 104). Though the presumed liability on objective grounds was difficult to rebut, Janosevic was not left without any means of defence and it was open to him to put forward grounds for a reduction or remission of the surcharges and to adduce supporting evidence (*Janosevic v. Sweden* para 102). Thus, the relevant domestic rules on tax surcharges provided for certain means of defence based on subjective elements. The Court acknowledged that 'a system that allows enforcement of considerable amounts of tax surcharges before there has been a court determination of the liability to pay the surcharges is open to criticism' (*Janosevic v. Sweden* para 108). Nevertheless, in the specific case, Article 6 ECHR was not infringed, as no amount was actually recovered from the applicant and the possibility provided for by Swedish law of securing reimbursement of any amount paid constituted a sufficient safeguard of the applicant's interests (*Janosevic v. Sweden* para 109).

Finally, the Court explicitly noted that no provision of the Convention could be seen as excluding, in principle, early enforcement measures being taken before decisions on tax surcharges have become final. That said, the Contracting States are required to confine such enforcement within reasonable limits (*Janosevic v. Sweden* para 106).

The *Radio France and Others v. France* defamation case concerned a series of news flashes and bulletins on Radio France reporting on allegations published in the French weekly *Le Point*. A journalist reported in a live broadcast that a French civil servant, Mr Juno, had supervised in the past the deportation of one thousand Jews, while in reality he did not take decisions on deportation. In line with French law, news bulletins had to be updated before going on air again. The broadcast in question was, however, repeated in either the same or a slightly different form

sixty-two times.<sup>7</sup> The difficulties of the case stemmed from a combination of presumptions under French law. On the one hand, that defamatory statements are made in bad faith, on the other hand that a publishing director was criminally responsible (as principal) for any defamatory statement made on air where the content of that statement has been ‘fixed prior to being communicated to the public’ (Section 93-3 of the Audiovisual Communication Act of 29 July 1982). Proceedings were brought against the company, the publishing director and the journalist who reported the story on air. The director and journalist were fined, while the company was ordered to broadcast a report on the judgment. The Paris Criminal Court found that the publishing director was not liable for the first live broadcast but for the ‘systematic repetition of the disputed statements’, as his duty was to control what is broadcast on the station.

The applicants claimed that French law established an irrebuttable presumption of the director’s responsibility, which was inferred from the sole objective facts of repeated statements and his function as director. They argued that by applying an irrebuttable presumption of liability on the part of the director, the decision involved breaches of Article 6 ECHR (*Radio France and Others v. France* para 21).

The French government claimed that the Convention did not prohibit presumptions of fact or of law as such provided that they were kept within reasonable limits (i.e. a balance between the importance of what is at stake and the rights of the defence). Additionally, the presumption was neither absolute nor irrebuttable. Firstly, the prosecution was still obliged to prove the objective elements of the offence, notably the broadcast of a defamatory statement. Secondly, defendants could still deny the facts or challenge their classification. Thirdly, the defendants could have overturned the presumption by establishing good faith. Therefore, the publishing director have put forward legal arguments other than a claim not to be the director (his function) as an effective defence (*Radio France and Others v. France* para 22). The government further claimed that the presumption in question was within reasonable limits, as it came into play solely with regard to specific offences and the legal responsibility of each defendant was determined in strict proportion to the part he or she had actually, played with a legal distinction being drawn according to whether or not the content of the information

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<sup>7</sup> ECtHR, 30 March 2004, *Radio France and Others v. France*, appl. no. 53984/00.

had been fixed prior to its communication to the public (*Radio France and Others v. France* para 22).

The Court took the view that French law presumed the director to be responsible for the repeated defamatory broadcast. That said, his guilt was not presumed as such, as it was a valid defence to prove good faith through reasonable enquiry of facts. Further, the Court agreed with the arguments of the French government that the journalist and the director should have exercised the utmost care, as they must have been aware of the potential impact for Mr Junot, and that it was possible to consider the responsibility of the director (*Radio France and Others v. France* paras 24 and 39).

### *1.2. The relationship between presumption of innocence and modes of criminal liability based on lack of supervision or control*

In *Radio France and Others v. France*, the presumed responsibility and so the criminal liability of the director was based on his lack of supervision arising from his function, where such control could have been exercised. The applicants claimed that the director's guilt was automatically inferred from mere objective facts and that the prosecution was not being required to prove criminal intent.

Even if the prosecution was absolved from proving the mental element, a number of objective elements still had to be proved, such as the broadcast itself or the defamatory nature of the statement. Most importantly however, the director had a valid defence to overturn the presumption when establishing that the offending remarks by the journalist had been made in good faith.

Therefore, analogous to the *Radio France* case, it is conceivable that heads of business might be responsible on objective grounds based on their lack of control in breach of their duties. In line with the ECtHR case law, responsibility could be established regardless of whether the breach of duty occurred intentionally or negligently. However, strict liability in the narrow sense cannot be based on the ECtHR case law as in *Radio France*, criminal liability was established only to the extent that the director would have been able to exercise such oversight and there was a valid defence to overturn the presumption and thus avoid criminal liability completely.

### *1.3. The presumption of innocence and heads of business – concluding remarks*

The presumption of innocence is a core principle of the criminal

justice process to protect the individual against the improper use of coercive state power. Accordingly, the prosecution must prove the case in trial, the defendant has the right to be heard, and it is unlawful to base a conviction solely on the defendant's silence.

According to the case law of the ECtHR a person's right in a criminal case to be presumed innocent and to require the prosecution to bear the onus of proving the allegations against him or her is not absolute, since presumptions of fact or law operate in every criminal law system and are not prohibited in principle by the Convention. However, the means employed have to be reasonably proportionate. In line with the Courts' case law, it is conceivable that under certain circumstances defined by law, heads of business might be responsible on objective grounds and without proving the mental element for their failure to perform their duty. Such responsibility could be established without breaching the right to be presumed innocent, regardless of the mode of criminal liability. However, strict criminal liability cannot be derived from the ECtHR case law as in the elaborated cases a valid defence, thus a possibility to rebut the presumption was always available.

## 2. Privilege against self-incrimination

### 2.1. *The case law of the ECtHR on the privilege against self-incrimination in criminal matters*

Overview. The privilege against self-incrimination, together with the right to remain silent, is not expressly declared in the ECHR. They have been implied in Article 6 ECHR through various judgments of the Court which have recognised these immunities as 'international standards, which lie at the heart of the notion of a fair procedure' (*John Murray v. United Kingdom*<sup>8</sup> para 45; *Funke v. France*<sup>9</sup> para 44). The right to silence and the privilege against self-incrimination shall minimise the risk of miscarriages of justice. The former concerns individuals' freedom not to speak/testify when questioned by the police; the latter concerns the limits of coercive and oppressive methods while the prosecution proves its case (*Saunders v. United Kingdom*<sup>10</sup> para 68; *Bykov v. Russia*<sup>11</sup> para 92; *John Murray v. United Kingdom*<sup>12</sup> para 111).

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<sup>8</sup> ECtHR, 8 February 1996, *John Murray v. United Kingdom*, appl.no. 18731/91.

<sup>9</sup> ECtHR, 25 February 1993, *Funke v. France*, appl. no. 10828/84.

<sup>10</sup> ECtHR, 17 December 1996, *Saunders v. United Kingdom*, appl. no. 19187/91.

<sup>11</sup> ECtHR, 10 March 2009, *Bykov v. France*, appl. no. 4378/02.

ed Kingdom para 45).<sup>12</sup> The right is relative. On the one hand, the accused's decision to remain silent throughout criminal proceedings may carry consequences. On the other hand, the nature and degree of compulsion, the existence of any relevant safeguards in the procedure, the weight of the public interest in the investigation and punishment of the offence at issue, and the use to which any material so obtained is put may still allow the use of evidence obtained under compulsion (*Jalloh v. Germany* paras 101 and 117; *Bykov v. Russia* para 104).

### Case law

In the following, the analysis focuses on selected cases before the ECtHR which dealt with the essence, scope and limitations of the privilege against self-incrimination and the right to remain silent. Though the ECtHR has not directly addressed the question of whether its case law on the right to remain silent applies to legal persons, the following cases might provide for some insights in the context of this study.

The privilege against self-incrimination and the right to remain silent were introduced to the Court's jurisdiction in *Funke v. France*, a customs case, where the applicant was convicted for his failure to give information (to produce papers and documents in the form of foreign bank accounts) which the authorities assumed to exist.

The Court found that the attempt to compel the applicant himself to provide the evidence violated Article 6 ECHR. Even if later no criminal proceedings were brought in the underlying case, the authorities—unable or unwilling to produce the evidence otherwise—compelled Funke by threat of coercion (criminal sanctions) to provide the evidence himself, thereby contributing to his own incrimination (*Funke v. France* para 44).

In *John Murray v. United Kingdom*, the applicant, who was arrested by police officers under the 1989 Prevention of Terrorism Act, decided not to reply to police questioning, which eventually led to his conviction. The Court found that there was no doubt that 'the right to remain silent under police questioning and the privilege against self-incrimination are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6' (*John Murray v. United King-*

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<sup>12</sup> A. Ashworth, 'Self-Incrimination in European Human Rights Law – A Pregnant Pragmatism?' *Cardozo Law Review* 30 (2008) 767. See also S. Lamberigts, 'The Privilege Against Self-Incrimination - A Chameleon of Criminal Procedure', 7 *New Journal of European Criminal Law* (2016) 4, 418–438.

*dom* para 45). The central question, however, concerned the impact of the applicant's silence during police questioning and trial. The Court held it incompatible with the immunities to base a conviction solely or mainly on the accused's silence or on a refusal to answer questions or to give evidence himself (*John Murray v. United Kingdom* para 47). Notwithstanding, the immunities could not and should not prevent the accused's silence from being taken into account in situations which clearly call for an explanation or where the only explanation of the accused's silence is that he had no answer to the case against him (*John Murray v. United Kingdom* para 47). That said, even in such cases, the silence cannot provide the sole or main reason for the accused's conviction.

Thus, the right to silence is relative. The accused's decision to remain silent throughout criminal proceedings may carry consequences, but silence, in itself, cannot, be regarded as the sole indication of guilt.

The case of *Saunders v. United Kingdom* concerned the use of the applicant's statements in a criminal trial, these having been obtained under legal compulsion in a previous administrative investigation. Saunders, the applicant, had become a director and chief executive of Guinness PLC. In a takeover battle for a third company, the company made use of unlawful share support operations, which led to subsequent administrative investigations. The domestic provisions required company officers to produce books and documents, cooperate with inspectors and give evidence under legal compulsion. A refusal could have led to a finding of contempt of court, threatened by the imposition of a fine or committal to prison. The transcripts were passed to the police and formed a significant part of a subsequent prosecution case, in which Saunders was convicted.

The Court held that in the context of the particular case, the use of statements in a criminal case, compelled in a previous administrative investigation, infringed Article 6. Under Article 6 (1) ECHR, the right not to incriminate oneself presupposes that the prosecution must prove their case against the accused without recourse to evidence obtained 'through methods of coercion or oppression against the will of the accused' (*Saunders v. United Kingdom* para 68). In a subsequent case, the Court established key factors, such as the degree and nature of compulsion, which are particularly decisive when establishing whether coercion/oppression against the individual's will has violated Article 6 ECHR (see *Jalloh v. Germany* below). The essence in the Saunders case was however the use to which evidence obtained under compulsion was put in the course of the subsequent criminal trial (*Saunders v. United Kingdom* para 71). The transcripts of the applicant's answers, whether directly

self-incriminating or not, were used in the course of the proceedings in a manner which sought to incriminate the applicant in support of the prosecution (*Saunders v. United Kingdom* para 72). Thus, not the degree or nature of compulsion, or the use of compelled materials in criminal proceedings in general, but their use in a way that intended to support the prosecution (e.g. potentially incriminating evidence) violated Article 6 ECHR in *Saunders v. United Kingdom*.

The Court also ruled that the right not to incriminate oneself is primarily concerned with respecting the will of an accused person to remain silent. It did not extend to the use in criminal proceedings of material which may be obtained from the accused through the use of compulsory powers but which had an existence independent of the will of the suspect, such as breath, blood and urine samples. With that, the Court distinguished between real evidence and oral or testimonial evidence in the context of the right not to incriminate oneself (*Saunders v. United Kingdom* para 69).

Finally, the Court also determined that the complexity of the offence (corporate fraud) and the vital public interest in the investigation of such fraud as well as the punishment of those responsible could not justify a violation of Article 6 (*Saunders v. United Kingdom* para 74).

In *Shannon v. United Kingdom*,<sup>13</sup> the applicant—who had been already charged with criminal offences (false accounting and conspiracy to defraud)—was at the same time summoned to a further interview with financial investigators in connection with the same events. Shannon did not attend the interview, as he received no written guarantee that his answers would not be used in the parallel criminal proceedings. Subsequently, he was convicted for failing to comply without reasonable excuse with the investigators' request.

The ECtHR found that, even if there were no subsequent proceedings in which the evidence could have been used, being compelled to answer questions when there is an ongoing parallel criminal investigation violates the privilege of not incriminating oneself (*Shannon v. United Kingdom* para 41). If Shannon had attended the interview, it would have been open to the investigators to forward information to the police. Even if the two investigations were being run separately, once the information had been passed they would have converged, at least as far as the applicant was concerned (*Shannon v. United Kingdom* para 39). Finally, the Court found that the privilege not to incriminate oneself applies with

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<sup>13</sup> ECtHR, *Shannon v. United Kingdom* (Dec.) appl. no. 67537/01.

no need for proceedings even to be brought (*Shannon v. United Kingdom* para 40).

In *Heaney and McGuinness v. Ireland*<sup>14</sup> the investigations were criminal from the start but, as in *Funke*, the failure to give information was a criminal offence itself (use of compulsion in respect of an offence with which the person has been charged). The applicants, who had been arrested in connection with a bombing, declined to answer questions under special legislation requiring an individual to provide a full account of his movements and actions during a specified period. Eventually, the applicants were acquitted of the underlying offence but were imprisoned for failing to give an account of their movements. The Court stressed once again that the right to remain silent and the right not to incriminate oneself were not absolute rights. That said, it found, that the ‘degree of compulsion’ imposed on the applicants—namely, a conviction and imprisonment for failing to give ‘a full account of [their] movements and actions during any specified period and all information in [their] possession in relation to the commission or intended commission [of specified offences]’—in effect destroyed the very essence of their privilege against self-incrimination and their right to remain silent’ (*Heaney and McGuinness v. Ireland* para 55). Thus, the liability for an offence arising from failing to provide information violated the privilege against self-incrimination under Article 6 even without incriminating evidence actually being used in criminal proceedings.<sup>15</sup>

The Court noted anew that the security and public-order concerns arising from terrorism could not justify such a legal regime, which extinguishes the very essence of the applicant’s rights to silence and privilege against self-incrimination (*Heaney and McGuinness v. Ireland* para 58).

*Jalloh v. Germany*<sup>16</sup> concerned the use of evidence, in the form of drugs swallowed by the applicant, which had been obtained by the forcible administration of emetics. Policemen repeatedly observed Jalloh supposedly handing over drugs in plastic bags to another person in exchange for money. The police officers went on to arrest him, whereupon he swallowed another plastic bag. Since further delay might have

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<sup>14</sup> ECtHR, 21 March 2001 (final), *Heaney and McGuinness v. Ireland*, appl. no. 34720/97.

<sup>15</sup> See also A Ashworth, ‘Self-Incrimination in European Human Rights Law – A Pregnant Pragmatism?’ *Cardozo Law Review* 30 (2008) 756-757.

<sup>16</sup> ECtHR, 15 November 2016, *Jalloh v. Germany*, appl. no. 54810/00.

frustrated the conduct of the investigation, the public prosecutor ordered that a doctor administer emetics to the applicant in order to provoke the regurgitation of the bag. In its judgment, the Court established the key factors, which are particularly decisive when establishing whether coercion/oppression against the individual's will has violated Article 6 ECHR.

These are the nature and degree of compulsion used to obtain the evidence, the existence of any relevant safeguards in the procedure, the weight of the public interest in the investigation and punishment of the offence at issue, and the use to which any material so obtained is put (*Jalloh v. Germany* paras 101 and 117; *Bykov v. Russia* para 104). The Court also upheld his opinion that public interest concerns cannot justify measures which extinguish the very essence of an applicant's defence rights (*Jalloh v. Germany* para 119).

## *2.2. The case law of the CJEU on the privilege against self-incrimination in competition proceedings*

The scope of the privilege against self-incrimination in competition proceedings differs in nature from that in criminal law proceedings. Neither the CJEU nor Article 23 (5) of Council Regulation (EC) 1/2003 accepts punitive administrative sanctions in competition cases as criminal in nature.<sup>17</sup> The Commission has no real power to summon persons for questioning: Article 19 Reg. 1/2003 is limited to situations of consent, whereas Article 20 deals with explanations of facts or documents relating to the subject matter and purpose of inspections.<sup>18</sup> In these cases, the main questions concern the powers of the Commission and the cooperation duty of the undertakings.<sup>19</sup>

The privilege against self-incrimination, as in the ECHR, is not expressly articulated in the Charter of Fundamental Rights of the

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<sup>17</sup> S Lamberigts, 'The Directive on the Presumption of Innocence: A Missed Opportunity for Legal Persons?' 1 *Eucrim* (2016) 36–37. See Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32003R0001>

<sup>18</sup> M Luchtmans, J Vervaele (eds), *Investigatory Powers and Procedural Safeguards: Improving OLAF's Legislative Framework through a Comparison with other EU Law Enforcement Authorities* (ECN/ESMA/ECB 2015) 259.

<sup>19</sup> See *Orkem v. Commission* 374/87 (1989) E.C.R. 3282, para 18. See M Veenbrink, 'The Privilege against Self-Incrimination in EU Competition Law: A Deafening Silence?' 42 *Legal Issues of Economic Integration* (2015) 2, 119.

European Union.<sup>20</sup> The explanatory note on Article 47 of the Charter (fair trial) states that the second paragraph of the Article corresponds to Article 6 (1) of the ECHR.<sup>21</sup> Nevertheless, it is Article 48 (2) of the Charter that covers the prohibition of self-incrimination.<sup>22</sup> To date, the right to silence and the privilege against self-incrimination in competition proceedings remain embedded in the case law and could be summarised as not including a broader right not to cooperate with the Commission.<sup>23</sup>

The CJEU ruled on the question of whether a right to silence applies to undertakings in *Orkem v. Commission*,<sup>24</sup> a judgment which predated the first ECtHR judgment on the right to silence in *Funke v. France*. Orkem, a limited liability company, challenged a decision of the Commission requesting information on several grounds, one of which compelled Orkem to incriminate itself by admitting an infringement of competition law (*Orkem v. Commission* para 18). The CJEU turned to the general principles (at that time) of Community law and took stock of the fact that there was neither an express legal basis in the ECHR nor a judgment of ECtHR recognising a right to silence. The Court further argued that the right was primarily reserved for natural persons in the criminal proceedings of Member States (*Orkem v. Commission* para 29). The CJEU found, however, that the power of the Commission to compel undertakings to provide it with information and documents may not go so far that it would, by means of a decision calling for information, undermine the undertaking's rights of defence (*Orkem v. Commission* para 34). It then held that requiring undertakings to provide answers to factual questions and the handing over of documents is acceptable, whereas requiring an admission of infringement of EU competition law (i.e. guilt), which it is incumbent upon the Commission to prove, is not (*Orkem v. Commission* para 35).<sup>25</sup> *Orkem* was later incorporated into Recital 23 of Regulation 1/2003, according to which 'undertakings cannot be forced to admit that they have committed an infringement'; however, 'they are in any event

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<sup>20</sup> Charter of Fundamental Rights of the European Union, OJ 2010 C83/02.

<sup>21</sup> Explanations relating to the Charter of Fundamental Rights (2007/C 303/02).

<sup>22</sup> M Veenbrink, 'The Privilege against Self-Incrimination in EU Competition Law: A Deafening Silence?' 42 *Legal Issues of Economic Integration* (2015) 2, 120.

<sup>23</sup> M Luchtmans et al. (eds) *Investigatory Powers and Procedural Safeguards: Improving OLAF's Legislative Framework through a Comparison with other EU Law Enforcement Authorities* (ECN/ESMA/ECB 2015) 258.

<sup>24</sup> ECJ Case C-374/87, *Orkem v. Commission*, 18 October 1989.

<sup>25</sup> S Lamberigts, 'The Directive on the Presumption of Innocence: A Missed Opportunity for Legal Persons?' 1 *Eucrim* (2016) 40.

obliged to answer factual questions and to provide documents, even if this information may be used to establish against them or against another undertaking the existence of an infringement'. Thus, undertakings may only refuse to answer questions that would require them to admit directly the very infringement that the Commission is trying to prove (see the different approach of the ECtHR in *Saunders* above, section 2.1).

While *Orkem* predated *Funke*, the CJEU has not fundamentally altered its position in light of the subsequent case law of the ECtHR. In fact, it confirmed its position in *Mannesmannröhren-Werke AG*,<sup>26</sup> by stating that an undertaking 'can be recognised as having a right to silence only to the extent that it would be compelled to provide answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove' (paras 29 and 67). In *Mannesmannröhren-Werke AG*, questions were considered whereby the Commission called upon an undertaking to describe the purpose of meetings and the decisions adopted during them, even though it was clear that this might compel the undertaking to admit its participation in an unlawful agreement contrary to the Community rules on competition and thus breach the rights of the defence (paras 71 and 73).

The case law of the CJEU leads to difficult distinctions in practice between admissible factual questions and forbidden questions on guilt. On the one hand, undertakings must communicate all facts which may be relevant in light of the law relating to restrictive agreements and practices. On the other hand, they may not be questioned on the intention, aim or purpose of particular practices or measures, given that such questions might constrain them to admit infringements.<sup>27</sup>

### *2.3. The right of heads of business to remain silent in the context of administrative or criminal investigations against the legal entity*

The ECtHR has not directly addressed the question of whether its case law on the right to remain silence applies to legal persons. On the one hand, the Court has generally been willing to apply several other rights covered by Article 6 ECHR to legal persons; on the other hand,

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<sup>26</sup> Case T-112/98, *Mannesmannröhren-Werke* [2001] ECR II-00729, ECLI:EU:T:2001:61.

<sup>27</sup> S Lamberigts, 'The Directive on the Presumption of Innocence: A Missed Opportunity for Legal Persons?' 1 *Eucrim* (2016) 40.

some of the Court's case law—for example, in relation to Article 8—suggests that it is more willing to accept restrictions to corporate rights than to those of individuals. Therefore, should the ECtHR expressly apply the right to silence for legal persons in the future, it is uncertain whether legal persons would be able to fully rely on the protection.<sup>28</sup>

The *Saunders* case has some relevance with regard to the issue. The applicant was the chief executive of Guinness and acted in his capacity of corporate official, even if prosecuted in his individual capacity.<sup>29</sup> Moreover, the case covers both administrative and criminal investigations. In this judgment, the Court held that the use to which evidence obtained under compulsion is put in a criminal proceeding might amount to an unjustifiable infringement of Article 6 if it is used in a way to support the prosecution. The Court did not restrict *Saunders*'s privilege against self-incrimination on the grounds that he acted in his capacity of corporate official. This suggests that the Court does not find that by accepting a position of corporate official one waives the personal privilege against self-incrimination in relation to those corporate activities.<sup>30</sup> Therefore, the ECtHR case law suggests that the privilege might apply for heads of business when being questioned regarding the company if their answers could incriminate them in person. In the context of heads of business, it would be important both for the individuals involved and for the corporation that a clear indication is given as to the capacity in which the individuals are being interviewed: as a representative of the corporation, as a witness or as a suspect.<sup>31</sup>

#### *2.4. The potential use of evidence gathered in a previous investigation against the legal entity in a subsequent criminal proceeding against the individual head of business*

The Court still has to address directly whether the scope of the

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<sup>28</sup> S Lamberigts, *The privilege against self-incrimination of corporations* (Doctoral thesis, University of Luxembourg 2017) 99. See, for example, ECtHR, *Menarini Diagnostics v. Italy*, 27 September 2011, appl. no. 43509/08 in relation to Art. 1.

<sup>29</sup> S Lamberigts, *The privilege against self-incrimination of corporations* (Doctoral thesis, University of Luxembourg 2017) 92.

<sup>30</sup> S Lamberigts, *The privilege against self-incrimination of corporations* (Doctoral thesis, University of Luxembourg 2017) 92.

<sup>31</sup> S Lamberigts, *The privilege against self-incrimination of corporations* (Doctoral thesis, University of Luxembourg 2017) 49.

privilege covers legal entities at all. If so, which employees could rely on the privilege, and could evidence gathered against the legal entity subsequently be used against the individual head of business?

Once again, *Saunders* might provide some useful insights, as the ECtHR gave a clear indication on the use of evidence obtained under compulsion in an administrative investigation in a subsequent criminal proceeding against the same individual. In *Saunders*, the evidence was compelled in a non-criminal investigation and used in a subsequent criminal case against the same person. The Court held that it was neither the compulsory questioning nor the use of compelled evidence that violated Article 6 ECHR, but the use to which compelled evidence was put by the prosecution in the subsequent criminal proceedings. Therefore, according to the ECtHR case law, the privilege might solely protect heads of business by excluding the use of evidence obtained under compulsion in the context of a previous administrative investigation if it is used in an incriminating manner in order to assist the prosecution of the head of business in a subsequent criminal trial.

## *2.5. The privilege against self-incrimination and heads of business – concluding remarks*

The privilege against self-incrimination and the right to remain silent are not expressly declared in the ECHR, but have been implied in Article 6 ECHR through various judgments of the Court, minimising the risk of miscarriages of justice. The right is not absolute. The accused's decision to remain silent throughout criminal proceedings may carry consequences, while the nature and degree of compulsion, the existence of any relevant safeguards in the procedure, the weight of the public interest in the investigation and punishment of the offence at issue, and the use to which any material so obtained is put may allow the use of evidence obtained under compulsion. That said, the use of materials compelled in administrative investigations as evidence in parallel or subsequent criminal proceedings in order to support the prosecution does violate Article 6 ECHR.

Similarly, the Charter of Fundamental Rights of the European Union does not provide for an express articulation of these immunities. The protection that legal persons can derive from the Luxembourg Court's case law with regard to the right to silence is limited: factual questions must be answered, the handing over of incriminating documents can be required, and only questions that might imply an admission of guilt do not have to be answered. Thus, under EU law, there is no

right to refuse to hand over documents and the privilege against self-incrimination is limited to confessions.<sup>32</sup>

The ECtHR still has to address directly whether the scope of the privilege covers legal entities at all. The ECtHR case law suggests that the privilege might apply to heads of business when being questioned regarding the company if their answers could incriminate them in person. In line with the ECtHR case law, the privilege might also protect heads of businesses by excluding the use of evidence obtained under compulsion in the context of a previous administrative investigation if it is used in an incriminating manner against them in a subsequent criminal trial.

### 3. Principle of *ne bis in idem*

#### 3.1. *The case law of the European Courts (ECtHR and CJEU) on the principle of ne bis in idem*

The right not to be tried or punished twice in criminal proceedings for the same criminal offence is laid down in Article 4 P7 ECHR and Article 50 of the Charter of Fundamental Rights. The relevance of this right for the present study is well demonstrated by some high profile cases in the financial sector.<sup>33</sup>

In 2007, Banco Santander, Fortis Bank and the Royal Bank of Scotland, for instance, obtained control over ABN AMRO Bank through a hostile takeover.<sup>34</sup> Fortis Bank had problems financing its part of the takeover and decided to go to the capital market for fresh capital. Due to the financial meltdown, and the nationalisation and dismantling of Fortis Bank, doubts were very soon raised about the financial integrity of the company and the information given to existing and new share-

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<sup>32</sup> S Lamberigts, *The privilege against self-incrimination of corporations* (Doctoral thesis, University of Luxembourg 2017) 120.

<sup>33</sup> For instance, the Fortis case, discussed by JAE Vervaele, MJJP Luchtman, 'Criminal Law Enforcement of EU Harmonised Financial Policies - The Need for a Shared Criminal Policy', in: F de Jong (ed) *Overarching views of Crime and Deviancy - Rethinking the Legacy of the Utrecht School* (Eleven International Publishers, The Hague 2015).

<sup>34</sup> This case description is based on JAE Vervaele, MJJP Luchtman, 'Criminal Law Enforcement of EU Harmonised Financial Policies - The Need for a Shared Criminal Policy,' in: F de Jong (ed) *Overarching views of Crime and Deviancy - Rethinking the Legacy of the Utrecht School* (Eleven International Publishers, The Hague 2015).

holders at the time of the capital extension. The rules on market abuse, part of the hardcore European law on the financial markets,<sup>35</sup> apply in all EU Member States. Nonetheless, the enforcement of these rules in the Fortis case was almost completely driven by the national enforcement design and national enforcement agendas, as the European rules leave much discretion to the Member States. Infringements of the EU market abuse rules are administrative irregularities and criminal offences in both Belgium and Luxembourg, as well as in the Netherlands. Moreover, legal persons can be criminally liable in the three countries for these types of offences. However, in Luxembourg, no action was undertaken at all by the administrative or judicial authorities, although Luxembourg was involved in the later (partial) nationalisation of Fortis. In the Netherlands, administrative enforcement authorities opened investigations against the former Fortis Bank concerning suspicions of market abuse. In Belgium, both administrative and judicial authorities opened investigations against the former Fortis Bank and against the CEOs. This led to concurrent and parallel investigations and proceedings in Belgium and the Netherlands, but to no investigations at all in Luxembourg. In 2012, the Dutch Financial Services Authority (*Autoriteit Financiële Markten*: AFM), the administrative enforcement agency, was the first to conclude proceedings and imposed four fines<sup>36</sup> of 144,000 euros each on the two legal persons that constituted the Fortis Bank corporation/holding. They were found guilty of market abuse.

The imposition of the administrative fines by the AFM on the two legal persons constituting the holding of Fortis Bank had undoubtedly been coordinated together with the Dutch judicial authorities. In the Netherlands, the legal framework imposes a duty upon the administrative and judicial enforcement authorities to choose, at a certain stage, one of the two enforcement regimes—in other words, to opt either for administrative sanctions or criminal prosecution (the so-called *una via* principle).<sup>37</sup> However, this does not preclude criminal proceedings against the former CEOs. The Dutch Public Prosecution Service has not given formal notice of any ongoing judicial investigation in that sphere.<sup>38</sup>

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<sup>35</sup> At that time, Directive 6/2003/EC of 28 January 2003 on insider dealing and market manipulation (market abuse), *OJ EUL* 96/16.

<sup>36</sup> See [www.afm.nl/~media/files/boete/2010/fortis-besluit-nv.ashx](http://www.afm.nl/~media/files/boete/2010/fortis-besluit-nv.ashx) and [www.afm.nl/~media/files/boete/2010/fortis-besluit-sanv.ashx](http://www.afm.nl/~media/files/boete/2010/fortis-besluit-sanv.ashx).

<sup>37</sup> This means that the administrative and criminal enforcement authorities have to decide at a certain stage in the investigation to opt for either administrative sanctioning or criminal prosecution.

<sup>38</sup> The Dutch Public Prosecution Service does not, in general, publish

It is not known and is difficult to guess if the authorities took into account the transnational dimension of the case when deciding to opt for administrative enforcement rather than taking the criminal law route. However, what is clear is that we can talk about unilateral action by the Dutch authorities without coordinating with the Belgian administrative and judicial authorities despite Article 16 (3) MAD 2003. In 2012, the Belgian administrative enforcement agency, the Financial Services and Markets Authority (FSMA), found evidence that the company had distributed misleading information and imposed fines of 500,000 euros on the former Fortis Bank and fines of up to 400,000 euros against the CEOs. Finally, in 2013, the Belgian judicial authorities decided to prosecute seven former CEOs for misleading information, market abuse, the forgery of documents and deception, but decided not to prosecute the former Fortis Bank or BNP Paribas Fortis (the new owner of the bank).

The Fortis case illustrates the complex issues the *ne bis in idem* principle brings about, particularly when multiple authorities take part in the investigations. Further complications arise when those investigations take different paths—i.e. of a criminal or administrative law nature—and/or when they involve different legal orders. Fortis illustrates the need to develop an encompassing vision on the *ne bis in idem* principle in the EU setting, taking account not only of the national/inner state dimension of law enforcement, but also the transnational dimension.

The principle of *ne bis in idem* can be said to protect, first of all, the *res judicata* status of the first (court) ruling on the matter and thus to prevent the possibility of contradicting verdicts. Secondly, the principle is nowadays also seen as a fundamental right, protecting the interests of individuals.<sup>39</sup> The transnational safeguard of Article 54 CISA, for instance, ensures ‘that a person whose trial has been finally disposed of is not prosecuted in several Contracting States for the same acts on account of his having exercised his right to freedom of movement, the aim being to ensure legal certainty—in the absence of harmonisation or approximation of the criminal laws of the Member States—through respect for decisions of public bodies which have become final.’<sup>40</sup>

For the purposes of application of the *ne bis in idem* principle, four

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communications on the opening or non-opening of financial judicial investigations or on ongoing financial judicial investigations. In Belgium, however, this is the current practice.

<sup>39</sup> See M. Luchtman, ‘Transnational law enforcement in the European Union and the *ne bis in idem* principle’, 4 *REALaw* (2011), 5-29, with further references.

<sup>40</sup> Case C-486/14, *Kossowski*, ECLI:EU:C:2016:483, para 44.

conditions must be satisfied: (1) the person prosecuted or on whom the penalty is imposed is the same; (2) the acts being judged are the same (*idem*); (3) there are two sets of proceedings in which a punitive penalty is imposed (*bis*); and (4) one of the two decisions is final.<sup>41</sup> The principle only applies to punitive penalties<sup>42</sup>. This means that combinations of criminal law and punitive administrative law penalties also come within the scope of the principle. The Strasbourg Court confirmed in *A. and B. v. Norway* that this is still the case.<sup>43</sup> As regards the finality of the verdict, this depends on the issue of whether prosecution has been definitively barred according to national law and whether there has been a decision on the merits of the case.<sup>44</sup> The concept of '*idem*' has been defined by both of the European Courts as 'a set of concrete factual circumstances involving the same defendant and inextricably linked together in time and space, the existence of which must be demonstrated in order to secure a conviction or institute criminal proceedings.'<sup>45</sup>

Recently, much debate has arisen around the concept of '*bis*'. After intense pressure by signatory States, the ECtHR mitigated the effects of the principle by redefining the concept. Essentially, the Court held that—depending on whether combinations of criminal and administrative law penalties are sufficiently connected in substance and time—those combinations may not constitute two distinct, consecutive sets of proceedings ('*bis*') but are more accurately regarded as one and the same procedure, thereby precluding the application of the principle.

This new case law has now been put before the Luxembourg Court. The issue is whether the article in question—Article 50 CFR—has the same meaning and the same scope as the corresponding right in the ECHR (at least within the same Member State) or whether the EU should maintain its previous, higher standard (cf. Article 52 (3) CFR), as it already did, for instance, in *Åkerberg Fransson*.<sup>46</sup>

It appears to us that the key to answering this question is to identify whether the specifics of the EU legal order, which is based on such prin-

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<sup>41</sup> Cf. Case C-596/16, *Enzo di Puma*, Opinion, ECLI:EU:C:2017:669, para 53.

<sup>42</sup> ECtHR, *Engel and Others v. The Netherlands*, 8 June 1976, para 80–82; Case C-489/10, *Bonda*, ECLI:EU:C:2012:319.

<sup>43</sup> ECtHR (GC), 15 November 2016, *A. and B. v. Norway*, appl. nos. 24130/11 and 29758/11, para 107.

<sup>44</sup> Cf. Case C-398/12, *M*, ECLI:EU:C:2014:1057, para 31.

<sup>45</sup> ECtHR 10 February 2009, *Sergey Zolotukhin v. Russia*, appl. no. 14939/03, para 84. See also ECJ Case C-436/04, *Van Esbroeck*, ECLI:EU:C:2006:165, para 36, 38.

<sup>46</sup> Case C-617/10, *Åkerberg Fransson*, ECLI:EU:C:2013:280.

ciples as primacy, loyal cooperation but also procedural autonomy, and the principle of attributed powers merit a deviation from the new Strasbourg case law. Two elements will certainly have to be taken into consideration for that. First of all, it is well known that the Seventh Protocol has not been ratified very well by European States and that many signatory States have limited the scope of the *ne bis in idem* safeguard further to criminal law *sensu stricto*. Secondly, there are differences in the principle's scope as put forward by its different supranational sources, particularly Article 4 P7 ECHR and Article 50 CFR. The scope of the principle is, after all, linked to the functional, personal and territorial boundaries of the legal order of which it is part. Under Article 4 P7 ECHR, the application of the principle is limited to the legal orders of the individual signatory States. That article provides that 'no one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State' (our emphasis). The territorial scope of the corresponding Charter provision is much wider: 'no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law' (our emphasis).

The Court of Justice's case law on Articles 54–58 CISA (which, according to the Explanatory Report to the Charter, has inspired the scope and content of Article 50 CFR) has already pointed out that these articles form a part of the area of freedom, security and justice and are to be interpreted accordingly; Article 3 (2) TEU states that 'the European Union is to offer 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 regard to, amongst other matters, the prevention and combating of crime. Therefore, the interpretation of the final nature, for the purposes of Article 54 of the CISA, of a decision in criminal proceedings in a Member State must be undertaken in the light not only of the need to ensure the free movement of persons but also of the need to promote the prevention and combating of crime within the area of freedom, security and justice.'<sup>47</sup>

The Court of Justice seems to follow a similar approach in competition matters, in cases where EU competition law and the national competition law of its Member States coincide.<sup>48</sup> It does recognise that de-

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<sup>47</sup> Case C-486/14, *Kossowski*, ECLI:EU:C:2016:483, para 46–47.

<sup>48</sup> Cf. Case C-289/04 *Showa Denko v. Commission*, EU:C:2006:431, para 50–58.

cisions taken within one legal order have a bearing on the other, where both are part of the European legal order. However, it has been reluctant to introduce a full *Erledigungsprinzip* in that respect. Already in *Walt Wilhelm*, the Court held that ‘the acceptability of a dual procedure of [national and EC competition law] follows in fact from the special system of the sharing of jurisdiction between the Community and the Member States with regard to cartels. If, however, the possibility of two procedures being conducted separately were to lead to the imposition of consecutive sanctions, a general requirement of natural justice...demands that any previous punitive decision must be taken into account in determining any sanction which is to be imposed.’<sup>49</sup>

Article 50 CFR is not an absolute right. It may be subjected to limitations in accordance with Article 52 CFR.<sup>50</sup> In that situation, those limitations must have a decent legal basis in the law, must not nullify the essence of the principle, must answer an important public interest/legitimate goal and **must** meet the requirements of the proportionality principle. Recently, AG Campos Sánchez-Bordona argued (in our opinion, convincingly) that the route of Article 52 CFR is the only route to limit the scope of Article 50;<sup>51</sup> the principle that sanctions of EU law are dissuasive, proportionate and effective can, as such, not be considered to be a limitation of the principle.<sup>52</sup>

### *3.2. Overview and critical assessment of the case law of the ECtHR and of the CJEU on the compatibility of ‘dual track enforcement systems’ with the principle of *ne bis in idem**

#### *3.2.1. ECtHR’s new approach in *A. and B. v. Norway**

As indicated above, the Grand Chamber of the ECtHR changed its

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This is different for third states; see C-231/14 P, *Innolux*, ECLI:EU:C:2015:451, para 75; C-289/04 P, *Showa Denko v. Commission*, EU:C:2006:431, para 52–58; Case C-308/04 P, *SGL Carbon v. Commission*, EU:C:2006:433, para 28–34; and C-328/05 P, *SGL Carbon v. Commission*, EU:C:2007:277, para 24–35.

<sup>49</sup> Case 14/68, *Walt Wilhelm*, ECLI:EU:C:1969:4, para 11.

<sup>50</sup> Case C-129/14 PPU, *Zoran Spasic*, EU:C:2014:586, discussed by JAE Vervaele, ‘Schengen and Charter Related *ne bis in idem* Protection in the Area of Freedom, Security and Justice: M and Zoran Spasic’, 52 *Common Market Law Review* (2015) 1339–1360.

<sup>51</sup> Case C-524/15, *Menci*, Opinion, ECLI:EU:C:2017:667, para 120–125; C-596/16, *Di Puma*, Opinion, ECLI:EU:C:2017:669, para 81–88; C-537/16, *Garlsson Real Estate*, Opinion, ECLI:EU:C:2017:668, para 74–81.

<sup>52</sup> C-537/16, *Garlsson Real Estate*, Opinion, ECLI:EU:C:2017:668, para 72–74.

case law on the concept of ‘*bis*’ in *A. and B. v. Norway*. The case involved a combination of tax and criminal proceedings, including punitive tax sanctions. The facts in the two sets of proceedings were essentially the same. The tax decisions became final in December 2008, less than two years before the criminal proceedings. The obvious question was whether all of this was in line with the *ne bis in idem* principle.

In its judgment, the majority of the Grand Chamber held that ‘in cases raising an issue under Article 4 of Protocol No. 7, it is the task of the Court to determine whether the specific national measure complained of entails, in substance or in effect, double jeopardy to the detriment of the individual or whether, in contrast, it is the product of an integrated system enabling different aspects of the wrongdoing to be addressed in a foreseeable and proportionate manner forming a coherent whole, so that the individual concerned is not thereby subjected to injustice.’<sup>53</sup> For that, ‘it must be shown that [the proceedings] have been combined in an integrated manner so as to form a coherent whole. This implies not only that the purposes pursued and the means used to achieve them should in essence be complementary and linked in time, but also that the possible consequences of organising the legal treatment of the conduct concerned in such a manner should be proportionate and foreseeable for the persons affected.’<sup>54</sup>

Consequently, the Grand Chamber held in para 132:

‘Material factors for determining whether there is a sufficiently close connection in substance include:

- whether the different proceedings pursue complementary purposes and thus address, not only *in abstracto* but also *in concreto*, different aspects of the social misconduct involved;
- whether the duality of proceedings concerned is a foreseeable consequence, both in law and in practice, of the same impugned conduct (*idem*);
- whether the relevant sets of proceedings are conducted in such a manner as to avoid as far as possible any duplication in the collection as well as the assessment of the evidence, notably through adequate inter-

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<sup>53</sup> ECtHR (GC), 15 November 2016, *A. and B v. Norway*, appl. nos. 24130/11 and 29758/11, para 122.

<sup>54</sup> ECtHR (GC), 15 November 2016, *A. and B v. Norway*, appl. nos. 24130/11 and 29758/11, para 130.

action between the various competent authorities to bring about that the establishment of facts in one set is also used in the other set;

- and, above all, whether the sanction imposed in the proceedings which become final first is taken into account in those which become final last, so as to prevent that the individual concerned is in the end made to bear an excessive burden, this latter risk being least likely to be present where there is in place an offsetting mechanism designed to ensure that the overall amount of any penalties imposed is proportionate.'

The Grand Chamber clarified the first criterion as follows:

'Combined proceedings will more likely meet the criteria of complementarity and coherence if the sanctions to be imposed in the proceedings not formally classified as "criminal" are specific for the conduct in question and thus differ from "the hard core of criminal law".... The additional factor that those proceedings do not carry any significant degree of stigma renders it less likely that the combination of proceedings will entail a disproportionate burden on the accused person. Conversely, the fact that the administrative proceedings have stigmatising features largely resembling those of ordinary criminal proceedings enhances the risk that the social purposes pursued in sanctioning the conduct in different proceedings will be duplicated (*bis*) rather than complementing one another.'<sup>55</sup>

Moreover, the Grand Chamber continued:

'[W]here the connection in substance is sufficiently strong, the requirement of a connection in time nonetheless remains and must be satisfied. This does not mean, however, that the two sets of proceedings have to be conducted simultaneously from beginning to end. It should be open to States to opt for conducting the proceedings progressively in instances where doing so is motivated by interests of efficiency and the proper administration of justice, pursued for different social purposes, and has not caused the applicant to suffer disproportionate prejudice. However, as indicated above, the connection in time must always be present. Thus, the connection in time must be sufficiently close to protect the individual from being subjected to un-

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<sup>55</sup> ECtHR (GC), 15 November 2016, *A. and B v. Norway*, appl. nos. 24130/11 and 29758/11, para 133.

certainty and delay and from proceedings becoming protracted over time...even where the relevant national system provides for an “integrated” scheme separating administrative and criminal components. The weaker the connection in time the greater the burden on the State to explain and justify any such delay as may be attributable to its conduct of the proceedings.’<sup>56</sup>

Applying these criteria to the case of A, the Grand Chamber clarified that, under Norwegian law:

‘the purpose of ordinary tax penalties was first and foremost to enhance the effectiveness of the taxpayer’s duty to provide complete and correct information and to secure the foundations of the national tax system, a precondition for a functioning State and thus a functioning society. Criminal conviction (...), on the other hand, (...), served not only as a deterrent but also had a punitive purpose in respect of the same anti-social omission, involving the additional element of the commission of culpable fraud.’<sup>57</sup>

The Grand Chamber concluded that no violation of Article 4 P7 could be established, because:

‘1. There was no cause to call into doubt either the reasons why the Norwegian legislature opted to regulate the socially undesirable conduct of non-payment of taxes in an integrated dual (administrative/criminal) process or the reasons why the competent Norwegian authorities chose to deal separately with the more serious and socially reprehensible aspect of fraud in a criminal procedure rather than in the ordinary administrative procedure.

2. The conduct of dual proceedings, with the possibility of different cumulated penalties, was foreseeable for the applicant, who must have known from the outset that criminal prosecution and the imposition of tax penalties was possible, or even likely, on the facts of the case.

3. The criminal proceedings and the administrative proceedings were conducted in parallel and were interconnected. The establishment

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<sup>56</sup> ECtHR (GC), 15 November 2016, *A. and B v. Norway*, appl. nos. 24130/11 and 29758/11, para 134.

<sup>57</sup> ECtHR (GC), 15 November 2016, *A. and B v. Norway*, appl. nos. 24130/11 and 29758/11, para 144.

of facts made in one set was used in the other set and, as regards the proportionality of the overall punishment inflicted, the sentence imposed in the criminal trial had regard to the tax penalty.'<sup>58</sup>

With respect to B, the Grand Chamber came to the same conclusion after having explained why the delay in the criminal proceedings did not alter this outcome. The Grand Chamber held:

[T]he second applicant had withdrawn his confession in February 2009, with the consequence that he had had to be indicted anew on 29 May 2009 and an ordinary adversarial trial hearing had had to be scheduled. This circumstance, resulting from a change of stance by the second applicant, cannot of itself suffice to disconnect in time the tax proceedings and the criminal proceedings. In particular, the additional lapse of time before the criminal trial hearing cannot be considered disproportionate or unreasonable, having regard to its cause.<sup>59</sup>

Dissenter, Judge Pinto de Albuquerque strongly disagreed with the majority. By reformulating the concept of '*bis*', the majority has in fact reduced the principle to a guarantee for 'the authority of the *chose jugée*, with the sole purpose of ensuring the punitive interest of the State and the impugnability of State adjudicatory decisions.'<sup>60</sup> The dissenter is critical, first of all, because of the fact that the dividing line between the hard core of criminal law and other types of irregularity has always been a particularly problematic issue, certainly in light of the consequences that may follow from this division in terms of different levels of fundamental rights protection.

The dissenter also, and rightly, stresses that the issue of the foreseeability is—as it is now applied—an empty shell. Criminal offences and sanctions, as defined by the Strasbourg organs, will always have to meet the requirements of foreseeability; that already follows from Article 7 ECHR. What needs to be foreseeable is the duality of the proceedings, but hardly any consideration was given by the majority to that condition and the choices to be made by the cooperating authorities in that respect (with a view to preventing arbitrary outcomes). In fact, as the dissenter

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<sup>58</sup> ECtHR (GC), 15 November 2016, *A. and B v. Norway*, appl. nos. 24130/11 and 29758/11, para 146.

<sup>59</sup> ECtHR (GC), 15 November 2016, *A. and B v. Norway*, appl. nos. 24130/11 and 29758/11, para 151.

<sup>60</sup> Dissenting opinion, Judge Pinto de Albuquerque, para 49.

notices, the applicable national guidelines were not followed in this case. From that point of view, the Grand Chamber's approach also raises questions in light of Strasbourg case law, particularly *Camilleri v. Malta*.<sup>61</sup>

As regards the issue of the avoidance of unnecessary duplications, the dissenting judge argues that the approach chosen by the majority poses challenges to the (overall) authority of the state (because of the risk of contradicting decisions) and removes barriers to forum shopping and manipulations by the authorities. We would add to that criticism that the arguments put forward by the majority could just as easily have been applied in the opposite direction. The Court emphasises that the complementarity of the proceedings is essential to prevent a *bis in idem* situation. But now that coordination and cooperation are so strongly promoted, why should those authorities not be given the joint responsibility to prevent or stall dual proceedings in the first place?

Finally, as regards the offsetting mechanism designed to ensure that the overall amount of any penalties imposed is proportionate, this criterion can only be of help in those cases where the first set of proceedings led to the application of sanctions. In the end, the new case law appears incredibly difficult to apply, the 'gains' for states not very clear, and the position of the individual increasingly complicated.

### 3.2.2. Follow-up in European Union

Obviously, *A. and B. v. Norway* did not go unnoticed by the EU Member States. Following the apparent overturning of *Grande Stevens v. Italy* by that judgment, four Italian cases have now been put to the ECJ, all of them dealing with the issue of whether the new Strasbourg approach will have consequences for the course of the European Union. After all, as the Explanation to Article 50 CFR indicates, regarding the situations referred to by Article 4 of Protocol No 7 (i.e. the application of the principle within the same Member State), the guaranteed right has the same meaning and the same scope as the corresponding right in the ECHR. However, Article 53 (3) CFR also stipulates that that provision shall not prevent Union law from providing more extensive protection. So, what should be the course of the EU after *A. and B. v. Norway*?

All four Italian cases revolve around the compatibility of combinations of criminal law and administrative law (punitive) sanctions with

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<sup>61</sup> ECtHR 22 January 2013, *Camilleri v. Malta*, appl. no. 42931/10.

Article 50 CFR. One of these cases concerns the protection of the EU's financial interests; the other three are related to the area of market abuse.

*Menci Luca* is the most important case in this regard.<sup>62</sup> In that case, *Menci Luca* was *inter alia* fined for an amount of over 80,000 euros by the tax authorities in November 2013 for a failure to pay VAT. In November 2014, criminal proceedings were opened into the same facts, long after the tax fine had become final. Is this in line with the principle of *ne bis in idem* (Article 50 CFR)? What is the influence of the changed Strasbourg approach in this regard? AG Campos Sánchez-Bordona considered that the Court essentially had the choice between:

1. acceptance of the new course of the ECtHR and to follow that approach.
2. rejection of that course and the further development of its own course in light of Article 52 (3) CFR.

The AG clearly advised the Court not to follow Strasbourg and not to bow to pressure exerted by the Member States, many of which have dual regimes of enforcement and have made reservations to the scope of Article 4 P7 (or have not even ratified it). According to the AG, it would make the scope of the guarantee dependent on the choices made by the Member States, whereas the new Strasbourg criterion of sufficient connection easily leads to legal uncertainty and complexities.

Consequently, the AG explores to what extent Article 50 CFR may be limited through Article 52 (1) CFR in combined proceedings of administrative and criminal law. He ultimately rejects that position because of a lack of need for such a far-reaching limitation of the principle. There are other options available to guarantee the goals pursued by dual systems that do not come into conflict with the *ne bis in idem* principle. This is demonstrated, according to the AG, by the mere existence of mechanisms that prevent *ne bis in idem* situations from occurring in other states (*una via* systems). A duality of proceedings without additional measures—even when it has a legal basis and serves legitimate interests—does not therefore meet the requirement of necessity, as meant in Article 52 (1) CFR. It may even nullify the essence of the guarantee.

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<sup>62</sup> C-524/15, *Menci*, Opinion, ECLI:EU:C:2017:667. The subsequent developments on *ne bis in idem* have been analysed in M Luchtman, 'The ECJ's recent case law on *ne bis in idem*: Implications for law enforcement in a shared legal order', *Common Market Law Review* 55 (2018), 1717-1750.

We agree with that approach. What the AG ultimately tries to achieve is to protect the coherence and unity of the European legal order. The principle of procedural autonomy, which gives Member States a certain degree of leeway when implementing EU law, cannot offer a convincing argument for limiting the scope of the principle of *ne bis in idem*, as there are enough viable alternatives for reconciling the different interests involved. The AG has moreover rightfully stated that the requirement of EU market abuse law that sanctions be effective, dissuasive and proportionate cannot warrant that conclusion either.<sup>63</sup> There is no reason to conclude otherwise in the area of the EU's financial interests.<sup>64</sup>

In light of that latter area, the issue may arise as to what extent Article 6 of Reg. 2988/95 can serve as the basis for a limitation of Article 50 CFR. On the basis of that Article, and without prejudice to other sectoral rules, the imposition of financial penalties may be suspended by a decision of the competent authority if criminal proceedings have been initiated against the person concerned in connection with the same facts. If the criminal proceedings are then not continued, the suspended administrative proceedings shall be resumed. Moreover, when the criminal proceedings are concluded, the suspended administrative proceedings shall be resumed, unless that is precluded by general legal principles. In that case, the administrative authority must ensure that a penalty at least equivalent to that prescribed by Community rules is imposed, which may take into account any penalty imposed by the judicial authority on the same person in respect of the same facts. Whether this can truly serve as an acceptable limitation of Article 50 CFR (basically offering the possibility of *Anrechnung* instead of *Erledigung*, when criminal proceedings precede administrative sanctions) remains to be seen.

We submit that, in addition to the arguments presented by the AG, the coherence of the EU legal order has not only a national, but also a transnational dimension. Article 50 CFR does after all apply not only within the jurisdiction of one State, but also between the jurisdictions of several Member States. That corresponds to the *acquis in Union* law (Articles. 54–58 CISA). This offers an additional argument for not adopting the *A. and B. v. Norway* approach. The course taken in *A. and B. v. Norway* will, if followed by the ECJ, inevitably also affect

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<sup>63</sup> C-596/16, *Di Puma*, Opinion, ECLI:EU:C:2017:669; C-537/16, *Garlsson Real Estate*, Opinion, ECLI:EU:C:2017:668.

<sup>64</sup> Cf. Art. 2 of Reg. 2988/95.

other building blocks of the European legal order, i.e. the principle of mutual recognition in criminal matters and the free movement of people. Following *A. and B. v. Norway*, the situation may after all occur that a prior criminal acquittal (in one State) does not necessarily prevent a later administrative punitive procedure (in another State) from being started or continued (or *vice versa*). That situation would not only produce very arbitrary results, depending on the choices made by different Member States, but would also effectively mean that, where a second set of administrative proceedings is opened or continued, the prior criminal judgment cannot be given full effect in the area and possible contradictory decisions on the subject matter may be rendered. That, in itself, is also capable of affecting the free movement of people, which has always been an important rationale in the Court's interpretation of Article 54 CISA, and which warrants the EU to take its own approach.<sup>65</sup> Its institutional setting is different from that of the Member States and its constitutional setting will require a more stringent approach than taken by the Strasbourg Court in purely national matters.

### *3.3. Overview and critical assessment of the case law of the ECtHR and of the CJEU on the relationship between individual liability and corporate liability in the context of ne bis in idem*

On this particular question, there does not seem to be a great lack of clarity. The principle of *ne bis in idem* hinges, as previously mentioned, on different elements. Its invocation requires a same set of facts, a concluded, first set of (punitive) proceedings and, finally, that the persons concerned in the first and the second set of proceedings are indeed the same.

The latter was clarified in *Orsi and Baldetti*.<sup>66</sup> Both men were criminally prosecuted for VAT fraud on the ground that they failed, in their capacity as legal representatives of their companies, to pay VAT within the time limit stipulated by law. Those criminal proceedings were brought after the tax authorities reported the offences to the public prosecutor. Yet before those criminal proceedings were initiated, the amounts of VAT at issue in the main proceedings were also subject to assessment by the tax authorities, which not only calculated the tax liability, but also imposed a tax penalty on the companies Orsi and Baldetti

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<sup>65</sup> Supra note 40.

<sup>66</sup> Joined cases C-217/15 and C-350/15, *Orsi and Baldetti*, ECLI:EU:C:2017:264.

represented equivalent to 30 per cent of the amount of VAT owed. Following a transaction relating to those assessment measures, they became definitive without being contested.

The question that was raised by the referring court was whether the criminal prosecution of Orsi and Baldetti was to be terminated as a result of the *ne bis in idem* principle. In a rather short ruling, the ECJ indeed clarified—as had the ECtHR—that the principle cannot be infringed if it is not the same person who was sanctioned more than once for the same unlawful act. Also, according to the case law of the European Court of Human Rights, the imposition of penalties, whether tax or criminal, does not constitute an infringement of Article 4 of Protocol No 7 to the ECHR where the penalties at issue concern natural or legal persons who are legally distinct.<sup>67</sup>

### *3.4. Results with respect to ne bis in idem*

With respect to the principle of *ne bis in idem*, developments are tempestuous. The *ne bis in idem* principle has always been at the forefront of human rights protection in Europe. Important questions on the transnational scope of the principle will remain high on the agenda for the period to come. In consequence, we do not know yet whether the principle will apply on combinations of administrative and criminal law sanctions from different EU Member States. Those situations may very well occur in the PIF area. As states will then be conducting proceedings that (also) protect the EU's financial interests, the Charter of Fundamental Rights is likely to be applicable. That brings us to the most urgent question for now: To what extent should the Luxembourg Court follow the Strasbourg Court's new approach on the concept of 'bis' (*A. and B. v. Norway*)? Those judgments will be expected very soon. It is difficult to predict whether Luxembourg will maintain its present course. In the foregoing, we have argued that it should, particularly because the key concept of the new Strasbourg case law—whether combinations of criminal and administrative law penalties are sufficiently connected in substance and time—will be very difficult, if not impossible, to operate in the complex, transnational setting of the EU. By that, we mean that we do not see how such a criterion could prevent arbitrariness in such

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<sup>67</sup> *Orsi and Baldetti*, para 25, citing ECtHR, 20 May 2014, *Pirttimäki v. Finland*, CE:ECHR:2014:0520JUD00353211, para 51.

a sensitive area as criminal justice and punitive law enforcement in general. That touches upon the very core of fundamental rights protection in Europe.

## CHAPTER VIII

### COMPARATIVE REPORT

*Dr Angelo Marletta \**

SUMMARY: – 1. Introduction. – 2. Renewed interest in individual liability of head of business. – 2.1. Liability of heads of business in PIF Convention. – 2.2. Liability of heads of business in *Corpus Juris*. – 2.3. New PIF Directive and liability of head of business. – 3. Liability of head of business and general rules of criminal law. – 3.1. Perpetration and participation. – 3.2. Omission liability and duties of care. – 3.2.1. Omission liability: general remarks. – 3.2.2. Omission liability and *actus reus*. – 3.2.3. Omission liability and duties of care. – 3.2.4. Omission liability and causal link. – 3.2.5. *Actus reus*: interim conclusions. – 3.3. Omission liability and *mens rea*. – 4. Liability for collegiate decisions. – 5. Delegation. – 6. Compliance programmes. – 7. Sanctions. – 8. Relationship with liability of legal person. – 9. Punitive administrative law. – 10. Conclusions.

#### 1. Introduction

The comparative study Liability of Company Directors in a Comparative EU Criminal Justice Context was conducted between April 2017 and April 2018, led by Prof. Katalin Ligeti and Dr Angelo Marletta, with the essential contribution of reputed academics from Finland (Prof. Raimo Lathi), France (Prof. Juliette Tricot), Germany (Prof. Martin Waßmer), the Netherlands (Prof. Michiel Luchtman, Dr Mark Hornman and Dr András Csúri) and Poland (Dr Witold Zontek).<sup>1</sup>

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\* University of Luxembourg.

<sup>1</sup> The selected jurisdictions represent different approaches towards the liability of legal entities, which is an inevitable point of reference for reflection on the individual liability of the head of business. In the Netherlands, corporate criminal liability has a long-standing practice dating back to the 1950s; Germany, on the other hand, still rejects the idea that criminal liability—and the moral blame it implies—may be ascribed to any subject other than a human being (although, as will be explained,

The renewed interest of national criminal justice systems in the individual liability of company directors and other employees in a decision-making position for economic and financial crimes is not mirrored by the new PIF Directive.<sup>2</sup> Unlike the PIF Convention, the new PIF Directive contains no provision on the liability of heads of business.

As will be further explained below, the relationship between the liability of legal persons and the individual liability of heads of business cannot be overlooked from the perspective of the coherent protection of the EU budget. On the side of both expenditure and revenue, offences against the EU's financial interests<sup>3</sup> often originate in a corporate context, and the failure of managers (if not their direct involvement) is of decisive importance in determining the commission of such offences.<sup>4</sup>

Starting from the domestic rules on criminal liability, the national reports provide an overview of the conditions and the limits to hold the heads of business accountable in case of commission of an offence by an employee under their responsibility. National rules on administrative liability and on corporate liability have also been assessed from the perspective of an integrated approach to punitive enforcement.

This report provides a comparative analysis of the findings of the analysed national legal systems, as well as their impact on the effectiveness and coherence of PIF enforcement.

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this does not prevent the possibility of an administrative liability of the legal person). France and Finland introduced the criminal liability of legal persons respectively in 1994 and 1995; although conceived in the same period, the models of liability enacted in the two jurisdictions present certain significant differences, at least on paper (such as the material scope or the model of attribution chosen). Poland, on the other hand, introduced more recently a form of liability of legal persons which is not formally labelled criminal but is of a punitive nature: it endorses a hybrid model based on both the identification and the organisational fault doctrine.

<sup>2</sup> Directive (EU) 2017/1371 on the fight against fraud affecting the Union's financial interests by means of criminal law, in OJ L 198, 28.7.2017, p. 29 ff (hereinafter 'PIF Directive').

<sup>3</sup> Meaning fraud affecting the Union's financial interests, passive and active corruption, misappropriation and money laundering, nowadays defined by the PIF Directive.

<sup>4</sup> The Preamble of the 1995 Convention on the Protection of the European Communities' financial interests ('PIF Convention') acknowledged that 'businesses play an important role in the areas financed by the European Communities and that those with decision-making powers in business should not escape criminal responsibility in appropriate circumstances'.

## 2. Renewed interest in individual liability of head of business

The commission of a corporate-related offence raises the question of who deserves punishment and where responsibility should be allocated in the ‘complex triangle’<sup>5</sup> between the direct material perpetrator, the legal entity and its senior management. The complex triangle dilemma is an inherent feature of white-collar crime and poses a considerable challenge to criminal law systems: while establishing the criminal liability of the direct perpetrator might not *per se* appear problematic (the employee materially committing the offence directly fulfils the material and subjective elements required by the statutory definition), the level of complexity significantly increases when such liability is considered in the broader context of modern economic actors and placed in relationship with the roles and responsibilities of managers and those of the legal entity.

Corporate-related offences, indeed, are only rarely the result of the isolated initiative of a rogue employee. On the contrary, the commission of this kind of offence is often nested in a broader context of corporate misconduct, either because it is deliberately conceived— incentivised or even instigated—as part of the corporate policy or because it is the result of a reprehensible lack of supervision by the senior management.

Against this background, the individual liability of low- and middle-level employees, along with corporate criminal liability, seem to have delivered only a partially satisfactory answer<sup>6</sup> and, in recent times, a renewed interest in the individual liability of heads of business has emerged even in those national legal systems, like the United States, the United Kingdom or the Netherlands, in which the criminal liability of corporations represented an established reality.<sup>7</sup>

In the US, indeed, the aftermath of the 2008 financial crisis revealed

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<sup>5</sup> The expression ‘complex triangle’ was coined by E Lederman to identify and highlight the complexities in allocating liability for business crimes. See E Lederman, ‘Criminal Law, Perpetrator and Corporation: Rethinking a Complex Triangle’, *Journal of Criminal Law and Criminology* (1985) 285 ff.

<sup>6</sup> See the considerations made by K Ligeti, ‘Criminal Liability of Heads of Business. A Necessary Pillar in the Enforcement of the Protection of the Financial Interests of the EU’, 4 *Eucrim* (2015) 145 ff.

<sup>7</sup> For a historical account, TJ Bernard, ‘The Historical Development of Corporate Criminal Liability’, *Criminology* (1984) 3 ff; EB Mills, ‘Perspectives on Corporate Crime and the Evasive Individual’, *Criminal Justice Journal* (1986) 327 ff; E Lieder- man, ‘Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation toward Aggregation and the Search for Self-Identity’, *Buffalo Criminal Law Review* (2000) 641 ff.

that the enforcement practice focused mainly—if not exclusively—on the legal entity, with middle- or low-level management leaving open a ‘responsibility gap’,<sup>8</sup> which is problematic in terms of both deterrence and the legitimacy of the punitive intervention.

The 2008 financial crisis judicially resulted in a number of small players being prosecuted for mortgage fraud, while only one top Wall Street executive was prosecuted and sentenced for having misrepresented the values of securities during the crisis.<sup>9</sup> This discrepancy, coupled with the emergence of ‘too big to jail’ thinking<sup>10</sup> and the popular perception that large corporations can sacrifice their fungible middle-level managers as scapegoats to eventually go unpunished, fuelled strong criticism of the criminal enforcement policy of the Department of Justice (DoJ) against corporate wrongdoing.<sup>11</sup> It was also in response to such criticisms that the DoJ gradually reoriented its policy and, in 2015, issued a memorandum (the so-called Yates Memorandum) reaffirming the need to focus on individuals from the first steps of the investigations with the aim, where possible, of reaching the responsible senior managers higher up in the corporate hierarchy.<sup>12</sup>

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<sup>8</sup> In these terms, SW Buell, ‘The Responsibility Gap in Corporate Crime’, *Criminal Law and Philosophy* (2017) 1. The author acknowledges the existence of a ‘re-responsibility gap’ in regard to the senior management of a large-scale corporation; however, he argues that such responsibility has a mere moral connotation and ‘core doctrines of criminal law have nothing to offer those who would seek to convert this account of moral responsibility into a case for criminal punishment. Indeed, those doctrines, and their animating principles, prohibit liability for corporate managers in the case of no action, no mental state, and high responsibility’ (p. 19).

<sup>9</sup> For an account, see S Headworth, JL Hagan, ‘White-Collar Crimes of the Financial Crisis’, in SR Van Slyke, ML Benson, FT Cullen, *The Oxford Handbook of White-Collar Crime* (2016).

<sup>10</sup> The prosecution and punishment of large financial institutions in cases of serious economic crimes may indeed prove difficult on several counts in terms of its sustainability when the adequate punishment of the legal entity for serious wrongdoings and harms would entail its collapse and severe negative externalities upon on a large number of subjects extraneous to the criminal conduct (workers, small shareholders, creditors, consumers); this problem represents an extreme form of the ‘externality trap’ described by JC Coffee, “No Soul to Damn: No Body to Kick”. An Unscandalized Inquiry into the Problem of Corporate Punishment’, *Michigan Law Review* (1981) 407, and is at the same time an argument to target criminal enforcement on the individual.

<sup>11</sup> See, R Steinzor, *Why Not Jail? Industrial Catastrophes, Corporate Malfeasance, and Government Inaction* (Cambridge University Press 2015) 42.

<sup>12</sup> See the Memorandum on Individual Accountability for Corporate Wrongdoing issued by Deputy Attorney General Sally Quillian Yates on 9 September 2015, available at: <https://www.justice.gov/dag/individual-accountability>. The Yates Memorandum, however, acknowledged the substantial challenges surrounding the

Besides the prosecutorial policy shift, the rediscovery of the importance of the individual liability of senior managers is an important element of a multifaceted strategy against corporate crime. An exclusive focus on the legal entity may indeed lead in several cases to the dilemma between punishing too much and ending up in the blind alley of ‘too big to jail’ thinking or punishing too little and transforming the sanction into a mere cost that the corporation can eventually transfer/pass on to consumers, shareholders or employees.<sup>13</sup> Targeting only the middle- or low-level employee (who materially committed the offence), on the other hand, may result in unfairness and, ultimately, a lack of real deterrence where the offence is actually the by-product and part of a bigger scheme. The individual employee, indeed, is fungible.

Holding senior managers accountable, in contrast, may in many cases turn out to be necessary to ensure an adequate level of deterrence at the appropriate level, the level where the corporate culture is shaped. As pointed out by J. C. Coffee in his seminal work, ‘a dual focus on the firm and the individual is necessary. Neither can be safely ignored’.<sup>14</sup>

The US trend is not system-specific. The complex triangle dilemma also surfaced in European systems<sup>15</sup> and, within the European debate on white collar crime,<sup>16</sup> the pendulum has swung on various occasions between the liability of the individual head of business and that of the legal entity.

As will be explained below, the responsibility of the heads of business emerged as an important element of an effective and comprehensive anti-fraud enforcement policy following the first PIF Convention

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prosecution of high-level corporate officials and the proof of their guilt beyond any reasonable doubt.

<sup>13</sup> See N Foster, ‘Individual Liability of Company Officers’, in J Gobert, A Pascal, *European Developments in Corporate Criminal Liability* (Routledge 2011) 117; JC Coffee, ‘No Soul to Damn: No Body to Kick’, cit., 408.

<sup>14</sup> See JC Coffee, ‘No Soul to Damn: No Body to Kick’, cit., 410.

<sup>15</sup> Interestingly, the Dutch rapporteur signalled an endorsement of the Yates Memorandum by Dutch prosecutors in recent developments of Dutch enforcement policy against white-collar crime. See Netherlands National Report, p. 213. Among the systems compared in this research, the Netherlands is the one that recognised the criminal liability of legal entities first, in the 1950s. For a historical overview of the individual liability of company directors under the Dutch system, see Netherlands National Report, pp. 204–207 and MJ Hornman, *De strafrechtelijke aansprakelijkheid van leidinggevenden van ondernemingen, Een beschouwing vanuit multidimensional perspectief* (dissertation Utrecht University 2016).

<sup>16</sup> See J Keiler, *Actus Reus*, cit., 447; K. Ligeti, *Criminal Liability of Heads of Business*, cit., 145 ff; J Gobert, ‘Squaring the Circle. The Relationship between Individual and Organizational Fault’, in J Gobert, A Pascal, *European Developments in Corporate Criminal Liability* (Routledge 2011) 137, 148.

adopted in 1995.<sup>17</sup> The *Corpus Juris* project (*infra* 2.2) confirmed such an approach, proposing a dedicated provision on the liability of the head of business. Nonetheless, over the last two decades, this form of individual liability has met with variable fortune and its consideration has been often overshadowed by the debate on the introduction of the liability of legal entities, which for several systems represented an absolute novelty.

### *2.1. Liability of heads of business in PIF Convention*

The liability of heads of business was addressed in the very first instrument approximating the definition of offences against the EU's financial interests (the 1995 PIF Convention) and chronologically emerged before the EU legal framework started considering the liability of legal entities.<sup>18</sup>

In 1995, Art. 3 of the PIF Convention provided an obligation for the Member States 'to take all the necessary measures' to hold criminally liable<sup>19</sup> the 'heads of business or any persons having power to take decisions or exercise control' in case a PIF offence were committed 'by a person under their authority acting on behalf of the business'.<sup>20</sup>

The provision did not receive an enthusiastic reception among the Member States. The two reports on the implementation of the PIF Convention released by the European Commission in 2004<sup>21</sup> and 2008<sup>22</sup> highlighted the reluctance of the Member States to introduce *ad hoc* pro-

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<sup>17</sup> Convention drawn up on the basis of Article K.3 of the Treaty on European Union on the protection of the European Communities' financial interests, in OJ C 316, 27.11.1995, 49 ff.

<sup>18</sup> Chronologically, the liability of legal persons in the PIF domain came under consideration slightly later: it was introduced for the first time in an EC legal instrument by the Second Protocol to the PIF Convention in 1997 (OJ C 221, 19.7.1997, 11 ff). Since then, EU instruments approximating criminal law have normally included provisions on the liability of legal entities. See D Flore, *Droit Pénal Européen. Les Enjeux d'une Justice Pénale Européenne* (2nd edition, Larcier 2014) 251.

<sup>19</sup> Unlike the standard EU provisions on the liability of legal entities, which do not impose a 'criminal label' on the form of liability the Member States are requested to introduce in this regard.

<sup>20</sup> See *supra* fn 17.

<sup>21</sup> See the Report from the Commission Implementation by Member States of the Convention on the Protection of the European Communities' financial interests and its protocols: COM (2004) 709 final.

<sup>22</sup> See Second Report from the Commission on the Implementation of the Convention on the Protection of the European Communities' Financial Interests and its Protocols: COM (2008) 77 final.

visions on the matter. A recurring objection raised by the Member States to the need for a specific implementation of Art. 3 relied on the adequacy of the existing national rules on complicity to cover the liability of corporate owners and directors.

The same provision of the PIF Convention, on the other hand, had expressly allowed the Member States to establish the liability of the head of business ‘in accordance with the principles defined by the national law’, leaving broad leeway to national legislators in regard to the scope and modality of its enactment.<sup>23</sup> Not surprisingly, the level of harmonisation on this point remained rather low, determining—as the Commission pointed out in its impact assessment for the 2012 PIF Directive Proposal—a normative gap that potentially could jeopardise the effectiveness of enforcement in the PIF area (see *infra*).<sup>24</sup>

## 2.2. Liability of heads of business in the *Corpus Juris*

Before moving forward with the analysis, a reference needs to be made to the *Corpus Juris* project.<sup>25</sup> This academic research, conducted between 1997 and 1999 by a group of eminent scholars, delivered a draft set of provisions covering both the special and the general parts of a ‘micro system’ of criminal law for the protection of EU financial interests. Recalling the *Corpus Juris* is relevant since its general part contained an express provision on the criminal liability of the heads of business (Art. 13). The existence of such a provision in economic and financial matters (together with a provision on the criminal liability of organisations)<sup>26</sup> was deemed necessary by the authors, even recognising the sensitivity and the divergences between systems on the matter.<sup>27</sup>

The *Corpus Juris* considered two distinct forms of liability of the head of business: a) as a ‘principal offender’ if a ‘PIF offence’<sup>28</sup> has been committed for the benefit of the business by a subordinate and the

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<sup>23</sup> See D Flore, *Droit Pénal Européen*, cit., 255, and the Explanatory Report accompanying the PIF Convention, III.3.

<sup>24</sup> See SWD (2012) 195 final, 16.

<sup>25</sup> See M Delmas-Marty, JAE Vervaele (eds), *The Implementation of the Corpus Juris in the Member States* (Volume I, Intersentia 2000).

<sup>26</sup> Art. 14 of the *Corpus Juris*.

<sup>27</sup> See Delmas, Marty, Vervaele (eds), *The Implementation*, cit., 73.

<sup>28</sup> The *Corpus Juris* considered and defined eight possible PIF offences: fraud in the Community budget, market rigging, corruption, misappropriation of funds, abuse of office, disclosure of secrets pertaining to an office, money laundering, and receiving and conspiracy. See Art. 1–8 of the draft *Corpus Juris*.

head of business has ‘knowingly allowed’ the commission; and b) for lack of supervision if the head of business (or ‘any other person with powers of decision and control within the business’) has knowingly omitted to exercise the necessary supervision over the subordinate and such omission has facilitated commission of the offence by the latter.<sup>29</sup>

These two forms of liability proposed in the *Corpus Juris* reflect a theoretical distinction that can be generally drawn in regard to the responsibility of the head of business. As mentioned in the introduction, the commission of a corporate-related offence by an employee may be either deliberately ordered or incentivised by the senior management or indirectly made possible by its reprehensible lack of supervision. Theoretically, this would correspond to two different forms of responsibility of the head of business: the first hypothesis is indeed a form of active (although indirect or functional) involvement of the head of business in the offence materially committed by another person (the employee) and its configuration belongs to the traditional categories of co-perpetration and participation; the second hypothesis, instead, represents a form of responsibility for own wrongdoing of the head of business based on the violation of a duty of care (supervision) and follows the pattern of omission liability (on which, see *infra*).

As for compatibility with the national systems of the suggested forms of liability, the *Corpus Juris* study reported three different attitudes emerging from the comparative analysis: a) a favourable position, expressed by countries where specific forms of liability for the heads of business have already been introduced by statutory provisions or recognised by the case law;<sup>30</sup> b) an intermediate, ‘possibilist’ position considering the ‘omission of necessary supervision’ as a mere specification of the concept of ‘commission by omission’;<sup>31</sup> and c) a negative position, considering the liability for lack of supervision a form of vicarious or

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<sup>29</sup> The first draft of the *Corpus Juris* study (1997) contained only the first form of liability of a head of business as ‘principal offender’. The second form of liability for lack of supervision was added as an amendment to the second draft of the *Corpus Juris* and the authors expressly recognised that it had been based on the model of administrative liability provided by the German § 130 *Ordnungswidrigkeitengesetz* (on which see *infra*).

<sup>30</sup> In the specific context of the *Corpus Juris* study, the Netherlands and France. See Delmas-Marty, Vervaele (eds), *The Implementation*, cit., 73.

<sup>31</sup> Germany and Spain; see Delmas, Marty, Vervaele (eds), *The Implementation*, cit., 74.

strict liability incompatible with the principle of personal criminal liability.<sup>32</sup>

In regard to this last position, however, it is fair to note that the commentary accompanying the *Corpus Juris* was clear in stating that the aim of Art. 13 was not ‘to establish vicarious liability but liability based on the individual fault of a “decision maker” who consciously allowed the offence to take place’.<sup>33</sup> In both forms of liability provided, indeed, the *Corpus Juris* required a rather high threshold for the cognitive element of the *mens rea* of the head of business: he/she should have either ‘knowingly’ allowed the commission of the offence or ‘knowingly’ omitted the necessary supervision.

It is important to highlight that the *Corpus Juris* addressed in detail the issue of delegation of powers and tasks as a defence, a crucial point for defining the scope of such a form of liability in the concrete reality of modern businesses. The solution proposed on this point by the *Corpus Juris* relied on two essential elements: on the one hand, the requirements for the validity of the delegation which had to be ‘partial, precise and specific’; on the other, the express exclusion of the possibility to delegate the general responsibilities of the head of business in regard to the monitoring, supervision and selection of the business personnel.

### 2.3. New PIF Directive and liability of head of business

Notwithstanding the existence of Art. 3 of the 1995 PIF Convention and the academic inputs provided by the *Corpus Juris*, the level of harmonisation on the liability of heads of business across the EU remained low. The two Commission reports on the implementation of the PIF Convention (2004 and 2008) highlighted the existence of different (and sometimes too restrictive) national approaches to the liability of senior managers, which could potentially jeopardise the effectiveness of enforcement in the PIF area.

The same concerns about this ‘normative gap’ and the possible lack of deterrence it might determine were reproduced in the impact assessment accompanying the Commission’s proposal for a new PIF Directive.<sup>34</sup> Surprisingly, however, the Commission proposal did not include

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<sup>32</sup> Ireland. See Delmas, Marty, Vervaele (eds), *The Implementation*, cit., 74.

<sup>33</sup> Delmas, Marty, Vervaele (eds), *The Implementation*, cit., 74.

<sup>34</sup> See SWD (2012) 195 final, 16. The Impact Assessment points out that the approaches to the criminal liability of managers ‘differ widely across the EU’ with some Member States applying restrictive definitions resulting in ‘a lack of deterrence’.

any provision on the liability of heads of business, not even in the minimalist form previously considered under the 1995 PIF Convention.<sup>35</sup>

The negotiations between the co-legislators apparently did not address the issue and the final text of the recently adopted Directive on the protection of the EU's financial interests by means of criminal law (PIF Directive)<sup>36</sup> nowadays only contains a general provision on the criminalisation of 'inciting, aiding and abetting'<sup>37</sup> PIF offences and on the liability of legal persons.<sup>38</sup> In regard to the criminalisation of 'inciting, aiding and abetting', the PIF Directive leaves the definition of such concepts entirely to national law,<sup>39</sup> relying on the traditionally cautious approach of the EU legislator to the general part of criminal law. Such an approach, common to several EU criminal law instruments, originates from doubts about the scope of the conferred EU legislative competence for the approximation of substantive criminal law.

The general legal basis for criminal law approximation under current Art. 83 (1) and (2) TFEU is indeed (still) focused on the adoption of 'minimum rules concerning the definition of criminal offences and sanctions',<sup>40</sup> which has suggested to several commentators and the EU legislator a scope limited solely to the 'special part' (the definition of the offences).<sup>41</sup>

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<sup>35</sup> See K Ligeti, *Criminal Liability of Heads of Business*, cit., 148.

<sup>36</sup> See the Directive (EU) 2017/1371 on the fight against fraud affecting the Union's financial interests by means of criminal law, in OJ L 198, 28.7.2017, 29 ff.

<sup>37</sup> Art. 5 of the PIF Directive (Incitement, aiding and abetting, and attempt).

<sup>38</sup> Art. 6 of the PIF Directive (Liability of legal persons).

<sup>39</sup> See J Blomsma, C Peristeridou, 'The Way Forward: A General Part of European Criminal Law', in A Weyembergh, F Galli (eds), *Approximation of Substantive Criminal Law in the EU. The Way Forward* (Editions de L' Université de Bruxelles 2013) 122.

<sup>40</sup> Similarly, the pre-Lisbon (and post-Amsterdam) legal basis under Art. 31 (1) TEU referred to 'minimum rules relating to the constituent elements of criminal acts and to penalties'.

<sup>41</sup> In this regard, see L Picotti, *Le basi giuridiche per l'introduzione di norme penali comuni relative ai reati oggetto della competenza della procura europea*, in [www.penalecontemporaneo.it](http://www.penalecontemporaneo.it), 30, expressly arguing in the sense of a lack of general competence for the approximation of concepts of the general part. In contrast, J Blomsma, C Peristeridou, cit., 136, consider that under the current legal basis (Art. 83 (1) and (2) TFEU), nothing would preclude the possibility of defining certain concepts such as *mens rea* and *actus reus*. Some scholars, furthermore, have argued that 'visible fragments' of the general part can be retraced across the various legal instruments, although 'the way in which the European Union has legislated (from issue to issue) may raise some doubts as to the general part "character" of certain provisions'; see A Klip, *European Criminal Law. An Integrative Approach* (3rd edition, Intersentia, 2016) 196.

Concepts such as ‘aiding and abetting’ or ‘incitement’ (and, more generally, norms on perpetration and participation), however, are crucial in determining the actual scope of applicability of the provisions of the special part at the national level and may have a significant impact on the uniform and consistent application of EU criminal law.<sup>42</sup>

The question of how, and how adequately, European criminal justice systems address the liability of heads of business under their general rules on criminal liability, participation and complicity thus remains open. On the other hand, the PIF Directive maintained a provision on the liability of the legal entity based on the identification doctrine<sup>43</sup> and the active or passive conduct (the lack of supervision or control over a subordinate)<sup>44</sup> of persons ‘having a leading position within the legal

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<sup>42</sup> As observed, ‘the rules of the “general part”...*inter alia* strive to secure a transparent and equal application of criminal law...the lack of a general part can however jeopardize the uniform application of European criminal law’; see J Keiler, *Actus Reus and Participation in European Criminal Law* (Intersentia 2013) 3.

<sup>43</sup> The identification doctrine (in certain cases called also the doctrine of direct liability or alter ego doctrine) is one of the models for establishing corporate (criminal) liability. According to this doctrine/model, the legal entity is identified with its company organs or other natural persons. Therefore, an offence can be attributed to the entity if one of its organs or leading persons has acted within the scope of his employment or authority and has committed the offence, fulfilling its objective (*actus reus*) and subjective requirements (*mens rea*). In this case, ‘the blame that the officer deserves is also attributed to the corporation’ (in these terms, T Weigend, ‘Societas Delinquere Non Potest’, *Journal of International Criminal Justice* (2008) 933). See J Keiler, *Actus Reus*, cit., 453; J Gobert, M Punch, *Rethinking Corporate Crime* (Cambridge 2003) 59. The identification doctrine originated and developed in the common law of England and Wales around the 1940s. In this regard, it seems interesting to note that the UK legislator recently expressed concerns that the identification doctrine—and the need to prove the *mens rea* (intent) of the ‘leading persons’ for the predicate offence—may ultimately hinder the enforcement action in certain specific fields. With regard to bribery and corruption, the 2010 reform of the Bribery Act introduced an exception to the identification model with a new form of corporate criminal liability based on the failure of the company to prevent bribery on its behalf (Section 7). The possibility of expanding such a model of corporate liability to other fields of economic and financial crime has recently been considered by the UK Ministry of Justice in a call for evidence issued on January 2017 (see <https://consult.justice.gov.uk/digital-communications/corporate-liability-for-economic-crime/>). In the financial sector, on the other hand, the UK has, since 2016, introduced a specific regulatory regime focused on the individual liability of senior managers, the Senior Managers and Certification Regime (SMR; on which, see *infra*).

<sup>44</sup> The standard model for the liability of legal persons included in all the EU approximation instruments provides for a direct and indirect liability of the legal person without specifying the nature or the label of such liability (criminal, administrative or civil), provided that the applicable sanctions are ‘effective, proportionate and dissuasive’. In the ‘direct’ form, the liability of the legal person is

entity'.<sup>45</sup> While it is expressly stated that the liability of the legal persons 'shall not exclude the possibility of criminal proceedings against the natural persons',<sup>46</sup> it would have been more consistent, in view of a coherent application of the two forms of liability, to define more clearly the scope of the individual liability of 'persons having a leading position', especially in regard to their liability for the lack (omission) of control and supervision. Leaving this aspect entirely at the mercy of the different national rules on perpetration and participation, in contrast, may not just lead to a 'deterrence gap' but, first and foremost, a 'coherence gap' in the enforcement process.<sup>47</sup>

In light of these considerations, this research project represents an attempt to map and systematise the answers from selected national frameworks, taking into particular account the rules on commission by omission and the interplay between the individual liability of the head of business and the liability of legal persons (either administrative or, where applicable, criminal).

### **3. Liability of head of business and general rules of criminal law**

The main objection raised by the Member States against the introduction of a dedicated form of liability for the heads of business recalled the adequacy of the existing national rules on perpetration and participation to cover the issue. Since the new PIF Directive discarded the respective provision of the 1995 PIF Convention and, fol-

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established when an offence (in this case, a PIF offence) has been committed for the benefit of the legal entity by any person having a leading position within the same entity. In the 'indirect' form, the liability of the legal person is established when the lack of supervision or control by a 'leading person' has made possible the commission of a (PIF) offence by an employee for the benefit of the entity. This latter form of liability, it has been argued, is not construed as strict or objective liability but a form of (derivative) liability for negligent lack of control or supervision. In this sense, see D Flore, *Droit Pénal Européen*, cit., 254; A Klip, *European Criminal Law*, 228.

<sup>45</sup> According to the standard EU model for the liability of legal persons, the identification of a natural person 'having a leading position' within the entity can be based on his/her power of representation, decision or control. In the case of the PIF Directive, see Art. 6 (1) (a–c).

<sup>46</sup> Both the direct perpetrators of the offence and the persons responsible under Art. 5 of the PIF Directive for incitement, aiding and abetting of its commission. See Art. 6 (3) PIF Directive.

<sup>47</sup> As pointed out by J Blomsma and C Peristeridou (*The Way Forward*, cit., 127): 'consistency and coherency have been explicitly recognized as core values of future European criminal law' by the EU institutions.

lowing the traditional approach of EU approximating instruments, left the definition of the concepts of ‘incitement, aiding and abetting’ to national law, the analysis of such national rules appears crucial to gauging the effectiveness and coherence of PIF criminal enforcement.

This comparative report provides an overview of the main findings emerging from the national reports as to the possibility of holding heads of business criminally accountable for offences committed by an employee. To this end, the next sections will present and analyse in a synthetic way the relevant national approaches to:

- perpetration and participation;
- omission liability and duties of care;
- individual criminal liability and collegial decisions;
- individual criminal liability and delegation of tasks;
- individual criminal liability and compliance programmes;
- sanctions applicable to heads of business;
- the relationship between individual liability and the liability of legal entities;
- the role of punitive administrative law.

### *3.1. Perpetration and participation*

Theories of perpetration and participation are the starting point of the analysis. When the commission of a crime by an employee is actively ordered, instigated or facilitated by the head of business, the establishment of the responsibility of the head of business will rely on the traditional models of (co)perpetration and participation in the offence materially committed by the employee. As mentioned,<sup>48</sup> this form of liability is focused on active involvement in the wrongdoing materially committed by another person and must be kept conceptually separate from the liability for lack of supervision, which is a form of liability for the own wrongdoing of the head of business and will be discussed below when addressing the general rules for omission liability.

In regard to perpetration and participation, criminal law theory acknowledges two main models: the unified model and the differentiated model. In the unified system, every participant in crime is formally treated by the law as a perpetrator. Differentiated models, in contrast, distinguish between principal perpetrators and secondary participants or ac-

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<sup>48</sup> See *supra* 1.2.

cessories.<sup>49</sup> The EU instruments on the approximation of substantive criminal law have so far adopted a differentiated model, distinguishing between perpetrators and participants, but without providing any unitary supranational definition of the concepts of incitement, aiding and abetting.<sup>50</sup>

All the compared systems endorse a differentiated model of participation. Distinctions are relevant since participants or accessories might receive a mitigated sentence compared to perpetrators and, most importantly, because the determination of their *mens rea* might require additional elements (for instance, the existence of a ‘double intent’ relating to both the perpetrator’s crime and to his/her own contribution to the commission of the crime).

Moving to the analysis of the national rules, German criminal law distinguishes between principal perpetrators and secondary participants in intentional offences, while adopting a unified system for negligent offences and regulatory (punitive administrative) offences.<sup>51</sup> Perpetration may take the form of direct, indirect or joint perpetration. Participation, on the other hand, includes aiding and abetting. The criteria for distinguishing between perpetrators are not defined by the StGB but have been developed by the courts and academic literature.<sup>52</sup> German courts nowadays apply a subjective and objective test to differentiate between perpetrators and participants (relevant factors for this purpose may be the degree of personal interest in the success of the offence, the will to dominate it and the extent of the contribution to the offence). German scholarly writing instead bases the distinction on objective theory: the ‘doctrine of the domination of the offence’,<sup>53</sup> according to which the ‘perpetrator’ is whoever can run or stop the commission of the offence; the participant, in contrast, can only initiate or support its realisation. The distinction is relevant, *inter alia*, because the aider receives a mandatory mitigation of the sentence. According to the intensity of their domination over the commission of the offence, heads of business can

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<sup>49</sup> See J Keiler, D Roef, ‘Forms of Participation’, in J Keiler, D Roef, (eds), *Comparative Concepts of Criminal Law* (Intersentia 2015) 213.

<sup>50</sup> In this sense, A Klip, *European Criminal Law*, cit., 225. In the field of competition law, the CJEU favoured a unitary and rather extensive approach to perpetration, under which the mere tacit approval of the cartel and the failure to report it to the authorities is sufficient to configure the liability of the company. See the case GC, *AC-Treuhand*, 8.8.2008, T-99/04.

<sup>51</sup> See Germany National Report, 126.

<sup>52</sup> See Germany National Report, 138.

<sup>53</sup> Germany National Report, 142.

be held responsible either as perpetrators or aiders for their intentional positive acts or omissions.<sup>54</sup>

Finland presents a very similar system, differentiating between principals (direct principal, indirect principal, co-perpetrator) and accomplices (instigators and abettors). The abettor must have furthered intentionally, ‘through advice, action or otherwise’, the commission of the offence by the principal and receives a mitigated sentence. In direct connection with the liability of the heads of business, it is worth noting that in 1995 a partial reform<sup>55</sup> of the Finnish Criminal Code introduced two provisions (Chapter 47 Section 7; Chapter 47 Section 8) dealing with the allocation of liability in respect of employment and environmental offences; these two special provisions established liability for relevant offences of ‘the person into whose sphere of responsibility the act or omission belongs’, further specifying that ‘due consideration shall be given to the position of the said person, the nature of his or her duties and competence’ and ‘his or her participation in the origin and continuation’ of the violation.<sup>56</sup>

Under Dutch criminal law, the concept of perpetration includes both direct (physical) and indirect (functional) commission of an offence. Participation includes instigation and aiding in the commission of a crime. With regard to the direct involvement of the head of business, functional perpetration may be generally applicable if it can be established that the head of business acted ‘through’ the employee and with the *mens rea* required by the offence (thus, in regard to fraud, with intent or, at least, *dolus eventualis*). However, Dutch criminal law also provides for a *sui generis* mode of individual participation called ‘actually directing’ (*feitelijk leidinggeven*),<sup>57</sup> which is strictly related to corporate criminal liability. The ‘actually directing’ model seems particularly relevant for establishing the liability of heads of business, since it allows accountable managers to be held responsible for the wrongdoing that can be attributed to their corporation.<sup>58</sup> ‘Actually directing’ covers both active and passive involvement and thus is relevant also in regard to the liability for lack of supervision; passive involvement, in particular, may occur when the “actual director” 1) knew the corporation was engaging or would

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<sup>54</sup> Germany National Report, 138.

<sup>55</sup> Parallel to the introduction of corporate criminal liability.

<sup>56</sup> See Finland National Report, 16.

<sup>57</sup> Art. 51 para 2 of the Dutch Penal Code.

<sup>58</sup> See Netherlands National Report, 206.

engage in criminal activities, 2) omitted to take measures to halt or prevent the further occurrence of these activities, despite 3) being authorised, or at least able and 4) reasonably bound to do so'.<sup>59</sup> The *mens rea* element for 'actually directing', however, seems to require a rather high standard of actual knowledge and it has been argued that that may hardly work in the context of a large organised structure (see *infra* 3.4).

Polish criminal law provides for four different types of perpetration and complicity: joint perpetration, perpetration by ordering, perpetration by directing and incitement, and assistance.<sup>60</sup> Perpetration by directing and incitement, in abstract terms, would cover the direct and intentional involvement of the head of business in an offence (fraud) materially committed by the employee.<sup>61</sup> The concept of assistance under Polish criminal law, on the other hand, expressly covers the responsibility of 'whoever by his conduct facilitates the commission of a prohibited act by another person, in defiance of a legal, special duty not to allow the commission of such a prohibited act'.<sup>62</sup> Perpetrators and participants are *in abstracto* submitted to the same sanction range, but in regard to the aider and the abettor the sentence may be mitigated.

In France, the criminal code distinguishes between perpetrators and accomplices. Perpetration may take three forms: material perpetration (*auteur matériel*), co-perpetration (*coauteur*) and moral perpetration (*auteur intellectuel ou moral*). Moral perpetration may be relevant to ascribe responsibility to the head of business when he or she intentionally directed the commission of the offence and used the employee (*auteur matériel*) as a mere instrument of execution.<sup>63</sup> On the other hand, the concept of complicity encompasses aiding, abetting and instigation.<sup>64</sup> Complicity in the form of aiding and abetting may be committed through an omission in cases of collusion or where the accomplice had a legal or contractual duty to prevent the of-

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<sup>59</sup> See Netherlands National Report, 226.

<sup>60</sup> See Poland National Report, 263–264.

<sup>61</sup> The difference between ordering and directing under Polish criminal law lies in the nature and the degree of power over the material perpetrator. For perpetration by ordering, there should be a strong relationship of dependence, securing a blunt obedience of the material perpetrator. For perpetration by directing, in contrast, such a strong dependence is not required.

<sup>62</sup> See Poland National Report, 274.

<sup>63</sup> See France National Report, 57.

<sup>64</sup> See France National Report, 61.

fence.<sup>65</sup> Instigation in the form of provocation may occur by ‘gift, promise, threat, order or abuse of authority or power’.<sup>66</sup> On the level of *mens rea*, the accomplice can be punished only if he acted knowingly, ‘having the knowledge and willingness to associate himself with the criminal fact’.<sup>67</sup> Both the hypotheses of collusion and instigation/provocation could *in abstracto* capture the direct involvement of the head of business. French case law, however, has long recognised a special form of liability for the head of business (*responsabilité pénale du chef d'entreprise*) which holds him liable as an indirect perpetrator (*auteur médiat*) for the offences committed in the course of the operations of the company on the basis of a functional responsibility (see *infra*).<sup>68</sup>

### 3.2. *Omission liability and duties of care*

With regard to the liability of the head of business for lack of control or supervision, the national rules on omission liability and duties of care represent the second point of analysis. This form of liability is probably the most relevant and challenging from the perspective of this research and, unlike the classical schemes of perpetration or participation in an offence committed by another person mentioned above, it entails a responsibility for the own (in the sense of autonomous) wrongdoing of the head of business.

Such ‘own wrongdoing’ of the head of business, consisting in the failure to fulfil a duty to supervise his employees, relies on two essential criminal law concepts: the concepts of omission and duty of care, which will be unpacked in the following paragraphs.

#### 3.2.1 *Omission liability: general remarks*

It has been interestingly argued that, in modern society, omission

<sup>65</sup> France National Report, 62.

<sup>66</sup> France National Report, 58.

<sup>67</sup> France National Report, 63.

<sup>68</sup> France National Report, 49. Originally construed by the Court of Cassation as a positional and vicarious form of liability based on a non-rebuttable presumption of fault (*présomption de faute irrefragable*), today the majority of the literature seems to consider the liability of the head of business a personal form of liability based on the powers and responsibilities connected to the function. See France National Report, 50 and *infra* in the text.

liability is gaining increasing influence, especially in regard to the protection of collective interests.<sup>69</sup>

In general terms, an omission may be defined as 'a failure to perform a specific duty which has been imposed by law'.<sup>70</sup> In a more precise way, omission liability is generally known in criminal law theory under two forms: proper omission offences, occurring when a statutory provision expressly criminalises the omission of a due positive action, and improper crimes of omission ('commission by omission'), occurring when an offence (often a crime event) whose conduct is statutorily defined in positive terms may be committed by failing to act according to a duty of care.<sup>71</sup>

Under EU Law, Art. 49 (1) of the EU Charter of Fundamental Rights,<sup>72</sup> similarly to Art. 7 (1) ECHR, expressly recalls the concept of omission, thereby recognising it as a possible legitimate form of the *actus reus* under EU criminal law;<sup>73</sup> yet there is no general definition of the concept under EU criminal law.

With regard to the legal systems compared in the context of this research (Germany, Finland, the Netherlands, France and Poland), all of them recognise forms of omission liability, although certain significant differences with regard to the acceptance of the concept of 'commission by omission' need to be highlighted. The following section will therefore address omission liability in regard to the:

- *actus reus*;
- source and scope of duties of care;
- causal link between the omission and the result;
- *mens rea* (subjective) element.

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<sup>69</sup> See J Keiler, *Actus Reus*, cit., 70; see also A Ashworth, 'The Scope of Criminal Liability for Omissions', *The Law Quarterly Review* (1989) 442.

<sup>70</sup> J Keiler, *Actus Reus*, cit., 69.

<sup>71</sup> See J Keiler, *Actus Reus*, cit., 71. G Fletcher distinguishes two forms of omission: 'the breach of a statutory obligation to act' (breach of duty) and the failure 'to intervene, when necessary, to prevent the occurrence of a serious harm' (commission by omission); G Fletcher, *Rethinking Criminal Law* (Oxford University Press, 2000) 422.

<sup>72</sup> Art. 49 (1) of the EU CFR provides that '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 law 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.'

<sup>73</sup> See, in this regard, A Klip, *European Criminal Law*, cit., 219; J Keiler, *Actus Reus*, cit., 511.

### 3.2.2. *Omission liability and actus reus*

As previously mentioned, an omission generally entails a failure to act according to a duty imposed by law.

The idea of omission as a form of manifestation of the *actus reus* (conduct) is well-established under German, Dutch and Polish criminal law. Section 13 of the German Criminal Code<sup>74</sup> expressly provides for omission liability under two conditions: a legal obligation on the subject omitting a certain action to prevent a result ('guarantor position', *Garantenstellung*)<sup>75</sup> and a 'clause of equivalence' (*Entsprechensklause*),<sup>76</sup> meaning that the omission, in order to be criminally relevant, must be equivalent to the realisation of the statutory elements of the offence through a positive act.<sup>77</sup>

After the reform of 2003, Finnish criminal law also foresaw a general provision on omission, covering both 'genuine omissions' and 'commission by omission' ('derivative omission').<sup>78</sup> In regard to the latter type, the failure to prevent the commission of an offence becomes criminally relevant only where there exists a special legal duty to prevent the commission of such offences. The sources of such special legal duties are indicated in the provision (see *infra*).

In the Netherlands, the Dutch Criminal Code, unlike the German StGB, does not provide for a general provision on liability for omission; however, such liability is accepted if there was an obligation to act according to a duty of care (*zorgplicht*) and such obligation was breached.<sup>79</sup> It is important to highlight that, in the context of the present study, commission by omission is compatible and can be combined with the concepts of 'functional perpetration' and 'actually directing' and thus may be relevant to hold heads of business liable in case of lack of control or supervision.

Under Polish criminal law, an omission is relevant only when a specific legal duty to prevent a consequence is imposed on the person omit-

<sup>74</sup> The express introduction of a provision on omission under § 13 StGB was intended to provide a legal basis and remedy to the legality objections moved to improper crimes of omission. See J Keiler, *Actus Reus*, cit., 83.

<sup>75</sup> On the guarantor position and the duty of care, see below 3.2.3. *Omission liability and duties of care*.

<sup>76</sup> See Germany National Report, 128.

<sup>77</sup> Germany National Report, 128; J Keiler, *Actus Reus*, cit., 84, who specifies that in regard to fraud and omission, equivalence implies that the omission 'must lead to a deception which subsequently causes the pecuniary loss'.

<sup>78</sup> See Finland National Report, 13.

<sup>79</sup> See Netherlands National Report, 216.

ting a certain conduct (Art. 2 of the Polish Criminal Code);<sup>80</sup> for formal crimes (in which no result or consequence is foreseen), liability for omission is possible only if the description of the offence expressly defines the *actus reus* as an omission. It is important to highlight that Art. 18 (3) of the Polish Criminal Code expressly states that ‘whoever, acting against a particular legal duty of preventing the prohibited act, facilitates its commission by another person through his omission, shall also be liable for assistance’.<sup>81</sup>

The French approach is rather different. Historically, French criminal law rejected the concept of ‘commission by omission’ as a general category.<sup>82</sup> However, beyond a theoretical rejection of the concept, omission liability is indirectly recognised by French criminal law through the concept of negligence: negligent offences, ‘due to their broadly worded definitions’, can also encompass commission by omission. Furthermore, French case law has recognised that aiding and abetting may also occur in passive forms, especially when there is a legal duty to act (*devoir juridique*) or when the abstention reveals a punishable collusion.<sup>83</sup>

### 3.2.3. *Omission liability and duties of care*

An omission is relevant as *actus reus* insofar as a legal obligation to act exists. Such legal obligations may be defined as duties of care and can theoretically derive from a variety of different sources: statutory law, general clauses of diligence, voluntary or contractual assumptions of responsibility, a specific position of ownership or responsibility towards a source of danger, or a specific role or position within society or an organisation.

The notion of duty of care is central to reconstructing omission liability. With regard to the head of business, it can be argued, in general terms, that duties of care (including supervision and control over employees) represent the other side of their power to organise and direct the business. However, this is not immediately and *per se* sufficient to establish their relevance under criminal law. As duties of care multiply

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<sup>80</sup> See Poland National Report, 265.

<sup>81</sup> See Poland National Report, 274.

<sup>82</sup> See France National Report, 65; J Pradel, *Droit Pénal Comparé* (4th edition, Dalloz 2016) 78; A Ashworth, E Steiner, ‘Criminal Omissions and Public Duties: The French Experience’, *Legal Studies* (1990) 155.

<sup>83</sup> See France National Report, 62.

and acquire an increasing role in our modern industrialised societies,<sup>84</sup> the problem of their objective foreseeability and compatibility with the principle of legality represents a central issue for criminal law theory and for European criminal law.<sup>85</sup>

The analysis of the compared systems, in this regard, provides a variety of answers.

Under German criminal law, the StGB does not provide a general definition of duty of care. However, duties based upon written and unwritten rules can be discerned in other sectors of the legal system. A general standard of care is identified in the ‘behaviour of a prudent and conscientious person from the criminal’s public sphere’,<sup>86</sup> while an example of a sectoral written rule particularly relevant for the topic of the liability of company directors is represented by § 93 of the German Stock Corporations Act (*Aktiengesetz*: AktG), which states that ‘members of the board of directors of a public limited company must exercise the diligence of a prudent and conscientious managing director when conducting their business’.<sup>87</sup>

Finnish criminal law identifies a number of sources of duties of care, including the assumption of an office, function or position, a contract or the creation of a dangerous situation. In regard to the position of head of business, general duties of appropriate organisation and supervision are expressly laid down under company law in regard to the board of directors and the managing director.<sup>88</sup> Special legislation and regulations (such as in the fields of labour safety and environmental protection) do provide for additional supervisory duties which may trigger the liability of the head of business.<sup>89</sup>

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<sup>84</sup> J Keiler, *Actus Reus*, cit., 77 observes that ‘while duties of care are increasingly applied as a means of crime control, it should not be overlooked that they can also fulfil a safeguard function, protecting the freedom of the citizen.’

<sup>85</sup> See J Keiler, *Actus Reus*, cit., 509. Foreseeability being an essential aspect of the principle of legality recognised under Art. 49 of the EU CFR and Art. 7 ECHR, the source and scope of the duty of care therefore also constitute an essential point for European criminal law.

<sup>86</sup> See Germany National Report, 128.

<sup>87</sup> Germany National Report, 128. Within the German literature, however, a debate seems to exist regarding: a) the possibility to consider the special knowledge and abilities of the individual as a factor for individualising and assessing the level of diligence due in the specific circumstances; and b) the compatibility, as such, of unwritten duties with the principle of legality (*lex certa* principle).

<sup>88</sup> See Finland National Report, 17.

<sup>89</sup> See Finland National Report, 18. In the specific fields of labour safety and environmental protection, the special duties of control and supervision determine the scope of application of the special provisions on the liability of ‘the persons into

In the Netherlands, the duties of care are identified as ‘open norms’ and their scope and nature need to be determined ‘on a case by case approach’.<sup>90</sup> Lacking a general provision in the Criminal Code, the source of duties of care can be found in regulatory law, ‘memorandums, guidelines from governmental or professional (supervisory) agencies, jurisprudence and legal literature’.<sup>91</sup>

In Poland, to be unlawful an omission must violate the rules of conduct and duties foreseen for the given circumstance.<sup>92</sup> The sources of duties of care are provided by the statutes and regulations belonging to the particular branch of social or commercial relations, but a general standard of ‘a good and reasonable manager’ has been developed by case law and the literature.<sup>93</sup>

French criminal law provides for a general concept of duty of care as a subjective element of the offence under the definition of negligent conduct;<sup>94</sup> beyond that, duties of care may derive from sectoral laws and regulations and a failure to comply with the respective obligations may constitute the basis for a (negligent) offence.<sup>95</sup> With regard to the liability of the heads of business, a special regime applies: the established jurisprudence of the French Court of Cassation has recognised the existence of a general duty of supervision, meaning a duty for the head of business to ensure compliance with the laws and regulations applicable to the company. Such a duty is the basis for establishing the functional responsibility of the head of business for the crimes committed by subordinates in the course of the operation of the company.<sup>96</sup>

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whose sphere of responsibility the act or omission belongs’ mentioned *supra* (Chapter 47 Section 7 and Chapter 48 Section 8 of the Finnish Criminal Code).

<sup>90</sup> See Netherlands National Report, 216–217.

<sup>91</sup> Netherlands National Report, 216–217.

<sup>92</sup> See Poland National Report, 273.

<sup>93</sup> See Poland National Report, 274.

<sup>94</sup> Art. 121–3 (3) and (4) of the French Criminal Code provide that: ‘(3) *Il y a également délit, lorsque la loi le prévoit, en cas de faute d’imprudence, de négligence ou de manquement à une obligation de prudence ou de sécurité prévue par la loi ou le règlement, s’il est établi que l’auteur des faits n’a pas accompli les diligences normales compte tenu, le cas échéant, de la nature de ses missions ou de ses fonctions, de ses compétences ainsi que du pouvoir et des moyens dont il disposait.*’ See France National Report, 82–83.

<sup>95</sup> See the France National Report, 66.

<sup>96</sup> See France National Report, 48–49; B Bouloc, *Droit Pénal Général* (25th edition, 2017) 321.

### 3.2.4. *Omission liability and causal link*

A causal link between the omission (the lack of control and supervision of the head of business) and the result (the commission of the offence by the employee) is required in all the systems examined, although following very different standards. Among the systems compared, causality is established in rather strict terms in Germany and Poland, while—especially with regard to the liability of the heads of business—it seems quite loose in France. Dutch criminal law, meanwhile, appears to follow an intermediate and ‘flexible’ approach.

German criminal law provides for the stricter standard, requiring a hypothetical (counter-factual) model of causality (*Quasi-Kausalität*), which establishes whether the result would not have occurred ‘with almost certain probability’ if the omitted action had taken place. Proposals to adopt a ‘risk reduction’ paradigm (establishing a causal link when the omitted action would have reduced the risk of the result) have so far been rejected.<sup>97</sup> Together with the *mens rea* element (*infra*), the strict causal link required under ordinary criminal law is considered one of the main obstacles to establishing the criminal liability of the head of business for lack of control or supervision in the case of commission of a corporate-related offence by one of his/her subordinates. Those obstacles, however, are overcome in the domain of administrative offences and § 130 OWiG (see *infra*).

Finland follows a similar approach, applying a causality test inspired by the *conditio sine qua non* formula.<sup>98</sup> The probability assessment therefore requires a causality relationship of near certainty between the violation of the specific duty of care and the occurrence of the result.

In Poland, assessment of the causal link required to establish the liability for omission is based on a normative method. According to this method, ‘it should be established whether undertaking the expected action would have prevented the consequence’.<sup>99</sup> Also, this standard, in its formulation, seems very close to German ‘quasi-causality’.

Dutch criminal law, on the other hand, endorses a much more flexible approach based on a ‘reasonable attribution’ test. This test is based on a ‘multi-factor approach’ which aims to ascertain whether the defendant’s omission ‘seriously raised the risk of the consequence setting

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<sup>97</sup> See Germany National Report, 114.

<sup>98</sup> See Finland National Report, 13.

<sup>99</sup> See Poland National Report, 269, 276.

in'.<sup>100</sup> Such a standard is different from the *conditio sine qua non* standard and originated from private law.<sup>101</sup>

Under French criminal law, the causal link is considered in broad terms. In regard to the functional criminal liability of the head of business, however, causality is assessed *in abstracto*, meaning not on the basis of the concrete relationship between the specific behaviour of the head of business and the commission of the offence by his/her employee, but with the mere consideration of the abstract power of the former to provoke or prevent the commission of the offence by the latter.<sup>102</sup>

### 3.2.5. *Actus reus: interim conclusions*

With regard to the *actus reus*, it might be partially concluded that all the systems analysed would in principle admit the possibility of considering an omission (such as the omission of supervision and control) the objective element of an offence. However, two aspects should be taken into account in terms of establishing the liability of the head of business: the definition of a specific duty of supervision and control, and the causal link. Notwithstanding the existence in all the systems of general duties of care based on standards of good management, the introduction of a specific obligation of supervision and control expressly aimed at the prevention of PIF offences would guarantee the objective foreseeability of the managerial duties and a sounder basis, on the level of the *actus reus*, for establishing their criminal liability in case of failure to comply with their supervisory duties.

The other critical point is represented by the causal link. The systems compared, indeed, present rather different approaches: Germany, Finland and Poland, as mentioned, endorse a rather strict approach to causation under criminal law,<sup>103</sup> implying that the omission of supervision may be criminally relevant only when an almost certain causal re-

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<sup>100</sup> See Netherlands National Report, 217-218.

<sup>101</sup> Such an approach is also defined as a normative/legal approach and was developed by the Dutch Supreme Court at the end of the 1970s. Criticisms of the doctrine of 'reasonable attribution' point out its 'indeterminate nature' and its problematic relationship with the principle of legal certainty; see J Keiler, *Actus Reus*, cit., 136.

<sup>102</sup> See France National Report, 82. The report specifies that the causal attribution to the head of business 'results less from an effective influence on the infringement than from an ability to influence.'

<sup>103</sup> The German legal system, however, adopts a more flexible causal link under the administrative provision of § 130 OWiG (see *infra*).

lationship with the commission of the offence is established. France and the Netherlands, in contrast, seem to adopt a more flexible approach.

### 3.3. *Omission liability and mens rea*

Across the compared legal systems, the *mens rea* element apparently represents the most problematic aspect of establishing the liability of heads of business for omitted control or supervision.

Under German criminal law, the holder of a guarantor position who allows the commission of an intentional crime by a subordinate must hold intent. *Dolus eventualis*<sup>104</sup> is sufficient and therefore liability may be established if the guarantor, on the one hand, recognised the serious possibility of the commission of the offence by the subordinate and, on the other, accepted the possible occurrence of such a risk.<sup>105</sup> Exact and secure knowledge of the commission is apparently not necessary, but the supervisor must have considered the commission of the offence ‘probable’.<sup>106</sup> The concurrent responsibility of the head of business for his/her negligent conduct or omission, however, cannot be established in regard to an intentional offence committed by the employee unless the underlying offence expressly admits the possibility of commission by negligence. Since fraud and all the other PIF offences are intentional offences that cannot be committed negligently, the criminal liability of the head of business is here limited to cases of intentional omission or lack of supervision.<sup>107</sup> However, a negligent violation of obligatory supervision may be relevant under § 130 OWiG (see *infra*).

In Finland, intent is the form of *mens rea* generally required for omission liability, although, similarly to Germany, the lowest level of intent (*dolus eventualis*) may suffice. In this regard, the National Report highlighted that the proof of intent (even in the form of *dolus eventualis*) might often pose difficulties in the context of omission and further referred to a line of case law which adopts the ‘must have known’ formula. This formula is not considered a means for actually widening the sub-

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<sup>104</sup> According to Blomsma, *dolus eventualis* can be defined as ‘the conscious acceptance of a considerable chance to a consequence’. This form of *mens rea* enables the extended interpretation of intention and accordingly allows an extension of criminal liability for intentional offences. See J Blomsma, ‘Mens Rea and Defences’, *European Criminal Law* Intersentia (2013) 99.

<sup>105</sup> See Germany National Report, 145.

<sup>106</sup> Germany National Report, 145.

<sup>107</sup> See Germany National Report, 126, 144.

stantial scope of the required *mens rea*, however, but rather an evidentiary rule allowing the inference of intent from circumstantial evidence.<sup>108</sup> A negligent omission may be relevant only if the statutory definition of the offence allows for its commission by negligence.

Under the Dutch Criminal Code, no general norm on the *mens rea* for omission liability is expressly provided. This implies that the subjective element for the omission must be determined case by case, according to the *mens rea* required for the underlying offence (intent, negligence or, in case of misdemeanours and administrative offences, strict liability).<sup>109</sup> In regard to ‘functional perpetration by omission’, the report highlights that case law of the Dutch Supreme Court has recently admitted the possibility of ascribing *dolus eventualis* to the head of business if he did not take ‘reasonable measures of care to prevent the criminal conduct’.<sup>110</sup> In contrast, in regard to the *mens rea* for ‘actually directing’ by omission, Dutch case law has maintained a more protective standard of actual knowledge, therefore excluding the possibility that poor or negligent management might suffice to configure liability unless through ‘wilful blindness’.<sup>111</sup>

The approach to the *mens rea* required under French law is not uniform. In general, a distinction will need to be drawn between intentional and unintentional offences: with regard to intentional offences such as fraud, the head of business will be liable only if he holds intent towards the underlying offence committed by the employee; negligence will not suffice.<sup>112</sup> With regard to unintentional offences, following a reform in 2000 an ‘aggravated or qualified fault’ (*faute délibérée*) was established in regard to the head of business as ‘indirect perpetrator’.<sup>113</sup> With regard

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<sup>108</sup> See Finland National Report, 19.

<sup>109</sup> See Netherlands National Report, 217.

<sup>110</sup> See Netherlands National Report, 218, 228.

<sup>111</sup> See Netherlands National Report, 229. Wilful blindness can be defined as ‘a suspicion coupled with a deliberate failure to use readily available and effective means to resolve the suspicion, in short, suspicion and the blameworthiness of not checking’; see J Blomsma, *Mens Rea*, cit., 97.

<sup>112</sup> See France National Report, 84-85.

<sup>113</sup> According to Art. 121-3 (4): ‘*Dans le cas prévu par l’alinéa qui précède, les personnes physiques qui n’ont pas causé directement le dommage, mais qui ont créé ou contribué à créer la situation qui a permis la réalisation du dommage ou qui n’ont pas pris les mesures permettant de l’éviter, sont responsables pénalement s’il est établi qu’elles ont, soit violé de façon manifestement délibérée une obligation particulière de prudence ou de sécurité prévue par la loi ou le règlement, soit commis une faute caractérisée et qui exposait autrui à un risque d’une particulière gravité qu’elles ne pouvaient ignorer.*’

to contraventions, the *mens rea* required upon the head of business is a form of ‘presumed’ negligence.<sup>114</sup>

#### 4. Liability for collegiate decisions

Strategic business decisions are often taken by a collegiate organ (for instance, the board of directors); when a collegiate decision entails the commission of a criminal offence, the allocation of individual responsibility for its adoption is an important aspect in addressing the liability of the head of business. In this regard, the analysed systems present different approaches. Voting in favour of the adoption of a decision constituting a criminal offence generally determines liability of the individual voter. Abstention and mere participation in the vote, in contrast, do not always exclude liability (for instance, in the Netherlands, even mere dissociation would not automatically exempt the participant).<sup>115</sup> Under German criminal law, voting against or abstaining excludes liability, but only if the unlawful decision is not implemented.<sup>116</sup> In France, individual liability in the context of collective decisions seems to require a *quid pluris* expressing personal participation in the offence and not just in the vote (such as being a promoter or rapporteur of the decision).<sup>117</sup>

Poland and Finland, in contrast, do not provide specific rules for attributing individual responsibility in respect of collective decisions: the ordinary rules on joint perpetration (and the individual assessment of the objective and subjective elements of the offence) therefore are, in principle, to be applied in regard to each participant.<sup>118</sup>

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<sup>114</sup> See France National Report, 84.

<sup>115</sup> Participants voting in favour of the adoption of the decision may be held criminally liable ‘for all of the criminal activity that flows from’ that decision and only one who has openly opposed the adoption can be exempted due to lack of *mens rea*. Merely distancing does not automatically exempt. The National Report highlights that, in respect of serious offences, a position has been expressed in literature that corporate officials participating in a collegiate decision are obliged either to intervene and halt the offences or to inform the authorities in order to escape liability. See Netherlands National Report, 234.

<sup>116</sup> See Germany National Report, 154. This might therefore imply that participants who abstained or voted against must step up and take action in order to prevent the implementation of an unlawful decision (informing the supervisory board or the shareholders or, if necessary, resigning).

<sup>117</sup> See France National Report, 88.

<sup>118</sup> See Finland National Report, 21 and Poland National Report, 282.

## 5. Delegation

Delegation nowadays represents a necessity for the efficient functioning of most (if not all) corporate realities; to a certain extent, it is an expression of diligent and conscientious management. At the same time, delegation of tasks and powers represents a central issue in relation to the liability of the head of business. Delegation may indeed determine a proper transfer and discharge of supervisory responsibility and exclude the *mens rea* of the delegating head of business.

With regard to the power to delegate tasks and responsibilities to employees, the national systems analysed adopt different approaches. As a baseline, however, the systems seem to converge on the fact that general and undetermined delegation (delegation *in blanco*) should not be allowed and that delegation does not automatically relieve the head of business of potential liability. Under German law, for instance, delegation does not relieve a head of business of his duties of 'selection, organisation, instruction, supervision and control' over the delegatee. In particular, the appointment of a supervisor does not exempt the owner from the duty of supervision and control 'but merely reduces the intensity'.<sup>119</sup> Furthermore, with regard to the punitive administrative liability under § 130 OWiG (see *infra*), a distinction is drawn between two different types of supervisor: qualified supervisors, whose position is characterised by autonomous decision-making powers, and simple supervisors, who do not hold such autonomous powers. In relation to the administrative punitive liability under § 130 OWiG, qualified supervisors are liable on an equal footing with the owner who delegated to them and their responsibility may trigger the administrative liability of the legal person under § 30 OWiG (see *infra*). Mere supervisors, on the other hand, are not responsible under punitive administrative liability.<sup>120</sup>

Under Finnish criminal law, delegation is admitted, but it does not *per se* exclude the supervisory duties incumbent on the members of the board of directors and possible liability for their violation. Delegation must, however, be clear and specific.<sup>121</sup>

In the Netherlands, the delegation of powers and supervisory tasks may determine a transfer of responsibility provided that the delegation is

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<sup>119</sup> See Germany National Report, 148.

<sup>120</sup> See Germany National Report, 149.

<sup>121</sup> See the Finland National Report, 19-20.

reasonable. However, even in this case, the delegating person remains bound to intervene if the person delegated to falls short of his duties.<sup>122</sup>

In Poland, delegation may be relevant for limiting or excluding the *mens rea* of heads of business in case of an offence committed by a subordinate. For certain specific duties that are reserved for members of the board (such as annual reporting to the tax office), the internal division of tasks is irrelevant and cannot discharge the members of the board.<sup>123</sup>

In France, delegation is considered by the case law of the Court of Cassation ‘a normal mode of management of the company’<sup>124</sup> and its absence may constitute a form of organisational fault ‘which could possibly be blamed on the company manager in the event of an accident’.<sup>125</sup> Essential requirements for the validity of the delegation are: a) lawfulness (meaning that the delegation of a specific task must not be forbidden by a legal provision); b) precision and limitation (the contents must be certain, unambiguous and partial); c) effectivity, meaning that delegation must include the authority and the means necessary to carry out the tasks assigned; and d) the delegate’s autonomy of action. Finally, and most importantly, according to French case law, ‘own management powers’ (such as the power to take strategic decisions) are not the subject of delegation.<sup>126</sup>

## 6. Compliance programmes

Compliance programmes can be broadly defined as management tools used to prevent and detect misconduct within businesses.<sup>127</sup> They represent a relative novelty in Europe<sup>128</sup> and, like the delegation of supervisory tasks, they may be seen as another expression of diligent management. Compliance programmes have an inherently self-regulatory and preventive function and normally include rules on business

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<sup>122</sup> See Netherlands National Report, 231.

<sup>123</sup> See Poland National Report, 280.

<sup>124</sup> See France National Report, 86.

<sup>125</sup> See France National Report, 86.

<sup>126</sup> France National Report, 86.

<sup>127</sup> See F Thépot, ‘Can Compliance Programmes Contribute to Effective Antitrust Enforcement?’ in J Paha (ed.), *Competition Law Compliance Programmes. An Interdisciplinary Approach* (Springer 2016) 191.

<sup>128</sup> Compliance programmes originated in the United States in the 1980s as an element following the theories of ‘self-regulation’ and of the ‘new regulatory State’; see K Wulf, *Ethics and Compliance Programs in Multinational Organizations* (Springer 2011) 38, 41.

ethics and leadership, risk assessment and risk management, controls and monitoring, internal reporting, training on compliance and business ethics.<sup>129</sup> As an expression of self-regulation, the adoption of a compliance programme is still largely voluntary. However, obligations to adopt a compliance programme are often provided in certain business sectors (financial services, banking, insurance) which are considered particularly sensitive or with regard to specific risks or misconduct (for example, corruption, money laundering).

A notable development in the field of anti-corruption has been recently introduced in France in the 2017 so-called Sapin II law. The law established an obligation for companies above a certain size to adopt a specific anti-corruption compliance programme; in case of non-adoption, the heads of business of the company may be held personally responsible and subject to a considerable administrative fine.<sup>130</sup>

Generally, however, the non-adoption of a compliance programme does not entail punitive consequences *per se*.

In the perspective of this research, however, an aspect of interest is represented by the potential impact of compliance programmes as a defence in order to limit or exclude the individual responsibility of the head of business when a compliance programme has been adopted but, nonetheless, an offence has been committed by an employee.

In this regard, the findings of the comparative analysis highlighted limited impact with regard to individual criminal liability: the existence of a compliance programme *per se* does not automatically exclude the responsibility of the individual, although its effective implementation may be assessed in terms of diligent fulfilment of the manager's duty of care. A greater role of the compliance programme seems to be recognised in regard to the establishment of the liability of the legal person: in those cases, the existence of a compliance programme may exclude liability based on 'organisational fault'.<sup>131</sup>

## 7. Sanctions

With regard to sanctions, the compared systems present a great variety of options.

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<sup>129</sup> See, for instance, the OECD Good Practice Guidance on Internal Controls, Ethics, and Compliance adopted on 18 February 2010.

<sup>130</sup> See France National Report, 95. The fine imposed by the National Anti-Corruption Agency can be up to 200,000 euros.

<sup>131</sup> See in particular Finland National Report, 23; Poland National Report, 284.

In Germany, criminal law provides for mandatory mitigation with regard to aiders and for optional mitigation in case of omission. The penalty level for fraud under § 263 StGB provides a maximum of up to five years' imprisonment or a fine for the basic form of the offence. In especially severe cases, the penalty range extends from a minimum of six months to a maximum of ten years, while, where the offender acted on a commercial basis and as a member of a gang, the potential sentence may extend from a minimum of one year up to ten years and a minimum of six months to five years 'in less serious cases'.<sup>132</sup> Confiscation of unlawfully obtained gains is possible under different headings and by resorting to different tools. A major reform in this regard was introduced in 2017. In particular, extended confiscation and third-party confiscation are possible.<sup>133</sup> Measures of incapacitation, such as professional disqualification, are available under general criminal law, but the German National Report highlights that it actually 'gained little practice'.<sup>134</sup>

The National Report also provides interesting statistical data for 2015 on the type and range of criminal penalties applied for fraud,<sup>135</sup> highlighting the undisputed preponderance of fines (85 per cent). The National Report further considers that, *in concreto*, the average level of the fines imposed appears very lenient.<sup>136</sup>

Significant regulatory fines may theoretically be imposed for the violation of obligatory supervision under § 130 OWiG (see *infra*) and upon legal persons according to § 30 OWiG; however, statistical data for 2015 also indicate in this sector an enforcement practice which is far from approaching the maximum—or even the middle—level of penalty.<sup>137</sup>

In Finland, a special sanction prohibiting future engagement in business activity was introduced in 1985 with regard to economic offences and may be applicable to entrepreneurs and managers who have committed an economic crime or 'otherwise crucially omitted their legal duties'.<sup>138</sup> The nature of this sanction is characterised as criminal and may concur with the ordinary criminal sanctions (fine, conditional imprisonment, community service, electronic

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<sup>132</sup> See Germany National Report, 169.

<sup>133</sup> Germany National Report, 181.

<sup>134</sup> Germany National Report, 173.

<sup>135</sup> Germany National Report, 185.

<sup>136</sup> Germany National Report, 184-185.

<sup>137</sup> Germany National Report, 186.

<sup>138</sup> See Finland National Report, 26.

monitoring and unconditional imprisonment) provided by the Criminal Code.<sup>139</sup>

In the Netherlands, besides criminal punishment, certain measures (*maatregelen*) can be imposed on the head of business: withdrawal from circulation, confiscation of unlawfully obtained gains and compensation for the victims.<sup>140</sup> Administrative law, in addition, provides for the possibility of repealing or denying licences in case of serious doubts regarding the integrity of a legal entity or a natural person associated with it.<sup>141</sup> Third-party confiscation of unlawfully obtained gains is possible, but the Dutch Report also notes that 'disentangling individual corporate involvement within corporate groups has proved difficult'.<sup>142</sup>

In Poland, alongside the general criminal sanctions applied under the Criminal Code (fines, limitation of liberty and deprivation of liberty), other specific criminal measures are available for economic crimes, such as the deprivation of public rights; the prohibition from occupying a specific position, practising a specific profession or operating a specific business activity; the prohibition from entering gambling facilities and engaging in gambling games; and the publication of the sentence. For fiscal crimes, specific measures are provided (including, in particular, forfeiture of the equivalence in value of the material benefit or the prohibition from operating a specific business activity).<sup>143</sup>

## 8. Relationship with liability of legal person

The liability of legal persons remains a sensitive issue at the national level. As mentioned above, several EU approximation instruments introduced obligations to establish such a form of liability, but without specifying the nature/label to be attached to it. Member States have therefore remained free to label the new form of liability criminal, administrative or civil, providing the effective, proportionate and dissuasive nature of the applicable penalties. The compared systems represent a variety of options in this regard, from an established tradition of criminal liability of legal entities (in the Netherlands) to the German punitive administrative model. In line with the model of liability designed in EU criminal instruments, however, the responsibility of the legal entity in all

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<sup>139</sup> Finland National Report, 25-26.

<sup>140</sup> See Netherlands National Report, 244.

<sup>141</sup> Netherlands National Report, 246.

<sup>142</sup> Netherlands National Report, 247.

<sup>143</sup> See Poland National Report, 290.

systems does not exclude and may concur with the responsibility of the individual employee or head of business.

In Germany, quite large administrative fines can be imposed upon the legal entity under the German Code on Administrative Offences (*Ordnungswidrigkeitengesetz*, OWiG, see § 30). According to the provision, the corporation may be liable if certain ‘triggering persons’<sup>144</sup> committed a criminal or administrative offence that either violated an obligation incumbent on the corporation or led (or was intended to lead) to an enrichment thereof (‘company-related offences’). It is important to note that under this scheme of liability, the ‘company-related offence’ may also be represented by § 130 OWiG (violation of a supervisory duty by the owner). Secondly, since 2002, persons responsible for supervisory functions (such as supervisory boards, environmental officers) are included among the ‘triggering persons’ for the purposes of § 30 OWiG.<sup>145</sup>

Finland introduced the criminal liability of legal persons in 1995. The Finnish model of corporate criminal liability is limited to certain enumerated offences (which nevertheless include PIF offences) and endorses a ‘hybrid model’ of attribution. The liability of the legal person may indeed be established either on the basis of the ‘identification doctrine’<sup>146</sup> or on the basis of an organisational fault. In the first case, the corporation may be held liable when a person who is a member of a statutory organ or who exercises actual decision-making powers within it is liable as a perpetrator or accomplice in the commission of an offence on behalf or for the benefit of the corporation. The second scenario occurs when a relevant offence has been committed and it is established that ‘the care and diligence necessary for the prevention of the offence have not been observed in the operations of the corporation’.<sup>147</sup> Individual and corporate responsibility may concur: corporate criminal liability indeed does not exclude the criminal liability of the individual head of business and, normally, both the corporate entity and the manager are prosecuted in parallel and coordinated proceedings. On the other hand, corporate liability based on organisational fault may also be established

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<sup>144</sup> See Germany National Report, 155.

<sup>145</sup> The National Report expressly mentions that such an extension of the personal scope of § 30 OWiG occurred in the enactment of Art. 3 (1) of the Second Protocol to the PIF Convention. Germany National Report, 156.

<sup>146</sup> See *supra* section 2.3, 344.

<sup>147</sup> See Finland National Report, 21.

when the individual liability of the head of business is not established ('anonymous *culpa*').<sup>148</sup>

In the Netherlands, corporate criminal liability has been admitted since the 1950s and, moreover, represents a prerequisite for the individual liability of the head of business under the scheme of 'actually directing' (Art. 51 (2) of the Dutch Criminal Code).<sup>149</sup> Corporate criminal liability, in this scheme, is triggered if the commission of a criminal offence 'can be reasonably attributed or imputed to the legal entity'.<sup>150</sup> Reasonable attribution is based on an overall assessment elaborated by the case law of the Supreme Court and includes several factors (the employment status of the perpetrator, the normal business activities conducted by the legal entity, the benefit obtained by the legal entity, the control over the commission of the crime or its acceptance by the legal entity). The National Report also highlighted how the scope of the persons that may involve the criminal liability of the legal entity is substantial and potentially quite broad: in particular, it does not necessarily require the involvement of the 'directing minds' of the corporation.<sup>151</sup> The *mens rea* element for the corporation may be fulfilled either by attributing the subjective *mens rea* of the individuals to the corporation or, more relevantly, on the basis of 'organisational deficiencies or policies (the organisational fault model)'.<sup>152</sup>

In Poland, liability of legal entities as a consequence of the commission of a criminal offence was introduced in 2002. The liability of the legal entity has not been expressly labelled as criminal, but entails a punitive (repressive) nature,<sup>153</sup> as was acknowledged by the Polish Constitutional Court in 2004. Liability of legal entities comprises a list of specific offences, including PIF offences, and is triggered when such an offence is committed by certain qualified 'triggering persons' for the benefit of the legal entity, and if the commission was the result of either a lack of due diligence in hiring or supervising the 'triggering' individual or an organisation of the operations of the collective entity in such a manner that the commission of the offence could not have been prevented.<sup>154</sup> The liability of the legal entity does not exclude the individual liability of the natural person committing the offence.

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<sup>148</sup> See Finland National Report, 22.

<sup>149</sup> See Netherlands National Report, 205.

<sup>150</sup> See Netherlands National Report, 235.

<sup>151</sup> Netherlands National Report, 236.

<sup>152</sup> Netherlands National Report, 237.

<sup>153</sup> See Poland National Report, 263.

<sup>154</sup> Poland National Report, 282-283.

In France, the criminal liability of legal persons was introduced for the first time in 1994 and is nowadays applicable to all the offences committed '*pour leur compte*' by their organs or representatives.<sup>155</sup> Responsibility is based on the 'identification doctrine' and does not exclude the accumulation and concurrence with the individual criminal responsibility of the perpetrators and accomplices.

## 9. Punitive administrative law

Administrative regimes are receiving increasing attention in order to hold senior managers accountable for their omissions or lack of supervision or control. Beyond the scope of this research, one notable example is represented by the introduction in 2016 of the UK Senior Manager and Certification Regime (SM&CR) for the financial sector.<sup>156</sup> Under this regime, senior managers in the top two tiers of corporations (board of directors and executive management) are obliged to subscribe to an individual 'statement of responsibilities' setting out areas of responsibility. A failure to take 'reasonable steps'<sup>157</sup> to prevent regulatory breaches in the area of responsibility may eventually lead to the imposition upon the individual senior manager of a regulatory fine.<sup>158</sup> Legal entities, furthermore, are obliged to adopt and share with the FCA (Financial Conduct Authority) and the PRA (Prudential Regulation Authority) 'management responsibilities maps' in order to facilitate the identification of responsibilities for regulatory purposes.

Another recent example of individual administrative liability focusing on heads of business is provided by the new anticorruption scheme introduced in France with the Sapin II law: as previously mentioned, under the new law, companies above a certain size<sup>159</sup> are obliged to adopt and implement specific anti-corruption compliance programmes and procedures and, in the event of a failure, both the senior manager and the legal person can be fined by the Anti-Corruption Agency.

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<sup>155</sup> See Art. 121-2 French Criminal Code.

<sup>156</sup> See K Ligeti, *Criminal Liability of Heads of Business*, cit., 146.

<sup>157</sup> Appropriate and clear delegation is considered part of the "reasonable steps".

<sup>158</sup> The imposition of a fine under the SM&CR would not occur *ex abrupto*; the senior manager is, in the first place, enabled to demonstrate to the regulatory authority the reasonableness of the steps he undertook.

<sup>159</sup> The applicability threshold requires more than 500 employees and a turnover exceeding 100 million euros. See the France National Report, 95.

In the field of administrative punitive law, a German provision appears particularly relevant for the purposes of this research, the already mentioned § 130 OWiG.<sup>160</sup> This provision establishes the administrative liability of owners of corporations for failing to supervise their employees, in the event that the latter commit an administrative or criminal offence. The liability scheme of § 130 OWiG relaxes the strict causality requirement that would be necessary to establish criminal liability by omission; it also covers negligent violations of the supervisory duties by the owner.<sup>161</sup> In particular, under § 130 OWiG, in order to establish a causal link between the breach of the supervisory duty and the commission of the offence by the subordinate, it would be sufficient to demonstrate that the omitted supervision, had it been in place, would have ‘made much more difficult’ the commission of the offence (therefore, endorsing a lower risk-reduction standard than the ‘almost certain probability’ required for criminal omission).<sup>162</sup> Further simplifying the liability scheme, § 130 OWiG considers the predicate offence committed by the subordinate a mere objective condition of punishment, implying that the *mens rea* of the supervisor need not extend to it. Finally, § 130 OWiG constitutes the ‘connecting offence’ for triggering the administrative liability of the legal person under § 30 OWiG.

From an EU perspective, however, administrative liability may potentially provide a viable alternative to close the ‘responsibility gap’ in relation to the liability of heads of business in the PIF domain. In this regard, it might be useful to consider the possibility of introducing an autonomous administrative offence sanctioning the negligent supervision or control of the head of business in the event of the commission of a PIF offence by one of his/her subordinates. The administrative qualification of the offence would allow resorting to Art. 325 TFEU as a legal basis and for the possibility of adopting different and more stringent schemes of responsibility for failure to supervise (strict liability

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<sup>160</sup> § 130 (1) OWiG provides: ‘Whoever, as the owner of an operation or undertaking, intentionally or negligently omits to take the supervisory measures required to prevent contraventions, within the operation or undertaking, of duties incumbent on the owner and the violation of which carries a criminal penalty or a regulatory fine, shall be deemed to have committed a regulatory offence in a case where such contravention has been committed as would have been prevented, or made much more difficult, if there had been proper supervision. The required supervisory measures shall also comprise appointment, careful selection and surveillance of supervisory personnel.’ English translation available at: [https://www.gesetze-im-internet.de/englisch\\_owig/index.html](https://www.gesetze-im-internet.de/englisch_owig/index.html).

<sup>161</sup> See Germany National Report, 139,143

<sup>162</sup> Germany National Report, 139.

may be provided as a criterion for attribution,<sup>163</sup> although a negligence<sup>164</sup> standard would probably be preferable).

## 10. Conclusions

In light of the findings from the national reports, national law seems to provide different answers and different scopes of liability for heads of business under the general rules of criminal perpetration and complicity.

The PIF Directive, relying entirely on such national rules, seems therefore at risk of reproducing the deterrence (and coherence) gap already acknowledged by the Commission reports on the implementation of the PIF Convention and the Impact Assessment accompanying the proposal for the PIF Directive back in 2012.<sup>165</sup>

Considering that the same PIF Directive maintained the obligation for the Member States to hold accountable the legal entity for the lack of supervision or control by one of its leading persons, the silence around—or rather the step back from—the individual liability of those same leading persons appears inconsistent from the perspective of an effective anti-fraud enforcement.

A coherent approach would therefore require consideration of the most adequate way to close potential responsibility gaps and to enforce effective supervision and control for the prevention of PIF offences in a corporate environment.

In this regard, two options might deserve consideration:

- The introduction of an autonomous criminal offence under Art. 83 para 2 TFEU for the negligent supervision or control by a leading person that made possible the commission of a PIF offence by a person under its authority.

- The introduction of an autonomous administrative offence based on Art. 325 para 4 TFEU for the negligent supervision or control by a

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<sup>163</sup> The CJEU acknowledges that strict liability as such is not incompatible with EU Law, CJEU, 10.7.1990, C-326/88, *Hansen and Son*, para 11; CJEU, 27.2.1997, C-177/95, *Ebony Maritime SA*, para 37.

<sup>164</sup> The CJEU provided a definition of 'serious negligence' in the case *Intertanko* (CJEU, 3.6.2008, C-308/06, *International Association of Independent Tanker Owners (Intertanko)*), para 77: 'An unintentional act or omission by which the person responsible commits a patent breach of the duty of care which he should have and could have complied with in view of his attributes, knowledge, abilities and individual situation.'

<sup>165</sup> See *supra*.

leading person that made possible the commission of a PIF offence by a person under its authority.

In both cases, following the example of the *Corpus Juris*, rules on the validity of delegation of supervisory tasks should be provided. In particular, delegation should be made conditional on the requirements of the specificity and precision of the delegated task and on the transfer of actual powers and means (including disciplinary powers) for the effective fulfilment of supervisory functions by the delegate. The responsibility of the senior manager, in any case, should be retained for what concerns the appointment and the selection of delegates.

# CHAPTER IX

## POLICY RECOMMENDATIONS ON THE PUNITIVE LIABILITY OF COMPANY DIRECTORS IN A COMPARATIVE CRIMINAL JUSTICE CONTEXT

**SUMMARY:** 1. Introduction. – 2. Policy options. – 2.1. Policy option A): retention of the current scenario. – 2.2. Policy option B): introduction of a criminal offence of seriously negligent supervision or control in the current PIF Directive. – 2.3. Policy option C): introduction of an administrative offence of negligent supervision under Art. 325 para. 4 TFEU. – 3. Conclusion.

### **1. Introduction**

The current legal framework on the criminal law protection of EU financial interests<sup>1</sup> relies entirely on national criminal law for determining the scope of liability of company directors for offences committed by their employees. The Comparative Report highlighted the existence of rather different approaches to the scope of criminal perpetration and complicity at national level, a circumstance that may potentially determine significant disparities in the enforcement of the criminal law protection of EU financial interests across the EU territory and a ‘deterrence gap’ in the PIF policy.

The following policy recommendations are based on the findings of this volume’s Comparative Report and the Transversal Report.

From a policy perspective, three options might deserve consideration:

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<sup>1</sup> Directive EU 2017/1731 of 5 July 2017 on the fight against fraud to the Union’s financial interests by means of criminal law, OJ L 198/29 28 July 2017, Art. 5.

- **Option A: retaining the current scenario;**
- **Option B: changing the current scenario** by introducing an autonomous **criminal offence** for seriously negligent supervision under the current PIF Directive on the basis of Art. 83 para. 2 TFEU;
- **Option C: changing the current scenario** by introducing an autonomous **administrative offence** for negligent supervision on the basis of Art. 325 para. 4 TFEU.

The three policy options will be briefly illustrated in the following paragraphs, together with specific recommendations for their implementation and with an assessment of their feasibility and convenience from the perspective of achieving the best possible protection of the EU's financial interests.

## 2. Policy options

### 2.1. *Policy option A): retention of the current scenario*

The most basic policy option is the maintenance of the current state of affairs on the punitive liability of the head of business under the PIF legal framework.

This option, by definition, would entail no further action at the EU level. The liability of the head of business would therefore continue to entirely rely on national rules on criminal perpetration and complicity, as currently provided under the 2017 PIF Directive.<sup>2</sup>

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<sup>2</sup> As the Comparative Report demonstrated, the 2017 PIF Directive represented a step back on the issue of liability of heads of business compared to the 1995 PIF Convention. The 2012 Commission Proposal for the PIF Directive did not reproduce the contents of Art. 3 of the 1995 Convention, which provided an obligation for the Member States 'to take all the necessary measures' to hold criminally liable 'heads of business or any persons having power to take decisions or exercise control' in case a PIF offence were committed 'by a person under their authority acting on behalf of the business'. This approach, actually, seems surprising in light of the policy statements that preceded the presentation of the proposal. The issue and the importance of the liability of heads of business was indeed highlighted in the 2011 Commission Communication on the protection of the financial interests of the EU by criminal law and by administrative investigations - An Integrated policy to safeguard taxpayers money, COM (2011) 293 final, p. 7. The same Communication also considered the inclusion under the new EU instrument on PIF protection criminal law of 'more systematic rules on aiding and abetting, instigation, attempt, as well as on intent and negligence'. Art. 5 of the adopted PIF Directive, as already specified, left the definition of those concepts to national law.

This option is not advised because, as indicated in the Comparative Report, the national rules on perpetration and complicity do actually diverge significantly and the current scenario will perpetuate the ‘deterrence gap’ pointed out in the Commission reports on the implementation of the 1995 PIF Convention.<sup>3</sup> Furthermore, as highlighted in the Comparative Report, the lack of an express provision on the punitive liability of heads of business appears incoherent with the retention under the PIF framework of a specific provision on the liability of legal persons for the lack of supervision or control by a leading person.<sup>4</sup>

A preference for maintaining the *status quo* may be supported by opportunity considerations of not reopening the negotiations on the framework for the criminal law protection of EU financial interests before the implementation of the new PIF Directive is completed and assessed and, particularly, pending the ‘start-up’ phase of the European Public Prosecutor’s Office. While understandable, such considerations do not invalidate the conclusion of the inadequacy of the current legal framework on the liability of heads of business. On the contrary, it is very likely that the entry into service of the EPPO and the multiplication of transnational PIF prosecutions will further highlight the limits of leaving liability rules (including those on the liability of heads of business) entirely determined by national law.<sup>5</sup>

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<sup>3</sup> See the Report from the Commission Implementation by Member States of the Convention on the Protection of the European Communities’ financial interests and its protocols, COM (2004) 709 final; Second Report from the Commission on the Implementation of the Convention on the Protection of the European Communities’ financial interests and its protocols, COM (2008) 77 final. See also the Commission Impact Assessment accompanying the 2012 Proposal for the new PIF Directive, SWD (2012) 195 final, p. 16. Although not reflected in the proposal text, the 2012 Impact Assessment stressed that the criminal liability of managers ‘differ[s] widely across the EU’ with some Member States applying restrictive approaches resulting in ‘a lack of deterrence’.

<sup>4</sup> Art. 6 para. 2 of the PIF Directive provides that ‘Member States shall also take the necessary measures to ensure that legal persons can be held liable where the lack of supervision or control by a person referred to in paragraph 1 of this Article (*“person having a leading position”*) has made possible the commission, by a person under its authority, of any of the criminal offences referred to in Article 3, 4 or 5 for the benefit of that legal person’.

<sup>5</sup> More generally, the differences and lack of harmonisation of certain general concepts of criminal law, and particularly rules on participation and complicity, may pose a significant challenge to consistent EPPO prosecutions.

In any event, should this option be preferred, it is recommended to specifically monitor and assess under Art. 18 paras 2 and 3 of the PIF Directive the consistency of the implementation of the PIF Directive in regard to the prosecution of heads of business according to the national rules on ‘inciting, aiding and abetting’.<sup>6</sup>

## *2.2. Policy option B): introduction of a criminal offence of seriously negligent supervision or control in the current PIF Directive*

The second possible option would entail a policy change on the specific issue and require legislative action under Art. 83 para. 2 TFEU.

Legislative action under this option might take the form of an amendment to the current PIF Directive and the introduction of a new provision (e.g. a new Art. 5bis) that establishes an autonomous criminal offence of seriously negligent supervision and control by a natural person ‘having a leading position’<sup>7</sup> within the legal person, in the event of the commission of a PIF offence by a person under his/her authority. The legal basis for introducing such an amendment, as mentioned, would be the same as that for the PIF Directive, Art. 83 para. 2 TFEU.

In implementing this policy option, the consideration of the following aspects is recommended:

- **Respect of the principle of legality and specification of the duty of care:** The new provision should expressly establish (in its first paragraph) an obligation for the persons ‘having a leading posi-

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<sup>6</sup> Art. 18 para. 2 of the PIF Directive requires the Member States to submit statistics on the criminal offences referred under Arts 3, 4 and 5 of the Directive, therefore including also the ‘number of criminal proceedings initiated, dismissed, resulting in an acquittal, resulting in a conviction and ongoing’ relating to persons suspected or accused of ‘incitement, aiding or abetting’ according to Art. 5 of the Directive.

<sup>7</sup> The definition of a person having a leading position is contained under Art. 6 of the PIF Directive in the context of the liability of legal persons. According to this definition a ‘leading position’ is based on: ‘(a) a power of representation of the legal person; (b) an authority to take decisions on behalf of the legal person; or (c) an authority to exercise control within the legal person’. In order to ensure consistency and a coherent application of the two forms of liability (individual and of the legal person), the same definition of ‘leading person’ should be adopted under the new criminal offence of seriously negligent supervision or control.

tion' within a legal person to exercise supervision and control in order to prevent the commission of PIF offences by persons under their authority. This obligation would constitute the precondition for the establishment of criminal liability of the head of business and represent a specification of the duty of care in the PIF domain. As already mentioned in the Comparative Report,<sup>8</sup> such a specification would ensure objective foreseeability of the managerial duty and exclude concerns about the compatibility of this specific form of omission liability with the principle of legality under Art. 49 of the EUCFR. In the same context, rules on delegation of supervisory and control duties should be laid down. Delegation of tasks within a complex organisation represents indeed a way to enact the duty of care. Nonetheless, in order to avoid abuses, delegation should exclude the liability of the leading person only if certain requirements are met. Those requirements may be identified in the specificity and precision of the delegated tasks and in the transfer of actual powers and means (including organisational and financial means and disciplinary powers) for the effective fulfilment of the supervisory tasks by the delegate. The person having a leading position, nonetheless, should be responsible for the selection of delegates and their appointment.

• **Respect of the principle of individual guilt and *mens rea*:** As the Comparative Report showed, the *mens rea* element represents one of the most critical points for establishing the criminal liability of the head of business (especially when applying the scheme of omission liability to those predicate offences—such as PIF offences—which are inherently intentional<sup>9</sup>). The establishment of an autonomous offence for lack of supervision, however, would allow for the adoption of an autonomous *mens rea* requirement for the own omission of the head of business, independently from the intentional nature of the PIF offence committed by employee. In other words, under this scheme, the violation of the duty to supervise and control might be attributed to the head of business also on the basis of negligence. The standard of '**serious negligence**' is recommended—although the new offence of negligent supervision or control would represent the only non-intentional PIF offence under the cur-

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<sup>8</sup> See Comparative Report, p. 358.

<sup>9</sup> See Comparative Report, p. 359.

rent framework.<sup>10</sup> An autonomous definition of such a standard has been provided by the CJEU in the *Intertanko* case as ‘an unintentional act or omission by which the person responsible commits a patent breach of the duty of care which he should have and could have complied with in view of his attributes, knowledge, abilities and individual situation’.<sup>11</sup>

• The combination of the ‘serious negligence’ standard and the express provision of an obligation for the person ‘having a leading position’ to exercise supervision and control in order to prevent the commission of PIF offences should guarantee an adequate balance between the respect of the principle of personal guilt and the deterring function of the new offence. As pointed out in the Comparative Report and in the Transversal Report, strict liability as a criterion for attribution in criminal law is not *per se* considered to contrast with EU Law;<sup>12</sup> nonetheless, the endorsement of such a standard (strict liability) is not advised, since its admissibility in the field of criminal law *stricto sensu* is controversial in several Member States.

• **Complementarity and consistency with the liability of legal persons:** The new norms should coherently complement the existing provisions on the liability of legal persons for lack of control or supervision (Art. 6 para. 2 of the current PIF Directive). In particular, it should be maintained that the (seriously) negligent failure of the head of business may be criminally relevant only when the PIF offence has been committed by the person under his/her authority ‘for the benefit’ of the legal person. This specification would keep the scope of the liability for the violation of the duty of supervision or control tied to the sphere of activity of the economic operator, mi-

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<sup>10</sup> To date, under EU Criminal Law, the standard of ‘serious negligence’ has been endorsed under the Directive 2008/99/EC on the protection of the environment through criminal law. The Directive itself does not contain, however, a definition of the concept of ‘serious negligence’; however, the concept has been defined by the CJEU.

<sup>11</sup> See CJEU, 3.6.2008, C-308/06, *International Association of Independent Tank Owners (Intertanko)*, para. 77. The definition provided by the CJEU should be recalled in the recitals or in the Explanatory Memorandum of the future proposal.

<sup>12</sup> See the CJEU cases *Hansen and Son* (CJEU, 10.7.1990, C-326/88) and *Eboni Maritime SA* (CJEU, 27.2.1997, C-177/95). See Comparative Report, p. 371 and Transversal Report, pp. 299-300, for the analysis of ECtHR case law on (limits to) the compatibility of presumptions of fact and law with the presumption of innocence.

tigating potential concerns about overcriminalisation of the managerial function.

• **Proportionality of the penalties:** The introduction of the new offence should comply with the principle of proportionality under Art. 49 para. 3 of the Charter. In concrete terms, however, it has to be recalled that the current PIF Directive is not particularly clear (nor ambitious) in terms of approximation of the sanctions for natural persons. Under the current framework, imprisonment is indeed required as a sanction only with regard to the offences provided under Art. 3 and 4 of the Directive and not also for the hypotheses of ‘incitement, aiding and abetting’ under Art. 5.<sup>13</sup> A minimum maximum penalty threshold of four years imprisonment is only foreseen when the offences ‘involve considerable damage or advantage’.<sup>14</sup> From the perspective of the introduction of a new offence of seriously negligent supervision and control, it is recommended that imprisonment be required as a penalty at least when the PIF offence committed by the employee involved a ‘considerable damage or advantage’.

### *2.3. Policy option C): introduction of an administrative offence of negligent supervision under Art. 325 para. 4 TFEU*

The third suggested option focuses on punitive administrative enforcement and concretely foresees the introduction of an administrative offence for the negligent supervision or control by a leading person in the event of the commission of a PIF offence by a person under his or her authority. Similar to the previous policy option, this option would imply a policy change and require legislative action.

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<sup>13</sup> This is inferred *a contrario* by comparing paras 1 and 2 of Art. 7 of the PIF Directive. Under the general provision of para. 1, which merely requires the Member States to lay down effective, proportionate and dissuasive criminal sanctions, Art. 5 is indeed cited. However, under para. 2, which expressly foresees the obligation to provide for imprisonment, only Arts 3 and 4 are cited. In other words, it seems that Member States are not obliged to impose imprisonment on the aider or abettor of a PIF offence.

<sup>14</sup> See Art. 7 para. 3 of the PIF Directive.

The legal basis for such intervention could be identified in Art. 325 para. 4 TFEU and, in order to ensure the highest degree of consistency and legal certainty, the legislative instrument could in this case take the form of a regulation.<sup>15</sup> Such a regulation should be complementary to the PIF Directive and subsidiary to its criminal law provisions (see below).

Under this policy option, the consideration of the following aspects is recommended:

- **Complementarity to the PIF Directive:** The new regulation should lay down complementary provisions to be applied in the event of the commission of an offence provided under Arts 3, 4 and 5 of the PIF Directive ‘for the benefit’ of a legal person by one of its employees. Also, in this case the focus of the offence should be based on the negligent supervision or control by a person in a leading position if such negligent control made possible the commission of the PIF offence by the employee. This complementary function, however, should be subsidiary to the application of criminal law provisions and exercised by OLAF and the competent national authorities in conformity with the EPPO mandate (see below).
- **Subsidiarity to criminal law provisions:** The administrative offence should apply only if the negligent supervision or control by the head of business does not constitute criminally punishable co-perpetration or another form of instigation, aiding or abetting in the meaning of Art. 5 of the current PIF Directive. This subsidiarity would ensure a coherent and integrated enforcement framework and avoid—on a substantive level—the risk of violating *ne bis in idem*. The subsidiarity may be expressed by the inclusion of a subsidiarity clause in the definition of the administrative offence (e.g. specifying that the offence would apply ‘except where the conduct of the leading person constitutes a criminal offence’).

- **Complementarity to the EPPO mandate:** The subsidiarity of the provision would also be functional to ensure complementarity to and respect of the EPPO mandate. Conversely, in case the negligent

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<sup>15</sup> Following a similar approach to Regulation 2988/95 on the protection of the European Communities’ financial interests.

supervision or control would not integrate a criminal offence according to the national rules on participation or complicity, the EPPO could transfer the case against the head of business to OLAF according to Art. 39 para. 4 of the EPPO Regulation. The proceeding for the administrative offence, in this regard, would represent ‘other administrative follow up’ in the meaning of the aforementioned provision.

• **Respect of the principle of legality and specification the duty of care:** Similar to Option B, the new regulation under Option C should preliminarily lay down an obligation for the persons ‘having a leading position’ within a legal person to exercise supervision and control in order to prevent the commission of PIF offences by persons under their authority. The respect of the principle of legality is relevant also in the context of punitive administrative law, and a specification and concretisation of the duty of care by establishing an express obligation for the head of business would also be needed under this option. A regulation adopted under Art. 325 para. 4 TFEU, in this regard, could include a far more detailed description of the specific obligations of the head of business, such as adopting and implementing an *ad hoc* compliance programme for the prevention of PIF offences or the subscription of individual ‘statements of PIF responsibilities’ by the persons holding a leading position. Rules on delegation, similar to the Option B, should be considered in this context.

• ***Mens rea:*** Similar to Option B, the autonomous configuration of an administrative offence for lack of supervision might allow the attribution of responsibility to the head of business on the basis of a negligence standard. In the field of punitive administrative law, a negligence standard less demanding than ‘serious negligence’ may be considered and strict liability may also represent an option. Considering the punitive nature of the provision and the need to respect the principle of individual guilt, the adoption of a (simple) negligence standard is nonetheless recommended.

• **Causal link between the negligent supervision or control by the head of business and the commission of the PIF offence:** As the Comparative Report showed, under criminal law, the configuration of the causal link between the omission of a supervisory duty by a leading person and the commission of an offence by an employee represents

a critical point.<sup>16</sup> While some systems (France, the Netherlands) accept a more flexible approach, others (Germany, Finland, Poland) retain a strict approach to causality that in practice would hinder the possibility of ascribing the responsibility to the head of business at the level of the *actus reus* (in the German model of *Quasi-Kausalität*, liability for the omission requires establishing that the result would not have occurred ‘with almost certain probability’ if the omitted action had taken place). Under punitive administrative law, on the other hand, the causal link may be intended in a more flexible way, e.g. by establishing liability when the (omitted) due supervision would have made much more difficult the commission of the offence.<sup>17</sup>

• **Proportionality of the sanctions:** The option for punitive administrative enforcement, obviously, excludes the opportunity to resort to the most symbolic criminal sanction, ‘imprisonment’. In adherence to the principle of proportionality, the new instrument could, however, provide for adequate punitive fines and exclusion measures (extending, e.g. the application of Art. 106 of the EU Financial Regulation<sup>18</sup>) that should apply to the individual head of business responsible for negligent control of supervision.<sup>19</sup> Since the new administrative offence would address negligent behaviours (which could carry very different degrees of actual social disvalue), an articulate and differentiated punitive response should be considered (e.g. prescribing that only fines should apply in the case of simply negligent omissions or minimal damage, while reserving a cumulative application of fines and exclusive measures for seriously negligent omissions or significant damage situations). The level of fines, *in abstracto*, should take into account the damage caused to EU financial interests and the advantage (for the legal person) gained through the commission of the PIF offence by the employee.

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<sup>16</sup> See Comparative Report, p. 356-357.

<sup>17</sup> An example of such a standard for causality is provided under the German § 130 of the *Ordnungswidrigkeitengesetz* (OWiG) which lays down an administrative offence for the violation of obligatory supervision in the context of enterprises; see Comparative Report, p. 357.

<sup>18</sup> Regulation 966/2012 on the financial rules applicable to the general budget of the Union.

<sup>19</sup> Art. 106 para. 1 (d) of the EU Financial Regulation already provides for such an exclusion, but its application is conditional on a final criminal judgement.

### 3. Conclusion

A preference and recommendation may be expressed in favour of Option C and the introduction of an administrative offence of negligent supervision and control under Art. 325 para. 4 TFEU. Although this option would actually represent a ‘second-best’ compared to the genuine criminal law intervention of Option B, in terms of feasibility, it would allow for a complementary intervention in the current state of affairs without immediately reopening and putting into question the framework of material competence for the EPPO. If set at an adequate level, complementary punitive administrative sanctions, on the other hand, may contribute to remedying the ‘deterrence gap’ that results from the existing divergence between national rules on perpetration and complicity. This conclusion, however, does not deny the need for reflection on the need to address at least some concepts of the general part of criminal law, even beyond the specific issue of the punitive liability of the head of business.



## ANNEX

# QUESTIONNAIRE FOR NATIONAL REPORTS

### **OBJECTIVES:**

The rise of new forms and modes of commission of EU-related offences and the corresponding challenges for law enforcement have triggered a series of developments in the area of the criminal law protection of the financial interests of the EU. In particular, many recent examples of fraudulent or corrupt management of corporations in the areas of customs, taxes, subsidies *et cetera* urge for a debate on whether or not to ‘pierce the corporate veil’ also with respect to the punitive law enforcement of EU policies.

Article 3 of the 1995 PIF Convention provided for an obligation on the Member States to take all the necessary measures to hold criminally liable the ‘heads of business or any persons having power to take decisions or exercise control’ for a PIF crime committed “by a person under their authority”.

The provision, however, expressly specified that such a form of liability had to be established “in accordance with the principles defined by the national law” of the Member State concerned.

The two Reports on the implementation of the Convention released by the European Commission in 2004<sup>1</sup> and 2008<sup>2</sup> highlighted a significant reluctance of the Member States to introduce *ad hoc* provisions, with some notable exceptions.

The level of harmonization on the liability of the heads of business across the EU territory, therefore, appears low and, as the Commission has pointed out in its reports, this may potentially jeopardize effective enforcement in this area.

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<sup>1</sup> COM (2004) 709 final, p. 5.

<sup>2</sup> COM (2008) 77 final, p. 3.

On the other hand, the current text of the proposal for a Directive on the protection of the EU's financial interests by means of criminal law<sup>3</sup> seems to have overlooked the issue previously considered under the 1995 Convention.

The aim of this questionnaire, within the broader objectives of the HOB study, is to map and systematize the national frameworks on the responsibility of heads of business, taking into particular consideration the hypothesis of commission by omission and the interplay between the individual liability of the head of business and the liability of the legal person (either administrative or – where applicable – criminal).

National rapporteurs are therefore requested to present their national legal framework under the 6 conceptual clusters of the questionnaire, providing where possible an account of the most relevant case law and the problems that have arisen in practice.

## **PART 1: CRITERIA FOR IMPUTATION OF CRIMINAL LAW RESPONSIBILITIES OF HEADS OF BUSINESSES AND THEIR THEORETICAL JUSTIFICATIONS**

### **A. Preliminary information**

1. Has your country implemented article 3 of the 1995 Convention on the protection of the European Communities' financial interests on the liability of heads of business through a specific provision? In the affirmative case, could you please provide an unofficial translation of the relevant legal provision?

1.1 In case of non-implementation, which were the reasons?

1.2 Were considerations relating to procedural safeguards involved in the national decision whether to implement or not the provision?

2. Could you provide some relevant examples of cases in which top managers were investigated for offences committed by an employee acting on behalf of the business<sup>4</sup>?

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<sup>3</sup> Commission Proposal COM (2012) 363 final; interinstitutional file 2012/0193 (COD).

<sup>4</sup> We are interested in both court cases and out of court cases. Please, focus only on the most recent cases and, particularly, highlight if there is the need for a supranational intervention. Please, consider both cases where the "rogue employee" was identified and cases where he/she was not clearly identified.

3. Could you provide a brief description of the policy debate in your country about the introduction of liability of company directors<sup>5</sup>?

## **B. Preliminary information on corporate liability**

4. Does your national legal system provide for corporate criminal liability? In the affirmative case, is corporate criminal liability established for all offences or is it restricted to specific offences? Are PIF offences<sup>6</sup> covered by the provisions on corporate criminal liability?

5. Does your national legal system provide for the administrative liability of legal persons as a consequence of an offence? In the affirmative case, is the administrative liability of legal persons established for all offences or is it restricted to specific offences? Are PIF offences covered by the provisions on the administrative liability of legal persons?

*5bis.* Could you please describe the policy debate about the introduction of corporate liability in your national system?

## **PART 2: RELATIONSHIP WITH GENERAL PRINCIPLES OF CRIMINAL LAW**

6. Does your national criminal law provide for a unified or differentiated system of participation in a criminal offence?

7. Does your system formally distinguish and define different forms of accessory liability such as instigating, aiding and abetting? In the affirmative case, could you please provide a translation of the relevant legal provisions or a brief account of the most relevant case law? How does this apply in the field of punitive administrative law?

8. Does your national criminal law provide for omission liability? Could you please provide a brief, general description of the requirements for such a form of liability and, in particular:

8.1 is there any general provision about the duty of care? How does

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<sup>5</sup> Please provide a short overview on the historical evolution, including prosecutorial policy (if any).

<sup>6</sup> For the purposes of our questionnaire, we are considering the current PIF framework established under the 1995 Convention and the First and Second Protocols, i.e. fraud affecting the EU financial interests both in respect of the expenditure and of the revenue of the EU, active and passive corruption of officials and money laundering.

your national system reconcile the concept of “duty of care” and the principle of *lex certa*?

8.2 is a causal link required between the omission and the commission of the offence? And in what terms (*conditio sine qua non*, increase of risk of commission)?

8.3 what is the *mens rea* required for omission liability?

8.4 how does this apply in the field of punitive administrative law?

9. Does your system provide any general provisions about the duty to report an offence and on the criminal consequences for the failure to do so? In the affirmative case, could you please indicate the subjective and objective scope of the duty and the requirements to establish criminal liability in case of a failure to report an offence?

9.1 How do reporting obligations relate with the privilege against self-incrimination?

10. Does your national system allow for strict liability offences? Is there any constitutional case law on the minimum requirement of *mens rea* for criminal liability? How does this relate to the presumption of innocence? How does this apply in the field of punitive administrative law?

10bis. Does your national system allow for special rules on liability with regard to specific fields, such as taxation?

### **PART 3: CONCEPT AND SCOPE OF THE CRIMINAL LAW RESPONSIBILITIES OF HEADS OF BUSINESS**

11. Does your national criminal law system expressly establish the criminal liability of heads of business through a specific provision?

12. In the affirmative case, what is the subjective scope of such liability? Does it cover corporate owners, members of the board of directors and executive directors?

13. Is such a form of liability based on specific duties to control and supervise the activities of the subordinates<sup>7</sup>?

14. Does your national criminal law require a causal link between the violation of the duties by the supervisor and the commission of the crime by the subordinate? Which type of causal relation is required?

15. Which form of *mens rea* is required to establish the responsibility of the supervisor? And in particular:

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<sup>7</sup> As, f.i. labour safety, environmental regulations, social security.

15.1 Must the supervisor actually be aware of the commission of the offence? F.i. by consciously disregarding information indicating the commission of an offence?

15.2 Or would it suffice that he or she should have known that an offence had been committed?

16. Under which limitations and conditions are corporate officials allowed to delegate control or supervision functions to subordinates?

17. How should the control and supervision duties of the head of business be discharged once an offence by a subordinate is discovered? Would the adoption of disciplinary measures and removal of the subordinate suffice to exclude the responsibility of the head of business? Is reporting to the judicial authority necessary?

18. How is the liability of heads of business established with regard to collective decisions?

19. How does the individual liability of heads of business relate to corporate criminal liability (if applicable)? And in particular:

19.1 Who are the individuals whose activity may implicate the liability of the corporation?

19.2 May the two forms of liability concur? (see also *infra*)

19.3 How may the liability of the corporation affect the liability of the individual?

20. What is the role of compliance programmes on the liability of heads of business?

20bis. Does your national system provide for an obligation to adopt a compliance programme and/or to appoint a compliance officer?

20bis.1 In the affirmative case, what are the consequences of failing to adopt a compliance programme?

#### **PART 4: DEFENCES**

21. May the actual effectiveness of supervision and control powers be raised in order to exclude the liability of heads of business, and if so to what extent? Can, f.i., an executive director claim as a defence that he was actually lacking effective powers of control and supervision?

21bis. May the delegation of control and supervision powers relieve the head of business of his/her duties, and if so to what extent? Is a formal delegation sufficient to discharge the duty and to shift the responsibility onto the subordinate?

22. Is the effective implementation of the compliance program/ or the appointment of the compliance officer reviewable in order to establish or exclude the liability of the head of business?

23. To what extent may the liability of an external auditor limit or exclude the responsibility of the head of business, f.i., with regard to bookkeeping offences?

## **PART 5: SANCTIONS**

24. What type of criminal or punitive administrative sanctions are provided in your system in regard to the responsibility of the head of business?

25. Which are the sentencing criteria/guidelines followed in criminal and administrative punitive law in order to determine the punishment for the individual head of business? Are there any specific sentencing criteria which are accorded particular weight in the national practice?

26. Could you compare the actual level of criminal sanctions or punitive administrative sanctions applied?

27. Are other types of punitive measures, such as administrative bans on negotiations in tender procedures or suspension of a professional licence, available in your national legal system? Are those measures available for all offences or just for specific offences? Where such measures exist, what is their target?

28. Is confiscation provided as a sanction for PIF offences? Is confiscation possible in criminal or administrative proceedings against the legal person? Under which conditions can confiscation be operated against a third party?

## **PART 6: RELATIONSHIP WITH PUNITIVE ADMINISTRATIVE LAW**

29. Are parallel criminal and administrative proceedings against the individual HoB allowed? In the affirmative case:

29.1 Does your national legal system impose the concentration of the proceedings?

29.2 Does your national legal system impose coordination of the two proceedings? And in which terms?

29.3 To what extent can evidence gathered in the course of administrative proceedings be used in criminal proceedings against the head of business?

29.4 To what extent can information gathered in a foreign proceeding be used in the proceedings against the HoB?

29.5 Is the head of business allowed to exercise his/her right to silence in the context of an administrative investigation? In the affirmative case, under which conditions?

30. Are parallel criminal or administrative proceedings against the legal person and against the individual head of business allowed? In the affirmative case:

30.1 Does your national legal system impose the concentration of the proceedings?

30.2 Does your national legal system impose coordination of the two proceedings? And in which terms?

30.3 To what extent can evidence gathered in the administrative proceedings against the legal person be used in the proceedings against the head of business?

30.4 To what extent can information gathered in a foreign proceeding against the legal person be used in the proceedings against the head of business (or viceversa)?

30.5 Is the head of business allowed to exercise his/her right to silence in the context of an administrative investigation against the legal person? In the affirmative case, under which conditions?

31. Is the individual liability of the head of business shielded or diminished if the corporation has previously pleaded guilty?

32. Is the previous imposition of an administrative penalty against the head of business taken into account in a subsequent criminal proceedings against the head of business for the same facts?



## ANNEX

# QUESTIONNAIRE FOR THE TRANSVERSAL REPORT ON THE SAFEGUARDS AND JUDICIAL PROTECTION OF THE HEADS OF BUSINESS

## OBJECTIVES:

The specific objective of this transversal report is to map those essential aspects of the supranational case law on the presumption of innocence, on the privilege against self-incrimination and on the principle of *ne bis in idem* which may result relevant in the context of the criminal liability of the heads of business.

For this purpose, we would ask the rapporteur to provide under each heading an overview and a critical assessment of the case law of the ECtHR and, where possible, of the CJEU. In particular, we would ask the rapporteur to highlight, where existent, the discrepancies between the case law of the two Courts which may impact on the scope of protection of the three fundamental rights under scrutiny.

The findings of this report will be used as an analytical grid for the comparative analysis and will be tested against the findings emerging from the national reports to identify the minimum standard and the limits of the protection of the fundamental rights of the head of business.

## 1. THE PRESUMPTION OF INNOCENCE:

1.1. Could you please provide us with an overview and a critical assessment of the case law of the ECtHR on the compatibility between presumptions of fact and of law in criminal cases and the presumption of innocence?

1.2. Are there any cases dealing with the relationship between the presumption of innocence and modes of criminal liability based on lack of supervision or control?

1.3. Are there any cases addressing the relationship between collec-

tive decisions of corporate organs and the individual liability of head of business?

## **2. THE PRIVILEGE AGAINST SELF-INCRIMINATION:**

2.1. Could you please provide us with an overview and a critical assessment of the case law of the ECtHR on the privilege against self-incrimination in criminal matters?

2.2. Could you please provide us with an overview and critical assessment of the case law of the CJEU on the privilege against self-incrimination in competition proceedings?

2.3. Would the privilege against self-incrimination – as interpreted by the ECtHR – allow a head of business to remain silent in the context of an administrative or criminal investigation conducted against the legal entity?

2.4. Would the privilege against self-incrimination – as interpreted by the ECtHR - allow for the use of evidence gathered in the context of a previous administrative or criminal investigation against the legal entity in a subsequent criminal proceedings against the individual head of business?

## **3. THE PRINCIPLE OF *NE BIS IN IDEM*:**

3.1. Could you please provide us with a preliminary general background on the case law of the European Courts (ECtHR and CJEU) on the principle of *ne bis in idem*?

3.2. Could you please provide us with an overview and a critical assessment of the case law of the ECtHR and of the CJEU on the compatibility of “dual track enforcement systems” (administrative and criminal) with the principle of *ne bis in idem*?

3.3. Could you please provide us with an overview and a critical assessment of the case law of the ECtHR and of the CJEU on the relationship between individual liability and corporate liability in the context of *ne bis in idem*?

## **4. CONCLUSIONS**

4.1. Would you consider the level of protection offered by the ECtHR (in regard to the three fundamental rights analysed) as adequate and sufficient to effectively guarantee the individual head of business?

4.2. Did you identify discrepancies or inconsistencies in the case law of two Courts that could impact and determine a different scope of protection between the ECHR framework and the Charter of Fundamental Rights?





