Development and Status of Economic Criminal Law in Germany

By Marc Engelhart[*]

A. Introduction

During the past decade, economic crime has been in the public focus in Germany like never before. Major cases, such as the embezzlement proceedings against former Deutsche Bank CEO Ackermann—the so-called *Mannesmann* proceedings—or the corruption incidents within the Siemens group, have shed more light on illegal behavior in the economic sector.[1] These cases revived an interest in economic criminal law that had not been present since the 1980s when the first wave of economic crime regulation after the establishment of economic criminal law as an academic subject and as a central part of criminal policy had passed.[2] This article analyzes the status and development of economic criminal law. First, it will deal with criminological aspects before turning to the forces in economic crime development. Second, it will examine the changes made in substantive, procedural, and soft law. It includes recent developments, such as the privatization of public investigations and the concept of compliance, as a means to prevent and discover criminal behavior.

B. Definition and Criminological Aspects

The term economic criminal law is widely used, but no common definition exists. The criminological approach still makes reference to Sutherland and his emphasis on white-collar perpetrators with a high social status.[3] Although the definition has been extended to

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[1] On the *Mannesmann* case from 2004 to 2006, *see* Bundesgerichtshof [BGH – Federal Court of Justice], 50 DECISIONS OF THE FEDERAL COURT OF JUSTICE (BGHSt) 331; Heiner Alwart, *Wirtschaftsstrafrecht im Übergang,* JURISTENZEITUNG (JZ) 546 (2006); Peter Kolla, *The Mannesmann Trial and the Role of the Courts*, 5 GERMAN L.J. 829 (2004); Gerald Spindler, *Vorstandsvergütungen und Abfindungen auf dem aktien- und strafrechtlichen Prüfstand – das Mannesmann-Urteil des BGH,* ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (ZIP), 349 (2006); Joachim Vogel, *Anmerkung*, JZ 568 (2006). On the *Siemens* case, which became public in 2007, *see* MARC ENGELHART, SANKTIONIERUNG VON UNTERNEHMEN UND COMPLIANCE 2 et seq. (2d ed. 2012); HARTMUT VOLZ & THOMAS ROMMERSKIRCHEN, DIE SPUR DES GELDES 20 et seq. (2009); Sebastian Wolf*, Korruption und Außenwirtschaftspolitik*, *in* DER KORRUPTIONSFALL SIEMENS 9 et seq. (Peter Graeff et al. eds., 2009).

[2] *See infra*, Part C.I.

[3] *See* Gerhard Dannecker, *Die Entwicklung des Wirtschaftsstrafrechts in der Bundesrepublik Deutschland*, *in* HANDBUCH DES WIRTSCHAFTS- UND STEUERSTRAFRECHTS, 1, 12 et seq. (Heinz-Bernd Wabnitz & Thomas Janovsky eds., 3d

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cover all persons committing crimes at their workplace (occupational crime), the definition is rather vague and conflicts with the constitutional requirement of defining criminal law by the elements of the offense and not by the offender.[4]

From a substantive law point of view, economic crimes are very much characterized by the protection of collective legal goods rather than individual rights.[5] This characteristic is the most important feature, as it stresses the protection of institutions in the economic market and makes economic criminal law a special means of regulation in the field of economic law.[6] As this approach is also rather vague, one generally refers to a definition in the Courts Constitution Act.[7] The Act lists all the statutes and offenses over which a special economic crime division within the regional court has jurisdiction.[8] The list does not cover all economic offenses, but gives a clear definition which research can be based on. Hence, the Federal Criminal Police Office collects data on this basis.[9]

For years, police data has shown the same picture—economic crimes make up only a small number of cases—yet it amounts to about half of the damage that is attributed to crime.[10] In 2012, economic crimes made up only 1.4 percent of all reported offenses, but were responsible for 48.9 percent of all damage reported—3.75 billion euros. In the last ten years, the numbers have differed considerably from year to year, but there is neither a clear increase in the number of cases, nor in the amount of damage. This means that

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ed. 2007); GÜNTHER KAISER, KRIMINOLOGIE § 75, paras. 15 et seq. (3d ed. 1996); KLAUS TIEDEMANN, WIRTSCHAFTSSTRAFRECHT: EINFÜHRUNG UND ALLGEMEINER TEIL 27–31 (4th ed. 2014).

[4] KLAUS TIEDEMANN, WIRTSCHAFTSSTRAFRECHT: EINFÜHRUNG UND ALLGEMEINER TEIL 28 (4th ed. 2014).

[5] ROLAND HEFENDEHL, KOLLEKTIVE RECHTSGÜTER IM STRAFRECHT 252 et seq. (2002); Ernst-Joachim Lampe, *Überindividuelle Rechtsgüter: Institutionen und Interessen*, *in* FESTSCHRIFT FÜR KLAUS TIEDEMANN, 79 et seq. (2008); Harro Otto, *Konzeption und Grundsätze des Wirtschaftsstrafrechts (einschließlich Verbraucherschutz),* 96 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT (ZStW) 339, 345 et seq. (1984).

[6] UTZ SCHLIESKY, ÖFFENTLICHES WIRTSCHAFTSRECHT 3 (4th ed. 2013); TIEDEMANN, WIRTSCHAFTSSTRAFRECHT, *supra* note 4, at 29.

[7] *See* Gerichtsverfassungsgesetz [GVG] [Courts Constitution Act], Jan. 27, 1877, RGBL. I at 41, § 74c, last modified Apr. 23, 2014, BGBL. I at 410–11.

[8] It covers, e.g., criminal offenses pursuant to the Patent Law, the Copyright Act, the Act against Unfair Competition, the Insolvency Statute, the Stock Corporation Act, and the Commercial Code. It also covers offenses of the penal code like fraud, computer fraud, breach of trust, the offering of a bribe, and the withholding and embezzlement of wages or salaries to the extent that special knowledge of business operations and practices is required in order to judge the case.

[9] The office publishes an annual report on the development of economic crime based on the general police statistics (PKS - *Polizeiliche Kriminalstatistik*). See the last report: FEDERAL CRIMINAL POLICE OFFICE (*Bundeskriminalamt*), BUNDESLAGEBILD WIRTSCHAFTSKRIMINALITÄT 2012 3 (2013), *available at* www.bka.de.

[10] *See id.* at 3–4.

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economic crime has neither become a more serious problem than before, nor that the enforcement strategies have shown visible results. Public awareness of these crimes is, therefore, due increasingly to the aforementioned spectacular cases and not to an increase in the number of crimes. Because of the high damage caused, economic crime remains a serious problem that needs special attention by both the legislature and enforcement agencies.

C. Forces of Development

Economic criminal law was overshadowed by general criminal law for a long time. After the Second World War, the legislature took up efforts to reform criminal law dating back to the beginning of the nineteenth century, which had been halted by the period of National Socialism and the Second World War.[11] This led to a substantive revision of the *Strafgesetzbuch* (StGB—Penal Code)[12] in the 1960s and 1970s. Economic crime, though, was not a topic that was much talked about. Building up the economy (*Wirtschaftswunder*) was the first priority. Prosecuting economic behavior would have impaired this development.[13] Therefore, neither the legislature nor the scientific community tried to develop a comprehensive and coherent system of economic crimes. The main exception was the decriminalization of minor crimes and the establishment of the system of regulatory offenses—the *Ordnungswidrigkeitenrecht*.[14] Often, new offenses were created not as criminal but as regulatory offenses, such as in the field of anti-trust law.[15]

[11] After the war, the legislator also had to revoke extensive economic crime legislation that had been passed by the National Socialists—especially during wartime—in order to reestablish to rule of law. This specific initiative to decriminalize the economy will not be discussed here in detail.

[12] Penal Code is the version promulgated on 13 November 1998. *See* STRAFGESETZBUCH [STGB] [PENAL CODE], Nov. 13, 1998, BUNDESGESETZBLATT, TEIL 1 [BGBL. I] at 3322, last modified Oct. 10, 2013, BGBL. I at 3799, art. 5.

[13] *See* Jürgen Taschke, *Zur Entwicklung der Verfolgung von Wirtschaftsstraftaten in der Bunderepublik Deutschland – Bemerkungen aus der Praxis,* 1 NEUE ZEITSCHRIFT FÜR WIRTSCHAFT-, STEUER- UND UNTERNEHMENSSTRAFRECHT (NZWiSt) 9, 10 (2012) (using the example of corruption outside Germany, which was not criminal).

[14] *See infra* Part D.IV.

[15] *See* Gesetz gegen Wettbewerbsbeschränkungen [GWB] [Act Against Restraints of Competition], July 27, 1957, BGBL. I at 1081. For the expansion of criminal law, *see infra*, Parts D.I.1. and D.IV.

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I. Economic Crime Reform Movement

Social change in the 1960s led to an economic crime reform movement that put attention on the scientific and political agenda. One key figure was the German law professor Klaus Tiedemann, who influenced its development in the following decades.[16] At the German Law Conference in 1972, Tiedemann presented an expert opinion on economic crime, which stimulated further discussion and political activities.[17] An expert commission set up by the Federal Ministry of Justice discussed the reform of economic crimes from 1972 to 1978.[18] A group of legal scholars also drafted a reform proposal.[19] The work resulted in two major legislative acts created in order to combat economic crime in 1976 and 1986.[20] They introduced new offenses like subsidy fraud[21] and a new section on computer crimes.[22]

II. Risk Society

In the 1960s, a debate also began about the consequences of economic development on the environment and about society's responsibility for future generations. This led to the codification of environmental crimes in the Penal Code in 1980.[23] The discussion gathered momentum in the mid-1980s, when Beck published his work on modern risk society and its

[16] See especially, his "Habilitation" thesis: TIEDEMANN, TATBESTANDSFUNKTIONEN IM NEBENSTRAFRECHT (1969).

[17] *See* 2 DEUTSCHER JURISTENTAG [ASSOC. OF GERMAN JURISTS], VERHANDLUNGEN DES 49. DEUTSCHEN JURISTENTAGS (1972) (containing substantive contributions by Schäfer and Noll as well).

[18] *See* BUNDESMINISTERIUM DER JUSTIZ [FED. MINISTRY OF JUSTICE], BEKÄMPFUNG DER WIRTSCHAFTSKRIMINALITÄT. SCHLUSSBERICHT DER SACHVERSTÄNDIGENKOMMISSION ZUR BEKÄMPFUNG DER WIRTSCHAFTSKRIMINALITÄT–REFORM DES WIRTSCHAFTSSTRAFRECHTS–ÜBER DIE BERATUNGSERGEBNISSE (1980).

[19] The expert group consisted of the criminal law professors Ernst-Joachim Lampe, Theodor Lenckner, Walter Stree, Klaus Tiedemann, and Ulrich Weber. *See* LENCKNER ET AL., ALTERNATIV-ENTWURF EINES STRAFGESETZBUCHS, BESONDERER TEIL. STRAFTATEN GEGEN DIE WIRTSCHAFT (1977).

[20] Erstes Gesetz zur Bekämpfung der Wirtschaftskriminalität [1. WiKG], July 29, 1976, BGBL. I at 2034; Zweites Gesetz zur Bekämpfung der Wirtschaftskriminalität [2. WiKG], May 15, 1986, BGBL. I at 721. *See* Klaus Tiedemann, *Der Entwurf eines Ersten Gesetzes zur Bekämpfung der Wirtschaftskriminalität*, 87 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT (ZSTW) 253 (1975); Klaus Tiedemann, *Die Bekämpfung der Wirtschaftskriminalität durch den Gesetzgeber*, 41 JZ 865, 867 (1986).

[21] PENAL CODE, BGBL. I at 3322, § 264 (1998).

[22] Computer crimes in the penal code comprise § 202a (data espionage), § 263a (computer fraud), § 269 (forgery of data intended to provide proof), § 270 (meaning of deception in the context of data processing), § 303a (data tempering), § 303b (computer sabotage). *See* ULRICH SIEBER, INFORMATIONSTECHNOLOGIE UND STRAFRECHTSREFORM (1985); ULRICH SIEBER, COMPUTERKRIMINALITÄT UND STRAFRECHT (2d ed. 1980).

[23] *See* 18. Strafrechtsänderungsgesetz – Gesetz zur Bekämpfung der Umweltkriminalität [18th Act on the Reform of Criminal Law – Act on Combating Environmental Crime], Mar. 28, 1980, BGBL. I at 373 (introducing § 324–330d into the penal code). On the history of the legislation, see FREYJA KRÜGER, DIE ENTSTEHUNGSGESCHICHTE DES 18. STÄG (1995).

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special vulnerability due to technical development and social changes.[24] Accidents in 1986, such as in Chernobyl or the major fire at the Sandoz AG chemical plant in Basel, and their impact on the environment and everyday life were seen as examples of this change. They led to an intensive discussion on the existing instruments and ultimately to a substantive reform of environmental criminal law in 1994.[25] Besides the environment, organized crime was identified as one of the major threats to modern society. This led to several acts in the 1990s that introduced the offense of money laundering, expanding investigative measures as well as the personal resources of police and prosecution.[26] As organized crime is closely connected to the economic market, this also promoted the prosecution of economic crimes.[27]

III. Reactive Regulation

In the 1990s, the national movement to reform economic criminal law finally lost its major impact on scientific discussion and law making. Legislation mainly concentrated on individual aspects, often in response to public discussion.[28] Examples are combating illegal employment,[29] illegal foreign trade (especially dealings with weapons),[30] and private commercial bribery.[31] This not only led to a non-systematic approach to economic crimes, but also left economic criminal law scattered (often referred to as *fragmentarisches Recht*) and, in many areas, highly symbolic (*symbolisches Recht*). Political marketing often seemed

[24] *See* ULRICH BECK, RISIKOGESELLSCHAFT (1986).

[25] *See* Zweites Gesetz zur Bekämpfung der Umweltkriminalität [Second Act on Combating Environmental Crime], June 27, 1994, BGBL. I at 1440.

[26] *See* Gesetz zur Bekämpfung des illegalen Rauschgifthandels und anderer Erscheinungsformen der Organisierten Kriminalität [Act Combating Illegal Drug Dealing and other Phenomena of Organized Crime], July 15, 1992, BGBL. I at 1302 (introducing penal code § 261 on money laundering); Gesetz zur Verbesserung der Bekämpfung der Organisierten Kriminalität [Act on the Improvement of Combating Organized Crime], May 4, 1998, BGBL. I at 845.

[27] See the comprehensive study on organized crime in Germany by Jörg Kinzig. JÖRG KINZIG, DIE RECHTLICHE BEWÄLTIGUNG VON ERSCHEINUNGSFORMEN ORGANISIERTER KRIMINALITÄT 163, 243, 392 (2004) (showing the use of the economic market by organized crime groups and the legal reactions of fighting organized crime).

[28] *See* Hans Achenbach, *Zur Entwicklung des Wirtschaftsstrafrechts in Deutschland seit dem späten 19. Jahrhundert,* 2007 JURISTISCHE AUSBILDUNG (JURA) 342, 346 et seq.

[29] *See* SVEN BRENNER, BEKÄMPFUNG DER SCHWARZARBEIT (2008); Gerhard Dannecker, *Die Entwicklung des Wirtschaftsstrafrechts in der Bundesrepublik Deutschland*, *in* HANDBUCH DES WIRTSCHAFTS- UND STEUERSTRAFRECHTS 1, 47 et seq. (Heinz-Bernd Wabnitz & Thomas Janovsky eds., 3d ed. 2007); Alexander Ignor & Stephan Rixen, *Grundprobleme und gegenwärtige Tendenzen des Arbeitsstrafrechts,* 2002 NEUE ZEITSCHRIFT FÜR STRAFRECHT (NSTZ) 510.

[30] *See* Klaus Bieneck, *Die Außenwirtschaftsstrafrechts-Novelle*, 2006 NSTZ at 608.

[31] *See* Gesetz zur Bekämpfung der Korruption [Act on Combating Corruption], Aug. 13, 1998, BGBL. I at 2038, §§ 298–299 (introducing a new part on private commercial bribery into the penal code).

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more important than the serious evaluation of alternatives and analyses of the effectiveness of the chosen measures.

IV. Internationalization and Europeanization

Whereas the national reform initiatives in Germany had lost momentum, supranational law became a major motor for reform at the beginning of the 1990s. On the international level, the OECD convention on combating bribery had a great influence on criminalizing bribery abroad.[32] The OECD monitoring system enables critical assessment of the German system on a regular basis and provides political input.[33] The European Union has become even more influential than the OECD in the meantime.[34] Its legislation increasingly shapes national criminal law, either by directly applicable regulations or by obligations that the national lawmakers have to implement. European legislation has had a great influence on the German criminal law regulations for insider trading and market manipulation, the falsification of balance sheets, or on the reform of subsidy fraud and the rules for corporate criminal liability.[35] Nowadays, initiatives for reform very often stem from the European level.[36]

V. Compliance Movement

Within the last decade, the compliance movement from the USA has greatly influenced the economic crime debate.[37] The idea has become so influential that it will be dealt with

[32] *See* Gesetz zur Bekämpfung internationaler Bestechung [Act on Combating International Bribery], Sept. 10, 1998, BGBL. I at 2327 (equating foreign officials with national officials).

[33] *See, e.g.*, OECD, GERMANY: PHASE 3, REPORT ON THE APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 2009 REVISED RECOMMENDATIONS ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS 36 et seq. (Mar. 2011), http://www.oecd.org/dataoecd/5/45/47416623.pdf.

[34] Gerhard Dannecker, *Die Entwicklung des Wirtschaftsstrafrechts in der Bundesrepublik Deutschland*, *in* HANDBUCH DES WIRTSCHAFTS- UND STEUERSTRAFRECHTS, 1, 67 et seq. (Heinz-Bernd Wabnitz & Thomas Janovsky eds., 3d ed. 2007); HELMUT SATZGER, INTERNATIONALES UND EUROPÄISCHES STRAFRECHT 96 et seq. (6th ed. 2013); TIEDEMANN, *supra* note 4, at 56 et seq.

[35] *See* Marc Engelhart, *Europäisches Strafrecht*, *in* WIRTSCHAFTSSTRAFRECHT (Christian Müller-Gugenberger ed., 6th ed. 2014); HELMUT SATZGER, DIE EUROPÄISIERUNG DES STRAFRECHTS 291 (2001).

[36] For a good overview of the current European influences on German Criminal law, see Martin Heger, *Einwirkungen des Europarechts auf das nationale Strafrecht*, *in* ENZYKLOPÄDIE EUROPARECHT (ENZEUR), 9 EUROPÄISCHES STRAFRECHT § 5 (Martin Böse ed., 2013).

[37] *See* MARC ENGELHART, SANKTIONIERUNG VON UNTERNEHMEN UND COMPLIANCE 497 et seq. (2d ed. 2012); Lothar Kuhlen, *Grundfragen von Compliance und Strafrecht*, *in* COMPLIANCE UND STRAFRECHT 1 (Lothar Kuhlen, Hans Kudlich & Íñigo Ortiz de Urbina eds., 2013); Thomas Rotsch, *Compliance und Strafrecht*, 125 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT (ZSTW) 481 (2013); Ulrich Sieber, *Compliance-Programme im Unternehmensstrafrecht*, *in*

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separately below.[38] One main aspect of the discussion is how criminal law and compliance—as an instrument of public social control—can enhance prevention and influence economic developments.[39] Compliance is therefore part of a new discussion on legal approaches in a world-risk society where private and public spheres merge more closely in order to enhance the fight against transnational economic crime.[40]

D. Developments in Substantive Criminal Law

I. Expansion of Criminal Law and the Changing Nature of Offenses

Since the establishment of the German Penal Code in 1871, the legislature has constantly expanded criminal law regulations.[41] This is especially true for economic crimes, which have increased enormously in the last decades. Although no coherent legislative approach existed after the Second World War, and the prosecution level was low, the legislature began to add criminal law regulations to almost any statute on economic behavior. Therefore, the bulk of economic administrative law (*Wirtschaftsverwaltungsrecht*) is accompanied by some sort of criminal—or regulatory[42]—offenses. This has not only led to a vast number of offenses outside the Penal Code, but has also made it impossible to count them. Consequently, only a small number of specialists in their respective areas are familiar with these offenses. This fact has also contributed to hindering the development of a comprehensive theory of economic criminal law.[43]

Although there is no general theory, certain traits exist that characterize modern economic crimes in contrast to "traditional" crimes. One main feature already mentioned is the protection not of individual goods and rights, but of collective legal goods (*kollektive*

FESTSCHRIFT FÜR KLAUS TIEDEMANN 449, 475 et seq. (Ulrich Sieber, et al. eds., 2008); TIEDEMANN, *supra* note 4, at 6 et seq.

[38] *See infra,* Parts D.III.2., E. II., F.

[39] DENNIS BOCK, CRIMINAL COMPLIANCE 131 (2011).

[40] See the contributions by Ulrich Sieber, *Grenzen des Strafrechts,* 119 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT (ZStW) 1, 35 et seq. (2007); Ulrich Sieber*, Compliance-Programme im Unternehmensstrafrecht*, *in* FESTSCHRIFT FÜR KLAUS TIEDEMANN 449, 475 (Ulrich Sieber, et. al. eds., 2008); Ulrich Sieber, *Rechtliche Ordnung in einer globalen Welt*, 41 RECHTSTHEORIE 151, 189 (2010).

[41] The main exception is the previously mentioned introduction of the *Ordnungs-widrigkeitenrecht*. *See infra*, Part D.IV.

[42] *See infra,* Part D.IV.

[43] *See* TIEDEMANN, *supra* note 4, at 15, 27–32 (discussing the difficulties of finding common traits and a standard approach for economic crimes); *see also* ADOLF ZYBORN, WIRTSCHAFTSKRIMINALITÄT ALS GESAMTWIRTSCHAFTLICHES PROBLEM 63 (1972) (stating early that neither the legal nor the economic scholars feel responsible for the interdisciplinary field of economic crime).

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Rechtsgüter).[44] Very often, crimes are so-called special offenses (*Sonderdelikte*), which can only be committed by a certain category of persons.[45] Also, the offenses frequently require that the criminal act causes merely a general danger (*abstrakte Gefährdungsdelikte*), but no harm or concrete danger.[46] This is mostly the consequence of the protection of collective legal goods where no individual goods are to be harmed. Additionally, in many cases no willful act is required, but instead gross negligence[47] or even negligence[48] is sufficient. In order to facilitate prosecution, there is a tendency to criminalize very early stages of an act.[49]

II. Expanding Offenses by the Judiciary: The Breach of Trust (Section 266 of the Penal Code)

Both the legislature and the judiciary expanded the criminal law by taking a broad approach when applying and interpreting criminal offenses. An important example of such an extensive interpretation is the crime of breach of trust[50] that played a major role in the *Mannesmann* proceedings[51] and in the recent financial crises.[52] The legislature has

[44] *See supra*, note 5 and accompanying text. One example is insider trading according to section 38 of the Securities Trading Act, which protects firsthand the functioning and transparency of the financial market. Wertpapierhandelsgesetz [WpHG] [Securities Trading Act], July 26, 1994, BGBL. I at 2708, § 38.

[45] One example is section 266a of the Penal Code (non-payment and misuse of wages and salaries), which can only by committed by the employer. PENAL CODE, BGBL. I at 3322, § 266a (1998).

[46] For example, section 18 of the Foreign Trade Act requires some exports to possibly endanger international peace, but does not require endangerment itself. Außenwirtschaftsgesetz [AWG] [Foreign Trade Act], Apr. 28, 1961, BGBL. I 481, 485, § 18. Another important example is sec. 85 of the Private limited Companies Act, which penalizes the disclosure of business secrets but does not require any actual damage for the Company. Gesellschaft mit beschränkter Haftung Gesetz [GmbHG] [Private Limited Companies Act], Apr. 20, 1892, RGBL. I 477, § 85, last modified Mar. 2013, BGBL. I at 556, 559.

[47] *See, e.g.*, PENAL CODE, BGBL. I at 3322, § 283, para. 5 no. 2 (1998) (criminal bankruptcy).

[48] *See, e.g.*, PENAL CODE, BGBL. I at 3322, § 283 para. 5 no. 1 (criminal bankruptcy); Aktiengesetz [AktG] [Stock Corporation Act], Jan. 30, 1937, RGBL. I at 107, § 401, para. 2, last modified July 23, 2013, BGBL. I at 2586, 2706 (criminalizing the failure of members of the Board to convene a general meeting at a loss equal to half of the share capital).

[49] A classic example is Penal Code § 265b (obtaining credit by deception), which covers an incorrect application for credit regardless of any harm caused or intended as required by Penal Code § 263 (fraud). This makes it especially easy for the prosecution to start an investigation. *See* TIEDEMANN, *supra* note 4, at 84.

[50] For an overview of the structure of the offense, see PETRA WITTIG, WIRTSCHAFTSSTRAFRECHT 241 et seq. (2nd ed. 2011).

[51] For the *Mannesmann* case, see *supra*, note 1.

[52] *See, e.g.*, Volker Krey, *Financial Crisis and German Criminal Law*, 49 LEGAL POLICY FORUM (Rechtspolitisches Forum) 5 (2009); Christian Schröder, Wolfgang Wohlers & Thomas Fischer *Die strafrechtliche Bewältigung der Finanzkrise am Beispiel der Untreue,* 123 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT (ZSTW) 771, 791, 816 (2011).

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designed the definition of the criminal offense in a rather broad fashion by using legal terms that are open for interpretation. This approach is taken when the offense borders between punishable and permissible behavior. This means that the legislature largely allows the courts to determine whether a certain behavior is criminal or not, leaving the individual in a state of uncertainty about the legality of his acts.

The offense of breach of trust[53] provides that:

> [W]hosoever abuses the power accorded him by statute, by commission of a public authority or private legal act to dispose of assets of another or to make binding agreements for another, or breaches his duty to safeguard the pecuniary interests of another incumbent upon him by reason of statute, commission of a public authority, private legal act or fiduciary relationship, and thereby causes damage to the person, whose pecuniary interests he was responsible for, shall be liable to imprisonment of not more than five years or a fine.[54]

During the last two decades, German jurisprudence has broadened the scope of the offense substantively. For example, the element of crime concerning the "damage" caused not only includes a real financial loss but also the endangerment of pecuniary interests and hence possible damage that could occur in the future (*Gefährdungsschaden bzw. schadensgleiche Vermögensgefährdung*).[55]

The German Constitutional Court tried to narrow this approach in 2009[56] and 2010,[57] but in essence declared the offense to be constitutional. The Court ruled that breach of trust in its current application by courts does not yet violate the German Constitution, specifically the principles of certainty of criminal laws (*Bestimmheitsgrundsatz*) as laid down in Article

[53] PENAL CODE, BGBL. I at 3322, § 266 para. 1 (1998).

[54] Translation by the author.

[55] Walter Perron, *§ 266*, *in* STRAFGESETZBUCH margin no. 45 (Adolf Schönke & Horst Schröder eds., 28th ed. 2010). THOMAS FISCHER, KOMMENTAR STRAFGESETZBUCH § 266, margin no. 150 (61st ed. 2014).

[56] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 1980/07 (Mar. 10 2009). For a discussion of this case, see Thomas Fischer, *Gefährdungsschaden und versuchte Untreue*, 2010 STRAFVERTEIDIGER 95.

[57] Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 2559/08, 105/09, 491/09, NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 3209 (June 23, 2010). On the case, see Frank Saliger, *Das Untreuestrafrecht auf dem Prüfstand der Verfassung*, 2010 NJW 3195.

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103, paragraph 2 of the German Constitution. But the Court pointed out that the interpretation of legal terms, especially with regard to criminal law, has to be very restrictive, and jurisprudence is obliged to narrow the possibly broad understanding of the elements of crime by ensuring a very precise interpretation.[58] The term "damage," for example, has to be determined narrowly and very precisely on an individual basis in the future.

The recent constitutional ruling shows that the legislature can refer to the convenient method of constructing open and broad criminal offenses, leaving the judiciary with the task of finding an interpretation in accordance with the Constitution. To a certain extent, this shifts power from the legislature to the judiciary and makes the latter a quasi-legislator. This, of course, has the advantage of enabling a legal system to cover new developments—especially in the financial market—not foreseen by the legislature, thus circumventing the problem of retroactivity that any "reactive regulation" has. But, it puts the risk of determining the illegality of an act on the individual—and his legal advisors—and substantially degrades the principle of the foreseeability of criminal behavior.

III. Changing Substantive Criminal Law Figures

As Germany concentrated on economic development for several decades after the war, managers were rarely prosecuted.[59] Unclear standards for the criminal responsibility of the management level were one main reason. The *Contergan* case[60] at the end of the 1960s exposed the weaknesses of the law.[61] A German pharmaceutical company had produced a sleep-inducing drug. When initial evidence emerged that the drug damaged the fetuses of pregnant women taking the pills, the company decided to continue selling the drug during its investigation.[62] The company only withdrew the drug from the market when it had been clearly proven that the damage was due to the pills and several hundred children had already been stillborn or disabled. Several managers were therefore prosecuted.[63] The court proceedings showed the difficulty of proving individual responsibility in this case. There was no framework in place that established how criminal law could judge economic

[58] "Gebot restriktiver Auslegung" (principle of restrictive interpretation) and "Präzisierungsgebot" (principle of precise interpretation). Federal Constitutional Court, Case No. 2 BvR 2559/08, 105/09, 491/09 NJW 3209, paras. 80 et seq. (June 23, 2010).

[59] Taschke, *supra* note 13, at 9, 10.

[60] See the decision of the regional court (*Landgericht Aachen*), JURISTENZEITUNG (JZ) 1971, 507.

[61] See on the case, CHRISTIAN BEYER, GRENZEN DER ARZNEIMITTELHAFTUNG (1989); Armin Kaufmann, *Tatbestandmäßigkeit und Verursachung im Contergan-Verfahren,* 26 JURISTENZEITUNG (JZ) 1971, 569.

[62] Beyer, *supra* note 61, at 2; Kaufmann *supra* note 61, at 569.

[63] Beyer, *supra* note 61, at 158; Kaufmann, *supra* note 61, at 570.

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decisions within a company and construct responsibility for faulty products. Hence, the court dismissed the case.[64]

1. The Leather Spray Decision

It took until the 1990s for German courts to begin to develop adequate rules for the management level. The turning point was the *Leather Spray* decision by the Federal Court of Justice in 1990.[65] A company produced a spray for the protection of leather shoes that caused serious health problems. Nonetheless, the management decided to carry on selling the spray and to further investigate the case. After several more people were injured, public authorities stopped sale of the spray. The federal court upheld a conviction of the management for bodily injury caused by negligence; managers of a company that allow dangerous products to remain on the market are criminally responsible. The court applied a two-step approach in order to establish causality and attribution of responsibility.[66] First, it examined whether the company had a duty to act or to refrain from certain dangerous activities. Next, it examined whether the manager in question contributed to a decision to act or to refrain from necessary action. The court made clear that every manager who takes part in such a management decision is responsible and that top management decisions would now be closely reviewed under criminal law. It also emphasized that a manager taking part in a group decision could only avoid responsibility if he actively took measures to avoid any future damage.

2. Management Duties to Act/Compliance Duties

The *Leather Spray* decision already indicated that the Federal Court of Justice would elaborate on the duties of the management to act. Although the Supreme Court of the German Empire had already declared at the beginning of the nineteenth century that the owners and the leading management of a company have a duty to prevent crimes of their employees,[67] the concrete outline of this duty remained open for decades. From the 1990s

[64] *See supra*, note 60 and accompanying text. The court also took into account that the proceedings had already taken almost ten years and that the company had promised to pay 110 million Deutsche Mark into a foundation for children affected by the drug.

[65] Bundesgerichtshof [BGH – Federal Court of Justice] 37 BGHSt 106 (1990). On the case Eric Hilgendorf, *Fragen der Kausalität bei Gremienentscheidungen am Beispiel des "Lederspray-Urteils"*, 14 NEUE ZEITSCHRIFT FÜR STRAFRECHT (NStZ) 561 (1994); Bernd Schünemann, *Unternehmenskriminalität*, *in* 50 JAHRE BUNDESGERICHTSHOF, FESTGABE AUS DER WISSENSCHAFT 621 (Claus Wilhelm Canaris et al. eds., 2000).

[66] Lothar Kuhlen, *Strafrechtliche Produkthaftung, in* HANDBUCH WIRTSCHAFTSSTRAFRECHT 79 et seq. (Hans Achenbach & Andreas Ransiek eds., 3rd ed. 2012).

[67] *See, e.g.,* Reichsgericht [RG – Federal Court of Justice], Case No. 273/89, 19 ENTSCHEIDUNGEN DES REICHSGERICHTS IN STRAFSACHEN [RGSt] 204 (March 7, 1889); Reichsgericht [RG – Federal Court of Justice], Case No. V 146/14, 48 ENTSCHEIDUNGEN DES REICHSGERICHTS IN STRAFSACHEN [RGSt] 316 (June 5, 1914); Reichsgericht [RG – Federal Court of Justice], Case No. I 18/22, 57 RGSt 148 (Nov. 24, 1922); Reichsgericht [RG – Federal Court of Justice], Case No. I

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on, the Federal Court of Justice began to clarify several important aspects in a number of decisions.[68] For example, the owner and the company's leading management are held responsible if they actually take over duties to prevent harm—meaning that their formal position alone does not constitute responsibility—and have the possibility to prevent such harm.[69] They have a duty to act (*Garantenpflicht*), which makes them criminally responsible for any omissions that cause harm.[70] One clear limitation is that they are only responsible for company-related offenses of employees (*betriebsbezogene Taten*). Crimes committed at the workplace but without a connection to the company are excluded.[71]

A statement of the Federal Court of Justice in a 2009 decision[72] sparked the discussion on duties to act substantively.[73] The court stated that "the duty of a Compliance Officer is to prevent infringements of the law, especially crimes, which are conducted out of the company. Such Officers regularly have a duty to act according to sec. 13 Penal Code (Omissions)."[74] As this aspect was not relevant for the case, the court did not clarify it any further. The approach of the court was not only a reference to the increased importance of

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818/23 58 ENTSCHEIDUNGEN DES REICHSGERICHTS IN STRAFSACHEN [RGST] 130 (March 28, 1924); Reichsgericht [RG – Federal Court of Justice], Case No. 4 D 207/41 75 ENTSCHEIDUNGEN DES REICHSGERICHTS IN STRAFSACHEN [RGST] 296 (Aug. 8, 1941).

[68] Bundesgerichtshof [BGH – Federal Court of Justice] 47 BGHST 224; BGH NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2933, 1995; BGH NEUE ZEITSCHRIFT FÜR STRAFRECHT [NSTZ] 142, 2012); BGH, NSTZ 545, 1997.

[69] Although some questions have been clarified, the topic remains one of the most frequently discussed and most difficult in German criminal law. *See, e.g.*, THOMAS FISCHER, STRAFGESETZBUCH MIT NEBENGESETZEN § 13, para. 67 (61st ed. 2014); PATRICK SPRING, DIE STRAFRECHTLICHE GESCHÄFTSHERRENHAFTUNG 63 et seq. (2009).

[70] *See* PENAL CODE, BGBL. I 3322, § 13 (1998).

[71] *See* Bundesgerichtshof [BGH – Federal Court of Justice], Case No. 4 StR 71/11, 57 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [BGHST] 42 (Oct. 20, 2011) (finding a manager not responsible as he had no duty to prevent employees from beating another employee during working hours). *See also* Michael Nietsch, *Die Garantenstellung von Geschäftsleitern im Außenverhältnis*, 2013 CORPORATE COMPLIANCE ZEITSCHRIFT (CCZ) 192.

[72] Bundesgerichtshof [BGH – Federal Court of Justice], Case No. 5 StR 394/08, 54 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [BGHST] 44 (July 17, 2009).

[73] See Gerhard Dannecker & Christoph Dannecker, *Die, Verteilung der strafrechtlichen Geschäftsherrenhaftung im Unternehmen*, 65 JURISTENZEITUNG (JZ) 981 (2010); Matthias Jahn, *BGH, Urteil vom, 5 StR 394/08 mit Anmerkung,* JURISTISCHE SCHULUNG (JuS) 1142 (July 7, 2009); Thomas Kremer & Christoph Klahold, *Compliance-Programme in Industriekonzernen,* ZEITSCHRIFT FÜR UNTERNEHMENS UND GESELLSCHAFTSRECHT (ZGR) 113 (2010); Matthias Krüger, *Beteiligung durch Unterlassen an fremden Straftaten,* ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK (ZIS), 1 (2010); Andreas Ransieck, *Zur strafrechtlichen Verantwortung des Compliance Officers*, DIE AKTIENGESELLSCHAFT (AG), 147 (2010); Thomas Rönnau & Frédéric Schneider, *Der Compliance-Beauftragte als strafrechtlicher Garant*, ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (ZIP) 53 (2010).

[74] Bundesgerichtshof [BGH – Federal Court of Justice], Case No. 5 StR 394/08, 54 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [BGHST] 44, paras. 27–28 (July 17, 2009).

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compliance,[75] but also raised interesting questions regarding the liability of a compliance officer. The task of many compliance officers is the prevention of crime. Yet, such a job description does not automatically constitute a criminal obligation to act. In many cases, compliance officers are merely obligated to report to the chief executive officer.[76] If they fulfill this obligation, there is no room for a liability based on omission.[77] The court has not dealt with any of these problems. It is therefore not clear whether the court wants to constitute a new kind of responsibility for compliance officers and the management.

3. Managers as Indirect Perpetrators

Besides the duty to act, the Federal Court of Justice has based the criminal liability of managers on the rules of participation in crimes for indirect perpetrators. Roxin had originally developed the concept of "indirect perpetration by the use of organizational powers (*mittelbare Täterschaft durch Organisationsherrschaft*)," such as holding "armchair strategists" within bureaucratic structures—like the administration of the Third Reich—responsible.[78] The Federal Court of Justice adopted this approach in 1994 in order to hold responsible high-ranking politicians of the former German Democratic Republic for killings at the former border between the two German states.[79] The court declared that the important role of these background actors—who had allowed the killing of fugitives—makes it necessary to hold them accountable as perpetrators and not merely as abettors to the crimes of the direct perpetrators (the soldiers who killed the fugitives).[80]

In this decision, the court already made clear that the concept of indirect perpetration was not restricted to state crimes but could also be adopted in economic cases.[81] Hence, in

[75] *See infra* Part F.

[76] See Marc Engelhart, *Die neuen Compliance-Anforderungen der BaFin (MaComp)*, ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (ZIP) 1832, 1838 (2010); Thomas Lösler, *Zur Rolle und Stellung des Compliance-Beauftragten*, WERTPAPIER-MITTEILUNGEN (WM) 1098, 1102 (2008); Thomas Rönnau & Frédéric Schneider, *Der Compliance-Beauftragte als strafrechtlicher Garant*, ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (ZIP) 60 (2010).

[77] See Ransieck, *supra* note 73, at 153; Thomas Rönnau & Frédéric Schneider, *Der Compliance-Beauftragte als strafrechtlicher Garant*, ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT (ZIP) 58 (2010).

[78] CLAUS ROXIN, TÄTERSCHAFT UND TATHERRSCHAFT 242 (1963). See also the influential work of FRIEDRICH-CHRISTIAN SCHROEDER, DER TÄTER HINTER DEM TÄTER 166 (1965).

[79] *See* Bundesgerichtshof [BGH – Federal Court of Justice], Case No. 5 StR 98/94, 40 BGHST 218, 232 et seq. (July 26, 1994). See also these similar decisions: Bundesgerichtshof [BGH – Federal Court of Justice], Case No. 5 StR 494/95, 42 BGHST 65 (Mar. 4, 1996); Bundesgerichtshof [BGH – Federal Court of Justice], Case No. 5 StR 632/98, 45 BGHST 270 (Nov. 8, 1999); Bundesgerichtshof [BGH – Federal Court of Justice], Case No. 5 StR 281/01, 48 BGHST 77 (Nov. 6, 2002).

[80] *See* Bundesgerichtshof [BGH – Federal Court of Justice], Case No. 5 StR 98/94, 40 BGHST 218, 237 (July 26, 1994).

[81] *Id.* at 236.

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subsequent cases, the court applied it to companies and held managers responsible when they willingly and knowingly used company structures to make employees commit crimes.[82] This approach holds managers liable for abuses of their management powers;[83] they cannot hide behind the veil of the direct perpetrators. In contrast to the courts, many legal scholars view the extension to the economic sphere critically,[84] as company structures normally do not have the same influence on employees as abusive state structures like the Third Reich or the former German Democratic Republic did on their personnel. The court neither required the structures to be above the law, nor that the acting employee be easily interchangeable, which make up the classic requirements according to Roxin.[85] Yet, as companies have often developed a certain corporate spirit and the influence of the workplace on the individual is quite substantial, the court is justified to hold managers accountable if they abuse these corporate mechanisms. Under these circumstances, employees are much more willing to commit crimes than they normally would be.[86] In this context, the approach of the Federal Court of Justice makes it possible to prosecute managers according to what they are: The key figures.

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[82] *See* Bundesgerichtshof [BGH – Federal Court of Justice], Case No. 2 StR 339/96, 43 BGHSt 219 (Jun. 6, 1997); Bundesgerichtshof [BGH – Federal Court of Justice], Case No. 5 StR 145/03, 48 BGHSt 331 (Aug. 26, 2003); Bundesgerichtshof [BGH – Federal Court of Justice], Case No. 5 StR 73/03, 49 BGHSt 147 (May 13, 2004). *See also* Bundesgerichtshof [BGH – Federal Court of Justice], Case No. 4 StR 323/97, 1998 NJW 767 (Dec. 11, 1997); Oberlandesgericht München [OLG – Higher Regional Court], Case No. 4 StR 222/07, 2008 Neue Zeitschrift für Strafrecht (NStZ) 89 (Dec. 20, 2007).

[83] See also the synopses by Manfred Heinrich, *Zur Frage der mittelbaren Täterschaft kraft Ausnutzung hierarchischen Organisationsstrukturen bei Wirtschaftsunternehmen*, *in* Festschrift für Volker Krey 147, 148 (Knut Amelung & Hans-Ludwig Günther eds., 2010); Wolfgang Schild, *§ 25*, *in*: Strafgesetzbuch (Urs Kindhäuser et al. eds., 4th ed. 2013); Thomas Rotsch, *Tatherrschaft kraft Organisationsherrschaft?,* 112 Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW) 518, 536 et seq. (2000); Thomas Rotsch, Einheitstäterschaft statt Tatherrschaft 371 (2009); Jan Schlösser, Soziale Tatherrschaft, 28 et seq. (2004); Jan Schlösser, *Die Anerkennung der Geschäftsherrenhaftung durch den BGH*, Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht (NZWiSt) 281 (2012).

[84] *See* Kai Ambos, *Tatherrschaft durch Willensherrschaft kraft organisatorischer Machapparate, in* Goltdammer's Archiv für Strafrecht (GA) 226 (1998); Manfred Heinrich, *Zur Frage der mittelbaren Täterschaft kraft Ausnutzung hierarchischen Organisationsstrukturen bei Wirtschaftsunternehmen*, *in* Festschrift für Volker Krey 147, 154 et seq. (Knut Amelung & Hans-Ludwig Günther eds., 2010); 2 Claus Roxin, Strafrecht Allgemeiner Teil, § 25 para. 105 et seq. (2003).

[85] Roxin requires three preconditions: (1) The power to decide, (2) a structure acting above the law (*Rechtsgelöstheit*), and (3) interchangeability of the employee. In recent years, he has also required the increased willingness of the employee to act. *See* Claus Roxin, *Organisationssteuereung als Erscheinungsform mittelbarer Täterschaft, in* Festschrift für Volker Krey, 449 et seq. (Knut Amelung & Hans-Ludwig Günther eds., 2010).

[86] Roxin, *supra* note 85, at 462 (referencing the Peruvian case of the former president Fujimori).

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4. Forfeiture

The provisions of the Penal Code on forfeiture have become increasingly important in recent years.[87] Although the Penal Code is generally directed at individuals, the rules on forfeiture also apply to companies.[88] Forfeiture guarantees that the company is treated like any individual and does not profit from any illegal gain. As no rules exist on corporate criminal liability,[89] this construction thus serves the public interest by criminally "punishing" the company. Law enforcement agencies nowadays often confiscate the assets a company has received. It is sufficient that any employee of the company—who can even be an outside party—acts *for* the company and helps it to acquire something as a result of this action. Forfeiture is easier to carry out than a criminal conviction of the acting employee or corporate liability according to section 30 of the Act on Regulatory Offenses.[90] According to prevailing opinion—especially of the courts—forfeiture does not require an element of guilt,[91] as forfeiture is not regarded as a classical criminal sanction. A company rarely challenges an order of forfeiture successfully.

Some scholars wish to restrict the application to persons acting within the corporate sphere, which would exclude third parties.[92] Yet the Penal Code does not provide for such a restriction. The only effective restriction is the exclusion of forfeiture in cases in which a victim of the crime can claim damages.[93] This ensures that the company does not pay twice, to the victim and to the state. In many cases, this excludes forfeiture and is therefore called "the gravedigger of forfeiture."[94] Yet, in cases of economic crimes that protect collective legal goods (*kollektive Rechtsgüter*), there is often no individual who has been damaged and could claim compensation. Therefore, forfeiture is especially important in cases of economic crime.

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[87] *See* PENAL CODE, BGBL. I 3322, §§ 73 et seq. (1998). For regulatory offenses, section 29a OWiG is the corresponding regulation.

[88] In addition to the provisions of the penal code, other regulations provide for forfeiture, too. For example, section 34 of the Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen – GWB) provides for a competence to deprive a corporation of illicit profits in anti-trust cases. It can also be enforced by private corporations (section 34a GWB). A similar provision contains section 10 of the Act against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb – UWG).

[89] On corporate criminal liability, see *infra* Part D.IV.2.

[90] *Id.*

[91] *See* Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 2 BvR 564/95, 110 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 1 (Jan. 14, 2004); Bundesgerichtshof [BGH – Federal Court of Justice], Case No. 1 StR 115/02, 47 BGHST 369 , 372 et seq. (Aug. 21, 2002).

[92] *See* Albin Eser, *§ 73 para. 37*, *in* STRAFGESETZBUCH (Adolf Schönke & Horst Schröder eds., 28th ed. 2010).

[93] PENAL CODE, BGBL. I 3322, § 73, para. 1. (1998).

[94] Bundesgerichtshof [BGH – Federal Court of Justice], Case No. 5 StR 336/99, 45 BGHST 235, 249 (Oct. 19, 1999).

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Good faith on the part of management does not generally exclude the order of forfeiture against a company and does not justify any mitigation.[95] Efforts by the company to prevent crimes, especially by means of a compliance program,[96] are not recognized.[97] Forfeiture extends to all benefits and surrogate objects the individual or the company receives because of the offense.[98] The objects can be replaced by a corresponding amount of money.[99] Forfeiture is calculated according to the so-called gross value principle (*Bruttoprinzip*);[100] everything received must be returned. One is not allowed to detract any costs and expenditures. Otherwise there would be no economic risks if one were merely deprived of the net gain. This makes forfeiture a powerful tool of criminal law. As the consequences go beyond the mere deprivation of illicit profits, forfeiture very much resembles a "true" criminal sanction. As a consequence, forfeiture should only be ordered in cases of personal guilt.[101] Yet the courts do not follow this approach.

IV. Ordnungswidrigkeitenrecht

1. Decriminalization?

In the years following the introduction of the German Penal Code in 1871, the development of a separate administrative sanctioning regime began.[102] It led to the establishment of the Act on Regulatory Offenses (*Ordnungswidrigkeitengesetz*, hereinafter

[95] Bundesgerichtshof [BGH – Federal Court of Justice], Case No. 1 StR 202/04, JURISTISCHE RUNDSCHAU (JR) 517 (2004).

[96] On compliance, see *infra* Part F.

[97] The only possibility to take into account regarding the efforts of the company is if forfeiture were to constitute an undue hardship for the company ("hardship clause" according to PENAL CODE, BGBL. I 3322, § 73c (1998)). The Federal Court of Justice has indicated that it could be applied in cases when management acted in good faith. *See* Bundesgerichtshof [BGH – Federal Court of Justice], Case No. 1 StR 115/02, 47 BGHST 369, 377 (Aug. 21, 2002). *See also* ENGELHART, *supra* note 1, at 489; Sabine Stetter, *Korruption und Wirtschaftskrise: Machen sich Präventionsmaßnahmen bezahlt?,* 2009 CORPORATE COMPLIANCE ZEITSCHRIFT (CCZ) 227, 230 et seq.

[98] PENAL CODE, BGBL. I 3322, § 73 para. 1, 2 (1998).

[99] *Id.* § 73a. In case of regulatory offenses, the forfeiture of the monetary value is the general rule (§ 29a para. 1 OWiG).

[100] Bundesgerichtshof [BGH – Federal Court of Justice], Case No. 5 StR 138/01, 47 BGHST 260, 265 (Mar. 21, 2002). Bundesgerichtshof [BGH – Federal Court of Justice], Case No. 1 StR 115/02, 47 BGHST 369 , 370 et seq. (Aug. 21, 2002).

[101] *See* Eser, *supra* note 92, at § 73, para. 19; WOLFGANG MITSCH, KARLSRUHER KOMMENTAR ZUM ORDNUNGSWIDRIGKEITENGESETZ § 29a, para. 45 (Lothar Senge ed., 3d ed. 2006); KLAUS ROGALL, KARLSRUHER KOMMENTAR ZUM ORDNUNGSWIDRIGKEITENGESETZ § 30, para. 108 (Lothar Senge ed., 3d ed. 2006).

[102] Hans Achenbach, *Ahndung materiell sozialschädlichen Verhaltens durch bloße Geldbuße?,* 155 GOLTDAMMER'S ARCHIV FÜR STRAFRECHT 1 (2008); ENGELHART, *supra* note 1, at 325.

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OWiG) in 1968. This act contained the general rules for regulatory offenses (*Ordnungswidrigkeiten*).[103] These were meant to cover minor violations of the law without social blame, distinguishing them from criminal offenses. Of great importance are the regulations on corporate responsibility,[104] the breach of duty of supervision,[105] and the rules on forfeiture.[106] At the same time that the OWiG was introduced, the Penal Code was reformed, decriminalizing all minor criminal offenses and treating them as regulatory offenses.[107] Economic offenses in particular were shifted to the system of regulatory offenses.

These measures were meant to clearly separate a mere administrative violation from the criminal sphere. But the situation nowadays shows that this separation has not been successful. Like the number of economic criminal offenses, the number of economic regulatory offenses has greatly increased over the past decades.[108] There is no economic sector that has not been regulated by a substantive number of regulatory offenses. And there is hardly any difference between criminal and regulatory offenses; both are often meant to protect the same legal goods (*Rechtsgüter*) like the functioning of the financial market, consumers, or the environment. When regulatory offenses regulate materially harmful behavior, the legal wrong (*Unrecht*) is often treated as severely as in criminal law. This holds true, for example, in important economic areas like anti-trust regulation, securities trading, and the takeover of publicly traded companies. In these fields, monetary sanctions (*Geldbuße)* are possible, which are often higher than comparable criminal fines.[109] Here, the legislature has blurred the categories of criminal and regulatory offenses and often quite arbitrarily decides which regulative approach to use. This significantly diminishes the importance and public perception of criminal law. In the future, the legislature would be well advised to revert to the original idea of the system and to sanction only the most harmful behavior by criminal law and to regulate less severe behavior by regulatory offenses.

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[103] Gesetz über Ordnungswidrigkeiten [OWiG] [Act on Regulatory Offenses], May 2, 1968 BGBL. I at 481 (Ger.).

[104] *Id.* § 30.

[105] *Id.* § 130.

[106] *Id.* § 29a. In contrast to the criminal rules on forfeiture, see *supra* Part D.III.4. These rules cover assets resulting from breaches of regulatory offenses.

[107] *See* Einführungsgesetz zum OWiG [EGOWiG] [Introductory Act to the Code of Regulatory Offences], May 2, 1968, BUNDESGESETZBLATT, TEIL 1 [BGBL. I] at 503; Einführungsgesetz zum Strafgesetzbuch [EGStGB] [Introductory Act to the Criminal Code] Mar. 2, 1974, BUNDESGESETZBLATT, TEIL 1 [BGBL. I] at 469.

[108] *See* Achenbach, *supra* note 102.

[109] See the *Siemens* case, where a fine of EUR 201 Million applied, whereas the highest possible criminal fine would be EUR 10.8 Million according to Penal Code § 40. *See* ENGELHART, *supra* note 1, at 6–7; Tonio Walter, *Sanktionen im Wirtschaftsstrafrecht*, 43 JURISTISCHE ARBEITSBLÄTTER 481 (2011).

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2. Corporate Criminal Liability

In Germany, the criminal responsibility of companies does not exist, as this is regarded as not being in line with the constitutional and criminal concept of personal guilt (*societas non delinquere potest*). Only Section 30 of the OWiG provides for the regulatory liability of companies. The regulation has been expanded substantively within the past two decades—for example in 2002 due to European legislation widening the scope of application[110] and in 2013 due to the raising of the maximum fine from 1 to 10 million euros. As the *Siemens* case shows—in which primarily the company and not its employees were sanctioned—the prosecution makes increasing use of the provision. Often, the company is held responsible in combination with Section 130 of the OWiG for the lack of due supervision, which enables employees to commit a criminal offense, such as corruption in the *Siemens* case. This combination makes it possible to hold companies responsible for a criminal offense. It also puts pressure on companies to establish measures such as compliance programs to achieve the requirement of due supervision.

The question of whether a true criminal sanction against companies is necessary is still being discussed intensively in Germany.[111] In 2011, the ministers of justice of the 16 German states asked the Federal Ministry of Justice to analyze whether a criminal sanction is necessary in order to fight economic crime.[112] In November 2013, the state of North Rhine-Westphalia introduced a draft law on corporate criminal liability into the German Bundesrat.[113] The proposal follows the lines of the Second Protocol to the Convention on the protection of the European Communities' financial interests from 1997 (PIF Convention)[114] and provides for corporate liability if senior management commits a crime or if the lack of supervision or control by senior management enables offenses of persons

[110] *See* Hans Achenbach, *Ausweitung des Zugriffs bei den ahndenden Sanktionen gegen die Unternehmensdelinquenz*, ZEITSCHRIFT FÜR WIRTSCHAFTS- UND STEUERSTRAFRECHT 440 (2002); Dannecker *supra* note 3, at 1, 42; ENGELHART, *supra* note 1, at 327.

[111] *See* ENGELHART, *supra* note 1, at 599; KATHLEEN MITTELSDORF, UNTERNEHMENSSTRAFRECHT IM KONTEXT (2007); Andreas Ransiek, *Zur strafrechtlichen Verantwortung von Unternehmen,* NEUE ZEITSCHRIFT FÜR WIRTSCHAFT-, STEUER- UND UNTERNEHMENSSTRAFRECHT 45 (2012).

[112] *See* Herbstkonferenz der Justizministerinnen und Justizminister, TOP II.2 (Nov. 9, 2011) (protocol of the conference); *see also* ENGELHART, *supra* note 1, at 750.

[113] BUNDESRAT DRUCKSACHEN [BR], ENTWURF EINES GESETZES ZUR EINFÜHRUNG DER STRAFRECHTLICHEN VERANTWORTLICHKEIT VON UNTERNEHMEN 13 (forthcoming), http://www.justiz.nrw.de/JM/justizpolitik/jumiko/beschluesse/2013/herbstkonferenz13/zw3/TOP_II_5_Gesetzentwurf.pdf.

[114] 1997 O.J. (C 221/02) art. 3, 11 (1997) (drawing up the Second Protocol to the Convention on the protection of the European Communities' financial interests). For details, see Marc Engelhart, *Unternehmensstrafbarkeit im europäischen und internationalen Recht*, 3 EUCRIM 110 (2012).

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under their responsibility. Although the proposal remains very controversial,[115] the near future might bring about a change in German legislation.

E. Developments in Procedural Law

Procedural law has undergone many changes in recent years, such as the extension of investigative measures in order to keep pace with technical developments.[116] Besides these necessary adoptions, the nature of procedural law is changing. It is not the state alone that conducts and ends proceedings; other actors like economic parties and the accused are also substantially involved. This privatization can be seen in legal regulations, in investigative tactics, and in the phenomena of deals.

I. Privatization by Legal Regulation

Criminal law enforcement is one of the core tasks and obligations of the state. The time of enlightenment has discarded private law enforcement in favor of a public and objective system. Nonetheless, in recent years the state has begun to privatize parts of law enforcement, especially in regard to the investigation of crimes. It is not only the state that investigates; private companies are also included in the process of locating suspects and collecting evidence. This development is clearly visible in the fields of securities trading and money laundering, including the financing of terrorism.[117] The obligation exists for private companies to inform state authorities about possible insider trading, market manipulations, or money laundering.[118] Companies have far-reaching duties to document transactions and provide information about customers and to store documents.[119] In the

[115] *Cf.* DEUTSCHER ANWALTVEREIN [German Bar Association], STELLUNGNAHME NR. 54/2013 (December 2013). *See also* Elisa Hoven, *Der nordrhein-westfälische Entwurf eines Verbandsstrafgesetzbuchs – Eine kritische Würdigung*, ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK 19 (2014); Bernd Schünemann, *Die aktuelle Forderung eines Verbandsstrafrechts – Ein kriminalpolitischer Zombie* 1 (2014).

[116] See, for example, the extensive expertise on the status of measures against "cybercrime" by Ulrich Sieber for the German Law Conference in fall 2012 in Munich. 2 DEUTSCHER JURISTENTAG [ASSOCIATION OF GERMAN JURISTS], VERHANDLUNGEN DES 69. DEUTSCHEN JURISTENTAGS 139 (2012).

[117] *See* Wertpapierhandelsgesetz [WpHG] [Securities Trading Act], Sept. 9, 1998, BUNDESGESETZBLATT, TEIL 1 [BGBL. I] at 2708, last amended by Gesetz [G], Aug. 28, 2013, BGBL. I at 3395, § 9–15; Gesetz über das Aufspüren von Gewinnen aus schweren Straftaten – Geldwäschegesetz [GwG] [Act on Tracing Profits from Serious Criminal Activities], Aug. 13, 2008, BUNDESGESETZBLATT, TEIL 1 [BGBL. I] at 1690, last amended by Gesetzes [G], Dec. 18, 2013 BGBL. I at 4318, §§ 8, 11; Joachim Vogel, *Wertpapierhandelstrafrecht – Vorschein eines neuen Strafrechtmodells?, in* FESTSCHRIFT FÜR GÜNTHER JAKOBS 731, 742 (Michael Pawlik ed., 2007).

[118] Wertpapierhandelsgesetz [WpHG] [Securities Trading Act], Sept. 9, 1998, BGBL. I at 2708, last amended by Gesetz [G], Aug. 28, 2013, BGBL. I at 3395, § 10; Gesetz über das Aufspüren von Gewinnen aus schweren Straftaten – Geldwäschegesetz [GwG] [Act on Tracing Profits from Serious Criminal Activities], Aug. 13, 2008, BGBL. I at 1690, last amended by Gesetzes [G], Dec. 18, 2013, BGBL. I at 4318, § 11 (Ger.).

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case of securities trading, companies are obliged to inform the respective authority on a day-to-day basis about all transactions in publicly traded securities.[120]

In addition to these obligations, companies must take measures to prevent crimes. In securities law, companies are explicitly obliged to implement a compliance program.[121] In regard to money laundering, the measures are not that far reaching, but companies must implement organizational changes so that their business cannot be used to launder money or to finance terrorism.[122] These organizational measures enable companies to uncover evidence of possible crimes, which they then have to report to the authorities. One could say that the state has outsourced quite a substantive part of the investigative process. Although these examples are still limited to specific areas of economic criminal law, they show a new tendency in regulation.[123]

[119] Wertpapierhandelsgesetz [WpHG] [Securities Trading Act], Sept. 9, 1998, BGBL. I at 2708, last amended by Gesetz [G], Aug. 28, 2013, BGBL. I at 3395, § 15 (providing for insider registers); Gesetz über das Aufspüren von Gewinnen aus schweren Straftaten – Geldwäschegesetz [GwG] [Act on Tracing Profits from Serious Criminal Activities], Aug. 13, 2008, BGBL. I at 1690, last amended by Gesetzes [G], Dec. 18, 2013, BGBL. I at 4318, § 8.

[120] Gesetz über das Aufspüren von Gewinnen aus schweren Straftaten – Geldwäschegesetz [GwG] [Act on Tracing Profits from Serious Criminal Activities], Aug. 13, 2008, BGBL. I at 1690, last amended by Gesetzes [G], Dec. 18, 2013, BGBL. I at 4318, § 9.

[121] *Id.* at § 33. *See also* ENGELHART, *supra* note 1, at 503; Engelhart, *supra* note 76, at 1832; Vogel, *supra* note 117, at 743.

[122] Gesetz über das Aufspüren von Gewinnen aus schweren Straftaten – Geldwäschegesetz [GwG] [Act on Tracing Profits from Serious Criminal Activities], Aug. 13, 2008, BGBL. I at 1690, last amended by Gesetzes [G], Dec. 18, 2013 BGBL. I at 4318, § 9.

[123] Vogel, *supra* note 117, at 745 (speaking of the appearance of the new criminal law model).

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II. Factual Privatization: Compliance Investigations

Beginning with the Siemens case in 2007, compliance investigations have become commonplace.[124] These are internal investigations by the company when the possible commission of an offense is discovered. In many cases, external law firms or consultancies are mandated. The costs—several 100 million euros in the *Siemens* case—are covered by the company.[125] State authorities often accompany the investigations and make use of the results. Companies are under the impression that they are expected to cooperate in such a way as to mitigate a possible sentence. They invest a huge amount of money, time, and resources, which the state could not equally provide if it were to conduct the investigations alone. It is quite doubtful whether state authorities should be allowed to profit from this behavior, but such cooperation has become commonplace. Clear rules on how a company could protect its interests hardly exist. It is, for example, not clear to what extent a company must hand over relevant documents. Consequently, it is still uncertain how a company could protect itself from not contributing to its own conviction.

Usually there is no official request, meaning that such investigations are privately conducted. Normal standards of criminal procedure do not apply. This creates problems for the protection of employees who are often interviewed about the incident.[126] As the interview is done on behalf of the organization, the employee is obliged to cooperate as part of his duties based on the employment contract. The employee might provide facts that could incriminate him. Often, the statements become relevant when the company hands out the interview protocols to the prosecutor who then uses them to prosecute the employee. Another important constellation is the seizure of such documents either in the possession of employees or of in-house lawyers.

[124] *See* ENGELHART, *supra* note 1, at 471; Thomas C. Knierim, *Erfordenisse und Grenzen der Internal Investigation*, *in* WISSENSCHAFTLICHE UND PRAKTISCHE ASPEKTE DER NATIONALEN UND INTERNATIONALEN COMPLIANCE-DISKUSSION 77 (Thomas Rotsch ed., 2012); Uwe H. Schneider, *Investigative Maßnahmen und Informationsweitergabe im konzernweiten Unternehmen und Konzern*, NEUE ZEITSCHRIFT FÜR GESELLSCHAFTSRECHT 1201 (2010); Thomas Schürrle & Lucie Anne Mary Olbers, *Praktische Hinweise zu Rechtsfragen bei eigenen Untersuchungen im Unternehmen,* CORPORATE COMPLIANCE ZEITSCHRIFT 178 (2010).

[125] *See* ENGELHART, *supra* note 1, at 5.

[126] *See* Matthias Dann & Kerstin Schmidt, *Im Würgegriff der SEC? – Mitarbeiterbefragungen und die Selbstbelastungsfreiheit*, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1851 (2009); Burkard Göpfert, Frank Merten & Carolin Siegrist, *Mitarbeiter als „Wissensträger" - Ein Beitrag zur aktuellen Compliance-Diskussion*, 2008 NJW 1703; ENGELHART, *supra* note 1, at 478; Matthias Jahn, *Ermittlungen in Sachen Siemens/SEC*, STRAFVERTEIDIGER 41, 44 (2009); Christoph Knauer & Erik Buhlmann, *Unternehmensinterne (Vor-)Ermittlungen – was bleibt von nemo-tenetur und fair-trial?*, 2010 ANWALTSBLATT 387.

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As the interview is not carried out by state officials, the *nemo tenetur* principle is not directly applicable and is not relied upon by the courts.[127] Up to now, it has not been clarified how an efficient protection of employees can be guaranteed. To extend the *nemo tenetur* principle to internal investigations would be an appropriate solution, as this would guarantee that established procedural protection mechanisms could not be circumvented by trends to privatize criminal investigations.[128]

III. Deals

The German procedural system traditionally did not provide for a consensual ending of proceedings on the basis of an agreement between the prosecutor, the court, and the accused. Nonetheless, the courts allowed agreements for mitigation of the sentence for a guilty plea.[129] In many economic crime cases, such deals have become common in the meantime.[130] Additionally, procedural law allows courts to close the proceedings in cases of minor offenses when the accused agrees to pay a certain amount of money and "the degree of guilt does not present an obstacle."[131] This solution has also become popular as proceedings may already be closed during the investigation by the prosecution, thus avoiding a public trial.

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[127] *See* Landgericht [LG – Regional Court], Case No. 608 Qs 18/10, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 942 (Oct. 15, 2010) (holding the principle to not be applicable). On this case, see Matthias Jahn, *Keine Beschlagnahmefreiheit für Unterlagen eines mit internen Ermittlungen beauftragten Rechtsanwalt,* 2011 STRAFVERTEIDIGER 151; Karl Sidhu, *Der Unternehmensanwalt im Strafrecht und die Lösung von Interessenkonflikten,* 64 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 881 (2011). See also Landgericht [LG – Regional Court], Case No. 24 Qs 1/12 et al. CORPORATE COMPLIANCE ZEITSCHRIFT [CCZ] 78 (July 3, 2012), which (after the change of the main legal provision, Section 160a StPO, on 1 November 2011) did not even discuss the nemo-tenetur-problem. On the case, see Martina de Lind van Wijngaarden & Philipp Egler, *Der Beschlagnahmeschutz von Dokumenten aus unternehmensinternen Untersuchungen*, 2013 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3549; Heiko Löw, 2013 *Korruptionsdelikte im Lichte der Compliance-Funktion*, JURISTISCHE ARBEITSBLÄTTER 88.

[128] *See* ENGELHART, *supra* note 1, at 478; Jahn, *supra* note 126, at 44. *See also* Göpfert, Merten & Siegrist, *supra* note 126, at 1706; Ulrich Wastl, Philippe Litzka & Martin Pusch, *SEC-Ermittlungen in Deutschland – eine Umgehung rechtsstaatlicher Mindeststandards!,* 2009 NEUE ZEITSCHRIFT FÜR STRAFRECHT [NStZ] 68, 71. *See also* Knauer & Buhlmann, *supra* note 126, at 387 (suggesting application of the fair trial standard).

[129] Bundesgerichtshofes [BGH – Federal Court of Justice], 43 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [BGHSt] 369; Bundesgerichtshofes [BGH – Federal Court of Justice], 40 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN [BGHSt] 40.

[130] For empirical data on this subject, see KARSTEN ALTENHAIN, INA HAGEMEIER, MIACHAEL HAIMERL & KARL-HEINZ STAMMEN, DIE PRAXIS DER ABSPRACHEN IN WIRTSCHAFTSSTRAFVERFAHREN (2007); KARSTEN ALTENHAIN, FRANK DIETMEIER & MARKUS MAY, DIE PRAXIS DER ABSPRACHEN IN STRAFVERFAHREN (2013). *See also* WOLFGANG SIOLEK, VERSTÄNDIGUNG IN DER HAUPTVERHANDLUNG (1993).

[131] *See* STRAFPROZESSORDNUNG [StPO] [CODE OF CRIMINAL PROCEDURE] Apr. 7, 1987, BUNDESGESETZBLATT, TEIL 1 [BGBL. I] at 1074, 1319, § 153a.

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In 2009, the legislature integrated the solution developed by the courts in the so-called *Verständigungsgesetz* (Act on Deals)[132] into the Code of Criminal Procedure.[133] The legislature refrained from allowing proceedings to be terminated by just an agreement—as is possible in the USA—as "justice" is not something that can be agreed on. Deals—mitigated sentences for confessions—have become even more important since then and now play a major role in economic crime proceedings.[134] The lack of state resources and the complexity of economic crime cases make this practice attractive for public prosecution and courts in order to end a proceeding quickly. The accused is usually very much interested in avoiding or ending public trials. Many cases end before the incident has been adjudicated. Deals in the German system show a tendency to reward speedy proceedings over finding the truth.

In 2013, the German Constitutional Court had to decide on the constitutionality of the *Verständigungsgesetz*.[135] The Court held that the system of rules implemented in 2009 did not violate constitutional law as such a change was within the discretion of the legislator. However, the Court ruled that the implementation of the law in practice violated constitutional rights (*Vollzugsdefizit*—implementing deficit), especially the *Schuldprinzip* (principle of guilt). The judges pointed out that the criminal courts applying the law have to examine each guilty plea on its credibility and make sure that the conclusion of the deal is transparent for the accused as well as for the public in order to comply with the *Schuldprinzip.*

The constitutional court has approved opening the door for a more consensus-orientated procedural law, where efficiency is rated much higher than in the classic procedure aiming mainly at establishing the truth. But the court also emphasized that a system based on the principle of guilt does not allow for rules that leave the description of the offense and the sanction to the mere discretion of the parties. The coming years will show whether the

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[132] DEUTSCHER BUNDESTAG: DRUCKSACHEN UND PROTOKOLLE [BT] 13095/09.

[133] CODE OF CRIMINAL PROCEDURE, BGBL. I at 1074, 1319, § 257c (1987). Besides Section 257c StPO, several other provisions, for example on protocol rules, were also changed. *See, e.g.*, *id.* §§ 35a, 202a.

[134] Karsten Altenhain, Ina Hagemaier & Michael Haimerl, *Die Vorschläge zur gesetzlichen Regelung der Urteilsabsprachen im Lichte aktueller rechtstatsächlicher Erkenntnisse*, 2011 NEUE ZEITSCHRIFT FÜR STRAFRECHT 292; Dannecker, *supra* note 3, at 1, 32; Thomas Fischer, *Ein Jahr Absprache-Regelung - Praktische Erfahrungen und gesetzlicher Ergänzungsbedarf,* 2010 ZEITSCHRIFT FÜR RECHTSPOLITIK 249; Michael Hettinger, *Die Absprache im Strafverfahren als rechtsstaatliches Problem*, 2011 JURISTENZEITUNG 292. *Cf.* Bernd Schünemann, *Ein deutsches Requiem auf den Strafprozess des liberalen Rechtsstaats*, ZEITSCHRIFT FÜR RECHTSPOLITIK 104 (2009).

[135] Bundesverfassungsgericht [BverfG – Federal Constitutional Court], Case No. 2 BvR 2628/10 (Mar. 19 2013), http://www.bverfg.de/en/decisions.html. On the current debate, see, for example, Bernd von Heintschel-Heinegg, *Anmerkung*, 2013 JURISTISCHE ARBEITSBLÄTTER [JA] 474; Folker Bittmann, *Die kommunikative Hauptverhandlung im Strafprozess*, 2013 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3017; Frank Meyer*, Die faktische Kraft des Normativen - Das BVerfG und die Verständigung im Strafverfahren*, 2013 NJW 1850.

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judiciary—already short on personnel resources—will be able to implement the ruling of the Constitutional Court.

F. Soft Law Development: Compliance

Compliance has become one of the key issues when companies and their regulation are discussed in Germany.[136] The development originated in the USA where compliance is of key importance in mitigating a sentence for companies according to the Federal Sentencing Guidelines.[137] Compliance simply means complying with legal regulations and criminal compliance, hence complying with criminal regulations. This is nothing new. Compliance has been and is expected of any citizen. What is new is compliance with the law by means of compliance programs that companies implement in order to prevent and detect crimes. Companies therefore actively take part in prevention much more so now than in the past. Effective compliance programs are complex and include standards and procedures, specialized personnel (e.g., compliance officers), training, incentives, and control mechanisms.[138]

In Germany, the discussion on how the state could be involved has just begun. Compliance is still primarily a soft law development that companies undertake voluntarily. The *Siemens* case showed how important it is to comply with the law and how severe consequences for companies can be. Compliance is already regulated in securities law,[139] where failing to establish compliance procedures is sanctioned with a regulatory fine.[140] In the banking sector, first steps in the same direction have been taken as the new Section 54a of the *Kreditwesengesetz* (KWG) (Banking Act) criminalizes inadequate risk management if it endangers the existence of a banking institute.[141]

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[136] *See* ENGELHART, *supra* note 1; Kuhlen, *supra* note 37; Rotsch, *supra* note 37; Sieber, *supra* note 37; TIEDEMANN, *supra* note 3, at 6. *See also* HELMUT GÖRLING, COMPLIANCE (2010); CHRISTOPH HAUSCHKA, CORPORATE COMPLIANCE (2d ed. 2010); KLAUS MOOSMAYER, COMPLIANCE (2d ed. 2012).

[137] U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 (2004). *See* ENGELHART, *supra* note 1, at 162; RICHARD GRUNER, CORPORATE CRIMINAL LIABILITY AND PREVENTION § 10, § 14 (2004). *See generally* JEFFREY M. KAPLAN & JOSEPH E. MURPHY, COMPLIANCE PROGRAMS AND THE CORPORATE SENTENCING GUIDELINES (2007).

[138] *See, e.g.*, ENGELHART, *supra* note 1, at 163, 711; Cornelia Inderst, *Das Compliance-Rahmenprogramm – Grundlagen, Prinzipien, Prozesse, Verantwortlichkeiten, in* COMPLIANCE 103 (Helmut Görling, Cornelia Inderst & Britta Bannenberg eds., 2010); MOOSMAYER, *supra* note 136, at 31; MARK PIETH, ANTI-KORRUPTIONS-COMPLIANCE 63 (2011).

[139] *See supra* note 121 and accompanying text.

[140] *See* Wertpapierhandelsgesetz [WpHG] [Securities Trading Act], Sept. 9, 1998, BGBL. I at 2708, last amended by Gesetz [G], Aug. 28, 2013 BGBL. I at 3395, § 39, paras. 1, 2.

[141] See Kreditwesengesetz [KWG] [Banking Act], Sept. 9. 1998, BUNDESGESETZBLATT, TEIL 1 [BGBL. I] at 2776, last amended by Gesetz [G], Dec. 8, 1999, BGBL. I at 2384, § 54a in connection with Banking Act § 25c (effective 2 January 2014).

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The German Corporate Governance Codex, a public-private regulation, regards compliance as part of the companies' duties.[142] Compliance is therefore closely connected to the more general corporate governance discussion aiming at a good corporate structure and management duties. The discussion is now beginning to focus on the question of what kind of compliance approach and which compliance measures are effective and efficient. Criminal law has a variety of possibilities to regulate modern sanctions—but also innovative incentives—and is thus a very good place to legally implement the compliance idea.[143] For the state, compliance is a new strategy by which to enhance adherence to legal regulations by private-public cooperation. One can expect that the development will further influence economic crime regulation in the future.

G. Conclusion

Beginning with the mid-1960s, economic criminal law in Germany has emerged as a separate field of criminal law with specific features and dynamics and has now become one of the major fields in legal theory and practice. Yet its outlines are often vague, and many important questions—such as the responsibility of the management—have not been adequately solved. Criminological knowledge is also scarce, especially in regard to the specific dynamics within companies that cause deviant behavior or prevent employees from committing crimes. The compliance discussion with its emphasis on prevention will very much contribute to exploring these dynamics in the near future and to finding regulative solutions. Companies are sure to be much more integrated into the prevention of crimes than they have been in the past.

Substantive economic criminal law is already and will furthermore be mainly influenced by supranational developments.[144] For example, reforming environmental crimes is a project that the European Union has pursued for years and that will probably become law in the near future. Corruption is a topic that the OECD will advance over the next years because, for example, the bribing of parliamentarians has not yet been integrated into German law. Last but not least, the privatization of investigations will continue. Integrating companies

[142] The Codex was initiated by the Federal Ministry of Justice, developed by economic experts and practitioners (that are also responsible for revisions), made public in an official organ, and is referred to in the Stock Companies Act where companies have to declare whether they adhere to the Codex or, if not, explain why. Aktiengesetz [AktG] [Stock Companies Act], Jan. 1, 1966, BUNDESGESETZBLATT, TEIL I [BGBL. I] at 1089, last amended by Jan. 1, 2013 BGBL. I at 2586, § 161 (Ger.). This makes the Codex neither public law nor private regulation. It is a set of rules "sui generis."

[143] *See* ENGELHART, *supra* note 1, at 649. *See also* Marc Engelhart, *Corporate Criminal Liability from a Comparative Perspective*, *in* REGULATING CORPORATE CRIMINAL LIABILITY 53 (Dominik Brodowski et al. eds., 2014).

[144] An overview provided by Marc Engelhart, *Wirtschaftsstrafrecht der Internationalen Organisationen*, *in* WIRTSCHAFTSSTRAFRECHT § 5 (Christian Müller-Gugenberger ed., 6th ed. 2014).

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opens up great possibilities, as they are on site of the criminal act, have better resources than the state, and can easily act transnationally. The main task for the future will be to set clear limits for outsourcing state tasks, guarantee objective proceedings, and protect the rights of natural and legal persons affected by internal investigations. The challenge for criminal law is to develop coherent concepts for this type of public-private cooperation.

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