Developments

Trial and Error—A Critique of the New German Draft Code for a Genuine Corporate Criminal Liability

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Abstract

The following article aims to analyze the first German draft bill concerning a corporate criminal code. The draft bill, recently introduced by the federal state of Nordrhein-Westfalen, led to a transformation of a theoretical academic discussion towards a specific proposal on potential future legislation. Firstly, the article introduces underlying reasons for the draft based on deficiencies of the current legislation. Current regulations solely provide corporate administrative responsibility for criminal offenses committed by a corporation´s management (involving huge fines). Subsequently, the article reviews the content of the draft, specifically the multiplicity of proposed criminal and other penalties. The authors intend to demonstrate that the draft is often too vague or—especially with regard to penalties—simply over the top. The applicable sanctions – which may be combined- would lead to a more draconic punishment than in any other comparable legal system. Furthermore, regarding the principles of due process and strict legality the proposed procedural rules of the draft are not satisfying. After all, the proposed procedural measures to safeguard the proceedings and the rules on representation and defense counsel are deficient.

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A. Introduction

In 2013, Thomas Kutschaty, Minister of Justice of the federal state of Nordrhein-Westfalen (NRW), announced that the federal state of Nordrhein-Westfalen intends to introduce a Draft on a federal Corporate Criminal Code titled "Gesetzesentwurf eines Verbandsstrafgesetzbuchs" (VerbStGB-E)[1] to the *Bundesrat* (Federal Assembly). The Conference of the Ministers of Justice welcomed the draft. The draft was especially seen as a sound basis for consultations on the introduction of a specific corporate criminal code.[2] Regarding similar intentions within the coalition agreement of the governing parties on the federal level—the "Christlich Demokratische Union/Christlich Soziale Union" and the "Sozialdemokratische Partei Deutschlands" (CDU/CSU and SPD)—this draft bill seems to have a realistic chance of at least partial implementation. Thus, the issue of lacking necessity of a German corporate criminal law is discussed in politics, praxis, and academia, and negated by most.[3] Although there is a number of legitimate reasons for introducing a corporate criminal liability code, the implementation of the VerbStGB-E in the current version triggers more negative than positive effects: Particularly the intended corporate criminal sanctions seem unnecessarily draconic. Additionally, the procedural provisions of the draft do not withstand a critical analysis.[4]

B. Reasons for the Draft

The government of NRW assumes that economic, environmental, and corruptive crimes committed out of an enterprise are a menace to economic and social structure; more than fifty percent of the yearly total loss identified by the police crime statistics consistently

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[1] *See* GESETZESENTWURF EINES VERBANDSSTRAFGESETZBUCHS [VERBSTGB-E] [CORPORATE CRIMINAL CODE], *presented in* 2013, BUNDSRAT DRUCKSACHEN [BR] 1/13 (Ger.), https://dico-ev.de/fileadmin/PDF/PDF_Intranet_2013/Unternehmensstrafrecht/2013-10-15_Entwurf_zum_Unternehmensstrafrecht.pdf [hereinafter VERBSTGB-E].

[2] *Löffelmann*, Der Entwurf eines Gesetzes zur Einführung der strafrechtlichen Verantwortlichkeit von Unternehmen und sonstigen Verbänden, JR 2014, 185 (186), *available at* http://www.nrw.de/landesregierung/justizministerkonferenz-begruesst-die-gesetzesinitiative-von-nrw-zum-unternehmensstrafrecht-15084/.

[3] Rübenstahl *&* Tsambikakis, *Neues Unternehmensstrafrecht: Der NRW-Gesetzentwurf zur Einführung der strafrechtlichen*, 7/2014 ZWH (2014) 8; Kirsch, *Völkerstrafrechtliche Risiken unternehmerischer Tätigkeit*, 6/2014, NZWISt 212 (2014); Kindler, *Unternehmensstrafrecht und individuelle sanktionsrechtliche Haftungsrisiken*, 4/2014 (2014), 134. In detail about dogmatic concerns, see Hoven, *Der nordrhein-westfälische Entwurf eines Verbandsstrafgesetzbuchs – Eine kritische Betrachtung von Begründungsmodell und Voraussetzungen der Straftatbestände*, ZIS 19 (2014), http://www.zis-online.com/dat/artikel/2014_1_790.pdf.

[4] *See* Markus Rübenstahl, *Contra: Deutschland braucht kein (solches) Unternehmensstrafrecht*, 1/14 ZRFC 26 (2014), *available at* http://www.compliancedigital.de/ce/contra-deutschland-braucht-kein-solches-unternehmensstrafrecht/detail.html.

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originate from economic crime.[5] Kutschaty is convinced that the current criminal law regulations and administrative fines are not sufficient to address crimes committed by corporations, therefore – from his point of view - a new sanction system concerning legal entities has to be established.[6] Kutschaty´s point of view is mainly opposed, since the instrument of administrative fines for corporations in accordance with Sections 30, 17, 130 OWiG—which were recently considerably increased—can be seen as an established "de facto corporate criminal law."[7] Even simple negligence regarding the breach of supervisory duties by board members and executive employees in accordance with Section 130 OWiG[8] suffices to impose a fine on a corporation in accordance with Section 30 (1)–(3) OWiG. Therefore, the scope of administrative fines for corporations in Germany is notably broader than comparable potential sanctions against associations in other jurisdictions.[9]

Nevertheless, Kutschaty's view is based on a NRW survey showing that only nine of nineteen prosecutor's offices processed in total twenty six cases during 2006 and 2011 that led to administrative fines on corporations. Despite the considerable amount of economic crimes, the remaining ten prosecutor's offices did not process a single case of imposing an administrative fine on a corporation.[10] According to Kutschaty, the discretionary decision is a focal point since it is used in very different ways by the prosecutorial officials.[11] Although a general guideline determines that the possible imposition of an administrative fine has to be considered, if the offender is an executive employee of an enterprise,[12] Kutschaty doubts – based on recent experience - that a guideline ensures coherent application of Section 30 OWiG. The crucial issue is the opportunity principle on which Section 30 OWiG is premised. Regarding the increase of prosecuted cases in Austria after a mandatory prosecution has been implemented he prefers the principle of legality in this context.[13]

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[5] VERBSTGB-E at 1.

[6] Kutschaty, *Deutschland braucht ein Unternehmensstrafrecht*, 3/2013 ZRP 74, 75 (2013).

[7] Rübenstahl, *supra* note 4, at 26; Haubner, *Der Gesetzentwurf Nordrhein-Westfalens zur Einführung eines Unternehmensstrafrechts*, 24/2014 DB 1358 (2014).

[8] Even the negligent constitution of a mere administrative offense also by omission shall be sufficient.

[9] *See* Rübenstahl, *supra* note 4, at 26.

[10] *See* Kutschaty, *supra* note 6, at 75.

[11] *See id.*

[12] Richtlinien für das Strafverfahren und das Bußgeldverfahren [RISTBV] [Rules of Action for Criminal Proceedings], Sept. 2014, No. 180a (4) (Ger.) *available at* http://www.verwaltungsvorschriften-im-internet.de/bsvwvbund_01011977_420821R5902002.htm.

[13] *See* Kutschaty, *supra* note 6, at 75.

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Nevertheless, the federal states are entitled to develop stricter guidelines by listing particular cases or using "should" to reduce the discretion and work toward imposing an administrative fine on corporations in a higher number of cases.[14] Furthermore, prosecutors of specialized economic crimes departments could be trained on applying Sections 130, 30, and 17 OWiG in a more comprehensive and knowledgeable way. In addition, increased financial and human resources could be allocated to these offices. The deplorable lack of resources of the German criminal justice system has to be tackled either way, no matter if the principle of legality for Corporate Criminal responsibility is implemented by the draft or if the guidelines for the application of Section 30 OWiG are formulated in a stricter way, forcing prosecutors to impose administrative fines on corporations in all suitable cases.

The draft argues that single subordinated employees are used as pawn sacrifices, while the "organization's responsibility" according to the draft would not have only virtual consequences. Nonetheless, the statement is not supported by a set of reliable data.[15] Nevertheless, according to the draft, the company itself deserves the expression of society's condemnation in terms of criminal punishment.[16] Administrative fines could not lead to the necessary preventive effect since the asset recovery (can be calculated and a lack of an ethical complaint.[17] In contrast to the German criminal law based on the principle of individual guilt,[18] the draft attributes the criminal responsibility of executive employees´ crimes to the corporation itself and deems that to be constitutional.[19]

Even though this point of view is based on previous case law of the *Bundesverfassungsgericht* (Federal Constitutional Court),[20] which was not related to a criminal case, it is highly doubtable whether such an attribution is constitutional. The addition of designated corporate sanctions effectively punishes innocent third parties such as shareholders or legal successors with no influence on the management, as well as employees and vendors.[21] Thus collective punishment, which is incompatible with the

[14] *See* Rübenstahl, *supra* note 4, at 27.

[15] *See* Rübenstahl, *supra* note 4, at 26, 27.

[16] VERBSTGB-E at 2.

[17] *See* Rübenstahl & Tsambikakis, *supra* note 3, at 8–9.

[18] Constitutional requirement in accordance with Arts. 1 & 20 III. *See* GRUNDESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDEGESETZ] [GG] [BASIC LAW], May 23, 1949, BGBl. I, arts. 1, 20 III.

[19] VERBSTGB-E at 29.

[20] Bundesverfassungsgericht, [BVERFGE] [Federal Constitutional Court], Oct. 25, 1996, Case No. II BvR 506/34 paras. 20, 323, 336.

[21] VERBSTGB-E § 4 at 9.

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principle of liability, would be established.[22] In regard of the constitutional principle of proportionality,[23] it is elusive why practical experiences of the new scope of fines—which have increased tenfold since 30 June 2013[24]—are not addressed by the draft, even though the draft thusly postulates the need for draconic criminal sanctions to achieve the deterrent effect without any empirical foundation.[25]

The current lack of explicit incentives in German statute law for Compliance Measures[26] does not necessarily justify the establishment of a corporate criminal law. The legislator should rather incorporate a regulation into Section 30 OWiG that reduces a fine mandatorily in case that preventive or repressive Compliance Measures of a certain intensity or quality are taken. Exceptionally, the Compliance Measures could lead the prosecution to refrain from imposing criminal penalties—comparable to the leniency program in accordance with Section 46b StGB or a non-prosecution agreements under US-law. In addition, the additionally applicable forfeiture of illegal profits under sections 73 seq. StGB should be combined with a hardship clause comparable to Section 73c sentence 1 StGB to avoid bankruptcy or other financial crises.[27]

Nonetheless, NRW proposes a draft regulating the corporation's liability in a self-contained legal set both regarding substantive and procedural law. In consideration of methodic approach and indemnity due to Compliance Measures it is similar to the Italian corporate criminal law.[28] Furthermore, the draft is also similar to the US corporate criminal law regarding the provisions on deferred prosecution agreements and compliance monitors.[29]

[22] *See* Rübenstahl, *supra* note 4, at 26–27.

[23] In accordance with Art. 20 III GG.

[24] *See* BUNDESGESETZBLATT, TEIL I [BGBL. I] at 1738; Witte & Wagner, *Die Gesetzesinitiative Nordrhein-Westfalens zur Einführung eines Unternehmensstrafrechts*, 12/2014 BB 643 (2014).

[25] *See* Rübenstahl, *supra* note 4, at 26.

[26] VERBSTGB-E at 2 (containing further references).

[27] *See* Rübenstahl, *supra* note 4, at 26, 28.

[28] D.Lgs. 231/2001; *see* Rübenstahl, *Strafrechtliche Unternehmenshaftung in Italian*, 8/2012 RIW 505, 508 (2012).

[29] *See* Rübenstahl & Skoupil, *Anforderungen der US-Behörden an Compliance-Programme nach dem FCPA und deren Auswirkung auf die Strafverfolgung von Unternehmen*, 6/2013 209 (2013).

C. (The Draft's) Content

I. Personal and Material Scope of Application

The draft addresses "associations,"[30]hence every privately held company or plurality of business associates, but not individual businessmen. Additionally, corporate bodies under public law as well as companies owned by public authorities as well as the Federal Republic of Germany, the Federal States and the municipalities are associations in this context. Compared to international standards the punishment of public associations would be extremely far reaching .[31] The draft solely exclude exercises of governmental authority—for example, the whole public service, all public procurements, political parties,[32] etc. It is doubtable that this huge scope of the law was intended: The monetary penalty would possibly directly or indirectly burden the public budgets on the one hand and be in favor of the same on the other hand.[33] Furthermore, the inclusion of non-profit- entities is questionable: most of those (small) entities are not capable of establishing or enhancing compliance organizations. If they were going to use financial means in this matter, they would risk a breach of earmarked funds, which might even be punishable.[34]

The company's liability begins with "infringements,"[35] for example an illegal but not necessarily criminal offense besides exercises of governmental authority.[36] Taking into account the academic debate on the infringement's subjective component (*mens rea*), the law should clarify explicitly whether intentional offenses—for example, fraud, Section 263 StGB (German Criminal Code)—must be committed intentionally.[37] The infringements are due to the draft "related to the association", if the association's legal duties are breached

[30] VERBSTGB-E § 1 at 7–8.

[31] *See* Rübenstahl, *supra* note 4; Rübenstahl, *supra* note 28; Rübenstahl, Der Foreign Corrupt Practices Act (FCPA) der USA Part 1, 11/2012, NZWISt 2012; *see also* Rübenstahl, Der Foreign Corrupt Practices Act (FCPA) der USA Part 2, 1/2013, NZWISt 2013, 13.

[32] Witte & Wagner, *supra* note 24, at 643–44.

[33] *See* Rübenstahl, *supra* note 4, at 26, 28.

[34] In particular, see ABGABENORDNUNG [AO] [FISCAL CODE], Oct. 1, 2002, BUNDESGESETZBLATT, TEIL I. [BGBL. I] §§ 51, 61–63; STRAFGESETZBUCH [STGB] [PENAL CODE] § 266.

[35] See ORDNUNGSWIDRIGKEITSGESETZ [OWIG] [Administrative Offenses Act], Feb. 19, 1987, [JURIS GMBH] § 130.

[36] Witte & Wagner, *supra* note 24, at 643–44; VERBSTGB-E § 1.

[37] Hoven, Wimmer, Schwarz, & Schumann, *Der nordrhein-westfälische Entwurf eines Verbandsstrafegesetzes – Kritische Anmerkungen aus Wissenschaft un Praxis Teil 1*, 5/2014 NZWISt 161, 163 (2014).

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by an illegal act,[38] or if the association is enriched by the illegal act (according to the plan of the person who commits the illegal act).[39] "Decision makers" are authorized bodies or members of such bodies of legal entities,[40] members of the executive board of societies without legal capacity, authorized shareholders of joint partnerships with legal capacity, and persons taking a leadership position including the supervision of management and the exercise of monitoring powers in an executive position.[41] Unfortunately, the monitoring power does not exclude Compliance-Officers, CCOs or Heads of Legal Departments or Audits, and even environmental managers are not excluded from the scope of the draft. The expansion of the liability-causing circle of persons is disproportionate because of the lack of influence on the management of some of the above named roles.[42] "Legal successor" means universal successor or partial universal successor in accordance with Section 123 UmwG.[43]

In contrast to the application of Section 30 OWiG, due to the draft prosecutors would have no discretionary power with regard to the application of the corporate criminal responsibility. Even the decision maker's offense needs not be punishable for corporate criminal responsibility. Regarding the principle of liability, there must be at least one decision maker to whom the company can attribute the guilt or liability. Nonetheless the draft is not requiring individual liability as condition comparable to Sections 17, 20 f. StGB. Furthermore, an inadequate personal selection or insufficient designed task fields on the executive level should justify a criminal accusation.[44] It is unclear how the dispensation of personal liability shall attribute a criminal guilt of the company.[45] In accordance with Section 2 (2) VerbStGB-E a company's sanction is imposed[46] as soon as a decision maker—intentionally or negligently[47]—fails to set a Compliance Management System in technical,

[38] Correctly criticizing the fact, that offenses against the association—for example, embezzlement—shall be "related to the association" in that sense. Hoven, Wimmer, Schwarz, & Schumann, *supra* note 38, at 161, 163–164.

[39] VERBSTGB-E § 1(2) at 7.

[40] VERBSTGB-E § 1(3)(d) at 8.

[41] VERBSTGB-E § 1(3); *see* OWIG § 30 I.

[42] Rübenstahl, *supra* note 4, at 26, 28.

[43] VERBSTGB-E § 1(4) at 8; *see* OWIG § 30(2)(a).

[44] VERBSTGB-E at 45.

[45] *See* Rübenstahl, *supra* note 4, at 26, 29.

[46] In the style of OWIG § 130.

[47] The draft and its explanation do not explain whether negligently infringement shall be attributable when only intentional infringement is punishable for the individual. *See* VERBSTGB-E at 46.

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organizational or personal terms to avoid the infringement or at least mitigate the infringement. The gap quoted by the draft in criminal liability resulting in "organized irresponsibility"[48] is not empirically proven (see above). It is also rather counter-intuitive to the principle of liability that corporate criminal responsibility should not require the causality for the attribution of monitoring violation according to the draft but a simple increase of risk.[49]

II. Criminal Penalties and Other Sanctions

In Section 4 VerbStGB-E the draft contains a definitive enumeration of association's sanctions: Criminal fine, warning with punishment salvo and public announcement of the conviction[50] and association's reprimand, exclusion of subsidies or of the award of public contracts and association's dissolution.[51] The skimming of profits in accordance to the gross principle (*Verfall*)[52] can also be imposed. Under certain circumstances, VerbStGB-E sanctions named in Section 5 can be disclaimed.

1. Criminal Fine

The criminal fine ranges between five and 360 daily rates depending on the infringement's gravity and shall not exceed ten percent of the company's total sales. The amount of the daily rates shall depend on the economic power and result of operations. The latter is measured as the difference between total sales on the one hand and taxes and necessary financial expenses on the other hand.[53]

The company is given the opportunity to influence the criteria for sentences, i.e. nature, seriousness and duration of the organization's fault, especially the behavior after the infringement, such as the effort for compensating damages and arrangements to avoid future infringements—remediation and compliance.[54] Internal Investigations and Disclosure should be considered as well, since the internal investigations are necessary to optimize a Compliance Management System (CMS) and the disclosure enables the authorities to clarify the company's offenses completely and to set a proportionate punishment.

[48] VERBSTGB-E at 36, 45.

[49] *See* Rübenstahl, *supra* note 4, at 26, 29.

[50] VERBSTGB-E § 4(1) at 9.

[51] VERBSTGB-E § 4(2) at 9.

[52] VERBSTGB-E § 3(1) at 8; STGB § 73.

[53] VERBSTGB-E at 57.

[54] VERBSTGB-E at 58.

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The maximum amount of ten percent of company's total sales is nevertheless disproportionately high. The calculation rules for antitrust fines were the archetype for the draft and they can be explained by evidential difficulties regarding "Verfall" (forfeiture or confiscation).[55] In contrast, there are many company offenses that do not necessarily lead to any profit and are not committed with the intention of profit: serious accidents at the workplace, product liability cases with (a high number of) personal injuries or deaths, serious environmental crimes, etc. According to the draft, those offenses lead to high criminal fines, even if they are not comparable to the cost-benefit analysis of antitrust fines and cannot justify the unspoken goal of "Verfall."

The determination of sales is the baseline for the assessment of penalty, therefore the worldwide turnover by legal and natural persons shall be summarized, if natural and legal persons act as an economic entity.[56] This regulation gives cause for concern: in regard of a penalty sentence a liable participation of all subsidiary companies is simulated, even if the peripheral subsidiary companies are not specifically related to the holding company. This is a possible breach of the principles of proportionality and liability.[57] The simple existence of an economic unity does not justify an attribution that is adequate to the principle of liability—in contrast to the antitrust fine in accordance to Section 81 (4) sentence 2–4 GWB which has no expression of society's condemnation.[58] Furthermore, the expression "economic entity" is highly uncertain[59] since it leads to difficulties in distinguishing cases of larger and complex Groups. The application of the expression may, therefore, be a breach of the principle of certainty in accordance to Article 103 (2) GG. Additionally, the *ne bis in idem* principle in accordance to Article 103 (3) GG may be breached if the holding company is chargeable due to violations of organizational and supervisory duties regarding the subsidiary and the total sales of the Group is relevant for sentencing both companies.[60] The same applies for a German Limited (*GmbH*) and its single director-participator.

[55] Cramer & Pananis, Kartellrecht *GWB*, § 81 marg, 59 (2009).

[56] VERBSTGB-E § 6(5).

[57] *See* Rübenstahl, *supra* note 4, at 26, 30.

[58] Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court], July 16, 1969, Case No. II BvL 2/69 at paras. 18, 27, 33.

[59] As well in antitrust law. *See* Cramer & Pananis, *supra* note 56.

[60] Rübenstahl, *supra* note 4, at 26, 30; Görtz, *Unternehmensstrafrecht: Entwurf eines Verbandstrafgesetzbuchs*, 1/2014, WIJ 7 (2014), *available at* www.wi-j.de/index.php/de/wij/aktuelle-ausgabe/item/244-unternehmensstrafrecht-entwurf-eines-verbandsstrafgesetzbuchs.

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2. Overkill of Penalties Due to Additional "Verfall" based on the Gross Principle

Furthermore, the corporate criminal fine "Verfall" in accordance to Section 73 ff. StGB *must* be ordered by the judge, since sanctions of the general part of the StGB (German Criminal Code) are additionally applicable if not stated otherwise.[61] Thus, the rules of third-party-"Verfall" would be cumulatively applicable (Section 73 (1) (3) StGB). The application of Section 73 (1), (3) StGB would lead to the forfeiture of all revenues gained by a corporation deriving from a crime without deduction of expenses[62] Empirically, the third-party-"Verfall" has rarely applied on companies, since the prosecutors—in agreement with the company—feel able to order adequate corporate administrative fines in accordance with Section 30 OWiG during the less complicated non-public preliminary proceedings.[63] They could also skim the economic advantage of the corporation's offense in accordance to Section 17 (4) OWiG—and not necessarily the whole revenue. Because corporate criminal fine—in accordance to the principle of legality—precedes the instruments of the OWiG, this way will be barred.[64] The draft combines the corporate criminal fine and the "Verfall" compulsorily, so the punishment may be in breach of the prohibition of excessive measures in particular cases. The calculating rule of the criminal fine borrowed by the antitrust law includes elements of skimming the profit. The "Verfall" in accordance to the gross principle on the other side is not only a skimming process but is a virtual punishment.[65] The combination of high payment exceeds the solvency of even very profitable companies—especially since the amount of the daily rates is in relation to the total sale and the liquid assets of a company regularly does not catch the edge of ten percentage of the annual sales.

This accumulation leads to a more draconic punishment than in any other comparable legal system.[66]

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[61] VERBSTGB-E § 3(1) at 8; in detail about difficulties of the perpetration of an offense, see Mitsch, Täterschaft & Teilnahme bei der Verbandsstraftat, 1/2014 NZWISt 1, 4 (2014).

[62] Bundesgerichtshof [BGH] [Federal Court of Justice], Mar. 21, 2002, Case No. 5 StR 138/01, para. 477.

[63] Rübenstahl*, Anwaltskommentar-StGB*, § 73 marg. 61a-61g (2014).

[64] Görtz, *supra* note 61, at 3, 4.

[65] Rübenstahl, *supra* note 4, at 26, 31.

[66] *See* Rübenstahl, *supra* note 28, at 505; Rübenstahl & Boerger, *Der Foreign Corrupt Practices Act (FCPA) der USA Part 4*, 8/2013 NZSTWI 281 (2013); *see also* Rübenstahl & Boerger, *Der Foreign Corrupt Practices Act (FCPA) der USA Part 5*, 10/2013 NZSTWI 267 (2013); Rübenstahl & Skoupil, *supra* note 29, at 209.

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3. Penalties and Sanctions Against the Legal Successor

The legal successor is sanctioned if he knew the legal predecessor's infringement—wholly or partly—or recklessly did not know it at the time of transfer of rights.[67] The draft equates the universal succession with the different sorts of transformation and the singular succession if the acquirer takes all relevant assets of the predecessor and applies it in the same way.[68] In range of Mergers and Acquisition, the acquirer's liability for predecessor's infringements would be related to knowledge because the previous Due-Diligence or the reckless unawareness because of missing or inadequate Compliance-Due-Diligence-Checks. The acquirer should try to displace liability risks for corporate crimes before the acquisition to the transferor because the delineation of simple negligent and reckless unawareness is too difficult to rely on. The authorities will assume recklessness at least in cases where the Acquirer-Due-Diligence does not cover the typical Compliance-Risks or the analysis is too cursorily to uncover systemic problems.

Therefore, it seems unjust that only the reckless acquirer is to be punished but not the transferor, even if the seller in bad faith earns the economic equivalent to the sold company.[69]

4. Compliance, Internal Investigations, and Disclosure as a Cause for Refraining from Punishment (Similar to a Non Prosecution/Deferred Prosecution Agreement)

Under the draft, the prosecutors and the court can decide to refrain from imposing a corporate sanction if the corporation has established the necessary Compliance Management System (CMS) to avoid comparable offenses in future. It is required, though, that no considerable damage has occurred or a considerable damage has been comprehensively compensated.[70] Otherwise the corporation must prove adequate compliance efforts for the future and additionally it is obliged to disclose evidence against the corporation voluntarily prior to the trial. The evidence must be adequate to prove the offense.[71] The effectiveness of a CMS is crucial for such non prosecution decisions.

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[67] VERBSTGB-E § 2(4) at 8; *see* STGB § 261(5); VERBSTGB-E at 50.

[68] VERBSTGB-E § 2(4) at 8.

[69] Rübenstahl, *supra* note 4, at 26, 31. Also in favor of a rule similar to section 30(2)(a) OWIG, see Görtz, *supra* note 60, at 8.

[70] *See* STGB § 46a II; VERBSTGB-E § 5(1) at 9; Hein, *Verbandsstrafgesetzbuch (VerbStrG-E) – Bietet der Entwurf Anreize zur Vermeidung von Wirtschafskriminalität in Unternehmen?*, 2/2014 CCZ 75, 77 (2014) (criticizing the use the draft makes often termed "damage").

[71] VERBSTGB-E § 5 at 9–10.

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Nonetheless, the draft remains silent regarding specific guidelines establishing and evaluating a CMS.[72] This is surprising to a large number of scholars because suitable U.S., British, or Italian role models do exist.[73] Criminal judges might have difficulties in evaluating CMS without practical experiences and binding guidelines, therefore putting the requirements unnecessarily high. Regarding the wide scope of personal application, non-profit associations or small communities might be overstrained by the compliance requirements in legal, economic, organizational and personal matters.[74] In contrast to the leniency program in accordance with Section 46b StGB, the requirements for evidence disclosure are considerably higher, which is problematic regarding the principle of equal treatment in accordance to Article 3 (1) GG. The concept that the suspected must prove the effectiveness of CMSs to be released from liability is a virtual breach of in *dubio pro reo* principle and might be unconstitutional.[75] In addition, the draft does not contain additional incentive on introducing effective CMS preventively, before a corporate offence is committed and detected: Whereas Compliance-Programs being implemented after a corporate offence are privileged in accordance with Section 5 (1) VerbStGB-E, Compliance-Programs that were settled before—but were not able to prevent the corporate offence—cannot refrain from punishment.[76]

5. Cautioning with Additional Measures and Public Announcement of the Conviction

Alternatively, the court may issue a cautioning with additional measures and set conditions and instructions that must be fulfilled by the association during a certain probation period.[77]Furthermore, the association can be ordered to pay a certain amount to a non-profit organization. Since the amount of the payment is not defined in the draft, there is the risk that the courts might tend to the potential criminal fine—comparable to Section 153a StPO—which would be disproportional regarding the additional "Verfall" in accordance to Section 3 (1) VerbStGB-E.[78]

The "corporate pillory"[79] will focus on certain natural persons, thus it is doubtable that the draft is adequate to constitutional, especially data-protection law.[80] Furthermore, a

[72] Rübenstahl & Skoupil, *supra* note 29, at 209; *Görtz*, *supra* note 61.

[73] Rübenstahl & Skoupil, *supra* note 29, at 209; *Rübenstahl*, *supra* note 4, at 32.

[74] Rübenstahl, *supra* note 4, at 26, 32.

[75] *See* GRUNDGESETZ [GG] [BASIC LAW] arts. 2 I & 20 III.

[76] Hein, *supra* note 70, at 75, 78.

[77] VERBSTGB-E §§ 7–8 at 11.

[78] Rübenstahl, *supra* note 4, at 26, 32.

[79] VERBSTGB-E at 26.

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"naming and shaming" is contradicting to modern Continental European principles of criminal law.

6. Non-Criminal sanctions

The other sanctions proposed in the draft could lead to more draconic effects than criminal sanctions.

Sections 10 ff. VerbStGB-E provides for the exclusion of subsidies or the award of public contracts and association's dissolution. The exclusion of subsidies or the award of public contracts for at least one year[81] can lead to the insolvency of certain corporations, especially in addition to imposed criminal fines and "Verfall". This seems misguided, as the German economic administrative law provides for sufficient, more specific and proportional possibilities of responding, particularly the refusal or revocation of permissions, the prohibition of activities, and, in extreme cases, the enforced association's dissolution.[82]

I. Procedure

The criminal proceeding against associations in principle follows the general rules, particularly the StPO and GVG, if the rules can be applied on associations and if the VerbStGB does not contain more specific rules.[83] The *Landgericht* (Regional Court) of First Instance is competent if association's reprimands are expected or if the case is brought in an action at the *Landgericht* in accordance to Section 24 (1) No. 3 GVG and the *Oberlandesgericht* (Higher Regional Court) is not competent. Sections 74 (2) 74a, 74b, 74c GVG apply accordingly and rule the competence of the *Landgericht* as well.[84]

1. Principle of Legality

The prosecutors have the duty to pursue any association's offenses[85] if there are sufficient factual indications that the association has committed an offense.[86] Refraining from pursuit

[80] *See* Görtz, *supra* note 61.

[81] VERBSTGB-E §§ 10–11 at 12.

[82] *See* Rübenstahl, *supra* note 4, at 26, 33.

[83] *See* VERBSTGB-E § 13(1) at 13; for more details, see VERBSTGB-E §§ 13(3), 15–16, 21–22 at 13–14, 17.

[84] VERBSTGB-E § 15(3) at 14.

[85] VERBSTGB-E § 14(1) at 13.

[86] VERBSTGB-E § 14(2) at 13.

according to Section 153, the draft does not mention 153a StPO explicitly. The more specific Section 14 (2) and (3) VerbStGB-E may forbid an application of Sections 153, 153a StPO.[87] Even though Hoven, Wimmer, Schwarz, and Schumann[88] argue convincingly that the Sections 153, 153a StPO could be considered to be applicable in a criminal procedure against associations and corporations, some legal uncertainty remains with regard to this assertion. As the capacity of German Criminal Law would be overwhelmed by even some dozen court procedures in complex and wide ranging cases against lager companies, it would be preferable if the legislator clarified the (analogous) applicability of the diversionary proceedings according to Sections 153, 153a StPO against companies. .

Proceedings against associations shall be closed without sanctions if the infringement occurred completely outside of Germany and if a sanction, which is adequate regarding both the effect on the association and the defense of the legal system, was imposed abroad or can be expected to be imposed abroad.[89] If the case is brought to action the court may close the case on the prosecution's request[90]—probably under the conditions of sentence one. Section 154(3) to (5) StPO rule the procedures of reopening the proceeding accordingly.[91]

In contrast to the draft, the implementation of the principle of legality regarding the combined criminal fine and "Verfall" would lead to a disproportional, inflexible, and cost-inefficient result.[92]

2. Measures to safeguard the Proceedings

The innocuously worded heading[93] of Section 20 (1) VerbStGB-E provides for the possibility of freezing order of the court up to ten percent of the assumed three-year average sales of an association, if it is strongly suspected to have committed association's crimes and there is a strong suspicion that decision-makers stash the association's property or want to dissolute the association to prevent a criminal proceeding.[94] A previous hearing is not necessary. The freezing order could exceed most company's liquidity and would risk

[87] *See* Rübenstahl & Tsambikakis, *supra* note 3, at 8, 11.

[88] Hoven et al., *supra* note 38, at 210.

[89] VERBSTGB-E § 14(3) at 13–14.

[90] VERBSTGB-E § 14(2) at 13.

[91] VERBSTGB-E § 14(3) at 13–14.

[92] *See* Rübenstahl, *supra* note 4, at 26, 33.

[93] *See* Rübenstahl & Tsambikakis, *supra* note 3, at 8, 12.

[94] *See* STGB § 283(1)(1).

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insolvencies.[95] The insolvency risk would increase even more[96], if the assumed amount of offense's profits can be confiscated provisionally during the criminal investigation[97].

3. Representation and Defense Counsel

In the criminal trial tthe association is represented in accordance to the rules of civil procedure, particularly Section 51 ZPO. Individuals being Defendants accused[98] of having committed the infringement or the omission in sense of Section 2 (2) VerbStGB-E are barred from representation of the association.[99] They can be interrogated as targets, not as witnesses and are entitled to retain defense counsel.[100]

The defendant´s rights under Sections 133–136a StPO are applied accordingly.[101] The prohibition of multiple defense[102] is explicitly not valid for the association and the natural person being accused of the infringement.[103] Still, the legislator may have had the one-person-GmbH in mind, but the uncertain expression "if there is no conflict of interests"[104]is highly problematic. There is reason to fear that most associations will try to defend at the expense of the individual accused and vice versa.[105] In most cases with potential recourse claims against e.g. board members of a corporation, a conflict of interest should be assumed.[106]

If the association lacks legal representation, for example because all legal representatives are accused the court will provide a public defender at the request of the prosecuting

[95] *See* Rübenstahl, *supra* note 4, at 26, 33.

[96] *See* Rübenstahl, *supra* note 4, at 26, 33.

[97] *See* VERBSTGB-E §§ 13(1)&(3) at 13; STPO § 111(b); STGB at § 73.

[98] Not targets of a criminal investigation. *See* Hoven et al., *supra* note 38, at 201, 204, 206.

[99] VERBSTGB-E § 17(1) at 15.

[100] *See* Rübenstahl & Tsambikakis, *supra* note 3, at 8, 12.

[101] VERBSTGB-E § 18(1) at 15.

[102] STPO § 146.

[103] VERBSTGB-E § 18(2) at 15.

[104] VERBSTGB-E at 77.

[105] *See* Rübenstahl, *supra* note 4, at 26, 33.

[106] *See* Rübenstahl & Tsambikakis, *supra* note 3, at 8, 12.

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authority.[107] If the public defender is provided despite the association's will,[108] this is be a breach of the fundamental right of effective defense.[109]

D. Conclusion

NRW's draft of a corporate criminal liability code should not become law. The suggested combination of drastic mandatory association's sanctions and reprimands in addition to the existing faculty of "Verfall" (forfeiture or disgorgement of the full revenue) is highly questionable in terms of constitutional law. It is in fact unnecessary and could lead to an "overkill" of sanctions.[110] Even without considering "death penalty" for associations provided in the draft, the consistent pursuit and the combined application of the economic sanctions would probably cause unnecessary company crises, insolvencies, and unemployment. The proposed corporate criminal law contains collective punishments at the expenses of innocent owners, stakeholders or employers, and would mean a relevant economic local disadvantage for Germany, as the sanctions are comparatively much more severe than in other jurisdictions. As a result of the draft becoming law, Internal Monitoring Systems and CMS of big associations would not be optimized, as the draft does not provide for effective incentives. Additionally, small associations like non-profit societies would be overstrained. A few well-aimed modifications of the existing laws on corporate administrative fines would have a more convincing effect. The unclear, half-baked, and partially constitutionally invalid procedural prescriptions of the draft would unduly restrict and complicate the association's defense. The politically-motivated implementation of the principle of legality might lead to the inapplicability of the closing possibilities of Sections 153, 153a StPO in criminal procedures against associations which would violate the constitutional principle of proportionality. This would also penalize procedural economy and overstrain the capacities of the German criminal justice system.[111]

[107] VERBSTGB-E § 19(1) at 15–16.

[108] *See* Rübenstahl, *supra* note 4, at 26, 33; Hoven et al., *supra* note 38, at 201, 205.

[109] GRUNDEGESETZ [GG] [BASIC LAW] arts. 2(1) & 20(3).

[110] Görtz, *supra* note 61, at 10.

[111] *See* Rübenstahl, *supra* note 4, at 26, 34.

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