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Compliance as a strategy to avoid criminal, administrative and civil sanctions**

ABSTRACT: Compliance, which has found its place in the corporate practices of European companies, has changed from the backward-looking, traditionally reactive criminal and administrative offence law to a forward-looking control system with a focus on modern prevention, which refers to the enforcement of legal prohibitions and regulations and the company's internal guidelines, including organizational measures within the company. This is supplemented by the pursuit of the goal of compliance integrity, the creation of a compliance culture within the company and the introduction of formal structures with preventative effects. This article shows the growing legalization and juridification of ethical and internal company rules and the growing importance of sanction-related compliance. One of the main reasons for this development is the increasing plurality of prosecutions in sanctions law - the plurality of sanctions, of sanctioned subjects and of prosecution and sanctioning bodies as well as the parallel administrative and criminal investigations in several states.¹ At present, there is no guarantee that the various sanctions will be applied in a proportionate manner and that appropriate sanctions will be imposed. As a result, the sanctions imposed on companies can lead to overwhelmingly high penalties, which should therefore be avoided at all costs.

KEYWORDS: compliance, compliance strategy, criminal, administrative and civil law sanctions, European Union.

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¹ Dannecker, 2022a, pp. 13.

1. Background and practical relevance of compliance

Compliance, which originated in the USA², has today found its place in the corporate practices of European companies and can now look back on decades of development in the European Union and its member states. Nevertheless, the concept of compliance³ is still not unambiguous.⁴ It is based on different approaches and perspectives: a legal, an economic, a behavioural-psychological and an organizational one, which focuses on the framework conditions of functioning compliance.⁵ Law, economics and behavioral psychology must intertwine as complementary elements: “each supplies what the other cannot”⁶ in order to establish an effective compliance system.

Compliance is concerned with creating the framework conditions for a modern, functional control system with preventative structures.⁷ This requires a change of perspective: from the backward-looking perspective of a traditionally reactive criminal and sanction law to a forward-looking control system with a strong focus on modern prevention. A key feature of compliance is therefore the need to anticipate responsibility under sanction law and, on this basis, to develop strategies to avoid criminal, administrative and civil sanctions against the management of a company and against legal entities. In addition, board responsibility is now being extended to groups of companies, thus partially overriding the principle of judicial separation under company law. As part of the supply chain responsibility of large companies, responsibility for certain human rights and environmental violations has even been extended to the upstream and downstream supply chain.

It should also be considered that the prevention of unlawful or dangerous conduct must be conceived from the perspective of deviance within and by the company and not, as in continental European criminal law systems, primarily from the perspective of deviance by individuals committed in the (supposed) interests of the company to the detriment of the

² On the development of compliance in the USA, see Rotsch, 2024, 4. Chapter 1, No. 11.

³ In detail Moosmayer and Lösler, 2024, § 1 no. 2 ss. with further references.

⁴ Engelhart, 2012; Moosmayer and Lösler, 2024, pp. 1 ss.; Rotsch, 2015, para. 1 no. 1.; Sieber, 2008, pp. 449.

⁵ Dannecker, 2023, p. 131.

⁶ Aroney, 2023, p. 81.

⁷ Rotsch, 2024, 4. Chapter 1, no. 10.

legal interests of the community⁸ (“corporate crimes”). Company-related infringements, which primarily include cartel and price fixing, corruption and embargo violations, environmental offenses, tax and accounting offenses or subsidy fraud, have considerable potential to cause damage. These forms of deviant behavior can also be regarded as deviance for which companies are responsible, and which must be countered by sanctions-based compliance.⁹

The specific aspect of strategies for avoiding criminal, administrative and civil sanctions through compliance initially focuses on the obligation to comply with applicable law. However, compliance also refers to adherence to the requirements that have been set as part of corporate self-regulation and are binding for the company's employees. The reason for this is that internal company guidelines and regulations that go beyond the legal requirements are included in the legality obligation and legality control obligation. An illustrative example of this is the German Corporate Governance Code (GCGC), which is drawn up and further developed by a government commission and stipulates for stock corporations¹⁰ that the Management Board must comply with statutory provisions as well as internal company guidelines (legality obligation) and ensure compliance with these by means of organizational precautions, including at subordinate levels, or work towards compliance by companies belonging to the Group (legality control obligation).¹¹ The Management Board and Supervisory Board of a listed stock corporation must report annually on compliance with the legality and legality control obligations and explain that the recommendations of the “Government Commission on the German Corporate Governance Code” published by the Federal Ministry of Justice and Consumer Protection in the official section of the Federal Gazette have been and are being complied with or which recommendations have not been or are not being applied and why not.

This creates transparency and makes it easier for the authorities to monitor compliance.

⁸ Dannecker and Bülte, 2024a, p. 1. Kapitel, no. 6; Dessecker, 2013, 1. Kapitel, A, no. 7.

⁹ Pohlmann et al., 2020, p. 14.

¹⁰ On the legal situation for stock corporations, see Spießhofer, 2018, p. 441; Liese, 2024, p. 25.

¹¹ Cf. No. 4.1.3 S. 1 DCGK; on this Holle, 2014, p. 37; Baur and Holle, 2017, mp. 171 with further references.

In the following, the development of compliance from the backward-looking, traditionally reactive criminal and administrative offence law to a forward-looking control system with a focus on modern prevention, which refers to the enforcement of legal prohibitions and regulations and the company's internal guidelines, including organizational measures within the company, will be discussed. This is supplemented by the pursuit of the goal of compliance integrity, the creation of a compliance culture within the company, and the introduction of formal structures with preventative effects. As a result of the increasing legalization of ethical and internal company rules, a clear increase in the importance of sanction-related compliance can be observed (2.). Subsequently, the plurality of prosecutions in sanctions law - the plurality of sanctions, the plurality of subjects of sanctions and the plurality of prosecution and sanctioning bodies as well as the parallel administrative and criminal investigations in several states - is discussed (3.), in order to then demonstrate the necessity of coordinated, proportionate and appropriate sanctions in a fair and constitutional procedure (4.). On this basis, we conclude by commenting on the importance of compliance as a strategy to avoid sanctions against enterprises (5.).

2. On the development of compliance in the European Union: from a backward-looking, traditionally reactive criminal and administrative offence law to a forward-looking control system with a focus on modern prevention

2.1. The need to anticipate legal responsibility

Observing laws and internal company rules is, first and foremost, the responsibility of the company management. Therefore, this task must not be delegated entirely to subordinate employees. In every company, compliance must be organized and monitored by the company management. The compliance department is also responsible for ensuring that legal and operational regulations are observed. Finally, the directly responsible norm addressees can be held accountable and sanctioned for legal violations. Such sanctions and disadvantages must be avoided. This requires the change of perspective, already mentioned, from the backward-looking perspective of traditional reactive criminal and administrative offence law to a preventive control system that anticipates legal responsibilities in order to counteract behavior that threatens sanctions and avoid violations of the law.

2.1.1. Adherence to legally binding regulations

The first, classic perspective on compliance concerns the legally binding requirements that a company must adhere to.¹² The application of national laws and standards is binding for all companies. In addition to national law, companies that operate across borders must also comply with foreign legal systems and regulations that must be observed abroad. This applies in particular to economic relations with countries such as the USA and the UK, which tend to apply their own regulations extraterritorially. Internationally active companies should therefore endeavor to comply with foreign legal requirements in order to avoid the risk of being prosecuted under liability and criminal law.

Sanctions may be imposed in the event of criminal offenses and breaches of regulations subject to fines for which the company can be held responsible. Furthermore, claims for damages and administrative sanctions such as the exclusion from public contracts and public subsidies or the publication of the company naming the violation of the law may be imposed. Damage to reputation and other negative publicity with an impact on the share price, employee morale, and relationships with authorities must also be avoided.¹³ The compliance department's first task is to identify the relevant regulations for its own company and monitor compliance with them.

2.1.2. Observance with internal company standards created through self-regulation

In addition to the binding requirements of laws, material norms, and standards, individual rules of conduct that each company defines within the framework of self-regulation must also be respected. Such guidelines can be, for example, directives or declarations of intent. Companies have a great deal of freedom here, with the result that the compliance rules established by the company generally go far beyond the general obligation to comply with the law.¹⁴

¹² For a legal understanding of compliance, see Bussmann, 2009, p. 223; for a critical view, see Kreutner, 2020, p. 24.

¹³ For more details, see Lehmann, 2015, § 3 no. 14.

¹⁴ Rotsch, 2015, § 1 no. 52 with further references.

2.1.3. Adherence to state-private co-regulation

In addition to purely state regulation and self-regulation by companies, there is also state-private co-regulation.¹⁵ Public law standards oblige companies to organize themselves in such a way that they take on state functions – standard setting, policing, sanctioning – in a complementary manner. As a first step, companies are obliged to develop appropriate standards, which are reflected in corporate government codes, manuals of good practice, technical or ethical codes, etc. Due to the technical, legal or moral complexity of many areas, state laws are no longer able to regulate all cases in detail, but are increasingly limited to the standardization of principles that must be concretized, specified, and adapted to the different characteristics of the respective company.

In addition, companies in areas such as money laundering and occupational safety are obliged to train and educate their employees in the relevant standards – a task that the state has not always undertaken. Co-regulation is characterized by the fact that government regulations create more or less detailed requirements for self-regulation and/or make self-regulation measures binding. Co-regulation is therefore also referred to as “regulated self-regulation”, which has numerous hybrid forms and intermediate stages from self-regulation to state regulation with regard to the freedom of content granted, the intended objectives of the programs, and the coercive or incentive structures used. This gives rise to new forms of control in the economic sector. If the task of regulated self-regulation is not carried out by the companies, this gives rise to liability of the companies under criminal or fine law in the sense of organizational responsibility.¹⁶

2.1.4. Responsibility for organizational measures in the company and their implementation

Furthermore, effective compliance requires the creation of a compliance organization.¹⁷ If rules are to be enforced, appropriate organizational

¹⁵ Nieto Martín, 2008, p. 489.

¹⁶ In detail Nieto Martín, 2008, p. 498.

¹⁷ Lehmann, 2015, § 3 no. 6 ss. However, the economic aspects have been reflected in various legal regulations; see Kort, 2010, pp. 440 ss.; on the legal situation in France, see Walther, 2019, p. 19.

structures are required¹⁸ to minimize liability damage caused by deviant behaviour and actions by members of the organization. From a business perspective, there are three dimensions: an instrumental, functional, and institutional dimension.¹⁹

The instrumental concept of compliance is the goal-oriented formulation and safeguarding of rules. The term is instrumental in the sense that criminal compliance is a measure in the sense of an instrument for complying with legal obligations and reducing the likelihood of damage.²⁰ The formulation of a cross-organizational code of ethics or code of conduct is the top priority. This self-imposed code must be aimed at encouraging members of the organization to follow imposed behaviours and patterns.

The functional character of compliance expresses the tasks and activities associated with how the relevant employee actions can be limited to a legally and economically responsible level. This involves activities in connection with the introduction, planning, implementation and monitoring of compliance programs. This area of responsibility includes structuring, segmenting, and differentiating the decision problem.²¹

The institutional character of compliance is expressed in the organizational integration of compliance, whether in the form of separate departments, as an external service, or in the form of a hybrid solution.²² The compliance department does not have to know and explain every rule and every law in detail. Instead, the tasks are more of a procedural nature. It is about recognizing relevant changes, implementing them with regard to the specific company, distributing knowledge about the rules, ensuring information flows, setting up notification and reporting structures and documenting issues relevant to liability and sanctions.

If a company does not fully and comprehensively comply with the requirements of organizational law, this can also result in improper conduct, which can lead to the infringement being attributed to compliance employees and the company management. In Germany, such cases constitute at least a breach of the “duty of supervision within the company”, which is punishable by a fine under Section 130 of the German Administrative Offenses Act (Ordnungswidrigkeitengesetz, OWiG). The

¹⁸ Bürkle, 2018, pp. 525 ff.; Dannecker and Dannecker, 2010, p. 981.

¹⁹ Lehmann, 2015, § 3 no. p.11.

²⁰ Lehmann, 2015, § 3 no. p. 76.

²¹ Lehmann, 2015, § 3 no. p. 66.

²² Lehmann, 2015, § 3 no. p. 11, p. 79.

prerequisite for Section 130 OWiG is that a person of the high or middle management intentionally or negligently fails to take supervisory measures that are necessary to prevent violations of obligations subject to criminal penalties or fines in the company. Violations of Section 130 OWiG by company management give rise to liability of the association under fine law.²³

2.2. Increasing importance of compliance as a result of the legalization of ethical and internal company rules

While ethical and internal company rules were very popular in the 20th century, there is now a clear trend towards the juridification of ethical and internal company rules. This development from soft to hard law is based on very different mechanisms.

2.2.1. Expansion of legal obligations in specific compliance areas

In recent years, there has been a very strong legalization under the influence of the European Union and the USA. Particularly in areas such as money laundering²⁴, accounting²⁵, anti-corruption,²⁶ and terrorism²⁷, the European Union's guidelines are binding for its member states and thus extend the legal obligations to be complied with in many areas. Regulations in directives of the European Union are not binding for citizens and legal entities, but they must be implemented by the member states in national law and thus become legally binding.

For special areas such as food law, the European Union's basic food law regulation²⁸ contains numerous obligations that companies must comply with. The inspection, information, and recall obligations regulated there, which also and in particular relate to cross-border situations, can be classified as a standard for dealing with products to be placed on the market, especially as they are in principle in line with the national obligations of the

²³ On the need to introduce criminal sanctions against legal persons in Germany, see Dannecker, GA 2001, p. 101.

²⁴ Jacsó, 2021, p. 117.

²⁵ Dannecker and Bülte, 2024.

²⁶ Dannecker and Schröder, 2021, § 8 no. 93.

²⁷ Böse, 2019, p.1.; Hecker, 2016, 467 ss.; Weißer, 2021, § 9 no. 82.

²⁸ Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety.

member states. It therefore makes sense to focus specifically on the food law of the European Union when it comes to specifying the obligations of companies operating across borders.²⁹

US regulations must always be taken into account by foreign companies, which have a connection to the USA, because there is a general tendency towards the extraterritorial application of US law; in addition, ideas from other countries are adopted there. Such rules are even suitable for specifying extra-legal expectations of companies if they want to act as good corporate citizens.³⁰ Finally, there are states with particularly strict regulations, such as the United Kingdom with the Bribery Act. If a company uses these to align its compliance accordingly, it can assume that it has implemented the highest compliance standards, provided that these are actually adhered to.

2.2.2. Adoption of ethical and internal company requirements in European and national law

The simplest form of legalization of ethical or internal company rules is the incorporation of such requirements into European or national law. This is not just about the requirements of stock corporation, accounting, or capital market law³¹, but about corporate law in a much broader sense.³² Examples of explicit inclusion in legally binding instruments include the EU Public Procurement Directives³³, the EU Basic Regulation on Food Law³⁴,

²⁹ See Csirszki, 2021, p. 191 ss.

³⁰ See Dannecker and Schröder, 2023, p. 445.

³¹ See Fleischer, 2017, p. 509.

³² On the regulatory approaches, see Beckers, 2021, p. 223; Möslin and Engsig Søkrensen, 2018, p. 391; Rühl, 2023, p. 14. For climate protection, see Weller, 2024.

³³ Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, OJ L 94, 28.3.2014, p. 1; Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94, 28.3.2014, p. 65; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, OJ L 94, 28.3.2014, p. 243.

³⁴ Regulation (EC) No 178/2002 of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, OJ L 31, 1.2.2002, p. 1.

occupational health and safety and environmental laws³⁵, the UK Modern Slavery Act, Section 172 of the UK Companies Act and the Public Benefit Corporation Statutes.³⁶ Sector-specific due diligence obligations to protect the legal interests concerned can be found in the Conflict Minerals Regulation³⁷, the Deforestation Regulation³⁸, the Batteries Regulation,³⁹ and the Forced Labor Regulation.⁴⁰

Moreover, with the CSR Reporting Directive⁴¹, the European Union has introduced reporting obligations on the impact of activities on non-financial matters⁴², such as human rights and environmental protection as well as other social and employee matters, governance factors and the fight against corruption.⁴³ In addition, parent companies have to report on the sustainability impact of their subsidiaries' activities as part of their consolidated reporting.⁴⁴ Since then, the Corporate Sustainability Reporting Directive of 2022 (CSRD)⁴⁵ has significantly tightened sustainability

³⁵ See the articles in De La Cuesta et al., 2016.

³⁶ See Fleischer, 2017, p. 524; Spießhofer, 2017, p. 70.

³⁷ Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas, OJ L 130, 19.5.2017, p. 1.

³⁸ Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010, OJ L 150, 9.6.2023, p. 206.

³⁹ Regulation (EU) 2023/1542 of the European Parliament and of the Council of 12 July 2023 concerning batteries and waste batteries, amending Directive 2008/98/EC and Regulation (EU) 2019/1020 and repealing Directive 2006/66/EC, OJ L 191, 28.7.2023, p. 1.

⁴⁰ Regulation (EU) 2024/3015 of the European Parliament and of the Council of 27 November 2024 on prohibiting products made with forced labour on the Union market and amending Directive (EU) 2019/1937, OJ L, 2024/3015, 12.12.2024.

⁴¹ Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, OJ L 322, 16.12.2022, p. 15.

⁴² Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups, p.1.

⁴³ Art. 19a.

⁴⁴ Art. 29a.

⁴⁵ Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC,

reporting by considerably expanding the scope of application⁴⁶ and introducing an external audit requirement.⁴⁷ The comply-or-explain mechanism has been largely abolished.⁴⁸ In addition, the new regulation also extends reporting to the value chain, business relationships, and supply chain of the reporting company itself and - if there is a consolidation obligation - also to subsidiaries.

Further reporting obligations can be found in the Taxonomy Regulation⁴⁹ on the scope of environmentally sustainable economic activities of a company (Art. 8) and in the Disclosure Regulation⁵⁰ on the consideration of sustainability criteria in the financial sector. The aim of reporting is to increase the comparability of companies with regard to the factors to be mentioned in the report.⁵¹

Furthermore, the European Union combines reporting with due diligence obligations⁵², for example in Directive (EU) 2024/1760 on due diligence obligations of companies with regard to sustainability (CSDDD).⁵³ This directive for the first time provides for material due diligence obligations to protect certain human rights and the environment at European level, irrespective of the sector. Compliance with these obligations is secured by public law measures of the supervisory authorities⁵⁴ and civil liability of the regulated companies.⁵⁵ In addition, Article 28 of the CSDDD

Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, OJ L 322, 16.12.2022, p. 15.

⁴⁶ Renner, 2022, p. 794.

⁴⁷ Atamer and Willi, 2022, p. 44; Leyens, 2023, p. 86.

⁴⁸ Cf. to the few exceptions Jentsch, 2023, pp. 24 s.

⁴⁹ Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, and amending Regulation (EU) 2019/2088, OJ L 198, 22.6.2020, p. 13.

⁵⁰ Regulation (EU) 2019/2088 of the European Parliament and of the Council of 27 November 2019 on sustainability-related disclosures in the financial services sector. p. 1. last amended by Regulation (EU) 2023/2869 of the European Parliament and of the Council of 13 December 2023 amending certain Regulations as regards the establishment and functioning of the European single access point, OJ L, 2023/2869, 20.12.2023.

⁵¹ Burckhardt, 2020, p. 75.

⁵² Atamer and Willi, 2018, p. 451.

⁵³ Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, OJ L, 2024/1760, 5.7.2024. p.2.

⁵⁴ Art. 24–28. CSDDD.

⁵⁵ Habersack and Zickgraf, 2023, p. 599; Kieninger, 2024, p. 1044; Nietsch, 2024, p. 2865. Critical evaluation by Thomale and Schmid, 2024, p. 425.

requires Member States to introduce provisions on fines for breaches of due diligence obligations. The directive thus supplements the existing European regulations for achieving the sustainability goals, which primarily provide for reporting obligations and sector-specific due diligence obligations.⁵⁶ In the opinion of the EU Commission, soft law and self-regulatory approaches were not sufficiently effective.⁵⁷

The most important innovation in the directive concerns the extension of the scope of corporate responsibility to subsidiaries and business partners in the supply chain. However, these requirements only apply to companies in selected legal forms that exceed high thresholds.⁵⁸ The specific details of the due diligence obligations are set out in the provisions of Art. 5-16 CSDDD.⁵⁹

It is apparent here, that the regulatory model addresses rules of conduct for companies and not for natural persons. The aim is for companies to establish preventive measures in their own business area and, where possible, to motivate their suppliers to do the same. A risk analysis is required in the company's own business area and in those of its direct suppliers. If a risk is identified, preventive measures must be taken immediately. It should be noted that breaches of obligations can often go hand in hand with conventional breaches of due diligence with specific hazards and violations at the beginning of the supply chain. In this respect, a duty to act is imposed on companies in advance of relevant violations of the law, obliging them to take remedial measures in the event of specific violations of the law, up to and including the termination of business relationships. If the obligation to introduce supply chain responsibility has not yet been transposed into national law in an EU member state, the UN Guiding Principles on Business and Human Rights 2011 and the OECD Guidelines for Multinational Enterprises 2011 can be referred to.⁶⁰

⁵⁶ Cf. Zetzsche and Sinnig, 2024, p. 1342.

⁵⁷ SWD(2022) 42 final (no. 16), pp. 14-34.

⁵⁸ In detail Atamer and Wittum, 2024, p. 14.

⁵⁹ Schuhr, 2023, p. 51.

⁶⁰ For more details, see Hübner, 2024, p. 763.

2.2.3. Legalization through the determination of dutiful conduct with recourse to good practices

As already indicated, “soft law with hard sanctions” can also develop if soft law, such as the UN’s due diligence obligation, establishes guiding principles for standards of care that are incorporated into tort or criminal negligence liability.⁶¹ Compliance with good practices can also exclude the charge of negligent, i.e. careless, behavior. Domestic and international best practices can therefore gain direct legal relevance through vague legal terms such as negligence.

The same applies in cases of omission, in which the omission contrary to duty lies in the failure to perform the required duties, and here, too, domestic good practices, e.g. recognized ethical rules, can be used for concretization.⁶² Criminal liability for failure to act in breach of duty is of central importance in Germany in connection with compliance, after the Federal Court of Justice (Bundesgerichtshof) ruled in the *Berliner Stadtwerke* decision that the compliance officer of a company is obliged to complain about and prevent legal violations against third parties from within a company. Furthermore, there are cases in which published codes of conduct contain inaccurate promises that can trigger lawsuits for unfair competition.⁶³

2.2.4. Legalization of good practices through recognition of compliance as a reason for mitigation under criminal and administrative fine law

Even though good practices are not legally binding rules, they do have a certain legal force in that compliance must be taken into account as a mitigating factor in the event of conduct that is relevant under criminal or administrative law. The Council states this in the draft EU Corruption Directive (11272/24):⁶⁴

⁶¹ In detail Sieber, 2008, p. 468.

⁶² In detail Nieto Martin, 2008, p. 496.

⁶³ In detail see the articles in Hilty and Bodewig, 2014, p. 3.

⁶⁴ Proposal for a directive of the European Parliament and of the Council on combating corruption, replacing Council Framework Decision 2003/568/JHA and the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union and amending Directive (EU) 2017/1371 of the European Parliament and of the Council, No. 22.

It is important that courts Member States should ensure that can take into account mitigating circumstances are laid down in national legislation in relation to the offences covered by this Directive, in accordance with the applicable rules established by their legal systems. Subject to judicial discretion, these circumstances should cover those cases in which offenders provide information or otherwise collaborate with authorities. Similarly, where legal persons have implemented genuine, effective and duly assessed internal controls, ethics, and compliance programmes, it should be possible to consider these actions as a mitigating circumstance when sanctioning such legal persons. Lower sanctions penalties should also be considered where, upon discovery of an offence, a legal person swiftly discloses information and takes remedial measures. In any case, it should remain within the discretion of the judge or the court to determine the actual amount of the sanction, taking into account all the circumstances of the individual case, including, where applicable, the fact that the legal person has compliance programmes only for cosmetic purposes, also called ‘window dressing’.

In its decision of 09.05.2017 - 1 StR 265/16⁶⁵ on the consideration of a compliance management system in the assessment of fines, the German Federal Court of Justice also stated that the extent to which a legal entity has fulfilled its duty to prevent legal violations and has installed an efficient compliance management system aimed at preventing legal violations is important for the assessment of the fine. This raises the question of what specific requirements a compliance system must fulfill in order to be taken into account as a reason for mitigation. In 2020, the German legislator standardized a non-exhaustive list of criteria for the assessment of fines in Section 81d (1) sentence 2 GWB for antitrust fine law, including the consideration of compliance measures before and after the infringement was committed to reduce the fine. The Federal Financial Supervisory Authority (BaFin) has also compiled “Minimum requirements for the compliance function and further conduct, organization and transparency obligations” in Circular 05/2018 (WA) in the version dated 19.04.2018, amended on

⁶⁵ BGH, Urteil v. 17.07.2009 — 5 StR 394/08, BGHSt 54, p. 44; JZ 20/2010, p. 1018.

29.04.2020. In Section 3 para. 1 no. 2 of the draft Association Sanctions Act the terms “organization”, “selection”, “guidance” and “supervision” are mentioned to describe suitable precautions. However, it does not specify what is meant by these terms and which precautions are appropriate.

As internationally active companies have to take into account the various national requirements for an effective and efficient CMS when designing their compliance management system, it is recommended that they look to countries such as the USA (UK Bribery Act 2010), the UK (UK Bribery Act 2010), Brazil (Clean Company Act), France (Sapin II) and Spain (Código Penal), which have long taken compliance efforts into account as a reason to mitigate penalties.⁶⁶

2.3. Higher probability of sanctions as a result of the responsibility of managers, compliance staff, the association and the enterprise as an economic entity

The management board of the company is the first level of duty addressees. In view of the fact that compliance with laws and regulations is first and foremost the responsibility of the company management, this task must not be delegated entirely to subordinate employees. Rather, compliance must be organized by the company management itself in every company. It is therefore essential to set up a compliance department and to delegate compliance tasks. In addition, the company management is responsible for the implementation of self-regulation. Next, the employees of the compliance department are obliged to uphold the tasks assigned to them and can be sanctioned in the event of a breach of duty by company employees if they have not fulfilled their monitoring and control duties. Finally, the conduct of persons with a management function in a company can trigger association⁶⁷ or even group responsibility.⁶⁸

The expansion of corporate obligations to include effective compliance thus leads both to an expansion of corporate obligations and to a multiplication of the addressees of sanctions, which increases the risk of sanctions being imposed on the persons responsible for the company and on the associations and groups themselves.

⁶⁶ Wiedmann und Greubel, 2019, p. 93; Makowicz, 2018, p. 558.

⁶⁷ In detail Dannecker, 2022b, p. 85.

⁶⁸ Näher Dannecker, 2022b, p. 85; Dannecker, 2021, p. 11.

2.4. Measures to reduce the risk of sanctions

2.4.1. Orientation towards domestic and international good practices

In addition to complying with legally binding rules, it is also advisable for companies to follow domestic and international good practices in order to minimize the risk of liability and sanctions and to avoid any negative publicity. Insofar as activities are carried out in the domestic market, the national requirements are decisive; in the case of cross-border activities, the good practices recognized in the respective country or international good practices can serve as points of reference for the companies.

2.4.2. Supplementing the legal and psychological behavioral requirements with aspects of compliance integrity and compliance culture

The legal view of compliance and the behavioural-psychological requirements are criticized as being too narrow and too strongly focused on individuals acting rationally.⁶⁹ In addition, attention must be paid to both compliance integrity⁷⁰ and compliance culture⁷¹ within the company.⁷²

The importance of corporate culture becomes clear when it is considered that even outside of companies, in society as a whole, crime prevention is achieved least through police control and strict penalties, but most strongly through socialization in instances such as friends, school and at work. However, modern moral research has identified a fragmentation of the application of norms:⁷³ Although offenses such as fraud are generally firmly rejected, the application of norms is made dependent on the respective situation. In the process of the dynamic differentiation of areas of life, normative expectations, values and moral concepts have lost their absolute validity. Contradictions in values are often no longer perceived as disturbing. Honest people believe that they are allowed to cheat or corrupt in their function as business managers. In private life, they are honest citizens. For this reason, socialization must also take place in companies.

⁶⁹ Jüttner, 2021, p. 2.

⁷⁰ Bussmann, 2016, pp. 50-54; Dannecker and Schröder, 2020, p. 301.

⁷¹ In detail Bussmann, 2016, p. 52; Jüttner and Barnutz, 2020, p. 250; Ruhmannseder, 2020, pp. 13-24.

⁷² In detail Graeff and Kleinwiese, 2020, p. 219; Gebhardt, 2020, p. 247; Jüttner and Barnutz, 2020, p. 250.

⁷³ Nunner-Winkler, 2000, p. 332.

Compliance must not only be legal, but must also be based on adherence to compliance rules out of insight and conviction.⁷⁴

Particular emphasis is given to the management's commitment to compliance.⁷⁵ For effective and efficient corporate compliance, the “tone from the top” must first be right.⁷⁶ Company management must show that it takes compliance with all regulations seriously and expects employees to do so.⁷⁷ The company management itself must make a clear commitment to compliance.⁷⁸ The code of conduct and the management's commitment to it must be set out in writing and regularly communicated to employees.⁷⁹ In order for the guiding principle of compliance to become firmly established in the company, the company management must set an unrestricted and authentic example of compliance.⁸⁰ In addition, middle management must be involved as their dutiful behavior towards compliance ensures the greatest possible impact within the company. This is a matter of the “tone from the middle”.

Compliance integrity means a commitment to questions of legitimacy. It requires not only wanting to comply with the law publicly and formally but also acting in accordance with the law and setting limits for the use of legal leeway. This is a particular challenge for international companies in a legally heterogeneous world in which, for example, human rights and environmental protection are respected very differently. A company that opts for “aggressive tax planning” may still be compliant, but cannot claim to act with integrity. Integrity requires that a “voluntary self-commitment based on insight” is developed.⁸¹

Compliance culture describes the value system of company employees in terms of the extent to which compliance with the law and adherence to rules

⁷⁴ Bussmann, 2016, p. 52.

⁷⁵ Wiedmann and Greubel, 2019, p. 89.

⁷⁶ Bussmann, 2016, p. 54.

⁷⁷ Bundesamt für Wirtschaft und Ausfuhrkontrolle (BAFA), 2018, p. 12; Bundesverband der Unternehmensjuristen e.V. (BUJ), 2014, p. 20; Makowicz, 2018, p. 558; Wilsing and Goslar, 2017, p. 1203; Glöckner, 2017, p. 906; Hastenrath, 2017, p. 327.

⁷⁸ Bundesamt für Wirtschaft und Ausfuhrkontrolle (BAFA), 2018, p. 12.

⁷⁹ Bundesamt für Wirtschaft und Ausfuhrkontrolle (BAFA), 2018, p. 12; Hastenrath, 2017, p. 328.

⁸⁰ Bundesamt für Wirtschaft und Ausfuhrkontrolle (BAFA), 2018, p. 13; Bundesverband der Unternehmensjuristen, 2014, p. 20; Hastenrath, 2017, pp. 325-329.

⁸¹ Bussmann, 2016, p. 54.

is accepted, respected and supported as a value by all employees.⁸² This is associated with the expectation that all company employees, including managers, behave with moral integrity and do not allow themselves to be corrupted.

2.4.3. Creating formal structures with preventative effects

The behavioral-psychological perspective on compliance continues to be countered with the argument that it is too short-sighted to place the human factor in isolation at the center of compliance efforts. Rather, it is necessary to create formal structures that have a preventative effect.⁸³ Therefore, an organizational approach is called for that focuses on the framework conditions for functioning compliance and the creation of preventative structures. It is not sufficient to implement legal requirements⁸⁴ and set up a department that is declared responsible. Adequate framework conditions must also be created that counteract deviant behavior and do not encourage it. If bank employees, for example, can only achieve targets by concluding illegal loan agreements or particularly risky investments, this is an incentive to break the rules. The old saying applies here: “You can’t force a plant to grow. But you can encourage it to grow by weeding the ground - and allowing it to grow.”⁸⁵ It is also necessary to ensure that standards are adhered to and to refrain from exhausting the possibilities of just legal behavior in the border area. This is because the “principle of the thin ice” recognized in English law applies here, which takes into account the fact that no lasting sustainability can be achieved if the limits of what is still permissible are explored and used.

3. Development of a plurality of sanctions and of prosecution by expanding the sanctions and the prosecution and sanctioning bodies

The expansion of the obligations to be fulfilled by companies in order to meet compliance requirements is complemented by the development of sanctions law. This is characterized by the fact that sanctions are being extended, the subjects of sanctions are being multiplied, and new

⁸² Schulz and Muth, 2014, p. 265.

⁸³ Jüttner and Barnutz, 2020, p. 252.

⁸⁴ Jüttner, 2021, p. 1.

⁸⁵ See Jüttner and Barnutz, 2020, pp. 250-256.

prosecution and sanctioning bodies, such as the EU's anti-money laundering authority AMLA, are being created.⁸⁶ In addition, administrative and criminal investigations are being conducted in parallel in several countries without the criminal, administrative and civil sanctions being coordinated.⁸⁷

3.1 Expansion of the sanctions, the subjects of sanctions and of the prosecution and sanctioning bodies

Modern sanctions law today includes a wide range of sanctions, ranging from criminal sanctions (custodial sentences, criminal fines and measures of improvement and security) to criminal sanctions in the broader sense (administrative penalties and administrative fines) and disciplinary measures. In addition, there are sanctions such as the freezing of illegally obtained profits, the seizure and confiscation of instrumentalities and proceeds of crime including their substitute goods, exclusion from public contracts, "shame and blame" sanctions, professional bans, subsidy cuts and subsidy freezes, punitive tariffs and tax surcharges, and the denial of future permits and concessions.⁸⁸ Measures to strengthen civil law damages, which the European Union and the ECJ use not only for restitution purposes but increasingly also as a means of private enforcement, should also be mentioned.⁸⁹

This development in the European Union⁹⁰, which is strongly influenced by international and, in particular, EU law, reflects a shift in focus from repressive criminal sanctions to preventive administrative sanctions.⁹¹ As a rule, the various sanctions are imposed cumulatively, as they serve different purposes: repression aimed at compensating for guilt, preventive danger prevention and restitution for the damage caused.⁹²

⁸⁶ Dannecker, G., 2022, p. 13; Neumann, 2024, passim, und 2021, pp. 449–458.

⁸⁷ Brodowski, 2022, p. 26; Graf, 2022, p. 55.

⁸⁸ See the articles in Saliger, 2025, p. 13; Sieber, 2019, p. 7.

⁸⁹ Thomale, 2024, p. 425.

⁹⁰ Dannecker and Bülte, 2024b, p.131.

⁹¹ See Paliero, 1994, p. 245.

⁹² On the need to integrate criminal, civil and administrative sanctions into an overall concept of sanctions, see Wess, 2023, pp. 93 - 112; Wegner, 2023, pp. 113 – 131; Groß, 2023, pp. 133 –140.

3.1.1. Supplementation of the classic criminal and fine sanctions by confiscation, disqualification from exercising a profession and publication of convictions

In the following, the supplements to the classic criminal penalties and fines will be shown on the basis of confiscation, disqualifications and notices of judgment.

Criminal penalties, including ancillary penalties and remedial measures (irrespective of guilt), are supplemented by criminal sanctions in the broader sense, such as administrative penalties and administrative fines (Verwaltungsstrafen, Geldbußen). A characteristic of all repressive sanctions is that they must be commensurate with guilt. The principle of culpability (*nullum crimen sine culpa*) requires not only a “psychological relationship” of the perpetrator to his offense, not “merely” a mental and emotional state with regard to the offense and the success of the offense. Criminal guilt is also about an assessment of the facts, a value judgment about the perpetrator's formation of will and exercise of will: “With the unworthy judgment of guilt, the perpetrator is accused of not having behaved lawfully, of having decided for the wrong, although he could have behaved lawfully, could have taken the right decision.”⁹³ The object of the accusation of guilt is therefore the perpetrator's incorrect attitude towards the behavioral requirements of the law.⁹⁴ In the sense of a material concept of guilt, guilt therefore means the reproachability of the act with regard to the legally disapproved attitude on which it is based.⁹⁵ The actualized lack of conviction determines the degree of guilt.⁹⁶ The compensation for guilt is in turn the basis and limit of repressive punishments, which must serve both special and general preventive purposes.⁹⁷ Neither guilt nor prevention alone can legitimize a punishment.⁹⁸

⁹³ BGHSt 2, 194, 200.

⁹⁴ Bringewat 2024, no. 465.

⁹⁵ Baumann et al., 2021, § 16 Rn. 11 ff., 14; Jescheck and Weigend, 1996, § 38 I 5; Roxin and Greco, 2020, § 19 Rn. 18 ff.

⁹⁶ Baumann et al., 2021, § 16 Rn. 11 ff., 14; Jescheck and Weigend, 1996, § 38 I 5; Roxin and Greco, 2020, § 19 Rn. 18 ff.

⁹⁷ Roxin and Greco, 2020, Vol. I § 3 Rn. 59.

⁹⁸ Hörnle, 2017, p. 4; Neumann, 2011, p. 125.

A) Supplementation of criminal penalties and fines through confiscation

In addition to the general penalties and measures of improvement and security, criminal and administrative offences law also provides for specific sanctions that are primarily aimed at the perpetrator's or participant's unfair pursuit of profit and serve to confiscate assets. In this regard, the European Union⁹⁹ has obliged the member states to introduce confiscation in the Directive “on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union” (Directive 2014/42/EU). This pursues the preventive goal that crime doesn't pay.¹⁰⁰ For this reason, both the proceeds of crime and the instrumentalities of crime, such as tools and objects produced by the crime, as well as counterfeit money and forged documents (crime products), must be confiscated. Confiscation is necessary because the fine, if it follows the daily rate system, does not allow profits to be skimmed off, as the economic benefits derived from the offense cannot be directly taken into account when determining the number and amount of daily rates.

Directive 2014/42/EU is based on a comprehensive concept of proceeds and property: According to Art. 2 No. 1 of the Directive, proceeds means any economic advantage obtained directly or indirectly as a result of a criminal offense. It may consist of property of any kind and includes any subsequent investment or conversion of direct proceeds and pecuniary benefits. Property is defined in Art. 2 No. 2 Directive 2014/42/EU as tangible or intangible, movable or immovable property of every kind and documents or instruments belonging to a person.

If an unlawful act has been committed, the confiscation of the offender's or participant's property is also ordered if this property was obtained through or for other unlawful acts (extended confiscation). Art. 5 para. 2 of the Directive contains a list of offenses that must be covered as a minimum for extended confiscation. This does not only apply to the confiscation of property resulting from the specific offense being prosecuted. It also covers property which, in the opinion of the court dealing with the case, originates from other criminal offenses committed by the offender.

Confiscation from third parties is also possible if they are the beneficiaries of a criminal offense, regardless of whether the beneficiary is at fault. Thus, the proceeds of crime can be recovered wherever they have

⁹⁹ For an overview of the measures in Europe, see Krause, 2024, no. 2490.

¹⁰⁰ Bundestags-Drucksache 18/9525, pp. 2-48.

accrued unlawfully because the perpetrator or participant has acted on behalf of the third party and the third party has thereby obtained the pecuniary advantage. In essence, the aim here is to recover this asset from a person who has not committed a criminally relevant act but has benefited economically in some way from a criminal offense. This applies in particular to white-collar and association crime, where financial benefits from criminal offenses usually accrue to the company rather than the perpetrator due to the contractual or agency relationship.¹⁰¹

The member states had to transpose Directive 2014/42/EU into national law by October 4, 2016. In Germany, this was done with the Act on the Reform of Criminal Asset Forfeiture, which came into force on July 1, 2017.¹⁰² The aim of the legislator was to completely reorganize confiscation¹⁰³ in order to ensure that criminal assets are not tolerated by the state because they create an incentive for offenders to commit profit-oriented crimes and encourage the reinvestment of criminal profits in criminal enterprises. In addition, the public's trust in the justice and integrity of the legal system will suffer lasting damage if criminals are allowed to permanently keep assets obtained through crime.¹⁰⁴ According to the Federal Constitutional Court in its decision of January 14, 2004¹⁰⁵, asset recovery thus serves the “regulatory access” (“*ordnenden Zugriff*”)¹⁰⁶ of the law to correct asset situations that violate criminal law and to restore the validity of the substantive legal order beyond the possibilities of civil law.¹⁰⁷ The criminal policy program of the reform legislator on asset recovery is upgraded to an overriding concern of the common good, which even justifies real reactivity.¹⁰⁸ This brought confiscation out of its criminal-policy shadowy existence and made it a powerful instrument in the fight against crime with facilitated evidence and genuine retroactive effect.¹⁰⁹

Furthermore, the European legislator adopted Directive (EU) 2024/1260 of the European Parliament and of the Council of April 24, 2024, on Asset Recovery and Confiscation. This Directive lays down “minimum

¹⁰¹ Lohse, 2024, no. 193.

¹⁰² Saliger 2023, Vor §§ 73 ff. p. 9.

¹⁰³ Ibid.

¹⁰⁴ Bittmann, 2025, p. 49.

¹⁰⁵ BVerfG, NJW 2021, p. 2073.

¹⁰⁶ BVerfG, NJW 2004, p. 2073.

¹⁰⁷ Bundestags-Drucksache 11/6623, p. 7; Bundestags-Drucksache 18/9525, p. 58.

¹⁰⁸ BVerfG, NJW 2004, p. 2078.

¹⁰⁹ Saliger, 2023, Vor § 73 Rn. 3.

rules” for the tracing, identification, freezing, confiscation and management of property in the context of proceedings in criminal matters. The directive applies to a wide range of offences that are primarily attributable to organized crime. However, the offense areas covered also include illegal arms trafficking, money laundering and corruption as well as violations of EU restrictive measures, i.e. violations of sanctions regulations, and environmental offenses. The member states must transpose this directive into national law by 23.11.2026.

Companies can be affected by the issue of asset recovery in very different ways.¹¹⁰ If the public prosecutor's office conducts a preliminary investigation against a corporate body or an employee of a company for a criminal offense that has benefited the company economically, the company in Germany can generally only be affected by asset recovery as a third party, as there is no criminal liability of legal persons. The decisive factor is who benefits from the economic advantage of the offense: the offender himself or the company. The German Federal Court of Justice has clarified in a series of rulings¹¹¹ that the pecuniary advantage is generally to be skimmed off from the person who directly received it. This case law is based on the principle of separation of property, according to which the legal entity has its own property which must be separated from the private property of the organ, representative or agent. In the case of criminal offenses committed for the benefit of a legal entity, the financial benefit generally lies with the legal entity. In such cases, according to the case law of the Federal Constitutional Court¹¹², a confiscation order can only be considered against the perpetrator in the exceptional case if the perpetrator only uses the legal entity as a “formal shell” or if every inflow of assets to the company resulting from the offense is also passed on to the perpetrator. These are cases in which there is no differentiation between the private assets and the company's assets, but rather a mixture of the respective asset spheres.¹¹³

¹¹⁰ See Meißner and Schüttrumpf, 2022, Kapitel 6 no. 428.

¹¹¹ BGH, wistra 2023, p. 424; BGH, NStZ 2023, p. 301; BGH, BeckRS 2022, 35139; BGH, wistra 2023, p. 289.

¹¹² BVerfG, wistra 2004, 378, Rn. 53

¹¹³ See Meißner, 2025, p. 30.

B) Professional bans under criminal and administrative law

There are also bans on practicing a profession in cases of misuse of the profession or trade, or gross violation of the duties associated with them. In practice in Germany, however - unlike in many other countries – criminal disqualifications are imposed comparatively rarely.¹¹⁴ Of greater sectoral significance are the criminal bans on directors of corporations, which were last extended in 2008, particularly in the case of convictions for insolvency offenses, embezzlement or fraud. Loss of office occurs *de lege* when the criminal judgment becomes final; legal acts carried out after this time are invalid. The court and public prosecutor's office must notify the commercial register of the conviction, which then deletes the entry. In many countries, the non-criminal option of removing members of government and civil servants from office plays a role in the fight against corruption. Disbarment can also take effect automatically upon conviction for certain criminal offenses, for example, for an insolvency offense, as is the case in Germany, without the court having to impose this sanction specifically. In this case, there is no question of guilt, administrative discretion or the principle of proportionality.

In addition to the criminal prohibition from practicing a profession, there is also the administrative prohibition from practicing a trade due to the unreliability of the trader and the exclusion from the liberal professions by a court of honor, the imposition of which is at the discretion of the administrative authority and is subject to the principle of proportionality.

C) Publication of violations of duty on mere suspicion of a violation of the law

Public information can be provided as a criminal sanction in the broader sense, such as the publication of the imposition of a fine for a cartel law violation. The fundamental principles of criminal law such as *nullum crimen sine lege*, *nullum crimen sine culpa* and the presumption of innocence apply to such sanctions.¹¹⁵

However, the law also recognizes administrative sanctions that serve to create transparency. For example, Section 40 (a) of the German Food and Feed Act (Lebens- und Futtermittelgesetz, LFGB) obliges the authorities to publish suspicions of a violation of food law against limit values, maximum levels or maximum quantities, or against other regulations that serve to

¹¹⁴ Dazu LK-StGB/Hanack § 70 Rn. 4.

¹¹⁵ Dannecker and Bülte, 2024b.

protect against health hazards, deception or adherence to hygiene requirements, if the violation is not only insignificant or repeated and the imposition of a fine (Geldbuße) of at least three hundred and fifty euros is to be expected. The expectation of a fine of 350 euros, which is intended to limit the scope of application to more serious cases¹¹⁶, is linked by preventive administrative law to a prediction of a repressive sanction.

This provision, which serves to inform the public about violations of food and feed law¹¹⁷, has been met with great reservation by administrative authorities and administrative court rulings,¹¹⁸ and has led to an intensive discussion about the justification and limits of public information in food law. In particular, the proportionality and specificity of the legal regulation¹¹⁹ as well as the lack of specifications for the content of official publications relevant to consumers, have been disputed.¹²⁰ Furthermore, a violation of the presumption of innocence is also alleged,¹²¹ and due to the sanction-like effect, a prohibited penalty of suspicion is claimed.¹²² This particular sanction¹²³ can be used to show that administrative sanctions must also comply with the rule of law.

Informing the public in accordance with Section 40 para. 1a no. 2 LFGB is only permitted if there is a suspicion of a violation of food or feed law that is sufficiently substantiated by facts, which must not be insignificant or must have been committed repeatedly, and a fine of at least EUR 350 is to be expected. Firstly, requirements are set for the factual basis of the suspicion and its probability, as well as two further requirements - the seriousness of the infringement and the expectation of a fine of at least 350 euros. This is intended to ensure that the mandatory publication, which

¹¹⁶ Dazu Böhm, 2019, p. 22.

¹¹⁷ Zur Verbraucherinformation in der Verwaltungspraxis *Monsees* Behördliches Informationshandeln im Lebensmittelbereich, 2018, S. 207 ff.

¹¹⁸ VGH Baden-Württemberg, Beschluss vom 28.1.2013 – 9 S 2423/12 –, juris, BayVGh, Beschluss vom 18.3.2013 – 9 C 13.80, Niedersächsisches OVG, Beschluss vom 14.6.2013 – 13 ME 18/13; Hessischer VGH, Beschluss vom 23.4.2013 – 8 B 28/13; OVG Nordrhein-Westfalen, Beschluss vom 24.4.2013 – 13 B 192/13.

¹¹⁹ Becker, 2011, pp. 391-416; Grube and Immel, 2012, p. 116; Hamm, 2018, p. 2099; Kühne and Preuß, 2012, p. 307; Möstl, 2015; Wallau, 2010, p. 382.

¹²⁰ See Bäcker, 2016, p. 595.

¹²¹ Gundel, 2013, p. 662; Hamm, 2018, p. 2101; Möstl, 2015, pp. 185; Wallau, 2010, p. 385; see also Dannecker, 2013, p. 925.

¹²² Esser in: Löwe and Rosenberg, StPO, Bd. 11, 26. Aufl. 2006, Art. 6 EMRK Rn. 493; differenzierend Dannecker, 2013, pp. 924-926.

¹²³ Herold, 2019, p. 53.

constitutes an infringement of professional freedom in particular¹²⁴, is proportionate; according to its wording, Section 40 (1a) LFGB is a “must” requirement that does not grant the authority any discretion with regard to informing the public.

The legislator's purpose in providing public information is to enable consumers to make their consumption decisions in the knowledge of the published irregularities and, if necessary, to refrain from contracting with the named company. According to the legislator's intention, the original purpose of the regulation is to provide consumers with an informational basis for their decisions.¹²⁵

In addition, court rulings and literature emphasize that a further function of Section 40 (1a) LFGB is to contribute to the observance of the provisions of food and feed law. The impending disadvantage of the dissemination of information is intended to encourage companies to operate in accordance with the provisions of food and feed law.¹²⁶ This deterrent effect of public information, which the German constitutional court (Bundesverfassungsgericht) has recognized¹²⁷, is not mentioned by the legislator in the explanatory memorandum to the law. There, the only aim of the law is to create the informational basis for consumer decisions and thus to create transparency.¹²⁸ If the legislator's decision to legitimize public information exclusively for transparency purposes¹²⁹ is taken seriously, informing the public in accordance with Section 40 (1a) LFGB is an administrative measure.¹³⁰ And administrative measures must be assessed based on the principle of proportionality and not, like repressive sanctions (punishment in the broader sense), on the principle of guilt.¹³¹

Even if public information is not a criminal sanction, the presumption of innocence nevertheless has consequences for such non-punitive measures. The presumption of innocence includes, as it is called, a

¹²⁴ BVerfG, Beschluss vom 21. März 2018 - 1 BvF 1/13 -, NJW 2018, 2109, Rn. 29; kritisch Becker, 2018, p. 1032.

¹²⁵ Siehe nur Wollenschläger, 2011, p. 25.

¹²⁶ BVerfG, Beschluss vom 21. März 2018 - 1 BvF 1/13 -, NJW 2018, 2109.

¹²⁷ Gundel, 2013, p. 673; Joh et al., 2012, p. 428; Möstl, 2015, p. 3; Möstl, 2015, p. 188.

¹²⁸ BVerfG, Beschluss des Ersten Senats vom 21. März 2018 - 1 BvF 1/13 -, NJW 2018, 2109, Rn. 32.

¹²⁹ Eingehend dazu Dannecker, 2013, pp. 924-928.

¹³⁰ Dannecker, 2019, p. 175.

¹³¹ BVerfG, Beschluss vom 21. März 2018 - 1 BvF 1/13 -, NJW 2018, 2109, Rn. 25.

¹³² Dannecker, 2013, p. 928.

prohibition on justifying non-punitive measures in a manner similar to punishment.¹³² This means that if the sanctioning character is denied because preventive/transparency-related purposes are being pursued, the corresponding measure must also be legitimized exclusively in relation to these purposes. In the context of the constitutional justification of the regulation and the proportionality test, it must not be taken into account that the regulation also increases compliance with the law due to its deterrent effect.¹³³

The presumption of innocence has a further implication for public information.¹³⁴ It is known from the area of press reporting on criminal offenses that it is incompatible with the presumption of innocence to present criminal offenses (or administrative offenses) as having been committed before they have been legally established in criminal proceedings (or administrative offense proceedings). This does not rule out the possibility of reporting on the suspicion of a criminal offense even before a legally binding decision has been made. In this case, however, it must be expressly stated that it is only a suspicion of a criminal offense in order to maintain the presumption of innocence. Before the legally binding guilty verdict, the “alleged perpetrator”, the “alleged offense”, the “suspicion of an offense”, etc. must always be mentioned. Applied to the constellation of public information, this means that the authority may only publish the fact that there is a “suspicion” of an offense, but not that an offense has definitely been committed, unless there is a legally binding fine notice or a criminal conviction. The food authorities' tabular publications regularly do not take this into account, so it remains to be seen whether such complaints will become the subject of higher administrative court rulings. Finally, this legal aspect is not only relevant at the level of the presumption of innocence, but also collides with the requirement of the substantial accuracy of the published information: the information is inaccurate if the authority claims that there is (definitely) a violation when the authority has only convinced itself that there is a suspicion of a violation.

¹³² Ausführlich hierzu C. Dannecker, 2013, p. 925.

¹³³ Dannecker, 2019, p. 175.

¹³⁴ On this aspect from the point of view of the accuracy of the information see Dannecker, 2013, p. 930.

3.1.2. Expansion of the subjects to be sanctioned

In addition to the plurality of sanctions, the subjects to be sanctioned are no longer only natural persons. In addition to natural persons, legal entities can also be considered as subjects to be sanctioned, as all highly developed industrialized nations provide for the imposition of criminal or fine sanctions against legal entities and other associations.¹³⁵ It is therefore possible to imagine cases in which the parent company and subsidiary as well as individual executives of the company are simultaneously under criminal investigation. The legal problems associated with this have been comparatively well worked out.¹³⁶

Furthermore, the European Union, following US law, also recognizes companies as economic entities for violations of antitrust, data protection and banking prohibitions.¹³⁷ The classic area in which this set of sanctions was developed is antitrust law. In this area, Regulation 17/62¹³⁸ introduced corporate fines, which were subsequently developed by the Commission under the supervision of the European Court of Justice into a differentiated system of sanctions¹³⁹ with a repressive character¹⁴⁰. In European Union competition law, the ECJ has consistently defined the term “undertaking” as “any entity engaged in an economic activity, whatever its legal form and however it is financed”, i.e. the economic entity.¹⁴¹ Legal entities that belong to the economic unit and are involved in the cartel infringement are jointly and severally liable for the fine imposed on the undertaking.

Legal entities belonging to the economic unit and involved in the cartel infringement are jointly and severally liable for the fine imposed on the company. In some cases, the Commission imposes the corporate fine on several legal entities belonging to the company, either by imposing a specific fine in each case or by declaring several legal entities jointly and severally liable without specifying the amount for which each legal entity is

¹³⁵ Dannecker, 2022b, p. 85.

¹³⁶ Brodowski, 2022, p. 19.

¹³⁷ In detail Dannecker and Schröder, 2021, § 8 No. p. 246; Dannecker, 2016, p. 162.

¹³⁸ EEC Council: Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, OJ 13, 21.2.1962, S. pp .204–211.

¹³⁹ In detail Dannecker and Fischer-Fritsch, p. 1093; Dannecker, 2007, p. 31; G. Dannecker and Dannecker, 2020.

¹⁴⁰ Dannecker and Dannecker, 2021, § 8 no. 18.37 with further references; Tiedemann, 1985, pp. 1411-1417.

¹⁴¹ In detail Schildgen, 2020, p. 7.

liable.¹⁴² Only the European Commission is responsible for imposing fines under EU law in accordance with Art. 23 Regulation 1/2003. In 2019, the ECN+ Directive obliged the member states to incorporate the EU concept of corporate liability for antitrust violations into their national legal systems.¹⁴³ In this way, a harmonization of the antitrust sanctions systems of the Union and the Member States should be achieved.

In addition, there are EU regulations on fines in the area of banking supervision law, which are mainly directed against legal entities, but also partly against companies.¹⁴⁴ In banking supervision law, the European Central Bank or the central banks of the member states are responsible for imposing sanctions, depending on their responsibility for banking supervision.

The antitrust fine regime with its corporate fines was incorporated into EU data protection law with the General Data Protection Regulation.¹⁴⁵ While the antitrust fines are imposed by the EU Commission and are subject to legal review by the General Court and the ECJ, the corporate fines under data protection law are imposed exclusively by the competent national authorities and then reviewed by national courts.¹⁴⁶

3.1.3. Expansion of the prosecution and sanctioning procedures

The introduction of alternative preventive regimes, in which criminal law and other preventive sanction systems come together, such as EU fines in the area of antitrust,¹⁴⁷ of the merger regulation,¹⁴⁸ of banking supervision¹⁴⁹ and data protection law¹⁵⁰, of the Digital markets Act,¹⁵¹ UN sanctions¹⁵²

¹⁴² Biermann, 2024, Vor Art. 23 VO 1/2003 no. 104 ff.

¹⁴³ Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market.

¹⁴⁴ See Dannecker, 2021b, pp. 11–41; Dannecker and Schröder, 2021, § 8 no. 247, pp. 313–325.

¹⁴⁵ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), pp. 1–88.

¹⁴⁶ Schäfer and Klaas, 2024, p. 293 and p. 345.

¹⁴⁷ Hustus, 2024, § 34 no. 108; Müller, 2021, pp. 50–63.

¹⁴⁸ Hustus, 2024, § 34 No. 182.

¹⁴⁹ Schäfer, 2021, p. 64.

¹⁵⁰ Hustus, 2024, § 34 No. 231; Schäfer and Klaas, 2024, p. 293 and p. 345.

¹⁵¹ Hustus, 2024, § 34 No. p. 188.

and measures to combat money laundering¹⁵³, is associated with a plurality of prosecution procedures: public prosecutors are responsible for the investigation and prosecution of criminal offenses. Preventive regimes under administrative law fall within the remit of specialized administrative authorities, which act independently of the public prosecutor's office, sometimes even prior to investigations by the public prosecutor's office. An expansion for a specialized office can also be observed in this area. One example is the Anti-Money Laundering Agency (AMLA) based in Frankfurt, which is responsible for combating money laundering in the European Union.¹⁵⁴ This EU authority is to play a leading role in the supervision of the fight against money laundering - with a European perspective. This fight is considered essential for global security, fair competition on the markets, social cohesion and sustainable growth.

AMLA is also intended to ensure the integrity of the financial system. Protecting the integrity of the financial system requires not only effective money laundering supervision and strong prudential supervision, but also ad-hoc information-sharing between the supervisors of individual institutions. AMLA's close proximity to the ECB, as the authority responsible for the prudential supervision of large banks in the EU, creates a one-stop shop for supervision, which will, in turn, make a significant contribution to strengthening the European financial system. This includes, in particular, the bundling of key competencies in the new Federal Office for Combating Financial Crime (Bundesamt zur Bekämpfung von Finanzkriminalität, BBF). This authority, which is due to commence operations in 2025, will carry out analyses currently conducted by the Financial Intelligence Unit (FIU), criminal investigations, and supervision. This is intended to eliminate the existing fragmentation. The core competencies will be bundled under AMLA in order to facilitate and strengthen cooperation. Insights, expertise, and information can thus be shared and linked more quickly and efficiently. In addition to the FIU, the Central Office for the Enforcement of Sanctions (Zentralstelle für Sanktionsdurchsetzung, ZfS) is also to be integrated into the BBF in the future.

The increasing number of different types of sanctions and the creation of new authorities is associated with new procedures to which companies

¹⁵² Vorrath 2024, p. 7.

¹⁵³ Jacsó, 2021, p. 117.

¹⁵⁴ In detail Neumann, 2024.

are exposed in the case of legal violations: In addition to criminal proceedings, there are administrative proceedings, occasionally even several at the same time and in different states, and civil recourse proceedings.

4. Requirements for procedural fairness and coordination of the sanctions

4.1. Procedural fairness

Only in criminal law does the principle of the prohibition of parallel prosecution prior to the first legally binding sanction apply as a requirement of “equality of arms”¹⁵⁵ and, if there is a nonappealable conviction or a legally binding acquittal, the principle of *ne bis in idem*. Corresponding principles of the rule of law still need to be developed in the relationship between criminal proceedings and civil and administrative proceedings. Overall, there is a need to coordinate criminal, administrative and civil proceedings in an integrated procedure. This raises the question of whether the traditional guarantees of criminal law need to be extended to administrative criminal law.¹⁵⁶ In this respect, the guarantees for criminal and administrative sanctions, in particular the principle of “*ne bis in idem*”¹⁵⁷, as well as the guarantees for non-criminal sanctions¹⁵⁸ must be put to the test.

Furthermore, the question arises as to whether, in view of the parallel responsibilities of national, European, foreign, and international criminal prosecution and administrative bodies, there is a ban on parallel prosecution of a breach of the law by several prosecuting and investigating authorities even before a first legally binding sanction is imposed, in order to avoid double sanctioning in violation of “*ne bis in idem*”.¹⁵⁹ The right to a fair trial, which is one of the essential principles of a constitutional procedure¹⁶⁰ and is qualified as a general fundamental procedural right¹⁶¹, as well as the principle of proportionality¹⁶², according to which any measure interfering

¹⁵⁵ Dannecker, 2021c, p. 1073.

¹⁵⁶ For the question “Do human rights belong exclusively to humans?”, see Granyák, 2019, p. 17; see also Dannecker, 2021a.

¹⁵⁷ See the articles in Hochmayr (ed.), *Ne bis in idem* in Europa, 2015.

¹⁵⁸ Winter, 2019, p. 299.

¹⁵⁹ Dannecker, 2021a; Papakyriakou, 2023, p. 457.

¹⁶⁰ See only BVerfGE 130, 1, Rn. 111.

¹⁶¹ See only BVerfGE 109, 13, Rn. 67.

¹⁶² Fundamental to this Kaspar, 2014.

with fundamental rights must pursue a legitimate purpose and, moreover, be suitable, necessary and proportionate, come into consideration. Overall, there is a need to coordinate criminal, administrative, and civil proceedings in an integrated procedure.

4.2. Coordination of criminal, administrative and civil law sanctions with each other

The new architecture of sanctions law, in which criminal law is increasingly supplemented by preventive administrative sanctions and private enforcement is increasingly used, requires the various sanctions to be coordinated with each other from the point of view of constitutional proportionality. The sanction as a whole must be appropriate and proportionate. In order to ensure this, all administrative and civil sanctions must be taken into account when determining the main penalties as part of the sentencing or assessment of fines. In order to guarantee this, it must be ensured procedurally that the necessary information is available to the sanctioning authority. If administrative or civil sanctions are imposed in proceedings subsequent to the criminal or fine proceedings, the previous criminal sanction must be taken into account.

5. Compliance as an indispensable strategy to avoid sanctions against enterprises

The current situation of companies in the area of sanctions compliance is characterized by the fact that existing obligations are being intensified and expanded and, in addition, the threat of sanctions has been and will continue to be expanded. In view of this development, it is essential to take compliance seriously to avoid criminal, administrative, and civil sanctions, especially as the guarantees provided by the rule of law are inadequate and are only partially granted to legal entities and companies in particular. As mentioned in the introduction to this article, this requires a change of perspective: from the backward-looking perspective of a traditionally reactive criminal and sanction law to a forward-looking control system with a strong focus on modern prevention.

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