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Sentencing guidelines based on the US model for criminal and administrative penalties against associations in the European Union**

ABSTRACT: Associations responsible for criminal violations are sanctioned with various sanctions in the member states of the European Union – criminal penalties or fines. These sanctions vary in severity and are enforced in different ways, as a look at Austria and Germany shows. To achieve fair and consistent sanctioning in this area, the literature repeatedly calls for to establish sentencing guidelines for corporations based on the model of the US sentencing guidelines to reduce sentencing discrepancies and promote transparency and proportionality in sentencing. This article argues that legal systems based on a statute law system are rightly should adhere to their own legal institutions and cultures. This allows for integration of the association sanctions into the respective national criminal justice systems without causing internal systemic distortions, which can lead to a lack of acceptance by the law enforcement authorities and the associations concerned.

KEYWORDS: Sentencing guidelines for corporations, United States sentencing guidelines, Sentencing corporations in Austria and Germany.

1. Introduction

The criminal and administrative liability of legal persons, which was demanded primarily by the European Union and in international legal acts, represented a paradigm shift for the Member States of the European Union – with the exception of the English legal system, which has recognised the criminal liability of companies since the turn of the 20th century. Today, associations can be punished with criminal penalties in most Member States

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of the European Union and with administrative fines in some states like Germany. This required a rethink in these states and poses a major challenge for law enforcement agencies, criminal defence lawyers and corporate lawyers alike. The triumph of compliance, which has become particularly important for larger companies and continues to gain in significance through requirements in EU directives, has contributed to this development.

1.1. Corporate liability under criminal and administrative law as an integral part of the sanction systems in the European Union

Corporate liability has now become an integral part of the sanction systems in the European Union. Nevertheless, national legal systems vary greatly: The majority of Member States imposes criminal penalties on associations, while a few legal systems, such as the German one, continue to provide for the imposition of administrative fines, which can also be imposed by administrative authorities without criminal proceedings, but which are of a criminal nature and are therefore subject to guarantees such as *nullum crimen, nulla poena sine lege*, the principle of guilt, the presumption of innocence, etc. Administrative fines can be appealed, with the result that they are decided in court proceedings. The EU itself also threatens administrative fines for legal violations in the areas of antitrust and merger control law, banking supervision law and data protection law.

While in the Member States, associations (legal entities) are traditionally the targets of sanctions, and maximum fines are set by law, the fines threatened under EU law are directed at enterprises in the sense of economic units, and the maximum fine is determined as a percentage of the total turnover generated by the company in the year prior to the sanction.

It can therefore be stated that the substantive requirements for sanctions for violations of the law by associations differ considerably at the Member State and EU level. This applies equally to the threatened sanctions, which are predominantly criminal penalties and sometimes also administrative fines. The sanction frameworks also exhibit considerable differences. The same applies to the assessment of sanctions against associations, including the enforcement of fines, which can be suspended in whole or in part. Finally, in addition to the sanction, the confiscation of assets acquired for or through the offense and their surrogates can be ordered against companies, as is the case, for example, in Austria. In Germany, the amount to be recovered must be included in the fine; an order for confiscation in addition to the fine is explicitly excluded in Section 30

(5) OWiG.¹ Since the European Union has established central guidelines specifically for corporate sanctions, the inconsistent assessment of sanctions raises questions about the justice and fairness of the various systems and concerns about equality. Therefore, the following will examine the question of whether sentencing guidelines are appropriate that aim to standardize sanctions against associations influenced by EU law.

1.2. Sentencing guidelines for specific legal areas

The different design of the sanction systems means, in practice, that very different sanctions are imposed for comparable conduct. To remedy this, EU law contains guidelines for determining sanctions, for example, for EU antitrust sanctions² and for data protection, for which the European Data Protection Board (EDPB) issued "Guidelines 04/2022 on the calculation of administrative fines under the GDPR" on May 12, 2022.³ Furthermore, German law, for example, provides guidelines for determining fines for violations of the Securities Trading Act, which regulate the assessment of fines under German administrative offense law (Section 17 (3) OWiG) using step-by-step instructions through the assessment process.⁴

1.3. Necessity of Sentencing Guidelines for Criminal and Administrative Sanctions Against Associations

Given that turnover-related fine frameworks have already been introduced in many specific areas of administrative offense law, such as antitrust, data protection, and the German Securities Trading Act (Wertpapierhandelsgesetz), the question arises whether sentencing guidelines should also be issued for the general sanction provisions against associations, such as those found in the Austrian Association Liability Act (Verbandsverantwortlichkeitsgesetz) or Section 30 of the German Administrative Offenses Act (Ordnungswidrigkeitengesetz), in order to

¹ (5) The imposition of a fine on the legal person or association of persons shall preclude the possibility of ordering confiscation against it for the same offence under Sections 73 or 73c of the Criminal Code or under Section 29a.

² Guidelines on the method of setting fines under Article 23(2)(a) of Regulation (EC) No 1/2003, OJ C 210, 1 September 2006, p 81.

³ The guidelines 04/2022 from the European Data Protection Board (EDPB) provide a five-step methodology for calculating administrative fines under the GDPR, aiming to harmonize the process among supervisory authorities.

⁴ Bundesanstalt für Finanzdienstleistungsaufsicht, WPhG-Bußgeldleitlinien II; Becker and Canzler, 2014, p. 1092; Spoerr, 2023, p. 401.

reconcile the often very broad and vague sanction frameworks with the requirements of *nulla poena sine lege* without jeopardizing fairness in individual cases. A uniform approach to the sentencing process could prevent disparities in the level of sanctions and thus lead to comprehensible, proportionate fines against associations.

In this context, with regard to the sanction provisions that threaten the sanctioning of associations in the event of criminal offenses committed by their managers and employees, reference is made to the U.S. sentencing guidelines, as they were developed in the United States to counteract inconsistent sentencing practices by means of detailed sentencing rules and to achieve consistent and transparent sanctioning.⁵

Therefore, the United States Sentencing Guidelines will be addressed first. Then, based on the Austrian and German legal situation, it will be demonstrated which criminal sanctions against associations are provided for in these countries and how the sanction systems are structured. These two countries were chosen because Austria has been increasingly imposing penalties against associations for several years and pursues a very independent sanction policy of special prevention. Germany, on the other hand, has a traditional system of fines that has significant deficiencies in the area of fine assessment.⁶ Finally, the adoption of the US sentencing guidelines into continental European corporate criminal justice systems is discussed.

2. United States Sentencing Guidelines

2.1. System des „indeterminate sentencing“

Until the introduction of the sentencing guidelines in 1984, there were no regulations for judicial sentencing in the United States.⁷ Rather, courts were granted very broad discretion to consider the individual circumstances of the offender.⁸ The only limit to sanctions was the maximum penalties provided by law.⁹ This led to significant variations in the imposition of sentences between states, especially since the judicial system is structured differently

⁵ For the transfer of the objective assessment of criminal sanctions to corporate sanctions, see Glotzbach, 2024, p. 26 ff.

⁶ Jareborg, 2020, p. 9.

⁷ Bowman, 1996, p. 679, p. 682; Nagel, 1990, p. 883, p. 892.

⁸ Demleitner et al., 2020, p. 131.

⁹ Bowman, 1996, p. 682; Howard-Nicolas, 2013, pp. 665 ss.

in each state. This system of "indeterminate sentencing" meant that natural and legal persons faced the same maximum penalty, with the result that only low fines were imposed on companies despite their financial strength. This, in turn, led to companies tending to ignore the laws if they could expect a corresponding profit.¹⁰ When a crime was discovered, companies vehemently resisted¹¹ and were unwilling to cooperate with law enforcement authorities.

Furthermore, the courts' broad discretion in sentencing proved problematic, especially since this discretion was supported by the U.S. Supreme Court.¹² Sentencing was unpredictable, and the outcomes varied widely.¹³ Furthermore, the judges lacked an anchor point¹⁴ to guide their decisions because there was no list of permissible and impermissible sentencing criteria.¹⁵ Since the courts were not required to justify the severity of the sanctions¹⁶, the higher courts could not monitor the courts' sentencing procedures, with the result that the higher courts could not develop new sentencing criteria.¹⁷

2.2. Introduction of the Reform Act in 1984

Due to the inadequate sanctioning of associations¹⁸, the Reform Act was passed in 1984¹⁹, with which the United States established the Sentencing Commission to reduce sentencing discrepancies and promote transparency and proportionality in sentencing at the federal level.²⁰ Furthermore, fines against corporations were regulated separately. Finally, the regulatory framework was created for the creation of the Federal Sentencing Guidelines for corporations, which came into force on November 1, 1991.

¹⁰ Albano and Sanyshyn, 2016, p. 1046; Eastmann, 2010, pp. 1623, 1620, 1623; Johnson, 2006, p. 640.

¹¹ United States Sentencing Commission, 1996, p. 27.

¹² Williams v. New York, 337 U.S. 241 (1949), pp. 245 s., 251.

¹³ Albano and Sanyshyn, 2016, p. 1027, p. 1046; Reitz, 2012, p. 272; Weisberg, 2012, p. 299.

¹⁴ Freed, 1992, p. 1687.

¹⁵ Bowman, 2005, p. 1322; Freed, 1992, p. 1687.

¹⁶ Ogletree, 1988, p. 1942 s.

¹⁷ Bowman, 2005, p. 1322; Freiberg and Roberts, 2023, pp. 87 ss.; Howard-Nicolas, 2013, p. 670; King, 2012, p. 323.

¹⁸ Johnson, 2006, p. 641.

¹⁹ Gruner, 1994, p. 409; Johnson, 2006, pp. 640 ff.

²⁰ United States Sentencing Commission, 1996, p. 1; Miller, 1993, p. 211.

These guidelines were significantly tightened in 2004 in light of widespread violations by large corporations such as Amazon, World Come, and Tyco.

2.3 Design of the Sentencing Guidelines for fines against corporations

2.3.1. Purposes of corporate sanctions

18 U.S.C. § 3553(a) regulates the purposes of punishment: Adequate Deterrence, Incapacitation, Rehabilitation, and Just Punishment. This is intended to create a balance between the social need for secure, uniform sanctioning across jurisdictions and the individual punishment of the offender. According to USSG Ch. 8, intro, comment., the sentencing guidelines primarily serve the purposes of just punishment, punishment commensurate with fault, and adequate deterrence, in order to encourage companies to implement internal processes that prevent, detect, and report criminal behavior.²¹ Furthermore, associations should be motivated to monitor themselves, avoid unethical behavior, and discipline company employees if they have participated in criminal offenses.²²

2.3.2. Calculation of the fine

Fines are calculated in four steps:²³ First, the base fine is determined, followed by the culpability score, then the penalty range, and finally the actual penalty. In a further step, the imposing judge examines whether departures from the imposed sanction are possible.

The base amount reflects the seriousness of the offense. Together with the culpability value, it should result in a penalty range that is suitable to deter the company from criminal behavior and provide incentives for a compliance system.²⁴ The base amount can be determined in three ways: (1) according to a table based on the seriousness of the offense, (2) according to the monetary benefit, or (3) the incurred loss. In this respect, the highest value of the three methods of determination is decisive.²⁵

²¹ Ferrell, LeClair and Ferrel, 1998, p. 354; Gruner, 1994, p. 414; Nunes, 1995, p. 1044.

²² Albano and Sanyshyn, 2016, p. 1048.

²³ Maurer, 1992, p. 806 ff; Gruner, 1992, pp. 225 ss; Nunes, 1995, pp. 1045 ff; see also Beckmann, 2021, p. 54; Engelhart, 2012, p. 155.

²⁴ Glotzbach, 2024, pp. 161 s.

²⁵ Johnson, 2006, pp. 632 ss.

The base amount can be taken either from the offense level from the table in USSG § 8C2.4(d), which refers to USSG CH.2. The degree of seriousness is determined using a fiction, in which the crime is treated as if it had been committed by a natural person.²⁶ The USSG assigns a value to each offense based on its severity, which represents the level of the basic seriousness of the offense.²⁷ This level can be increased by additional offense-specific factors, thus forming an overall severity level (USSG § 2A1. intro. comment.). However, this method is rarely used because in practice the monetary advantage or disadvantage is usually higher.

Furthermore, the base amount can be determined from the monetary benefit, which is determined based on the gross profit achieved. This involves a comparison between the actual and the fictitious situation in which the company acts lawfully.²⁸

Finally, the base amount can correspond to the monetary loss.²⁹ This describes the economic damage to the victims. Interest payments, late payment surcharges, penalties, and the costs of prosecution are not to be taken into account. The court estimates the monetary loss.

The culpability factor quantitatively describes the degree of culpability of the company, the amount of which is the decisive criterion for the sentence.³⁰ According to USSG § 8C2.5(a), the culpability factor starts with five points, which are modified by four aggravating and two mitigating sentencing factors. Aggravating factors include acquiescence and participation in criminal conduct, prior convictions, violation of conditions, and obstruction of justice. The severity of the penalty depends partly on the size of the association and the involvement of a leading figure. Effective compliance systems, as well as voluntary disclosure, cooperation, and admission of guilt, are all factors that can lead to reduced penalties.

The penalty range is calculated by multiplying the base amount by the guilt value (USSG § 8C2.7). A minimum and maximum multiplier is assigned to the guilt value based on the number of points, with only points between zero and ten being relevant. This multiplication then results in a penalty range within which the judge determines the sentence at his or her discretion.

²⁶ Gruner, 1922, p. 263.

²⁷ Maurer, 1992, pp. 799 ss.

²⁸ Gruner, 1922, pp. 225 ss.

²⁹ Gruner, 1922, p. 259.

³⁰ Soto, Debold and Chesley, 2020, p. 27.

The deviations represent a corrective measure to ensure the proportionality of the fine when there are aggravating or mitigating circumstances whose nature and extent have not been adequately considered in the sentencing guidelines and which require an expanded range of sanctions. There are three types of variances:

- identified variances (policy statements), which result in a higher or lower penalty range;
- Unidentified variances for cases that are so exceptional that they have not been taken into account in the sentencing guidelines;³¹
- Heartland variances, which are generally taken into account in the sentencing guidelines, but deviate significantly from the standard case, either upwards or downwards.³²

2.4. Repeal of the binding effect of the Sentencing Guidelines by the Supreme Court

However, the Supreme Court has since repealed the binding effect of the 2005 Sentencing Guidelines in the "Booker" judgment³³ due to a violation of the right to a jury trial.³⁴ According to this ruling, the judge may only deviate from the maximum sentence if the aggravating factors have been established by the jury. However, the Sentencing Guidelines left this decision to the court.³⁵ Only a consultation requirement remained.³⁶

2.5. Further Development of the Sentencing Guidelines

Initially released in 2017 as a series of 119 "common questions that the Fraud Section may ask in making an individualized determination" for corporate compliance programs,³⁷ the ECCP describes the factors that the DOJ considers when conducting investigations of corporations, determining whether to bring charges, and negotiating pleas or other agreements. That guidance has been substantially revised and expanded since its release to

³¹ Goldstein, 2004, p. 1973.

³² Goldstein, 2004, p. 1973.

³³ U.S. v. Booker, 543 U.S. 265 (2005), pp. 222 ss.

³⁴ U.S. v. Booker, 543 U.S. 265 (2005), p. 244.

³⁵ U.S. v. Booker, 543 U.S. 265 (2005), pp. 244 ss.

³⁶ U.S. v. Booker, 543 U.S. 265 (2005), pp. 259, 264.

³⁷ Weiss, P. (n.d.) *New DOJ Guidance For Evaluating Corporate Compliance Programs* (Mar. 20, 2017), [Online]. Available at: <https://www.paulweiss.com/insights/client-memos/doj-s-updated-guidance-for-evaluating-corporate-compliance-programs-emphasizes-double-edged-sword-of-new-technologies> (Accessed: 21 October 2025).

reflect DOJ's evolving enforcement priorities. In 2019, DOJ began to structure the guidance around three central questions,³⁸ which have continued in a similar form up to the present version: (1) Is a corporation's compliance program well designed? (2) Is the program being applied earnestly and in good faith? In other words, is the program adequately resourced and empowered to function effectively? and (3) Does a corporation's compliance program work in practice?³⁹ Further revisions in 2020 and 2023 focused on features such as companies' use of data and technology to improve and review employees' access to compliance materials,⁴⁰ management of personal devices and third-party applications, and the preservation of communications.⁴¹

On September 23, 2024, the Criminal Division of the U.S. Department of Justice ("DOJ") issued an update to its guidance titled *Evaluation of Corporate Compliance Programs* (the "ECCP").⁴² Since its introduction in 2017, the ECCP has been revised periodically, but the update of 2024 shows the Department's increasing emphasis on artificial intelligence ("AI"), on data analysis and whistleblower policies. The revisions are intended "to account for changing circumstances and new risks."⁴³ The updates further align the

³⁸ Weiss, P. (2019) *DOJ Updated Guidance for Evaluating Corporate Compliance Programs Focuses on Effectiveness* (May 6, 2019), [Online]. Available at: <https://www.paulweiss.com/media/0uvfmsnt/6may19-doj-compliance.pdf> (Accessed: 21 October 2025).

³⁹ ECCP, at 1–2; see also U.S. Department of Justice, Justice Manual § 9-28.800. DOJ has adopted a similar analytical structure in its guidance for corporate compliance programs in criminal antitrust investigations, and it has explained that the same three questions guide its evaluations in that context. See U.S. Department of Justice, Antitrust Division, *Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations* 2 (July 2019).

⁴⁰ Weiss, P. (2020) *DOJ 2020 Guidance for Evaluating Corporate Compliance Incorporates Feedback From Business and Compliance Communities* (June 8, 2020), [Online]. Available at: <https://www.paulweiss.com/media/y4xd00ft/08june20-fcpa.pdf> (Accessed: 21 October 2025).

⁴¹ Weiss, P. (2025) *FCPA Enforcement and Anti-Corruption Developments: 2023 Year in Review* (Jan. 17, 2024), [Online]. Available at: <https://www.paulweiss.com/insights/client-memos/2024-year-in-review-fcpa-enforcement-and-anti-corruption-developments> (Accessed: 21 October 2025).

⁴² U.S. Department of Justice, Criminal Division, *Evaluation of Corporate Compliance Programs* (updated Sept. 2024).

⁴³ U.S. Department of Justice, Office of Public Affairs, *Principal Deputy Assistant Attorney General Nicole M. Argentieri Delivers Remarks at the Society of Corporate Compliance and Ethics 23rd Annual Compliance & Ethics Institute* (Sept. 23, 2024).

ECCP with the Department's additional initiatives, such as its efforts to assess the risks of disruptive technology and incentivize whistleblower reporting.

2.6. Critical Assessment of the Sentencing Guidelines from a US Perspective

The Sentencing Guidelines are considered questionable in the US both by practitioners and by scholars⁴⁴ because the indeterminacy of sentencing remains⁴⁵ and the guidelines as a whole are too complex and confusing.⁴⁶ Furthermore, they generate excessively high sentences. Some also criticize the USSG for focusing too heavily on compliance and cooperation and failing to deter or detect crimes.⁴⁷ Furthermore, there is a risk that companies will merely introduce a compliance system in order to obtain a reduced sentence.⁴⁸ Finally, there are doubts as to whether federal judges are capable of adequately assessing the effectiveness of a compliance system.⁴⁹ On the other hand, the increased predictability of sentencing and the judges' duty to provide reasons are supported because they facilitate review by the appellate courts.⁵⁰

3. Corporate Sanctions in Austria and their Assessment

3.1. Threat of Fines

The Austrian legislature regulates the criminal liability of associations in the Corporate Liability Act (Verbandsverantwortlichkeitsgesetz). However, it avoids terms such as criminality, guilt, and punishment and uses the term "fine", which has a general and specific preventive effect and is also intended to express a socio-ethical rebuke. Even though the punitive nature of the fine is sometimes questioned in the literature, the corporate fine nevertheless exhibits all the essential characteristics of a penalty. The only independent sanction provided for by the law for associations is the threatened corporate fine provided for in Section 4 of the Administrative Court Act (VbVG).

⁴⁴ Pryor, 2016, p. 95.

⁴⁵ Rakoff, 2013, p. 6; Stith and Cabranes, 1998, p. 8.

⁴⁶ Frase and Mitchell, 2020, p. 53; Howard-Nicolas, 2013, p. 637; Mueller, 1990, p. 132; Parker, 1993, pp. 397 ss.; Pryor, 2016, p. 95.

⁴⁷ Howard-Nicolas, 2013, p. 637; Parker, 1993, p. 410; Pryor, 2016, p. 97.

⁴⁸ Eastman, 2010, p. 1630.

⁴⁹ See Baker, 2004, pp. 310 ss.; Webb and Molo, 1993, p. 396; Hertel, 2019, p. 219.

⁵⁰ Stith and Cabranes, 1998, p. 8.

3.2. Daily Rate System

The corporate fine is imposed, Like the fines for individual defendants, in two steps: The number of daily rates is determined based on the culpability of the offender or the severity of the charge in corporate criminal law, i.e., purely based on sentencing considerations. The daily rate is set based on financial capacity. This is intended to ensure that financially better-off individuals are not favored and less well-off individuals are not disadvantaged. The minimum sentence is one daily rate. The maximum possible number of daily rates depends on the severity of the offense for which the association is responsible under Section 3 of the Association Act (VbVG) and, depending on the offense, ranges between 40 and 180 daily rates.

According to Section 4 (4) of the Association Act, the daily rate is to be determined based on the association's earnings situation, taking into account its other financial capacity. For associations, it is generally at least €50 and at most €10,000. The annual income must be divided by 360 to calculate the daily rate. This results in a theoretical minimum fine of €50 for a daily rate and a maximum fine of €1,800,000 for 180 daily rates. The assessment based on the profitability is intended to ensure that the responsible association is deprived of the surpluses that would otherwise accrue to the owners as profit. Therefore, the amount that can be skimmed off annually without jeopardizing the association's operating basis must be determined. This is the amount that the association has at its disposal after necessary investments and external financing expenses, as well as after deducting all taxes, and which can potentially be distributed to the owner level.⁵¹ This is intended to ensure that the association's creditors, employees, and suppliers are not affected by the sanction.⁵² The association's profitability does not have to be determined precisely; it can be estimated if the estimate is based on verifiable information.⁵³

Furthermore, other economic performance must be taken into account: For this purpose, a premium or discount of one-third of the estimated earnings situation is provided for if the association's other economic performance permits it (Section 4 (4) VbVG). This is intended to take

⁵¹ Steininger, 2018, chap. 6 no. 30.

⁵² Erläuternde Bemerkungen zur Regierungsvorlage, Beilage zu den stenographischen Protokollen des Nationalrates 994 GP 26.

⁵³ Bauer, 2004, p. 492 ff.

individual circumstances into account⁵⁴, such as a company belonging to a group not distributing profits to the association. Other economic performance must be specifically proven. The mere fact that an association belongs to a group does not per se mean that it is economically more efficient and would therefore justify a higher fine. However, if concrete evidence can be provided that companies in which the association holds a stake have failed to distribute profits, this must be taken into account.⁵⁵

3.3. Assessment of the fine

The assessment of the association fine is governed by Section 5 of the Association Act (VbVG). The association-specific grounds for determining the penalty are listed as examples in Section 5 (2) and (3) of the VbVG, so that additional circumstances can also be considered on a case-by-case basis. The sentencing grounds under individual criminal law (Sections 33 and 34 of the German Criminal Code) are applicable subsidiarily.⁵⁶ Since an association cannot act on its own, the aggravating and mitigating factors must be assessed from the perspective of the person who committed the initial offense.⁵⁷ The decisive factor is whether the offense committed by the decision-maker or employee contains circumstances in its statutory description that, given the association's structure, also constitute special grounds for sentencing.⁵⁸ However, if the sentencing grounds are only linked to certain character traits typically associated with natural persons, these are excluded from the scope of corporate criminal liability.⁵⁹

3.3.1. Aggravating Factors

The aggravating factors expressly stated in Section 5 (2) Nos. 1-3 of the Administrative Offenses Act (VbVG) relate to the damage and the danger⁶⁰, and to the advantage, thus the consequences of the offense. Furthermore, a

⁵⁴ Baier-Grabner, 2020, 4.12.

⁵⁵ Erläuternde Bemerkungen zur Regierungsvorlage, Beilage zu den stenographischen Protokollen des Nationalrates 994 GP 27.

⁵⁶ Lehmkuhl and Zeder, 2025, § 5 VbVG no. 2.

⁵⁷ Steininger, 2020, § 5 no. 3.

⁵⁸ Steininger, 2018, Kap. 6 Rz. 5.

⁵⁹ Steininger, 2018, Kap. 6 Rz. 9.

⁶⁰ Steininger, 2020, § 5 no. 12.

gross breach of the duty of supervision must be considered. The supervisory deficiencies must, taken as a whole, be grossly negligent.⁶¹

3.3.2. Mitigating Factors

Section 5 (3) Nos. 1-6 lists measures to compensate for damages, preventive measures, and cooperation in establishing the truth as reasons for a lower assessment of the number of daily night vision rates.⁶² Furthermore, compliance measures have been legally implemented as mitigating factors pursuant to Section 5 (3) Nos. 1 and 5 of the Administrative Offenses Act (VbVG).⁶³

The following points are listed as mitigating factors:

No 1: Preventive measures before committing an offense

No 2: Act of an employee

No 3: Contribution to the determination of the truth

No 4: Elimination of consequences

No 5: Preventive measures after the commission of the crime

No 6: Disadvantage for the association or its owners

The introduction of corporate criminal liability was intended to provide a strong incentive for companies to pay increased attention to potential risks within their operations and to implement technical, organizational, personnel, and other measures to prevent criminal prosecutions within their operations as far as possible. Compliance measures should have a positive impact on the affected association even if risk management in the specific case was insufficient to prevent the attribution of an association-related offense or to obtain a waiver of prosecution by the public prosecutor or a diversionary settlement.

3.4. *Conditional Leniency of the Fine*

Section 6 of the Association Act (VbVG) allows for conditional leniency of the fine if there are no objections from a special and general preventive perspective. Compliance measures also play a role in assessing these requirements. The granting of leniency is made by the adjudicating court and must be included in the judgment as part of the sentence.⁶⁴

⁶¹ Steininger, 2018, Kap. 6 Rz. 14.

⁶² Baier-Grabner, 2020, 4 no. 4.40 ss.

⁶³ Konopatsch, 2010, p. 155.

⁶⁴ Lehmkuhl and Zeder, 2025, § 6 VbVG no. 1.

Section 6 (1) VbVG stipulates that the sentence imposed in the judgment for the offense itself may not exceed 70 daily rates. This maximum limit corresponds to a prison sentence of up to two years (Section 4 (3) VbVG). A positive prognosis for both special and general preventive purposes is required. For this, the simple probability that the conditional leniency, possibly in combination with instructions, to deter the association from further criminal offenses is sufficient.⁶⁵ Compliance measures must also be considered when assessing these credit criteria.⁶⁶

The conditional remission of the association fine must be accompanied by the determination of a probationary period and is intended to determine whether improvement has occurred.⁶⁷ The probationary period must be at least one year and may not exceed three years. If the conditional remission is not revoked, the fine shall be permanently suspended.

3.5. Conditional Remission of Part of the Association Fine, Section 7 VbVB

If the fine exceeds more than 70 daily rates, only part of the fine may be conditionally suspended.⁶⁸ There is no upper limit for the conditional remission of part of the association fine. The court of first instance is responsible for granting the conditional remission. The amount to be conditionally suspended must be at least one-third and no more than five-sixths of the total sentence. A further prerequisite for the imposition of a partially conditional fine is that the procedure under Section 6 does not apply and the entire fine is imposed, since the association fine is conditionally suspended. The probationary period is also at least one year and at most three years.

3.6. Confiscation

According to Section 12 of the Association Act (VbVG), the provisions of the Criminal Code regarding confiscation and forfeiture apply and can be imposed in addition to an association fine.⁶⁹

⁶⁵ Lehmkuhl and Zeder, 2025, § 6 VbVG no. 3.

⁶⁶ Baier-Grabner, 2020, Kap. 4 no. 4.69.

⁶⁷ Steininger, 2018, Kap. 6 Rz. 45.

⁶⁸ Baier-Grabner, 2020, chap. 4 no. 4.75 ss.

⁶⁹ OGH, 17.11.2015, 141 Os 97/15 v.

3.7. Issuing of Instructions

According to Section 8 (1) of the Association Act, in addition to the fine, if the fine is conditionally suspended, instructions may be issued to eliminate the causes of the offense and thus ensure the association's lawful conduct in the future.⁷⁰ In addition, the responsible administrative or supervisory authority may be requested to cooperate in monitoring compliance with the instruction.⁷¹

3.8. Order to Compensate for Damages

Section 8 (2) of the Association Act stipulates, as a mandatory instruction, that the association must make amends for the damages to the best of its ability.⁷² This instruction must be specified in figures or at least contain a definable payment obligation.⁷³ This instruction may only be waived if the damage has already been remedied.

3.9. Special preventive measures pursuant to Section 8 (1) (3) of the Association Act (VbVG)

Furthermore, in the case of partial or partial conditional leniency of an association fine, the association may, with its consent, be instructed to take technical, organizational, or personnel measures as instructions to prevent further offenses. Examples include the modernization or retrofitting of company equipment, the introduction or modification of relevant security measures, the conduct of employee training, changes to job descriptions or employment contracts, changes to employee responsibilities, and the introduction of a dual control principle.⁷⁴ Such preventive measures are intended to ensure the association's legally compliant conduct in the future. They require approval because such measures represent a profound change in corporate governance.⁷⁵ If the association withdraws its consent after issuing the consensual instruction, this may lead to the revocation of the conditional leniency or the extension of the probationary period (Section 9 (2) and (3) of the VbVG).⁷⁶ This shows that the determination and

⁷⁰ Steininger, 2018, chap. 6 no. 1.

⁷¹ Baier-Grabner, 2020, chap. 4.84.

⁷² Lehmkuhl and Zeder, 2025, § 8 VbVG no. 3.

⁷³ Baier-Grabner, 2020, chap. 4.85.

⁷⁴ Baier-Grabner, 2020, chKap. 4.86.

⁷⁵ Erläuternde Bemerkungen zur Regierungsvorlage, Beilage zu den stenographischen Protokollen des Nationalrates 994 GP 29.

⁷⁶ Lehmkuhl and Zeder, 2025, § 8 VbVG no. 8.

assessment of the association fine is very much geared to the goal of special prevention.

3.10. Conclusion

In Austria, association sanctioning is fully integrated into the sentencing system and has a very strong focus on specific prevention. This is reflected in particular in the possibility of suspending fines on probation and in the issuing of conditions and instructions that closely resemble the general criminal law system. This means that essential areas that are regulated in the sentencing guidelines are covered by special regulations in the Association Responsibility Act, so that there is no need for additional sentencing rules.

4. Corporate Sanctions in Germany and their Assessment

In Germany, if a company is attributable to misconduct, the association can be sanctioned with a fine in accordance with Section 30 OWiG. The legislature introduced this regulation to prevent the commission of criminal and administrative offenses and to prevent further profit-making. This serves both repressive and preventive purposes. The repressive purposes include retaliation for injustice committed. This purpose is achieved by sanctioning with a fine, which has a punitive part and also skims off the benefits of the association.⁷⁷ In general preventive terms, the repetition of legal violations should be avoided and the organs of the associations should be made aware that criminal offenses also result in sanctions against the company.⁷⁸ The sanctioning means that the Constitutional Court (BVerfG)⁷⁹, a "subsequent reminder of obligations that is intended to encourage the association to only appoint law-abiding managers. It is also intended to signal that white-collar criminal behavior will not be tolerated."⁸⁰

4.1. Determination of the fine range

Section 30 (2) OWiG sets the fine limits. A distinction is made here depending on whether the management's related act is a criminal offense or an administrative offense. If it is an intentional crime, the maximum fine is

⁷⁷ Achenbach, 2024, chap 1.2 no. 13; Engelhart, 2012, p. 374; Waßmer, 2024, § 30 no. 65; Rogall, 2025, § 30 no. 18; Schmidt, 2024, no. 2268.

⁷⁸ Engelhart, 2012, S. 375; Rogall, 2025, § 30 no. 16.

⁷⁹ BVerfG, BVerfGE 27, 18, 33; BVerfG 45, 272, 289.

⁸⁰ Sieber, 2018, p. 258.

€10 million, and for negligent crimes it is €5 million. According to Section 30 (3) and 17 (4) OWiG, this fine limit can be exceeded in order to reap the benefits of the offense. According to Section 17 (1) OWiG, the minimum fine is five euros, which, however, has no significance in cases where companies are sanctioned.

The penalty portion concerns the sanction solely based on the legal violation.⁸¹ The general attribution rules of Section 17 (3a) OWiG apply here. These principles for individual fines must be applied accordingly to companies.⁸² The basis for the assessment is the significance of the administrative offense, the accusation against the perpetrator and the perpetrator's economic circumstances.

The basis for the assessment is, in particular, the injustice of the act and its consequences for the protected regulatory area. In order to define the meaning of the administrative offense, case law has developed a wealth of factors that reduce and increase fines. These include, among other things, the extent of the economic consequences, the severity of the damage caused, the types and intensity of execution and the severity of the breach of duty.

When the perpetrator is accused, the focus is on the perpetrator-related circumstances: motives, goals and predicaments.⁸³ To determine these aspects, the focus is primarily on the natural person and not on the legal entity.⁸⁴ By involving the association, company-related factors can be taken into account, such as the repeated occurrence of legal violations and the company's efforts to prevent such violations through compliance system.⁸⁵ The latter can lead to a reduction in punishment if, despite minor deficiencies, the system is fundamentally capable of preventing legal violations and was not just introduced for the sake of appearance.⁸⁶ In addition, the subsequent offense can be viewed to the company's advantage if it improves an existing compliance system in order to prevent future legal violations.⁸⁷ The same applies if there is active cooperation with the prosecution authorities.⁸⁸

⁸¹ Engelhart, 2012, p. 63 sff.

⁸² Beckmann, 2021, p. 132; Rogall, 2025, § 30 no. 134.

⁸³ Glotzbach, 2024, p. 66 ss.

⁸⁴ Rogall, 2025, § 30 no. 134; critical of this Otten, 2012, p. 2 120; Sieber, 2008, p. 472.

⁸⁵ BGH, NZWiSt 2018, 379, 387; Engelhardt, 2012, p. 440 ss.; Glotzbach, 2024, p. 68.

⁸⁶ Engelhardt, 2012, p. 441 ff.

⁸⁷ BGH, NZWiSt 2018, 379, 387; NZWiSt 2020, 410, 413; Engelhardt, 2012, p. 440 ss.; Eufinger, 2018, pp. 615-619.

⁸⁸ Lenk, 2021, pp. 142 ff.

It is undisputed that the economic circumstances of the association must be taken into account.⁸⁹ This includes all factors that determine the company's performance. The fine is intended to take into account the liquidity at the time of the decision.

4.2. Confiscation of the benefit

According to Section 30 (3) in conjunction with Section 17 (4) OWiG, the fine should exceed the economic advantage that the perpetrator gained from the administrative offense. This means that the confiscation part often is much higher than the punishment part. When Volkswagen AG was sanctioned in connection with the emissions scandal, this meant that the other part was €5 million, while the skimming part amounted to € 995 million. This shows that the economic advantage represents the lowest limit of the fine and is then added to the treatment part.

According to the net principle, the economic advantage corresponds to the Rhine profit derived from the act after deduction of expenses, whereby a hypothetically legitimate profit is not taken into account.⁹⁰ The profit also includes saved expenses and other benefits such as an improved market position. Only benefits that are directly related to the administrative offense and have flowed to the company are taken into account.⁹¹

4.3. Criticism of the legal assessment practice

The literature criticizes Section 30 OWiG. The scope of discretion for the judges is too great because Section 30 OWiG does not name any offenses whose injustice is expressed by a penal name. The lack of clear legal requirements leads to unequal sanctions and a lack of transparency in the assessment process, which means that the risks of legal violations cannot be calculated foreseeably.⁹² In addition, the sentencing is not guided by rules.⁹³ This is due, among other things, to the fact that associations negotiate the fine with the public prosecutor's office in an informal procedure without the involvement of the court. In addition, the legislature has not yet taken the opportunity to develop a concept for determining

⁸⁹ Glotzbach, 2024, p. 69 ff.

⁹⁰ BGH, wistra 2017, pp. 242, 243.

⁹¹ Rogall, 2025, § 17 no. 140.

⁹² von Galen and Schaefer, 2022, § 30 no. 46; Krems, 2015, pp. 5-6; Kubiciel, 2016, pp. 178 s.

⁹³ Kubiciel, 2016, pp. 178 s.

association fines.⁹⁴ There is a lack of concrete and comprehensible assessment rules for company fines.

It is rightly criticized that Section 30 OWiG does not contain its own allocation principles, which results in general uncertainty as to which criteria are to be applied and how they are to be interpreted. In addition, there are no company-specific assessment rules, such as poor organizational structures or criminogenic corporate ethics.⁹⁵ There is also no regulation as to the extent to which a compliance system has a mitigating effect on punishment and how associations can help minimize their own risk of sanctions. Since both company-related and perpetrator-related circumstances are taken into account in the assessment, in the absence of a legal provision this raises the question of how these relate to each other and should be weighted.⁹⁶ In addition, the focus is on asset recovery, in which there is a very wide scope for discretion. This means that there is a total lack of rules that enable transparent and comprehensible measurement.

5. Conclusion

The goal of uniform sanctioning of associations and companies represents a problem in both the US and continental European legal systems, raising questions about the justice and uniformity of sanctioning. This also applies in particular to the sanctioning of companies and associations, which has gained increasing importance in recent decades, particularly in the European Union. This development has resulted in considerable differences in the sanctioning of associations within national legal systems of the EU member states. This is due, on the one hand, to the different definitions of the criminal offenses and the threatened sanctions, and, on the other hand, to the different goals that states pursue with sanctioning associations. In addition, sanctioning practices often differ regionally within individual states. In Germany, for example, a north-south divide can be observed: in the north of Germany, significantly fewer corporate offenses are prosecuted than in the southern part of the country and the fines are higher in the north.⁹⁷

In areas that are largely influenced by US law, such as antitrust and merger control law, the European Union has introduced its own sentencing

⁹⁴ Altenburg and Peukert, 2014, pp. 649 ss.; Lenk, 2021, p. 164.

⁹⁵ Wegner, 2000, p. 93.

⁹⁶ Lenk, 2021, pp. 344 ss.

⁹⁷ Henssler et al., 2017, p. 15.

guidelines based on US law. However, the European Union attaches much less importance to compliance than is the case in the US. In other sanction areas that are largely determined by EU law, such as data protection and banking supervision law, there are both European and national sentencing guidelines. However, the national sentencing guidelines are not accepted by national courts in all countries. For example, the German Federal Court of Justice (BGH) does not consider itself bound by the guidelines of the Federal Cartel Office, even though these guidelines were issued on the statutory basis of Section 83 ~~###~~ GWB. The Federal Court of Justice (BGH) classifies these guidelines as merely a self-imposed obligation of the administration. The determination of sanctions in court proceedings is considered a primary task of the criminal justice system.⁹⁸

In contrast to the specialised areas of law just mentioned, there is great reluctance in the area of general corporate criminal and administrative fines law to introduce sentencing guidelines, even though in the area of common law, particularly over the last 25 years, sentencing commissions whose main task is to issue sentencing guidelines have been increasingly set up.⁹⁹ In the USA, these guidelines have helped to standardise criminal sanctions and thus make a contribution to fairness and uniformity in sanctioning. The USA has made bold progress in this area and has introduced numerous innovations. Over the past few decades, the traditional, discretionary approach to sentencing has been progressively replaced by structured regimes, often administered by sentencing commissions or councils. Sentencing guidelines have proliferated across the common law world and constitute the most significant development in sentencing in a century.¹⁰⁰ As Tonry wrote in 1996, this means that the "Sentencing Commission is alive and well,"¹⁰¹ and recent publications confirm this conclusion.¹⁰² This sanctions policy has met with widespread approval in the United States.

It is therefore not surprising that the US Sentencing Commissions and sentencing guidelines are repeatedly discussed at academic conferences, but also in academic papers, regarding their suitability as a model for the EU and its member states, and their adoption is repeatedly recommended. Even though internationally "a lively spirit of innovation and adaptation of the

⁹⁸ BGH, 26.2.2013, KRB 2012.

⁹⁹ Freiberg and Roberts, 2022, pp. 127 ss.

¹⁰⁰ Freiberg and Roberts, 2022, p. 87.

¹⁰¹ Tonry, 1996, p. 25.

¹⁰² Weisberg, 2008, pp. 179 ss.

directive concept appears to prevail,"¹⁰³ the national policy insights are carefully, thoughtfully and cautiously evaluated, with particular consideration given to local requirements, laws, institutions, and cultures, and have so far been rejected. On the one hand, the validity of the principle of legality (*nullum crimen, nulla poena sine lege*) in the European Union and the continental European states plays a central role here; this, together with the statute law, requires a decision by a democratically legitimized parliament. Especially when new sanction systems are introduced, clearer and more precise legal requirements are needed, as the German Federal Constitutional Court has stated with regard to the punishment of confiscation of all assets of the perpetrator (*Vermögensstrafe*).¹⁰⁴ Especially when introducing new criminal sanctions systems, integration into an existing constitutional sanctions system, taking into account one's own legal culture, is advantageous because this can lead to a high level of acceptance of the norms by law enforcement authorities and compliance with the principles of the rule of law. For this reason, only the objectives of European Union directives are binding, but not the method by which they are to be achieved. Fundamental changes to a sanctions system often lead to significant disruptions in the national sanctions system, as experience in areas such as criminal confiscation and the fight against money laundering shows. Furthermore, given that sanctions systems can also be used in a discriminatory manner against foreign companies, as is currently the case in the United States, there is particular reason for caution.

Overall, legal systems based on a statute law system are extremely cautious and reserved, and adhere to their own legal institutions and cultures. This is particularly true in the continental European member states of the European Union. There, criminal sanctions are traditionally referred to as the state's "sharpest sword" for responding to misconduct. They are closely linked to the respective national cultural and social roots. Punishment should only be threatened for socially intolerable attacks on the most important legal interests. Threats of punishment are therefore always subsidiary to other solutions. The presumption applies: *in dubio pro libertate*. Within the supranational structure of the European Union, it is important to preserve the liberal and largely coherent sanction systems of the member states. Furthermore, the harmonization of criminal law to date on the basis of Article 83 TFEU has shown that minimum maximum

¹⁰³ Hester, 2020, pp. 180 s.

¹⁰⁴ BVerfG, 20.3.2002, 2 BvR 794/95, no. 62 ss.

penalties established by the EU, in particular, have tended to increase punitiveness in the member states and impair the proportionality of national penal concepts. The reason for this is the EU's arithmetic, absolute understanding of the wording "minimum rules for the determination of [...] penalties". This demonstrates that international policy transfer is particularly problematic in a criminal law governed by the rule of law (Rechtsstaatsprinzip). It is preferable to integrate the sanctioning of legal persons into the respective national criminal justice systems. This has the advantage that no internal systemic distortions arise, which in turn can lead to a lack of acceptance by the law enforcement authorities and the associations concerned.

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