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Conclusions**

1. Corporate compliance and criminal law

The title of this conference "Corporate compliance as a challenge for the design of legal consequences – towards a coherent system of sanctions in commercial criminal law" suggests that we currently have a multitude of sanctions in different laws in all Member States of the EU, but that these are only coordinated to a very limited extent. And it was in my opinion very fruitful not only to hear criminal law experts, but experts in competition law, labour law and ethics.

The concept of compliance has been a central topic in commercial and corporate criminal law for several years now. It is not only an important topic in criminal law, but many companies have to deal with it and have to think about setting up compliance programmes and establish compliance departments. The term “criminal compliance” is used by everyone, but it is quite vague and its implications for criminal law are largely unclear. In order to take a broadly conceived area of responsibility seriously, compliance rules are being created to ensure that legal violations of any kind are prevented. This specifies the obligations prescribed by the legal system (specification of standards through compliance regulations). However, compliance measures can go beyond the legal requirements and include higher requirements. It is a matter of regulatory compliance.

On this conference interesting examples of compliance from ethics, antitrust law and labour law on the basis of clinical ethics counselling were presented. Clinical ethics counselling can contribute to careful action. It seems important to me that the law gives a framework and that within this framework there is room for ethics to play a role. The problem is that ethics is not so clear-cut. Prof. Bobbert's thesis was that clinical ethics counselling is a weak instrument for legal compliance.

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2. Variety of sanctions and subjects to sanctions

On the one hand, we heard about a number of parties subject to sanctions: managers/decision-makers, employees, the company or association, and in some cases also corporations. On the other hand, a range of different sanctions or measures are provided for: criminal sanctions, i.e. classic fines and prison sentences, but also confiscation, forfeiture, administrative sanctions such as the exclusion of bidders from procurement procedures, labour law measures (dismissal, termination, loss of salary), civil law recourse claims, claim for damages etc. We can see that in modern law criminal, civil and administrative aspects are intertwined. These sanctions are foreseen for the same or similar violations of law. However, they have different purposes, as Prof. Dannecker explained: prevention, repression, averting of a danger, restitution.

Dr Toth introduced us to the system of sanctions in antitrust law. He raised the question of whether fines against companies have a sufficiently deterrent effect and whether it makes more sense to expose managers to a higher risk of being held personally accountable. This shows that it is not so easy to choose the "right" sanction and the right subject to sanction in order to achieve the desired purposes, since sanctions have different effects and not for every irregularity the same sanctions are adequate and appropriate. Mr Toth also pointed out the problems and shortcomings of private enforcement in competition law.

How do all these sanctions relate to each other? When are they proportionate and when do they go beyond the intended goal?

The problem is that these sanctions are largely imposed independently of each other, since they are foreseen in different laws and imposed by different authorities that do not cooperate or refer to one another in this regard.

As long as it concerns criminal sanctions, the principle of "ne bis in idem" sets limits on imposing sanctions by prohibiting multiple punishments and prosecutions for the same offence. However, we can already see here that it is not always clear whether a sanction is of a criminal nature and if the sanction is not of criminal nature, the “ne bis in idem” principle is not applicable.

But what about other sanctions? How are they taken into account in such a diverse system of sanctions?

It depends on the rules of determination of sanctions whether the imposition of other sanctions has to be taken into account in the sanctioning process. The principle of proportionality requires that other sanctions and other consequences of the violation of law – i.e. other sanctions and measures – must be taken into account in the sentencing process in criminal law. This also applies to associations. Other sanctions such as professional bans, exclusion from public procurement procedures and loss of office must therefore be taken into account. However, there is a lack of clear principles and of a coherent concept of sentencing that takes these other sanctions into account.

Although the variety of sanctions is certainly appropriate in order to respond to legal violations in a suitable and appropriate manner, it must not lead to sanctions being placed outside the scope of criminal law in order to avoid the application of criminal law guarantees, even though these sanctions are similarly intrusive and fulfil criminal law functions. We need to coordinate sanctions in order to achieve a coherent system.

What significance can sentencing guidelines have for the assessment of sanctions?

They are repeatedly discussed but rejected for criminal law because it is the criminal judge's inherent task to determine penalties. However, they are accepted in administrative penal law. It makes sense to use sentencing guidelines for sanctions against legal entities. When introducing sentencing guidelines, however, care must be taken to ensure that they do not lead to disproportionate penalties, especially for repeat offenders. Prof. Dannecker proposed the inclusion of sentencing guidelines for sanctioning companies in EU directives and has set out requirements for this.

3. Concluding thesis

These considerations lead to the following concluding thesis

- If we look at the purpose of criminal and sanctioning law, it is prevention. If prevention is regarded as the central purpose, it is essential to answer the question of how this purpose can be achieved in the best possible and proportionate manner. Since criminal law is supposed to be the "ultima ratio", i.e. that only these means must be used which are sufficient to achieve the purposes, it is always necessary to consider whether the preventive purposes can be achieved with less severe sanctions.

- What role does compliance play in sanctions? Is compliance soft law or hard law? Compliance concerns the obligations of companies in which way they have to take care to avoid irregularities. These obligations and how they are fulfilled are relevant to criminal negligence, not only of companies or associations, but also the duties of natural persons which influence the guarantor position in cases of offences committed by omission. Therefore, compliance is part of criminal law and consequently hard law. However, care must be taken in the case that companies set higher standards for themselves than they are foreseen by (general) law. These must not be automatically elevated to general standards of care for the companies, because these voluntary commitments do not also raise the standard of diligence.
- Sanctions must be tailored to the individual perpetrator and specifically targeted at them. This applies in particular to associations. The question must be asked: Which sanctions are necessary and which are sufficient to guide them towards legally compliant behaviour?
- If compliance measures are taken in a company, this constitutes a mitigating factor, provided that these measures are also suitable for preventing non-compliant behaviour.
- It is always a question is when these measures should be implemented. Only before the offence or also in the event of corresponding post-offence behaviour?
- If an association establishes compliance systems, it implements measures to prevent non-compliant behaviour. If, despite this, a non-compliant conduct is committed by decision-makers or employees of the association, it must be examined whether this is due to a deficiency in the compliance system, whether it was not implemented correctly, or whether it was due to the behaviour of the natural person(s) that could not be prevented even with a well-working compliance system.
- What does it mean, if a company implements compliance measures after the criminal offence? Is this a mitigating factor or even sufficient to have a preventive effect, and are penalties or other sanctions superfluous in such a case? The Austrian regulations on corporate criminal law e.g. provide that the public prosecutor's office may withdraw from prosecution if the association takes measures to prevent misconduct within the association in the future.

- Compensation for damages should in any case be considered as a mitigating factor.
- Could imposing the establishment of appropriate compliance measures on associations be a sanction in itself? One could consider that imposing an obligation on the association to establish compliance systems to prevent future offences within the company constitutes a sanction. If this happens, other penalties and sanctions, such as fines, may be waived.
- At European level, care must be taken to ensure that the sanctions required by harmonisation legislation allow Member States sufficient flexibility to adapt the sanctions to their respective national sanctions/criminal law.