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“The Criminal Liability of Corporations and Directors: The Road to Implementing Compliance Laws and Regulations Discussed in the Context of Selected States”

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ONE: INTRODUCTION AND HISTORY OF THE LIABILITY OF CORPORATIONS AND THEIR DIRECTORS

In recent years, many events have brought the issue of corporate criminal liability back into the spotlight, and events such as the global financial crisis have proven that the harms that can arise out of a misuse of corporate power can be devastating.[1] An incident such as the aforementioned global financial crisis has reignited the debate on corporate criminal liability, and the arguments that have been raised over the years have proven to be all too familiar and futile in the combat against corporate crime and legal systems worldwide are facing several issues with regard to holding corporations accountable for their actions.[2] The debate became especially significant following the 1990s, when both the United States and Europe have faced an alarming number of environmental, antitrust, fraud, food, drug, false statements, worker death, bribery, obstruction of justice, and financial crimes involving corporations.[3] The consequences that most directly affect our society are the enormous losses of money, jobs, and sometimes even lives. At the same time, the long effect of these crimes, such as the damaging effects upon health or the environment, which may definitely severely affect us now, should not be underestimated.[4]

The main reaction to this criminal phenomenon has been the creation of judicial regimes that could deter and punish corporate wrongdoing. Corporate misconduct along the years has been addressed by civil, administrative, as well as criminal laws. However, the criminal liability of corporations and their directors has become more controversial, in the sense that there has been a significant struggle towards finding the right way to combat such a significant legal problem. Even if several jurisdictions have accepted and applied the concept of corporate criminal liability having various models in sight, other law systems have not been able or even willing to incorporate it.[5] Critics have voiced strong arguments against the efficiency of imposing criminal liability on corporations and its consistency with common principles of criminal law. But at the same time, a large pool of partisans have defended corporate criminal liability and insisted that

[1] Kristen Wong, *Breaking the Cycle: The Development of Corporate Criminal Liability* (2012) 5
[2] Ibid.
[3] Anca Iulia Pop, *Criminal Liability of Corporations – Comparative Jurisprudence* (2006) 2
[4] Ibid.
[5] Ibid., 2, 3

every legal system should have in place legislation which shall address issues of such special kind of liability.[6] The main goals of the criminal liability of corporations and their directors are similar of those in criminal law in general,[7] where characteristics such as *deterrence* and *retribution* are principal staples.[8] *Deterrence*, in this context, refers to the effective prevention of future crimes. *Retribution* refers to the society's duty of punishing those who conduct criminal behavior.[9] The *rehabilitation* of corporate criminals within the context of this paper refers to the process of returning the "state of affairs" to a good condition – i.e. insofar as the "state of affairs" refers to the companies affected by their directors' criminal conduct. Furthermore, corporate criminal liability should, same as general criminal law, achieve the goals of *clarity*, *predictability* and *consistency* with the criminal law principles which are applied normally,[10] without incurring any sort of exceptions. Moreover, *efficiency* should be reflected by the aforementioned goals, but in somewhat measure, it is not fully achieved. This is how the main question with respect to this issue is: "Is there a possibility for these corporate criminals to properly rehabilitate?". This is a question which, in a way, makes reference to the idea that the progress in regard to certain processes such as: detection, combat and prevention – are hindered – and this is why it is debatable whether the principle of efficiency is properly achieved. Last but not least, the principle of *general fairness* should be upheld with respect to each of the aforementioned goals – but considering the path that corporate criminal liability has followed (a path which eventually split into numerous other paths – or better yet, "models"), different countries have implemented various models of corporate criminal liability,[11] and this variation (which is not necessarily harmonized) – has been subjected to considerable scrutiny – and some of the goals which have been recently presented are not reflected in full.

As early as the 1700s, with respect to the Anglo-American legal world, English cases held that corporations were not indictable for any wrongful act[12] – "*A corporation is not indictable but particular members of it are*".[13] This remark was not accompanied by any facts, nor the context in which it was made apparent – but such shortcomings did not dissuade common law

[6] Ibid., 3
[7] Ibid.
[8] Ibid.
[9] Ibid.
[10] Ibid.
[11] Ibid., 3, 4
[12] Kathleen F. Brickey, *Corporate Criminal Accountability*: *A Brief History and an Observation*, 60 Wash. U. L. Q. 393 (1982) 396
[13] *Anonymous*, 88 Eng. Rep. 1518 (K.B. 1701)

judges from citing this statement with approval.[14] As such, prior to the mid-1800s it was questionable whether corporations could be held criminally liable for *misfeasances* (positive acts) as well as nonfeasances (omissions)[15] – and in 1846, in *The Queen v. Great North of England Railway Co.*[16] it was held that corporations could be criminally liable for misfeasance.[17] In order to hold corporations liable for misfeasance, the courts imputed agent conduct to corporations, and such imputation would have been somewhat troublesome without the doctrine of *respondeat superior*.[18] Therefore, in the twentieth century, conventional wisdom experienced another major shift, when the U.S. Supreme Court applied a civil law doctrine, that of *respondeat superior*, in criminal law.[19] This doctrine makes an employer or principal liable for the wrong of an employee or agent if it was committed within the scope of employment or agency.[20] The case of *New York Central & Hudson River Railroad Co. v. United States*[21] has demonstrated that a corporation can be held criminally liable for crimes of intent as well, after courts were slow in extending corporate criminal liability to such crimes. Therefore, the above-mentioned doctrine's development coincided with the growth in the number and importance of corporations, as well as with the society's demand to better regulate business.[22]

In the last quarter of the same century, European legislation had begun to acknowledge corporate criminal liability – and this is also probably due to Perrow's study on organizations,[23] which played a significant role in the overall acknowledgment that corporations should be held criminally liable.[24] In addition, the first decade of the twenty-first century has shown significant oxymoronic tendencies, as certain theorists have labeled the Anglo-American tradition as somewhat outdated, since more legislations around the globe started to introduce corporate criminal

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[14] Kathleen F. Brickey, *Corporate Criminal Accountability*: *A Brief History and an Observation*, 60 Wash. U. L. Q. 393 (1982) 396
[15] Vikramaditya S. Khanna, *Corporate Criminal Liability: What Purpose Does it Serve?*, 109 Harvard Law Review, No. 7, pp. 1477-1534 (1996) 1481
[16] *The Queen v. Great North of England Railway Co.* US Eng. Rep. 1294 (Q.B. 1846)
[17] Ibid., [1298]
[18] Vikramaditya S. Khanna, *Corporate Criminal Liability: What Purpose Does it Serve?* 109 Harvard Law Review, No. 7, pp. 1477-1534 (1996) 1482
[19] Zachary J. Goldberg, *Reflections on Ethics and Responsibility: Essays in Honor of Peter A. French* (Springer, 2017) 38
[20] Respondeat superior < https://www.merriam-webster.com/legal/respondeat%20superior >, accessed May 22, 2020
[21] *New York Central & Hudson River Railroad Co. v. United States* 212 U.S. 481 (1909)
[22] Vikramaditya S. Khanna, *Corporate Criminal Liability: What Purpose Does it Serve?*, 109 Harvard Law Review, No. 7, pp. 1477-1534 (1996) 1482
[23] Charles Perrow, *Theory and Society*, Vol. 20, No. 6 (Springer, 1991) 725-762
[24] Zachary J. Goldberg, *Reflections on Ethics and Responsibility: Essays in Honor of Peter A. French* (Springer, 2017) 38

liability provisions.[25] In other words, this meant that while legal theory was questioning the wisdom of imposing criminal liability on corporations, legal systems were introducing several provisions which allowed for corporations to be held criminally liable.[26] In this regard, it appeared that there was a detachment between criminal theory and criminal policy – and such a detachment sparked controversy in the legal world, as what seemed obvious to some, seemed unreasonable and unjustified to others.

However, the debate itself is not centered on *if* corporations should be sanctioned, but more on *how* they should be sanctioned.[27] And this debate calls for the analysis of the function of criminal procedure and criminal punishment – and this function of the two pillars of criminal justice – has taken a different shape and a different approach towards corporations. Therefore, it can be said that the standards of corporate criminal liability have evidently drifted away from traditional criminal law principles insofar as what would be unthinkable in terms of individual criminal liability is commonplace in corporate criminal liability – and the best example is the use of monetary penalties as the common criminal sanction against corporations.[28] Notwithstanding the earlier-mentioned arguments, the basic principles of criminal law should not be subjected to change just because an actor is a corporation and, as such, Peter French's CID (Corporate Internal Decision) Structure, established in 1979, plays an important role in assessing responsibility and corporate wrongdoing.[29] The CID is comprised of: (a) an organizational or responsibility flow chart that describes stations and levels within the power structure of the corporation; and (b) the rules of corporate decision recognition (in other words, corporate policy). As such, when the two components work concomitantly, a synthesis of various decision-making sections of the corporation are constituted. Therefore, the CID structure incorporates acts of biological persons, and any event can be described in two non-identical ways: (a) where one of the executives is performing an act; and (b) where the corporation is performing an act.[30]

With the help of the distinct elements of the corporate structure that French identified in 1979, corporate structures have developed over time, and noteworthy is that these elements have

[25] Ibid.
[26] Ibid.
[27] Ibid., 39
[28] Ibid.
[29] Ibid.
[30] Mark C. Vopat, 'Corporate Moral Agency: Peter A. French' < http://mvopat.people.ysu.edu/courses/business_ethics/BE_Notes/BE5_Corp_Agency_French.pdf >, accessed May 23, 2020

gradually been incorporated into nowadays' compliance programs.[31] Corporate integrity, after all, is based on a proper compliance system, and this statement has never been more relevant as it is now, when compliance programs are considered the bulk of corporate criminal liability.[32] Compliance programs entered the corporate liability landscape in 1991 with respect to the system of Federal Criminal Law of the United States – and the fact that a corporation could substantially reduce the criminal sanctions if it had in place a proper (and effective) compliance program, triggered a strong response in the corporate world.[33] In addition, this created a path towards the so-called principle of mitigating criminal responsibility: if the corporation had an effective compliance program established, prosecutors would have considered it a factor in whether or not to charge the supposedly liable corporation. As such, the importance of compliance programs became paramount, and more and more corporations were eager to implement them in order to, as aforementioned, mitigate their criminal responsibility.[34] Even if the concept of compliance programs had entered the corporate liability landscape more than two decades ago, there are a number of countries which started adhering and practically implementing compliance programs much later than other. For instance, Romania, where even if fifteen years will soon pass since the introduction of corporate criminal liability in the Romanian judicial system, the investigation and litigation practice is still very much oriented towards identifying first a natural person, or more, who may have been in charge of deciding and only later, if required, they also charge the company for the specific crime.[35]

Having discussed the subject of corporate criminal liability in general, the author will focus on the criminal liability of directors.[36] Normally, the liability of company directors is typically "non-existent" when it comes to corporations which have proper protections in place for their high-ranking members, owners, shareholders, etc. – this means that even if a high-ranking member makes a decision which can give rise to criminal liability, it is likely that he will not be made

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[31] Zachary J. Goldberg, *Reflections on Ethics and Responsibility: Essays in Honor of Peter A. French* (Springer, 2017) 44

[32] Ibid.

[33] Ibid., 44, 45

[34] Ibid., 45

[35] Simona Pirtea and Mădălin Enache, 'Corporate Liability in Romania' (ExpertGuides, April 14, 2020) < https://www.expertguides.com/articles/corporate-criminal-liability-in-romania/arieswem >, accessed June 28, 2020

[36] 'Liability of Company Directors' (UpCounsel) < https://www.upcounsel.com/liability-of-company-directors#:~:text=members%20and%20owners.-,The%20liability%20of%20company%20directors%20is%20typically%20non%2Dexistent%20when,violation%20of%20a%20specific%20duty. >, accessed April 17, 2020

liable unless the *corporate veil* is pierced.[37] A concept which will be later explained. As it has been earlier discussed and illustrated, the laws that handle corporations have expanded several liability terms, but even though there is a somewhat shield against liability, there are occasions in which the law will hold corporations' officers and directors liable for their business decisions.[38] Piercing the *corporate veil* refers to the occasions when officer and director liability happens. Normally, the director is responsible for acting in good faith and upholding the duty of care in a way that any normal person would, in a normal or similar situation.[39] The directors are protected by the *business judgment rule*, a rule which is invoked in lawsuits when a director of a corporation takes an action that affects the corporation, and the plaintiff sues, alleging that the director violated the duty of care required by the corporation.[40] Nevertheless, there are circumstances where liability is limited and a court of law will hold officers, directors or shareholders liable. A court of law will do this if it should believe that the business in question was not formed for legitimate purposes. Moreover, if a business is not distinguishable from its owners, a court of law will not allow owners to benefit from limited liability.[41] Another concept to mention which finds itself in the sphere of piercing the corporate veil is the *responsible corporate officer doctrine* (RCO), created by the U.S. Supreme Court.[42] Under this doctrine, a corporate officer may be found criminally liable for regulatory offenses even when he or she is *unaware* of and *not involved* in the wrongdoing if he or she is in a position of authority in regards to the activities which had given rise to the illicit conduct[43] and had not taken moderate steps to detect, prevent, and correct the conduct.[44] Furthermore, penalties under the RCO doctrine can include fines[45] and even imprisonment.[46]

[37] Ibid.
[38] Ibid.
[39] Ibid.
[40] 'Business Judgment Rule' (Legal Information Institute) < https://www.law.cornell.edu/wex/business_judgment_rule >, accessed April 18, 2020
[41] 'Liability of Company Directors' (UpCounsel) < https://www.upcounsel.com/liability-of-company-directors#:~:text=members%20and%20owners.-,The%20liability%20of%20company%20directors%20is%20typically%20non%2Dexistent%20when,violation%20of%20a%20specific%20duty. >, accessed April 17, 2020
[42] Jodi Avergun, Ellen V. Holloman, Lex Urban, Hyungjoo Han and Christian Larson, 'Corporations, Directors, and Officers: Potential Criminal and Civil Liability' (LexisNexis) 4 < https://www.cadwalader.com/uploads/books/a64d249c326e1db7c52c10d4985f6e2d.pdf >, accessed April 19, 2020
[43] *United States v. Park*, 421 U.S. 658, 672-74 (1975)
[44] *United States v. Dotterweich*, 320 U.S. 277, 284-85 (1943)
[45] *Meyer v. Holley*, 537 U.S. 280, 287 (2003)
[46] Jodi Avergun, Ellen V. Holloman, Lex Urban, Hyungjoo Han and Christian Larson, 'Corporations, Directors, and Officers: Potential Criminal and Civil Liability' (LexisNexis) 4 < https://www.cadwalader.com/uploads/books/a64d249c326e1db7c52c10d4985f6e2d.pdf >, accessed April 19, 2020

The next subject which will be discussed is that of compliance programs and management systems, that focus on *corporate* wrongdoing and not on *individual* wrongdoing. Having the aforementioned themes discussed, it would be definitely reasonable to conclude that corporations can and should be held criminally accountable for their actions.[47] Regardless of the location or type of corporation, establishing an effective compliance and ethics program has become a necessity in order to protect any type of highly regulated organization.[48] At its core, such an effective program protects the organization with the detection and prevention of improper conduct and promoting a strong adherence to the corporation's ethical and legal obligations.[49] However, there is no sort of "one-size-fits-all" type of compliance program – even if a template is well put into place. There are several core components that must exist in order for the compliance program to operate efficiently.[50] As such, an organization must have certain standards of conduct and internal control designed to be reasonably capable of reducing the likelihood of criminal and other illicit or improper conduct, and the foundation of such controls should be the well-known code of conduct.[51] The code should overall contain a description of the program and address the compliance risks that are relevant to the organization in a practical manner.[52] In the first stages of the twenty-first century, compliance programs were the only possibility for a corporation to properly avoid criminal liability, and not just in the U.S., but globally. Corporate wrongdoing has been increasingly conceived as a lack of compliance programs or as an improper and ineffective implementation of those programs.[53] However, this initial assumption has evolved, from a legal perspective into the notion that the target of corporate punishment is aimed at blaming the corporate culture, policy, or procedures.[54]

For a number of years already, there have been several international efforts at standardizing compliance programs to try and create a "one-size-fits-all" (as earlier mentioned) type. But as every company is different, the programs will also differ in nature and approach. The trend of

[47] Zachary J. Goldberg, *Reflections on Ethics and Responsibility: Essays in Honor of Peter A. French* (Springer, 2017) 43, 44
[48] Kwamina Williford and Daniel Small, 'Establishing an Effective Compliance Program' (Association of Corporate Counsel ACC, January 25, 2013) < https://www.acc.com/resource-library/establishing-effective-compliance-program-overview-protecting-your-organization >, accessed April 22, 2020
[49] Ibid.
[50] Ibid.
[51] Ibid.
[52] Ibid.
[53] Zachary J. Goldberg, *Reflections on Ethics and Responsibility: Essays in Honor of Peter A. French* (Springer, 2017) 45
[54] Ibid.

establishing a proper compliance program has moved towards the establishment of a management-system approach, where law compliance programs are adequate examples of *performance quality management systems* or just *quality systems*.[55] Such compliance management systems go further than just the usual "law-abidance" principle upheld by compliance programs on their own. With such systems, the emphasis is put on the compliance culture of the corporation, therefore creating a compliance culture as part of the organizational culture – an aim which should be reached by corporations that want to be successful in the long term.[56] From this perspective, the distinct corporate offense can be properly assessed by looking into the functioning of the compliance management system of a corporation.

These management systems do not just illustrate the rules and procedures of a company, but they serve as a basis for evaluating the law-abiding behavior of the company – and as such, if the corporation has a well-established compliance culture, it is unlikely that it will be subject to punishment for the acts of its directors, officers, or employees. In regard to employees, however, there is an aspect imperative to be mentioned: corporations are only liable for the acts of employees if the employees are acting within the scope and nature of their employment.[57] This requirement is met if the employee has actual or apparent authority to engage in the act in question.[58] Actual authority attaches when a corporation knowingly and intentionally authorizes an employee to act on its behalf, regardless of the action performed.[59] Furthermore, the decision to impute liability is based on a fact-specific inquiry, and courts have found that an employee's act can bind the corporation even where the corporation has implemented policies that explicitly prohibit a certain behavior (i.e. where a compliance program was in place).[60] And, reversed, if the aforementioned principle of having a well-established compliance culture is not respected, then it will make perfect sense to hold the corporation responsible for its wrongdoings.[61] Based on the earlier discussion, it can be concluded that in a business environment where reputational threats are faced quite often, the key to a robust risk management program is a strong culture of

[55] Ibid.
[56] Ibid., 46
[57] Melissa Ku and Lee Pepper, *Corporate Criminal Liability*, 45 The American Criminal Law Review (2008) 278
[58] *Myers v. Bennett Law Offices*, 238 F.3d 1068, 1073 (9th Cir. 2001)
[59] Melissa Ku and Lee Pepper, *Corporate Criminal Liability*, 45 The American Criminal Law Review (2008) 278
[60] Ibid., 278-279
[61] Ibid.

ethics and compliance.[62] The lessons learned which relate to previous scandals and organizational crises that trace back to the early 2000s show not just what has been discussed previously, but what will follow in this exhaustive research: that without an ethical and compliant culture, organizations will always find themselves to be at risk. This is why the current business culture is turning into a concept which must be properly defined, measured, and constantly improved.[63] As global regulations proliferate and are becoming more complex, concomitantly with the increase in expectations of stakeholders, organizations are exposed to a greater *compliance risk* than before – and global regulatory convergence and the expansion of businesses into new (emerging) or adjacent industries have also definitely increased the requirement for a broader view of compliance risk. *Compliance risk* is the threat posed to an organization's financial, organizational or reputational standing, all resulting from various violations of laws, regulations, codes of conduct, or organizational standards of practice.[64] This is why the starting point for all compliance programs is to know which areas have the highest potential for violations of law – directors and officers have a duty to "ferret" out and work towards the prevention of the most serious types of risk for their organization – undoubtedly this means a solid understanding of the environment that the organization is operating in.[65]

Returning to the concept of internal control programs, after Peter French's CID Structure in 1979, the 1992 COSO report, or the "Internal Control-Integrated Framework" is now the most commonly used and understood framework for evaluating compliance risks and internal controls over financial reporting.[66] Since anti-corruption compliance programs are a form of internal control programs, understanding the COSO framework is useful for gaining perspective on what an anti-corruption compliance program should seek to achieve.[67] COSO is a joint initiative, private-sector organization, dedicated to providing thought leadership through the development of frameworks and guidance on enterprise risk management, internal control and fraud deterrence,

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62 Deloitte, 'Building world-class ethics and compliance programs: Making a good program great' (Deloitte) 7 < https://www2.deloitte.com/content/dam/Deloitte/no/Documents/risk/Building-world-class-ethics-and-compliance-programs.pdf >, accessed May 5, 2020
63 Ibid.
64 Ibid., 12
65 Ibid., 13
66 Brian Loughman and Richard Sibery, *Bribery and Corruption: Navigating the Global Risks* (Ernst & Young LLP, 2012) 49
67 Ibid.

globally.[68] The COSO report identifies five essential components that must be present and functioning to have an effective internal control system:

(1) Control environment – the control environment establishes the foundations for the internal control system by providing fundamental discipline and structure, and also “sets the tone” of the organization, influencing the control consciousness of its people;
(2) Risk assessment – the process of identifying, analyzing, and managing risks is a critical component of an effective internal control system – basically acknowledging that change is always present and imminent and the importance of taking actions as necessary to respond to these changes;
(3) Control activities – the policies, procedures, and practices that ensure management objectives are met and that risk mitigation strategies are carried out efficiently. Such activities include reviews, approvals, authorizations, and verifications;
(4) Information and communication – the process of capturing and exchanging the information needed to conduct, manage, and control the company operations;
(5) Monitoring – the continuous process that assesses the quality of the performance of internal control over time.[69]

An anti-corruption compliance program is part of the overall internal control system of a company, and the logic of the COSO framework is fully applicable in designing such an effective program. The COSO report specifies that an effective internal control system should provide some sort of reasonable assurance to management and the board that applicable laws are being complied with.[70] Having provided valuable insight through discussions, alongside supporting relevant case law, and concepts established and developed over the years with respect to the criminal liability of corporations and their directors, as well as to the emergence and importance of compliance programs and systems, the analysis of the response of six different countries towards white-collar crime is introduced in the remainder of this thesis. The analysis will be comprised of: an outline of the evolution of corporate criminal liability in each country, and a discussion on what could be done in order to provide for a positive outcome, namely the decrease of corporate crime.

[68] COSO, ‘About us’ < https://www.coso.org/Pages/aboutus.aspx >, accessed May 10, 2020
[69] Brian Loughman and Richard Sibery, *Bribery and Corruption: Navigating the Global Risks* (Ernst & Young LLP, 2012) 50-51
[70] Ibid., 51-52

TWO: THE EVALUATION OF CORPORATE CRIMINAL LIABILITY IN ROMANIA AND THE ROMANIAN CRIMINAL CODE

15 years will soon pass since the introduction of corporate criminal liability into the Romanian judicial system, and even though such a substantial amount of time has passed, the investigation and litigation practice is still very much oriented towards first identifying a natural person (or more, depending on the case) who may have been in charge of making decisions on behalf of the moral person and only later, when applied on a case-by-case basis, the company might be charged for a specific crime, in order to allow for seizure measures to be taken.[71] In Romania, the main accusations which are more often than not formulated against directors and officers are for tax evasion, money laundering, embezzlement, misuse of funds, false statements, misusing the credit or reputation of the company, bribery, or even abuse in office or fraudulent bankruptcy.[72] Before continuing the discussion on the current standing of corporate criminal liability in the country, it is important to outline the principles of corporate criminal liability and the afferent punishments of the offenses that are present in the Romanian legal system.

First, the criminal liability of a corporation can arise for any given offense – corporations have a similar penal capacity as with natural persons.[73] Second, the criminal liability of a corporation does not exclude the criminal liability of the natural person who contributed to committing the offense.[74] This basically means that corporate criminal liability can incur when the crimes are committed by the representatives or the employees in the performance of the object of activity of the legal entity,[75] in their interest, or on their behalf.[76] This principle is also supported by civil statute, which states:

"*(1) The actions, be they legal or illegal, committed by representatives of the legal person, will give rise to liability of the legal person itself, but only if the actions will be in connection to the*

[71] Simona Pirtea and Mădălin Enache, 'Corporate Liability in Romania' (ExpertGuides, April 14, 2020) < https://www.expertguides.com/articles/corporate-criminal-liability-in-romania/arieswem >, accessed June 28, 2020
[72] Ibid.
[73] Constantin Mitrache and Cristian Mitrache, *Romanian Criminal Law: The General Part* (Drept penal român: Partea generală) (2nd edition, Universul Juridic, 2016) 404
[74] Ibid.
[75] Ilie Pascu, Traian Dima, Costică Păun, Mirela Gorunescu, Vasile Dobrinoiu, Mihai Adrian Hotca, Ioan Chiș and Maxim Dobrinoiu, *The New Criminal Code with Commentary: The General Part* (Noul Cod penal comentat: Partea generală) (3rd edition, Universul Juridic 2016) Art. 135, 717
[76] Simona Pirtea and Mădălin Enache, 'Corporate Liability in Romania' (ExpertGuides, April 14, 2020) < https://www.expertguides.com/articles/corporate-criminal-liability-in-romania/arieswem >, accessed June 28, 2020

attributions or the scope of given functions. (2) The illegal actions will give rise to personal, solidary liability of those who have committed them both towards the legal person and towards third parties".[77]

And third, criminal liability cannot be imposed on public law institutions. The following institutions cannot be held criminally liable: the state itself, public authorities and public institutions[78] – but these entities will not be held liable for the offenses committed with reference to a practice (or activity) which does not pertain to the private domain. The legal nature of the commercial companies, as subjects of law, has required the enactment of special provisions as well, applicable solely to the legal persons, regarding:

(1) The representation of the legal person within the criminal trial;
(2) The precautionary measures that may be taken within the criminal trial; and
(3) The complementary measures to be taken in order to properly sanction the legal person.[79]

According to the Romanian Criminal Code, the types of sanctions applicable to a legal person are the following:

(1) The main sanction is a fine;
(2) The complementary sanctions are: the dissolution of the company, the suspension of the activity altogether or one of the activities with a duration of 3 months up to 3 years, closure of locations of operation with a duration of 3 months up to 3 years, the interdiction to participate in public acquisitions with a duration of 1 up to 3 years, the placement of the legal person under judicial supervision, and the disclosure of the criminal charge being published in the media.[80]

[77] Dan Lupașcu, *The Civil Code: Consolidated Legislation and Index* (Codul civil: Legislație consolidată și index) (Universul Juridic, 2020) Art. 219, 62
[78] Constantin Mitrache and Cristian Mitrache, *Romanian Criminal Law: The General Part* (Drept penal român: Partea generală) (2nd edition, Universul Juridic, 2016) 404
[79] Lex Mundi, 'Criminal Liability of Companies Survey' (Lex Mundi, 2008) 276 < https://www.lexmundi.com/images/lexmundi/PDF/Business_Crimes/Criminal_Liability_Survey.pdf >, accessed May 17, 2020
[80] Ilie Pascu, Traian Dima, Costică Păun, Mirela Gorunescu, Vasile Dobrinoiu, Mihai Adrian Hotca, Ioan Chiș and Maxim Dobrinoiu, *The New Criminal Code with Commentary: The General Part* (Noul Cod penal comentat: Partea generală) (3rd edition, Universul Juridic 2016) Art. 136, 739

Having presented the sanctions that Romanian law provides for offenses committed by legal persons, it is important to provide further insight into how these sanctions work, from the main towards the complementary ones.

First, in regards to the main sanction, Romanian law, with the provisions outlined in Article 137 of the Criminal Code, presents a “fine-days” system; system which applies to both natural and legal persons.[81] The *general limits* of the fine range from 30 to 600 fine-days. The corresponding sum to a fine-day ranges from 100 to 5.000 Romanian Lei.[82] The *special limits* of the fine are to be determined by referral to the sanction provided for the specific offense, but the range of fine-days are from 60 to 510, when the law provides for sanctions both by fine and by imprisonment.[83] The quantum of the sum pertaining to a fine-day is to be determined by taking into consideration the capital of the legal entity (in the case of a legal entity with a lucrative scope), or the value of the patrimonial asset (in the case of other legal entities).[84] The fine must be paid in full within a period of 3 months from the date of the definitive decision. If the legal entity finds itself in a state where it cannot make the full payment, it can make a request to the judge to pay the fine in monthly installments which should last no more than 2 years.[85] Because there is no possibility to replace the sanction of the fine with respect to a legal person, if there should be a case where the legal person cannot pay the fine in full or cannot pay one of the installments, Article 26 of Law no. 253/2013 has provided for the possibility of enforcement (*executare silită*) of the legal person, according to the provisions of the Code of Fiscal Procedure.[86]

Second, because there are more and distinct complementary sanctions, they will be discussed separately by making reference to current legislation and providing commentary. The first sanction, the dissolution of the company, is the most severe of the complementary sanctions that can be imposed on a legal person. It is applied when:

(1) The company (legal entity) was established in order to conduct criminal activities;

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[81] Constantin Mitrache and Cristian Mitrache, *Romanian Criminal Law: The General Part* (Drept penal român: Partea generală) (2nd edition, Universul Juridic, 2016) 258
[82] Ibid.
[83] Ibid.
[84] Ibid., 258-259
[85] Ibid., 259
[86] Ibid.

(2) The company's main activity has changed with the main reason of committing criminal offenses, for which the punishment is imprisonment for a duration of over 3 years;
(3) In case the punishments provided under Art. 136 of the Criminal Code are not executed intentionally, the Court shall impose the dissolution of the legal entity.[87]

Metaphorically speaking, the dissolution of the legal entity is the "capital punishment" applied to it, because the collective entity sentenced to dissolution requires it yielding its legal existence. Because of its irreversible nature, dissolution is not accepted in the case of some other legal entities, when their existence would threaten certain fundamentals of the rule of law. Some examples of such legal entities are political parties or those entities which operate their activity in the press field. The dissolution of legal entities can be a solution when severe offenses have been committed or where a legal entity which has been sentenced in the past, has continued committing offenses or has not completed its sentence (executed punishments) of complementary sanctions which were considerably milder.[88] In the doctrine it has been discussed if, in order to apply the sanction of dissolution, it is necessary for all founding members to have been ill-willed when establishing the legal entity. The fact that some of those who have established the legal entity did not have any knowledge of the illicit scope known by other co-founders does not represent an impediment in providing the sanction of dissolution, if the real reason of establishment was, principally, to operate illicit activities.[89] For example – if an auto service has been established with the main reason of laundering money, the complementary sanction of dissolution can be applied, even if the service does operate legal activities, such as auto repairs.[90] A relevant criterion in establishing the importance of the illicit activity is represented by the fiscal value. If the illicit activity of penal nature of a legal entity had, from the beginning, a fiscal value higher than the legal activity, it can easily be said that the legal entity had been established with the purpose of committing offenses.[91] The declared reason of establishment, which must be legal, must not be confused with actual activities carried out, which may present both legal aspects as well as illegal ones. Only in the cases in which it is established if the reason of establishing the legal entity (or its principal scope) was to commit offenses, can the sanction of dissolution be applied.

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[87] Ilie Pascu, Traian Dima, Costică Păun, Mirela Gorunescu, Vasile Dobrinoiu, Mihai Adrian Hotca, Ioan Chiș and Maxim Dobrinoiu, *The New Criminal Code with Commentary: The General Part* (Noul Cod penal comentat: Partea generală) (3rd edition, Universul Juridic 2016) Art. 139, 746
[88] Ibid., 747
[89] Ibid.
[90] Ibid.
[91] Ibid., 747-748

As such, it can be said that the subjective element will take the form of direct intention, qualified through scope.[92]

The second complementary sanction, that of the suspension of the activity altogether or one of the activities, means that the legal entity is barred from performing the activity or certain activities due to committing certain offenses.[93] This complementary sanction is applied in two cases that have different causes, but the same effect –

(1) Where the offense was committed during the exercise of the main activity or of one of the activities, and the suspension can be placed for a duration of anywhere between 3 months and 3 years; and
(2) Where the legal entity has not completed its sentence (being ill-willed), this sanction will be, more or less, applied as a penalty. Therefore, according to Article 140, paragraph (2) of the Criminal Code – if the company has not completed its sentence intentionally (sentenced with one of the sanctions provided in Article 136, paragraph (3)(f) of the Criminal Code), the Court shall suspend the activity of or one of the activities of the company until the completion of the sentence, but not for more than 3 months.[94]

The third complementary sanction, that of the closure of locations of operation, means the closure of one or more of the locations in which the illicit activity took place, and the completion of this sentence can last from 3 months to 3 years. However, the law provides for an exception, one which has been earlier mentioned – legal entities which operate in the field of the press are exempted from this punishment.[95]

The fourth complementary sanction is that of the interdiction to participate in public acquisitions. By principle, under the requirement to fulfil certain conditions, any legal entity would

[92] Ibid., 748
[93] Ibid., 749
[94] Constantin Mitrache and Cristian Mitrache, *Romanian Criminal Law: The General Part* (Drept penal român: Partea generală) (2nd edition, Universul Juridic, 2016) 260
[95] Ibid., 261

be allowed to participate in any public acquisition process.[96] The interdiction of participating in such a process means the exclusion of any possibility of partaking, whether direct or indirect, to the process of acquiring public acquisition contracts provided by the law, with a duration from one to 3 years. The rationale behind this sanction is that the products or the public services are of general interest, and a legal person which has committed an offense does not present the necessary credibility anymore. However, this complementary sanction does not have any kind of effect on already present public acquisition contracts.[97]

The fifth complementary sanction is that of placing the legal person under judicial supervision. This means that the activity is operated under the supervision of a legal representative due to committing the offense, for a period from one to 3 years.[98] From this legal text, it is clear that the appointed legal representative will supervise the activity which has permitted the illicit action to take place, without having the right to be implicated in the proper operation of the legal entity. The legal representative has the obligation to notify the Court when it ascertains that the legal person did not take the appropriate measures with respect to the prevention of committing new offenses, and if the notification is well-grounded, the Court shall change the sanction to the dissolution of the legal entity.[99] The placing of the legal person under judicial supervision is a penal sanction which is present in many national legal systems, such as Portuguese law, Italian law, American law, and French law. For instance, in Italy, the placing of the collective legal entity under judicial supervision is a replacement measure instead of other sanctions, applicable in the case in which a legal entity exercises an important public activity, whose interruption would have consequences on the labor force in the region in which the entity is operating.[100] In France, placing the legal person under judicial supervision has a juridical regime similar to the one provided in the Romanian Criminal Code, this sanction being available for application for a duration of anywhere up to 5 years.[101]

Finally, the sixth complementary sanction, that of the disclosure of the criminal charge being published in the media, is performed at the sentenced legal entity's expense, under the

[96] Ilie Pascu, Traian Dima, Costică Păun, Mirela Gorunescu, Vasile Dobrinoiu, Mihai Adrian Hotca, Ioan Chiș and Maxim Dobrinoiu, *The New Criminal Code with Commentary: The General Part* (Noul Cod penal comentat: Partea generală) (3rd edition, Universul Juridic 2016) Art. 143, 755
[97] Ibid.
[98] Ibid., Art. 144, 757
[99] Ibid.
[100] Ibid.
[101] Ibid.

form of an extract, in the form and at the place decided by the Court. The duration of this disclosure (or posting) is established by the Court, usually between one and 3 months.[102] The form is usually under written or audiovisual press or through other means of audiovisual communication, named by the Court. The number of disclosures must not be higher than 10, when the disclosure is made by written or audiovisual press.[103] If the case of other means of audiovisual communication, the posting duration cannot last more than 3 months, and through the display or publishing of sentencing, the identity of other persons cannot be disclosed.[104] The publishing of the sentencing is a penal sanction present in many legal systems, such as the Belgian legal system[105] or the French legal system[106] (where the ninth subsection of Article 131-39 refers to the aforementioned sanction).[107]

There are several articles in the Romanian Criminal Code that are extremely relevant to the sphere of business crimes that are currently committed. A few of these offenses are:

(1) Taking bribes[108] - business and corruption-related offenses have, as generic legal object, the multitude of social relationships that are being established and which exist in relation to the well-functioning process and the completion of the business activity, which suggests the fulfilment of business obligations in good faith.[109] However, especially in regard to taking bribes, the special legal object is the social relationships which exists in relation to the well-functioning process and the completion of the business activity of the public institutions, of freelancers, or of other legal persons,

[102] Constantin Mitrache and Cristian Mitrache, *Romanian Criminal Law: The General Part* (Drept penal român: Partea generală) (2nd edition, Universul Juridic, 2016) 261
[103] Ibid., 262
[104] Ibid.
[105] Belgian Criminal Code, Art. 7bis, 4º < http://www.ejustice.just.fgov.be/cgi_loi/loi_a1.pl?language=fr&caller=list&cn=1867060801&la=f&fromtab=loi#LNK0003 >, accessed May 19, 2020
[106] French Criminal Code, Art. 131-39, 9º < https://www.legislationline.org/download/id/8546/file/France_CC_am012020_fr.pdf >, accessed May 19, 2020
[107] Ilie Pascu, Traian Dima, Costică Păun, Mirela Gorunescu, Vasile Dobrinoiu, Mihai Adrian Hotca, Ioan Chiș and Maxim Dobrinoiu, *The New Criminal Code with Commentary: The General Part* (Noul Cod penal comentat: Partea generală) (3rd edition, Universul Juridic 2016) Art. 145, 759
[108] Ilie Pascu, Traian Dima, Costică Păun, Mirela Gorunescu, Vasile Dobrinoiu, Mihai Adrian Hotca, Ioan Chiș and Maxim Dobrinoiu, *The New Criminal Code with Commentary: The Special Part* (Noul Cod penal comentat: Partea specială) (3rd edition, Universul Juridic 2016) Art. 289, 510
[109] Ibid., 513

social relationships which suggest the completion of the business activity in good faith on behalf of public servants and on behalf of other professionals.[110]

(2) Giving bribes[111] - it is characterized by an action of corruption committed by an individual towards a public servant or another person with work attributes in the service of a public servant or any other legal person.[112]

(3) Embezzlement[113] - the special legal objects in regard to this offense are social professional relationships, of which operation implies a correct management and administration of movable goods from the patrimony of a public authority, public institution, or another legal person which administers or exploits goods which are public property.[114] In addition, the offense of embezzlement is determined exactly by the incriminatory norm through the phrase: "money, valuables, or other goods".[115]

(4) Professional negligence[116] - the special legal object in regard to this offense is the ensuring on behalf of public servants, or on behalf of a legal person, of respecting the obligation to fulfil, correctly, the duties that are assigned to them, in order to avoid causing damage, or a breach of the laws or interests of a natural or a legal person.[117]

The offenses mentioned above, among several others, are fought against by the National Anti-corruption Directorate (DNA), a governmental agency which is tasked with preventing, investigating and prosecution corruption-related offenses. DNA was created as a structure with a clear jurisdiction in combating high and medium-level corruption, following a model adopted by several countries such as Spain, Norway, Belgium, and Croatia.[118] DNA has sent to trial, for instance, 7 dignitaries, 25 mayors and vice-mayors, 17 people with positions in upper management within the local authorities and 18 presidents of public institutions.[119]

In Romania, the legislative evolution over the past few years has shown that it is not the number of regulations that is the problem, but the implementation and the maintenance of those regulations. GRECO (Group of States Against Corruption) was established in 1999 by the Coun-

[110] Ibid.
[111] Ibid., Art. 290, 524
[112] Ibid., 525
[113] Ibid., Art. 295, 549
[114] Ibid., 551
[115] Ibid.
[116] Ibid., Art. 298, 569
[117] Ibid., 570
[118] DNA, 'About us' < https://www.pna.ro/about_us.xhtml >, accessed May 22, 2020
[119] DNA, '2018 activity report' < https://www.pna.ro/obiect2.jsp?id=387 >, accessed May 22, 2020

cil of Europe to monitor the States' compliance with the organization's anti-corruption standards.[120] GRECO's objective is to constantly improve the capacity of its members to combat corruption by monitoring their compliance with the standards of the corruption imposed by the Council of Europe through a dynamic process that consists of mutual evaluation and peer pressure. As such, it helps to identify deficiencies in national anti-corruption policies and regulations, prompting the necessary legislative, institutional and practical reforms. GRECO also provides a platform for the sharing of best practice in the prevention and detection of corruption.[121] GRECO has previously stated:

"*Romania needs to make decisive efforts in order to develop a compliance system that is more efficient, to detect problematic situations before these could transform into criminal justice issues*".[122]

Romanian public officials are still not used to regulatory compliance, ethics or conducts, and they sometimes do not see the relevance in most cases. It definitely represents a risk when these conducts are not made known, when regulations can tend to be redundant and generalized out of reach, or when its obligatory character is not concrete enough to provide a proper understanding. After all, as aforementioned, criminal liability of corporations is a new concept under Romanian law and has, until now, remained largely untested, so efforts towards prosecuting corporations will intensify over the next few years. There are several advantages when it comes to integrating a proper compliance program, as it assures prevention, detection and action over illicit activities with the company. In addition, a compliance program protects the reputation of the corporate body, it assures the continuous trust and interest of various investors, it reduces the instability of transactions, creates a safe environment, makes for an improved business environment, and last but not least, assures a better defense scheme along the criminal trial, when the case.

In current times, the principle is and will probably remain that "prevention is key". Actions and strategies that are applied become limited once an investigation is begun or an accusa-

[120] GRECO, 'What is GRECO?' < https://www.coe.int/en/web/greco/about-greco/what-is-greco >, accessed May 26, 2020
[121] Ibid.
[122] Ministry of Justice, 'GRECO Report – Romania' < http://www.just.ro/raportul-greco-de-evaluare-privind-romania/ >, accessed May 26, 2020

tion is formulated.[123] As earlier mentioned, even though the field of compliance and regulatory is a special branch which is more often than not, associated with non-criminal legislation, to take a compliance program into consideration as to prevent criminal activities or behavior is crucial.[124] As it has been shown, there are many behaviors that may be overlooked by the company or even seen as being "low-risk", but these activities can easily generate legal threats if they are performed in an inappropriate context or if they are misinterpreted by the state authorities, and all these due to a lack of coherence and clarity in their performance.[125] In such cases, the persons that are prone to be exposed to such risks are the ones that make decisions in the company, themselves being the ones who are held responsible for the respective behavior, and this responsibility can, more often than not, take the form of criminal liability.[126] In several regulated systems, support from local and national institutions exists – but it is the obligation of the strong market players and of the jurists to regulate the concept of compliance programs or systems in as many fields as possible.[127] If such a step will be taken, a greater degree of transparency and professionalism would be as such reached, and several "amateur"-like entities will be eliminated step-by-step due to the fact that other parties will refuse to enter transactional relationships with them if they do not have a proper compliance program implemented.[128] Nevertheless, an interest and implication must be shown from the private enterprises as well – the interest is both the state's, as well as the companies' which operate on the territory of Romania to have clean and viable business operations which aim to support the national economy, as well as the private institutions' economy.[129] Therefore, having proper measures in place means having protection and acting profitably and efficiently, without the interference of certain aspects which may bring financial prejudice or reputational damage.[130]

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[123] Simona Pirtea and Mădălin Enache, 'Corporate Liability in Romania' (ExpertGuides, April 14, 2020) < https://www.expertguides.com/articles/corporate-criminal-liability-in-romania/arieswem >, accessed June 28, 2020
[124] Ibid.
[125] Ibid.
[126] Ibid.
[127] Universul Juridic, 'How can a corporate compliance program protect a company?' (Cum poate un program de corporate compliance proteja o companie?) (Universul Juridic, March 8, 2016) < https://www.universuljuridic.ro/cum-poate-un-program-de-corporate-compliance-proteja-o-companie/ >, accessed June 1, 2020
[128] Ibid.
[129] Ibid.
[130] Ibid.

THREE: THE EVALUATION OF CORPORATE CRIMINAL LIABILITY IN THE UNITED KINGDOM – THE CORPORATE MANSLAUGHTER AND CORPORATE HOMICIDE ACT 2007 AND THE BRIBERY ACT 2010

Initially, the English corporation could only be created by a grant from the Crown or by an Act of Parliament.[131] These were mainly bodies which controlled church property but evolved to include associations, mercantile and craft guilds. Along the years, as business and trade considerably increased, a growing need for venture capital and credit mobilization to develop new industries came and, as a result, unincorporated joint stock companies had increased in power and prevalence, concomitantly.[132] From a legal standpoint, these companies could be more closely associated with partnerships rather than incorporated companies.[133] It took over a century for corporations to be able to retain legal and commercial recognition and, as such, acceptance.[134] The Bubble Act 1720 was eventually repealed in 1825 and the number of corporations began to increase considerably. Prior to the 19th century, corporations were incapable of committing unlawful acts because they lacked the necessary *mens rea* alongside physical and moral capacities.[135] The principle of *societas delinquere non potest* ("a legal entity cannot be guilty") had a significant weight across the world, especially in continental Europe in countries such as Italy or Germany.[136] In addition, this Latin maxim is illustrated through a case earlier mentioned in this thesis, a case which exemplified the judiciary's reluctance to extend criminal liability to corporations: "*A corporation is not indictable but particular members of it are*".[137] By the early 19th century, corporations had become more dominant in society and their potential to cause substantial harm to the public had increased.[138] The courts began to regulate and punish corporations for public nuisances, and public enforcement was necessary because only a few people would have had the incentives or the ability to even pursue these provoked nuisances through private enforcement.[139]

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131 Kristen Wong, *Breaking the Cycle: The Development of Corporate Criminal Liability* (2012) 7
132 Ibid.
133 Ibid.
134 Ibid., 8
135 Ibid.
136 Ibid.
137 *Anonymous*, 88 Eng. Rep. 1518 (K.B. 1701)
138 Kristen Wong, *Breaking the Cycle: The Development of Corporate Criminal Liability* (2012) 8
139 Ibid., 8-9

Corporate criminal liability was initially limited to crimes of nonfeasance (a failure to satisfy a duty required by the law), and by the middle of the 19th century, the courts had extended criminal liability to corporations for misfeasance (the improper performance of a legal action) as well.[140] However, the courts recognized that the difference between nonfeasance and misfeasance was superficially plausible but in essence, wrong, because the unlawful act could more often than not be characterized as both nonfeasance and misfeasance.[141] The courts, however, have had considerable difficulties in finding corporations capable of committing offenses which required specific intent – as they were considered to be "legal fiction",[142] or an artificial person, per se, rather than a proper legal entity. This is why courts could not approve of a deracinated perspective over corporations, as the idea that corporations "lacked soul" and could not be capable of any kind of criminal intent was enshrined in theory and procedure. Furthermore, the doctrine of *ultra vires* also played an important role, as it inhibited the expansion of corporate criminal liability.[143] Under this doctrine, corporations could neither commit actions, nor authorize its agents to commit certain actions which were outside the scope of business. However, this doctrine was eventually rejected in *Citizens Life Assurance Company v. Brown,*[144] where the Privy Council held that corporations, like employers, were capable of being liable for torts that involved malice, committed by their employees in the course of their employment.[145] The discussion will be moved briefly towards the connection between corporate criminal liability and the law of tort.

In the law of tort, the normal position is that a director of a limited company is not personally liable for the tortious acts or omissions of the company. The foundation for the general rule is the concept of the separate personality of a corporation:[146] "… Whether the principal is a company or a natural person, someone acting on his behalf may incur personal liability in tort as well as imposing vicarious or attributed liability upon his principal."[147] As such, the general civil law position of a director of a company is unaltered, as a director has the duty to promote the success of the company,[148] the duty to exercise independent judgment,[149] the duty to exercise

[140] Ibid., 9
[141] Ibid.
[142] Ibid., 10
[143] Ibid.
[144] *Citizens Life Assurance Company v. Brown* [1904] UKPC 20 (NSW)
[145] Kristen Wong, *Breaking the Cycle: The Development of Corporate Criminal Liability* (2012) 10
[146] Amanda Pinto and Martin Evans, *Corporate Criminal Liability* (3rd edition, Sweet & Maxwell 2013) 67-68
[147] *Salomon v. Salomon and Co. Ltd.* [1987] A.C. 22
[148] Companies Act 2006, s. 172

reasonable care, skill and diligence,[150] and the duty of not accepting benefits from third parties.[151] The civil courts have developed two alternative approaches to the consideration of directors' liabilities.[152] The first is to apply one of the specific tests developed through the doctrine of company law and the second one is to apply ordinary principles of the law of tort and assess whether the director in question may properly be considered a joint tortfeasor.[153] However, an examination of the case law remains the most helpful and practical way to assess the potential liability of a director (whether in tort or criminal law).[154]

Corporations, as legal entities, can gain many benefits similar to natural persons, and they have the advantage of hiding behind very complex corporate structures in order to evade the liability of natural persons under criminal law.[155] The principles of limited liability and a company being a separate entity do not protect a company officer from criminal liability but, equally, such an officer will not be liable unless he or she himself or herself has behaved culpably and therefore be criminally liable.[156] In criminal law, basically, there is no parasitic liability of directors, so a director is not guilty of an offense simply because the corporation itself is guilty; a condition precedent to the conviction of a director other corporate officer is some act (or even omission) on his or her part.[157] Where a director has himself acted criminally, it is no defense that he or she had done so within the scope of his employment and was committing the crime on behalf of the company.[158] Where an individual, who may be a director, manager, or other officer of the company in question, has committed a crime together with the company in which he or she plays a role, he or she may definitely be joined as a co-defendant to proceedings that may take place.[159]

One of the common law approaches to corporate criminal liability is the identification doctrine,[160] which presents the fact that the people who control or manage the affairs of the com-

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[149] Ibid., s. 173
[150] Ibid., s. 174
[151] Ibid., s. 176
[152] Amanda Pinto and Martin Evans, *Corporate Criminal Liability* (3rd edition, Sweet & Maxwell 2013) 67-68
[153] Ibid.
[154] Ibid.
[155] Kristen Wong, *Breaking the Cycle: The Development of Corporate Criminal Liability* (2012) 12
[156] Amanda Pinto and Martin Evans, *Corporate Criminal Liability* (3rd edition, Sweet & Maxwell 2013) 69-70
[157] Ibid.
[158] Ibid.
[159] Ibid.
[160] Kristen Wong, *Breaking the Cycle: The Development of Corporate Criminal Liability* (2012) 17

pany are regarded as embodying the company itself.[161] There is no difficulty in regards to a company being required to pay a fine under the criminal law.[162] Major difficulties have arisen, however, where a death results in a charge of manslaughter against the company and the courts were required to determine whether the death arose from decisions of the controlling mind and will of the company. In a number of cases, this proved to be impossible – as such, the pressure for reform grew substantially.[163] The key legislation which makes referral to this issue is the Corporate Manslaughter and Corporate Homicide Act 2007 (the CMCH Act) – the law provides that an organization is guilty of an offense if the way in which its activities are managed or organized causes a person's death and amounts to a gross breach of a relevant duty of care owed by the organization to the deceased person.[164] In addition, the organizations to which the respective section applies are a corporation, a department or other body, police force, a partnership, or a trade union or employers' association, that is an employer.[165] The offense under section 1 of the aforementioned Act shifts the emphasis away from decisions made by the "controlling mind and will" of a company to consider broader questions of the management systems established or employed by the company[166] – as such, the first successful prosecution for corporate manslaughter under the Act was *R v. Cotswold*.[167]

The CMCH Act, however, is limited to incidents that result in death – therefore, there is no liability under the CMCH for incidents that cause grievous bodily harm or other injuries, injuries which occur more frequently than incidents that result in death.[168] Under common law, free and voluntary acts of informed adults of sound mind will ordinarily break the chain of causation.[169] Potentially, the actions of lower-level employees outside senior management could much more easily break the chain of causation and absolve the corporation from liability. As such, the Crown Prosecution Service's (CPS) Guidelines on Corporate Manslaughter explain that the prosecution must only prove that the breach was more than a minimal contribution to the death

[161] Law Commission, *Legislating the Criminal Code Involuntary Manslaughter* (Law Com No. 237, 1996) para. 6.27
[162] Chris Taylor, *LawExpress: Company Law* (4th edition, Pearson 2017) 48
[163] Ibid.
[164] Corporate Manslaughter and Corporate Homicide Act 2007, s. 1(1)
[165] Ibid., s. 1(2)
[166] Chris Taylor, *LawExpress: Company Law* (4th edition, Pearson 2017) 49
[167] *R v. Cotswold Geotechnical (Holdings) Ltd.* [2011] All ER (D) 100
[168] Kristen Wong, *Breaking the Cycle: The Development of Corporate Criminal Liability* (2012) 29
[169] Ibid.

of the respective person.[170] The CMCH legislation is still relatively untested in the courts, this legislation being intended to minimize the threat of large complex corporations with decentralized decision-making structures.[171] Nevertheless, it is likely that the CMCH Act will not threaten large corporations, as prosecutors have brought only a few proceedings under the CMCH, with the majority of defendants being small to medium-sized firms.[172] In order to discuss an offense which is more common in the business world, the Bribery Act 2010 will be analyzed next, providing insight on both the Act in general and its legal importance.

The Bribery Act 2010 came into force on July 1, 2011. The Act applies to the whole of the United Kingdom and also provides for wide extra-territorial jurisdiction to deal with bribery committed outside of the UK.[173] The Act reflects the United Kingdom's continued commitment to combat bribery and provides a modern, comprehensive scheme of bribery offenses. The Act covers all forms of bribery, but there is a clear focus on commercial bribery, which is evidenced by the fact that two of its four offenses are business-related.[174] The UK Government intends that, over time, the Act will contribute to national and international efforts towards ensuring a shift away from the culture of bribery that may persist in certain sectors or markets and help ensure high ethical standards in international business transactions.[175] The Act provides a revised framework to combat bribery in the public and private sectors, removing the need to prove acts were done corruptly or dishonestly,[176] creates two general offenses of bribing another person[177] (also considered as "active bribery")[178] and being bribed[179] (also considered as "passive bribery"),[180] creates a discrete offense of bribery of a foreign public official,[181] creates a new offense

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[170] Crown Prosecution Service, 'Corporate Manslaughter' < https://www.cps.gov.uk/legal-guidance/corporate-manslaughter >, accessed June 30, 2020
[171] Kristen Wong, *Breaking the Cycle: The Development of Corporate Criminal Liability* (2012) 33
[172] Ibid.
[173] Crown Prosecution Service, 'Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions' < https://www.cps.gov.uk/legal-guidance/bribery-act-2010-joint-prosecution-guidance-director-serious-fraud-office-and >, accessed June 30, 2020
[174] Ibid.
[175] Ibid.
[176] Ibid.
[177] Bribery Act 2010, s. 1
[178] Crown Prosecution Service, 'Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions' < https://www.cps.gov.uk/legal-guidance/bribery-act-2010-joint-prosecution-guidance-director-serious-fraud-office-and >, accessed June 30, 2020
[179] Bribery Act 2010, s. 2
[180] Crown Prosecution Service, 'Bribery Act 2010: Joint Prosecution Guidance of the Director of the Serious Fraud Office and the Director of Public Prosecutions' < https://www.cps.gov.uk/legal-guidance/bribery-act-2010-joint-prosecution-guidance-director-serious-fraud-office-and >, accessed June 30, 2020
[181] Bribery Act 2010, s. 6

of failure of commercial organizations to prevent bribery by person associated with them,[182] provides a penalty of 10 years' imprisonment or an unlimited fine for all the offenses for individuals, and an unlimited fine only for commercial organizations,[183] and provides that senior officers of a body corporate may be prosecuted if an offense is proved to have been committed by a corporate body with their consent or connivance.[184]

The Bribery Act can be enforced by agencies including the Serious Fraud Office (SFO), the National Crime Agency (NCA), the Financial Conduct Authority (FCA), City of London Police and regional police forces.[185] Nevertheless, the SFO is the primary agency in England and Wales which investigates and prosecutes corruption cases. The SFO is a specialist prosecuting authority which tackles the top level of serious and complex fraud, bribery, and corruption.[186] In considering whether to authorize an investigation, the Director of the SFO will take into account the actual or intended harm that may be caused to the public, or to the reputation and integrity of the UK as an international financial center, or the economy and prosperity of the UK, and whether the complexity and nature of the suspected offense warrants the application of the SFO's specialist skills, powers and capabilities to investigate and prosecute.[187]

One of the most important applications of the Act was in the case of GlaxoSmithKlein (GSK), which had offered money or property to non-government personnel in order to obtain improper commercial gains.[188] It was found that bribery was a core part of the activities of the company, and to boost their share prices and sales, the company performed illegal actions. The pay and bonus packages focused heavily on sale performance, and this encouraged people to engage in the act of bribery, and the knowledge of the bribery that was occurring at that time was widespread across the company.[189] As such, the company has been fined £300 million and five

[182] Ibid., s. 7
[183] Ibid., s. 11
[184] Ibid., s. 14
[185] Azizur Rahman, 'UK: Anti-Corruption & Bribery Comparative Guide' (Mondaq, June 22, 2020) < https://www.mondaq.com/uk/Criminal-Law/864070/Anti-Corruption-Bribery-Comparative-Guide#:~:text=The%20Bribery%20Act%20can%20be,the%20consent%20of%20the%20DPP. >, accessed June 30, 2020
[186] Serious Fraud Office, 'About us' < https://www.sfo.gov.uk/about-us/ >, accessed June 30, 2020
[187] Ibid.
[188] Daniel Roules, 'GSK Bribery Case – End of the Matter?' (Squire Patton Boggs, The Anticorruption Blog, October 6, 2014) < https://www.anticorruptionblog.com/china/gsk-bribery-case-end-of-the-matter-2/ >, accessed July 1, 2020
[189] Ibid.

of its employees given suspended prison sentences in China for bribery.[190] Another example is that of the case of Alstom Network UK Ltd., which has convicted in April 2018 of conspiracy to corrupt, having paid an intermediary called Construction et Gestion Nevco Inc. (Nevco) €2.4 million in order to secure a €79.9 million contract with Transtu, the company responsible for running the Tunis Metro.[191] In order to satisfy internal compliance controls and conclude its agreement with Nevco, thus making its agreement with Nevco appear as a legitimate contract for services, Alstom helped to produce paperwork as proper evidence of services rendered.[192] However, in reality, Nevco was just a conduit for bribes – and this was acknowledged by Alstom UK itself when it decided not to make a final payment of €240.000 in its original €2.64 million contract.[193] As with the Tunisian conduct, the same situation was with Alstom bribing senior Lithuanian figures in order to win contracts. Papers were falsified to circumvent checks put in place to prevent by Alstom staff responsible for preventing corruption.[194] Alstom Network UK Ltd has been ordered to pay a total of £16.4 million for conspiracy to corrupt relating to a contract to supply the trams in Tunisia, and the sentence comprised £15 million in fines and £1.4 million in costs.[195]

The Bribery Act is one of the toughest anti-corruption legislations in the world, a legislation which raises the bar above the standard set by America's Foreign Corrupt Practices Act (FCPA). Even if the act is widely drafted and somewhat far-reaching in its scope, several concerns have been raised, especially around the fact that the Bribery Act might present a harm to the British industry's competitiveness in the global market. However, even if the Act is one of the toughest anti-corruption legislations, a commercial organization will have a defense (possibly even full) if it can show that despite a particular case of bribery it nevertheless had adequate procedures established in order to prevent such conduct. As such, the next topic which will be discussed are the six principles outlined in the Bribery Act Guidance. The principles are not pre-

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[190] Ibid.

[191] Serious Fraud Office, 'Court orders Alstom Network UK Ltd to pay £16.4 million' (SFO, November 25, 2019) < https://www.sfo.gov.uk/2019/11/25/sfos-alstom-case-concludes-with-sentencing-of-alstom-network-uk-ltd/ >, accessed July 1, 2020

[192] Ibid.

[193] Ibid.

[194] Ibid.

[195] Ibid.

scriptive – they are intended to be flexible and outcome focused, allowing for the huge variety of circumstances that commercial organizations find themselves in.[196]

(1) A commercial organization's procedures to prevent bribery by persons associated with it must be proportionate to the bribery risks it faces and to the nature, scale, and complexity of the commercial activities of the organization.[197] The procedures put in place to implement an organization's bribery prevention policies should be designed to mitigate identified risks as well as to prevent deliberate unethical conduct on the part of associated persons. A few examples are: due diligence of existing or prospective associated persons, transparency of transactions and disclosure of information, and enforcement, which details discipline processes and sanctions for breaches of the organization's anti-bribery rules.[198]
(2) The top-level management of a commercial organization (a board of directors, the owners, or any other similar body or person) must be committed to preventing bribery by persons associated with it. They should foster a culture within the organization in which bribery is never acceptable.[199] Whatever the size, structure or market of a commercial organization, top-level management commitment to bribery prevention should include: communication of the organization's anti-bribery stance, as well as an appropriate degree of involvement in developing bribery prevention procedures.[200] Effective formal statements that demonstrate such top-level commitment, for example, are: a commitment to carry out business fairly, honestly, and openly (transparency), a commitment to zero tolerance towards bribery, and the articulation of the business benefits or rejecting the conduct of bribery.[201]
(3) The commercial organization must assess the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment must be periodic, informed and documented.[202] Risk assessment procedures should enable the organization to accurately identify and prioritize the risks it faces. They will usually present a few characteristics such as: oversight of the risk assessment by top-

[196] Ministry of Justice, 'The Bribery Act 2010 – Guidance', 20 < https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf >, accessed July 2, 2020
[197] Ibid., 21
[198] Ibid., 22
[199] Ibid., 23
[200] Ibid.
[201] Ibid.
[202] Ibid., 25

level management, appropriate resourcing, this should reflect the scale of the organization's business and the need to identify and prioritize all relevant risks, and an accurate and appropriate documentation of the risk assessment and its conclusions.[203] In addition, a few of the commonly encountered risks are the country risk, sectorial risk, and the transaction risk. All evidenced by either high levels of corruption, types of sensitive transactions, or types of high-value projects.[204]

(4) The commercial organization must apply due diligence procedures, thus taking a proportionate and risk-based approach, in regard to persons who perform or will perform services for or on behalf of the organization in question, in order to mitigate already identified bribery risks.[205] Organizations need to take proper care when entering into business relationships, due to the particular circumstances in which the relationships spring into existence. The purpose of the fourth principle is to encourage commercial organizations to establish proper due diligence procedures that adequately inform the application measures specially designed to prevent persons associated with them from bribing on their behalf.[206]

(5) The commercial organization must seek to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organization through internal and external channels (communication), including training, that is proportionate to the risks it faces.[207] The content, language, and tone of communications for internal consumption may vary from that for external usage in response to the different relationship the audience has with the commercial organization.[208] External communication of bribery prevention policies should exist through a statement or specific codes of conduct, materials that can reassure existing and prospective associated persons and can, as such, act as a deterrent to those who have the intention of bribing on a commercial organization's behalf.[209]

(6) The commercial organization must monitor and review procedures that are designed to prevent bribery by persons associated with it and must make improvements were neces-

[203] Ibid.
[204] Ibid., 26
[205] Ibid., 27
[206] Ibid.
[207] Ibid., 29
[208] Ibid.
[209] Ibid., 29-30

sary.[210] Systems that are set up to deter, detect and investigate bribery, and monitor the ethical quality of transactions, such as internal financial control mechanisms, will definitely help provide insight into the effectiveness of procedures designed to prevent bribery.[211] Staff surveys, questionnaires and feedback from training can also provide an important source of information on effectiveness and a means by which employees and other associated persons can inform the organization about the continuing improvement of anti-bribery policies.[212]

Having the above-detailed listing of the six principles outlined in the Bribery Act Guidance, one could easily say that Principles two through six are and could, in some way be, included in Principle one, which illustrates the procedures which should be implemented by the commercial organization in question in order to prevent such criminal conduct. Nevertheless, the entire Guidance provides valuable information for the improvement of current policies established throughout any commercial organization. The Principles in the Guidance aim to mirror concepts such as transparency, fairness, and enforcement. If a commercial organizations implements such conduct as to touch upon these concepts, then it will benefit from full, proper protection while acting accordingly and profitably. While there might be a disadvantage of the Bribery Act being severe and restrictive in terms of competition in the global market, the Act should be an aid to commercial organizations instead of it being a cinderblock on the road to fair and profitable commerce. The means of committing illicit activities have evolved over time and, as aforementioned (also enunciated in the Guidance), a proper compliance program is paramount to surviving in today's business world. All procedures should be proportionate to the risk a commercial organization is facing or will face, and even if certain organizations' methods of implementing such procedures will definitely vary (as earlier stated, there is no "one-size-fits-all" type of compliance program), the result should always be robust and efficient compliance programs.

[210] Ibid., 31
[211] Ibid.
[212] Ibid.

FOUR: THE EVALUATION OF CORPORATE CRIMINAL LIABILITY IN THE UNITED STATES – THE MODEL PENAL CODE AND THE FOREIGN CORRUPT PRACTICES ACT

Under the federal law of the United States, corporations or other legal entities may be criminally liable for the crimes committed by their employees or agents.[213] This is also the general perspective of Romania and the United Kingdom as outlined prior. The aforementioned statement is true in the case of regulatory offenses, economic offenses, and common law offenses – thus, the agents and employees who commit the crimes for which their employers are liable also face prosecution and punishment.[214] Individual criminal statutes, Department of Justice policies, as well as the Sentencing Guidelines largely dictate the circumstances under which, and the extent to which, agents, employees, corporations and similar unincorporated entities are prosecuted and punished.[215] Following the law of the United Kingdom, it was said that "*A corporation is not indictable but particular members of it are*".[216] Obviously, this perspective changed over time. As discussed earlier in this thesis, a corporation may be held criminally liable for its failure to honor certain legal obligations (nonfeasance), and then for the inadequate manner in which it performed its legal obligations (malfeasance).[217]

At the "dawn" of the 20th century, the U.S. Supreme Court in *New York Central & Hudson River Railroad Co. v. United States*[218] had expressed a different view, mentioned earlier as well. They held that there are certain crimes which, because of their nature, cannot be committed by corporations but there is a large sphere of offenses wherein the crime consists in purposely committing certain actions which are prohibited by statute. Because of this sphere (or class) of crimes, there is no reason why a corporation should not be held responsible for and charged with the knowledge and purposes of their agents, persons which act within the authority conferred

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213 *United States v. Agosto-Vega*, 617 F.3d 541, 552-53 (1st Cir. 2010); *New York Central & Hudson River Railroad Co. v. United States* 212 U.S. 481 (1909); *United States v. Park*, 421 U.S. 658, 672-74 (1975)
214 Charles Doyle, *Corporate Criminal Liability: An Overview of Federal Law* (Congressional Research Service, October 30, 2013) 1
215 Ibid.
216 *Anonymous*, 88 Eng. Rep. 1518 (K.B. 1701)
217 Charles Doyle, *Corporate Criminal Liability: An Overview of Federal Law* (Congressional Research Service, October 30, 2013) 1
218 *New York Central & Hudson River Railroad Co. v. United States*, 212 U.S. 481 (1909)

upon them.[219] Even if the Supreme Court did not make any mention of specific crimes, it stated these arguments in the midst of whether a corporation could be held liable not only for crimes of action and inaction (malfeasance and nonfeasance) of its agents but also for those crimes which required a somewhat *mens rea* factor, such as the intent to defraud.[220]

Four historical developments facilitated the continued growth of corporate criminal liability in the twentieth century in the United States. First, federal courts in the U.S. disregarded European liability standards, as well as the standards laid out in the Model Penal Code, settling instead on the doctrine of *respondeat superior*.[221] Second, Congress enacted a growing body of legislation which authorized the imposition of criminal liability on corporations.[222] Third, public civil enforcement became more feasible, thus providing the government with a tool other than corporate criminal liability which combined both public enforcement and corporate liability. Public civil enforcement could have impeded the development of corporate criminal liability, given the similarity of purpose but yet it has been shown that it did not.[223] The discrepancies between enforcement in public criminal and public civil cases have greatly diminished since that time, thus raising the question of why corporate criminal liability is necessary in our day and age.[224] The fourth development is the recent issuance of federal sentencing guidelines for crimes committed by organizations. The guidelines have occasioned a scholarly debate on the severity and effectiveness of criminal sanctions on corporations and on how deterrence could be improved in that regard.[225] The focus on sanctions has encouraged a few commentators to observe that the sanctions in corporate civil and criminal proceedings are essentially the same and to question the need for both forms of liability.[226]

The scope of corporate criminal liability in the United States is very broad – a corporation may be criminally liable for almost any kind of crime except acts which require commission by natural persons, such as murder. Similarly, the standards that courts use to attribute liability to a corporation are easily satisfied. Corporate liability in the United States is based on the imputation

[219] Ibid., 494-495
[220] Charles Doyle, *Corporate Criminal Liability: An Overview of Federal Law* (Congressional Research Service, October 30, 2013) 2
[221] Vikramaditya S. Khanna, *Corporate Criminal Liability: What Purpose Does it Serve?*, 109 Harvard Law Review, No. 7, pp. 1477-1534 (1996) 1487
[222] Ibid.
[223] Ibid.
[224] Ibid., 1487-1488
[225] Ibid., 1488
[226] Ibid.

of agents' conduct within a corporation, usually through the application of the earlier-mentioned doctrine *respondeat superior*.[227] Under this doctrine, three requirements must be met in order to impose liability on a corporation:

(1) A corporate agent must have committed an illegal act (*actus reus*) with the requisite state of mind (*mens rea*). If a particular agent, regardless of his or her rank in the specific corporation, had the required state of mind, the *mens rea* can be imputed to the corporation.[228] Alternatively, the *mens rea* object of the offense can be shown on the basis of *collective knowledge* of the employees of the corporation.[229] This is also known as the *aggregation theory* – it provides that, while no single employee of the corporation had sufficient information necessary to have the required *mens rea* of the offense, if multiple individuals within the corporation possessed the elements of such knowledge collectively, their *aggregate* knowledge can definitely be attributed to the corporation;[230]
(2) The agent must have acted within the scope of employment – this includes any act that occurred while the offending employee was carrying out a job-related task or activity. Moreover, this requirement is in itself so broad that courts may hold corporations liable even if the corporations have forbidden the wrongful activities;[231]
(3) The agent must have intended to benefit the corporation through committing the offense(s). This standard is probably the easiest to be met – the employee need not act with the exclusive purpose of benefitting the corporation and, as such, the corporation need not receive the respective benefit.[232]

Under the Model Penal Code and many other state penal codes, corporate criminal liability differs, as it may depend upon the misconduct of senior management officials – the misconduct of lower-level employees is not always enough even when they act within their scope of authority for the corporation's benefit[233] –

[227] Ibid., 1488-1489
[228] Ibid., 1489
[229] Ibid.
[230] Anca Iulia Pop, *Criminal Liability of Corporations – Comparative Jurisprudence* (2006) 33-34
[231] Ibid.
[232] Ibid.
[233] Charles Doyle, *Corporate Criminal Liability: An Overview of Federal Law* (Congressional Research Service, October 30, 2013) 3-4

(1) A corporation may be convicted of the commission of an offense if:

(a) The offense is a violation or the offense is defined by a statute other than the Code in which a legislative purpose to impose liability on corporations plainly appears and the conduct is performed by an agent of the corporation acting in behalf of the corporation within the scope of his office or employment, except that if the law defining the offense designates the agents for whose conduct the corporation is accountable or the circumstances under which it is accountable, such provisions shall apply (…)

(2) When absolute liability is imposed for the commission of an offense, a legislative purpose to impose liability on a corporation shall be assumed, unless the contrary plainly appears.[234]

The Model Penal Code is adopted by only a few American jurisdictions, and has proposed a different model which contains three systems of corporate criminal liability. The first system is similar to the English *alter ego* criminal liability – corporations are liable for the ordinary or true crimes, such as manslaughter or theft, that are committed by managers or other high corporate officers whose acts represent the acts of the corporation.[235] Under the second system, corporations are liable for price-fixing, securities fraud, or other offenses for which there is an apparent legislative intent to impose such liability on corporations (offenses committed by employees acting within the scope of employment, on behalf of the entity) – but corporations can defend themselves by showing that the managers had performed due diligence when attempting to prevent the crime from being committed.[236] And last, under the third system, corporations are generally liable for violations or regulatory offenses for which the legislation imposes strict liability – as such, the due diligence defense is not available.[237]

Generally, there are two models of corporate criminal liability: a restrictive direct liability model which is followed by France and England, and a wide vicarious liability model which is followed by the United States.[238] The American model establishes a wide system of corporate criminal liability which promotes general fairness and deterrence. The adoption of the earlier-

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[234] Model Penal Code §2.07 (1985); 'Penal Code Comparer and Analyzer' < http://individual.utoronto.ca/dubber/web/website/genliab/Model_Penal_Code.htm#:~:text=Section%202.07.,to%20Act%2C%20in%20Their%20Behalf.&text=(2)%20When%20absolute%20liability%20is,unless%20the%20contrary%20plainly%20appears. >, accessed July 4, 2020

[235] Anca Iulia Pop, *Criminal Liability of Corporations – Comparative Jurisprudence* (2006) 34

[236] Ibid.

[237] Ibid., 34-35

[238] Ibid., 35

mentioned aggregation theory and the fact that any employee can engage the criminal liability of corporations under certain circumstances represent great advantages.[239] The American model comprehensively covers the wide variety of loopholes existent under other systems, which makes it clear, predictable and efficient in preventing corporate crimes.[240] However, at the same time, the wide possibility of convicting corporations for the acts of employees means that the lawsuits against these entities are increasing in number, and this causes high costs for both the courts and the corporations, and last but not least, the loss of jobs and profits for innocent employees and shareholders.[241] Having discussed models of corporate criminal liability as well as the Model Penal Code, the next subject will focus on another piece of legislation, namely the Foreign Corrupt Practices Act (FCPA), which prohibits U.S. corporations and U.S. nationals from making illegal payments to foreign officials or parties in order to aid a company in obtaining business to and for any person.

Congress enacted the FCPA in 1977 in response to revelations of widespread bribery of foreign officials by U.S. companies. The Act was intended to halt these corrupt practices, create a level playing field for honest businesses, and restore public confidence in the integrity of the marketplace.[242] The FCPA contains both anti-bribery and accounting provisions – the anti-bribery provisions prohibit U.S. persons and businesses (this for domestic concerns), U.S. and foreign public companies listed on stock exchanges in the United States or which are required to file periodic reports with the Securities and Exchange Commission (SEC) (also known as issuers), and certain foreign persons and businesses acting while on the territory of the United States (thus, territorial jurisdiction) from making corrupt payments to foreign officials to obtain or retain business.[243] The accounting provisions require issuers to make and keep accurate books and records and to devise and maintain and adequate system of internal accounting controls.[244] The Department of Justice (DOJ) and the SEC share FCPA enforcement power and are committed to combating foreign bribery through vigorous enforcement. Because an important component of this effort is education, the FCPA itself alongside resources guides aims to provide businesses and individuals with as much information as possible to help them abide by the laws and regula-

[239] Ibid.
[240] Ibid.
[241] Ibid., 35-36
[242] 'FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act' (SEC, November 14, 2012) 2 < https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf >, accessed July 4, 2020
[243] Ibid.
[244] Ibid.

tions, identify and prevent violations of the FCPA, as well as implement effective and performant compliance programs.[245]

Until 1998 foreign persons were not subject to the FCPA's anti-bribery provisions unless they were issuers or presented domestic concerns. The amendments, however, expanded the statute to allow for the prosecution of any person (be it foreign or not) who takes any act in furtherance of a corrupt payment while in the territory of the United States.[246] Thus, for instance, a foreign subsidiary that causes, directly or through agents, an act in furtherance of a bribe to take place within the United States will be liable under the FCPA. The 1998 amendments were passed in order to implement the 1997 OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions.[247] Three key concepts from the FCPA will be discussed further.

The first, *offers, payments, promises to pay, or authorizations of payments* – a company or person can be liable under the FCPA not only for making improper payments, but also for an offer, promise, or authorization of a corrupt payment, even if the employee or agent does not ultimately make a payment – thus, a bribe need not actually be paid, and a corrupt act need not necessarily succeed in its purpose.[248]

The second, *money or anything of value* – the Act prohibits paying, offering, or promising to pay (or authorizing to pay or offer) money or making a gift of anything of value. Even if neither the Act or any judgment give any definition of "anything of value", it does, without a doubt, include cash equivalents and other forms of valuable inducements.[249] Thus, read literally, the FCPA prohibits, in theory, almost any kind of gift or form of entertainment, even nominal ones, assuming that all other elements of a violation of an anti-bribery provision are met.[250] Nevertheless, evidentiary issues and the nature of the underlying business activity may ultimately determine whether there are sufficient grounds (or linkages) between anything of value and any business

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245 Ibid.

246 Robert W. Tarun and Peter P. Tomczak, *The Foreign Corrupt Practices Act Handbook: A Practical Guide for Multinational General Counsel, Transactional Lawyers and White Collar Criminal Practitioners* (5th edition, American Bar Association 2018) 5 < https://globalcompliancenews.com/wp-content/uploads/2018/01/Chapter-1-_FCPA-5th.12-21-17.pdf >, accessed July 6, 2020

247 Ibid.

248 Ibid., 6

249 Ibid.; *United States v. King*, 351 F.3d 859 (8th Cir. 2004)

250 Ibid.

obtained[251] (as the SEC and DOJ will focus on conduct which evidences a scheme of corruption).

The third, *corrupt intent*, brings forward a few prerequisites for the action to be in violation of FCPA's anti-bribery provisions, but only two of them shall be discussed for the purposes of this thesis. First, the payment must be made *corruptly* – even if the Act does not define "corruptly", the legislative history indicates there must have been an intent to wrongfully influence the recipient[252] – as such, the motive or purpose is the same as that required for domestic bribery.[253] In this regard, jury instructions prove to be a valuable source of information, as the courts have instructed the jury what they should consider in deliberations of whether the defendant(s) in question acted corruptly: "*The offer, promise to pay, payment or authorization of payment, must be intended to induce the recipient to misuse his official position or to influence someone else to do so (...) An act is corruptly done if done voluntarily and intentionally, and with a bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful method or means.*"[254] And second, the payment must be made willfully – the FCPA does not provide a definition of "willfully", so the government must prove an individual acted purposefully and with knowledge that he or she was committing an illicit act under the general rules of the law.[255]

With stronger DOJ and SEC enforcement over the past couple of years, the highest peak of enforcement being in 2016 (the number of enforcement actions filed both by the DOJ and SEC being 29),[256] several companies have been subjected to large corporate fines. Valuable examples of FCPA's application will be outlined and discussed next, providing examples of notable cases where international companies were charged with bribery, namely Siemens AG, Johnson & Johnson, and GlaxoSmithKlein (GSK).

In the year 2008, SEC charged Siemens AG for engaging in worldwide bribery, thus violating the FCPA by engaging in a systematic practice of paying bribes to foreign governmental officials

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[251] Ibid., 6-7
[252] Ibid., 7
[253] 18 U.S.C. § 201(b)
[254] *United States v. Liebo*, 923 F.2d 1308 (1991)
[255] Robert W. Tarun and Peter P. Tomczak, *The Foreign Corrupt Practices Act Handbook: A Practical Guide for Multinational General Counsel, Transactional Lawyers and White Collar Criminal Practitioners* (5th edition, American Bar Association 2018) 8 < https://globalcompliancenews.com/wp-content/uploads/2018/01/Chapter-1-_FCPA-5th.12-21-17.pdf >, accessed July 6, 2020
[256] 'DOJ and SEC Enforcement Actions per Year' < http://fcpa.stanford.edu/statistics-analytics.html >, accessed July 8, 2020

with the purpose of obtaining business.[257] Siemens had obtained business such as developing mobile telephone networks in Bangladesh, national identity cards in Argentina, and medical devices in Vietnam, China, and Russia. According to the complaint made by SEC, Siemens also paid kickbacks to Iraqi ministers in connection with sales of power stations and equipment to Iraq under the United Nations Oil for Food Program.[258] Siemens earned more than $1.1 billion in profits on these transactions and several others. Siemens has agreed to pay $350 million in disgorgement to settle the SEC's charges, and a $450 million fine to the DOJ to settle criminal charges. In addition, Siemens has paid a fine of approximately $569 million to the Office of the Prosecutor General in Munich, to whom the company previously paid an approximately $285 million fine in October 2007.[259]

In the year 2011, SEC charged Johnson & Johnson with violating the FCPA by bribing public doctors in several European countries and by paying kickbacks to Iraq in order to illegally obtain business.[260] The SEC has alleged that since at least 1998, subsidiaries of the U.S.-based pharmaceutical giant paid bribes to public doctors in Greece who selected Johnson & Johnson surgical implants, public doctors and hospital administrators in Poland who awarded contracts to the company, and public doctors in Romania to prescribe the company's products. In addition, as aforementioned, Johnson & Johnson paid kickbacks to Iraq to obtain 19 contracts under the United Nations Oil for Food Program.[261] The company has agreed to settle the SEC's charges by paying more than $48.6 million in disgorgement and prejudgment interest. Johnson & Johnson also agreed to pay a $21.4 million fine to settle parallel criminal charges filed by the DOJ.[262]

In the year 2012, pharmaceutical giant GSK was fined $3 billion after admitting to bribing doctors and encouraging the prescription of unsuitable antidepressants to children.[263] The company encouraged sales representatives in the United States to mis-sell three drugs to doctors and lavished hospitality and kickbacks on those who agreed to write extra prescriptions, including trips

[257] 'SEC Charges Siemens AG for Engaging in Worldwide Bribery' (SEC, December 15, 2008) < https://www.sec.gov/news/press/2008/2008-294.htm >, accessed July 8, 2020
[258] Ibid.
[259] Ibid.
[260] 'SEC Charges Johnson & Johnson with Foreign Bribery' (SEC, April 7, 2011) < https://www.sec.gov/news/press/2011/2011-87.htm >, accessed July 8, 2020
[261] Ibid.
[262] Ibid.
[263] Simon Neville, 'GlaxoSmithKlein fined $3bn after bribing doctors to increase drug sales' (The Guardian, July 3, 2012) < https://www.theguardian.com/business/2012/jul/03/glaxosmithkline-fined-bribing-doctors-pharmaceuticals >, accessed July 8, 2020

to luxurious resorts.[264] The company admitted corporate misconduct over the antidepressants Paxil and Wellbutrin and asthma drug Advair. However, despite the large fine, $3 billion is far less than the profits made from the drugs. Advair has made $10.4 billion in sales, Paxil made $11.6 billion, and Wellbutrin sales were $5.9 billion during the years covered by the settlement.[265]

The importance of compliance programs will be discussed next, taking into account the guidance for the federal prosecution of business organizations.

Compliance programs are established by corporate management to prevent and detect misconduct and to ensure that corporate activities are operated in accordance with applicable criminal and civil laws, regulations, and rules.[266] The DOJ encourages such corporate self-policing, including voluntary disclosures to the government of any problems that a corporation may discover on its own.[267] However, the existence of a compliance program is not sufficient, in and of itself, to justify not charging a company for criminal misconduct undertaken by its officers, directors, employees, or agents. In addition, the nature of certain offenses may be such as national law enforcement policies mandate prosecutions of corporations notwithstanding the existence of a compliance program.[268] An effective anti-corruption compliance program is a critical component of an issuer's controls, and it should not be disregarded – the designs of a company's internal controls must take into account the operational realities and risks associated with the company's business such as the nature of its products or services, the nature of the workforce, the degree of regulation, and last but not least, the degree to which it has operations in countries with a high risk of corruption.[269]

As earlier mentioned, as part of an effective compliance program, a company should have clear and easily accessible guidelines and processes in place for gift-giving by the company's

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[264] Ibid.
[265] Ibid.
[266] Department of Justice, 'Justice Manual – Title 9-28.000 Principles of Federal Prosecution of Business Organizations' 9-28.800 < https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.800 >, accessed July 9, 2020
[267] Ibid.
[268] Ibid.
[269] Robert W. Tarun and Peter P. Tomczak, *The Foreign Corrupt Practices Act Handbook: A Practical Guide for Multinational General Counsel, Transactional Lawyers and White Collar Criminal Practitioners* (5th edition, American Bar Association 2018) 28-29 < https://globalcompliancenews.com/wp-content/uploads/2018/01/Chapter-1-_FCPA-5th.12-21-17.pdf >, accessed July 6, 2020

directors, officers, employees, and agents. Though not appropriate for every business, many larger companies have automated gift-giving clearance processes and have set certain monetary thresholds alongside annual limitations.[270] Clear guidance and processes can be an effective and efficient means for controlling such gift-giving, deterring improper payments, and protecting corporate assets. The FCPA itself does not prohibit gift-giving, it prohibits the payments of bribes, including those *disguised* as gifts.[271]

DOJ and SEC have no formulaic requirements regarding compliance programs, but they employ a common-sense and pragmatic approach to evaluating such programs and make inquiries related to three important questions:

(1) Is the company's compliance program well designed?
(2) Is it being applied in good faith?, and
(3) Does it work?[272]

A strong ethical culture will directly support a strong compliance program – as such, by adhering to ethical standards, managers who hold a senior position with the company will be able to inspire mid-level managers to reinforce such standards.[273] Compliant mid-level managers, in turn, will encourage the other employees to strive to attain those standards throughout the whole organizational structure, thus increasing transparency both internally and externally. Compliance with the FCPA and ethical rules must start with senior management, and that is why both SEC and DOJ evaluate whether senior management has articulated company standards clearly, communicated them in unambiguous terms, adhered to them meticulously, and disseminated them throughout the organization.[274]

[270] 'FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act' (SEC, November 14, 2012) 16 < https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf >, accessed July 4, 2020
[271] Ibid.
[272] Ibid., 56
[273] Ibid., 57
[274] Ibid.

FIVE: THE EVALUATION OF CORPORATE CRIMINAL LIABILITY IN FRANCE AND THE SAPIN LAWS

The increase in trade has caused a profound change in the way in which businesses operate. The globalization of the markets leads to the conclusion of increasingly numerous, diversified, but also faster commercial transactions.[275] Thus, both diversification and the acceleration of economic, commercial and financial operations require entrepreneurs and managers of commercial organizations to constantly adapt their investment decisions. These include, of course, risk-taking – subject to situations where the future is only predictable with probabilities, where business leaders and planners try to limit the financial, commercial, tax and social risks.[276] Even if the aforementioned risks recover some sort of element of acceptability through investment decisions, still, there is a risk of having negative outcomes on business operations – this is the criminal risk leading to the criminal liability of business leaders, but also of companies when these are commercial organizations.[277]

Criminal responsibility corresponds to the obligation of answering or accounting for one's criminal acts by undergoing a penal sanction under the conditions and according to the forms prescribed by the law. The criminal risk taken by business managers must be understood as the potential to penetrate the repressive perimeter and be subject to criminal sanctions.[278] In France, criminal responsibility is materialized by the commission of criminal offenses punishable by deprivation of liberty against natural persons and by fine against legal persons. The senior management of a commercial organization can pay a heavy price for acts committed by them or on their behalf: embezzlement, concealment, corruption, and money laundering are all acts which produce harmful effects, effects that target citizens, businesses and their senior managers, altogether.[279]

Companies can be sentenced to exponential fines and suffer damage to their reputation following the publication of judgments of criminal convictions or fraud, concealment of fraud,

[275] Brigitte Pereira, *The Criminal Liability of Corporations and their Directors* (La responsabilité pénale des entreprises et de leurs dirigeants) (EMS Editions, 2011) 8
[276] Ibid.
[277] Ibid.
[278] Ibid.
[279] Ibid.

presentation of inaccurate annual reports, bankruptcy, corruption, favoritism, and many other offenses.[280] The reputation of brands or the very object of corporate identity are likely to be seriously damaged – moreover, shareholders may also suffer significant damage as a result of the actions of the commercial organization's officers.[281] Commercial organizations are likely to be closed depending on the circumstances of the commission of offenses – senior managers, as well as their accomplices, as appropriate (from bankers, financial analysts, accountants, auditors, to commercial executives) may see the imposition of prohibitions on the management of exercise of certain professional activities and may be the subject of custodial sentences.[282] This means that the criminal liability risk in the business sector includes an increasing interest given its consequences on the organization and its freedoms. But, in regards to criminal liability, one most understand the probability of being the victim of fraudulent acts, acts that lead to the problem of securing business on particular markets.[283] In other words, criminal liability, arising from risks taken by certain business actors, must be observed from two prisms: that of taking the risk of committing an act prohibited by the law and exposing oneself to criminal sanctions, and the second (seen as complementary), which consists of being the very object of these fraudulent acts and of seeking means of reparation for the benefit of the companies.[284]

The term "corporation" is more associated with the theory of economics rather than the theory of law. It is of interest to target both sole proprietorship, trading companies as legal persons and groups of companies. The apprehension of criminal responsibility will therefore not be the same depending on the legal structure and the size of the companies, even if the risk concerns any business, whatever its form.[285] So, whatever the type of business, it is a question of what penal offenses should be applied when risks are taken beyond what is authorized by the law. In the same way, it is a question of characterizing the behaviors likely to fall in the sphere of criminal law: is it an abuse of power, a forgery, a false balance sheet, insider trading, counterfeiting, or money laundering? Furthermore, the repressive field of business is experiencing remarkable change, as it touches a constantly-changing factor: in the context of globalization, the means of the commission of offenses is more and more sophisticated and extended over the geographical

280 Ibid., 8-9
281 Ibid., 9
282 Ibid.
283 Ibid.
284 Ibid.
285 Ibid.

space, thus posing difficulties.[286] However, this is a paradox, as the economic actors deplore the legislative inflation which leads to the “all repressive” and prevents the optimal exercise of the freedom to undertake business.[287]

France has looked towards developing a stronger anti-bribery system as over the years it has been intensely criticized for its lax approach to reduce unethical behavior and this fight against illicit financial flows was and is a priority for the French law enforcement authorities.[288] The country has adopted a handful of laws in the field of criminal justice – for instance the “Of Criminal Liability” section of the Penal Code, where the law provides for the prosecution of companies as legal entities in a similar way as an individual offender:[289] legal persons, with the exception of the State, are criminally liable for the offenses committed on their account by their organs or representatives.[290] In addition, Articles 122-1 through 122-8 illustrate the grounds for absence or the attenuation of criminal liability.

Articles 131-39 of the Penal Code enumerates additional sanctions, depending on the offense committed. For instance, dissolution as a sanction, which is also found in Romanian law if not under the same, then similar circumstances, applies where the legal person was created to commit a felony, or, where the felony or misdemeanor is one which carries a sentence of imprisonment of three years or more.[291] Other sanctions include prohibition from exercising directly or indirectly one or more professional activities, either permanently or for a maximum period of five years, placement under judicial supervision for a maximum period of five years, permanent closure or closure for up to five years or closure of one or more of the establishments of the enterprise that was used to commit the offense, disqualification from public tenders either permanently or for a limited period, and posting a public notice of the judgment.[292] Furthermore, the country has also shown its support towards entities such as Financial Action Task Force (FATF),

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[286] Ibid., 9-10
[287] Ibid., 10
[288] Aarti Maharaj, ‘France Anti-Corruption Bill and Compliance Officers’ (Ethisphere, April 21, 2016) < https://magazine.ethisphere.com/12902-2/ >, accessed July 6, 2020
[289] Lex Mundi, ‘Criminal Liability of Companies Survey’ (Lex Mundi, 2008) 113 < https://www.lexmundi.com/images/lexmundi/PDF/Business_Crimes/Criminal_Liability_Survey.pdf >, accessed May 17, 2020
[290] Code pénale, Article 121-2
[291] Lex Mundi, ‘Criminal Liability of Companies Survey’ (Lex Mundi, 2008) 114 < https://www.lexmundi.com/images/lexmundi/PDF/Business_Crimes/Criminal_Liability_Survey.pdf >, accessed May 17, 2020
[292] Ibid., 115

which is the global money laundering and terrorist financing “watchdog”. The inter-governmental body sets international standards that aim to prevent the aforementioned criminal activities and the harm they cause to society.[293] However, these were not the only measures taken by the French government to combat corruption – the title of this chapter makes reference to the Sapin laws – Sapin I and II, both anti-corruption-oriented, and they will be discussed next, as they are the bedrock of French anti-corruption legislation.

Law Sapin I was implemented in 1993, and focused on the financing of political parties and implemented a stronger requirement for transparency in order to prevent corruption on the French territory. The law also created the Central Corruption Prevention Department (SCPC).[294] The SCPC has historically focused upon preventative measures whilst another body, the French Financial Investigation Unit (TRACFIN), has gathered suspicious transaction reports made in the area of money laundering and terrorist financing.[295] Subsequent to Sapin-I, France signed the OECD Anti-bribery Convention in 1997, which came into force in 2000. In order to meet the requirements imposed by the Convention, the Penal Code was amended by inserting the offense of bribery of foreign public officials in connection with international business transactions.[296] In 1999, France joined the GRECO, the Council of Europe’s anti-corruption monitoring body, shortly followed, in July 2005, by France’s ratification of the UN Convention Against Corruption (UNCAC).[297]

France continued to take actions to strengthen its anti-corruption efforts, but despite the recent legal evolution, the country has been lagging behind for the implementation of anti-corruption regulations. This is why in 2014, the OECD expressed serious concerns about the efforts of the French government to comply with the Convention provisions due to the low volume of prosecutions, moderate fines and suspended or partly suspended prison sentences. These concerns were made in comparison to the already-existing or emerging legal framework of other countries such as the United Kingdom or Spain (also signatory countries to the Convention).[298]

[293] FATF, ‘About’ < http://www.fatf-gafi.org/about/ >, accessed July 7, 2020
[294] Quinton Newcomb and Olivier Lopez, ‘Sapin I to II – French anti-bribery law, an evolution’ (Fulcrum Chambers, May 4, 2017) < https://fulcrumchambers.com/wp-content/uploads/2017/05/sapin-french-anti-bribery-law.pdf >, accessed July 7, 2020
[295] Ibid.
[296] Ibid.
[297] Ibid.
[298] Ibid.

In this context, in March 2016, Michel Sapin proposed a new draft law, the Sapin II, which stands to significantly improve France's anti-corruption landscape.

The enactment of Law Sapin II was no accident, particularly with three French companies among the top 10 organizations that paid the largest fines to U.S. regulators for 2016 under the FCPA. Effective as of June 1, 2017, Sapin-II mandates that the presidents, directors and managers of French companies implement a set of measures aimed at preventing corruption and bribery.[299] Under the new law, non-compliance with these requirements may be punishable by fines of up to €200,000 for corporate officers and €1 million for legal entities. Sapin-II applies to companies and corporate groups that:

(1) Are incorporated or headquartered in France;
(2) Have at least 500 employees;
(3) Have annual revenues or consolidated revenues of at least €100 million.[300]

The new law applies equally to parent companies and their subsidiaries and controlled entities, as provided in Article L-233-3 of the French Commercial Code. A parent company may implement the Sapin-II anti-corruption program for its entire corporate group and, in this case, subsidiaries and controlled entities would be deemed to have met their obligations under the law.[301] Five anti-corruption measures mandated by Sapin-II will be discussed next, to provide insight on improvements herein brought.

(1) *Code of conduct* – Sapin-II provides for the implementation of a set of measures aimed at preventing corruption. Notably, the best compliance practices incorporate an effective code of conduct or code of ethics, which is an integral part of corporate culture, in order to improve the company's image and boost investors' confidence and interest in the company.[302]
(2) *Whistleblowing channel* – Sapin-II also requires that companies establish an internal whistleblowing hotline that allows employees to report behaviors that violate the cor-

[299] Ksenia Neboga and Natalya Gordienko, 'France's new Sapin-II anti-corruption law: recommendations for French companies operating in the CIS' (Deloitte, 2017) 3 < https://www2.deloitte.com/content/dam/Deloitte/ru/Documents/finance/sapin_II_en.pdf >, accessed July 8, 2020
[300] Ibid.
[301] Ibid.
[302] Ibid., 4

porate code of conduct. Chapter II of the law stipulates that disclosure of confidential information about a whistleblower or an alleged violator may be punishable by two years of incarceration of a fine of €30,000.[303]

(3) *Risk map* – a risk map should ideally contain an updated list of identified, analyzed and prioritized business transactions or processes that are exposed to corruption risks and that correlate with the nature and geography of the company's business.[304] As most companies do not update this risk map regularly, Sapin-II aims at correcting this issue and encouraging companies to perform a proper due diligence in order to understand which business processes it should focus on, to avoid fraud in critical transactions.

(4) *Due diligence on customers, key vendors and third party agents* – counterparty due diligence is also an integral part of any corporate anti-corruption program; clients should perform regular due diligence procedures on their counterparties, as well as sharing ethical standards and values of the company itself, fully.[305]

(5) *Internal and external accounting controls* – if a company fails in ensuring the segregation of duties, appropriate controls over the cost-effectiveness of business transactions, and regular audits of corporate activities performed will most likely result in a substantially weaker financial performance and reputational losses. Sapin-II states that such controls may be implemented by either external or internal auditors.[306]

The objective of Sapin-II is to guarantee more transparent and more effective financing of the real economy, in particular through:

(1) Improved financial stability and protection for savers by increasing the powers of the financial regulation authorities;
(2) A ban on advertising for internet platforms that offer high-risk financial instruments;
(3) Support for the development of new means of payment, by creating fair competition conditions for all categories of payment service provider; and

[303] Ibid.
[304] Ibid.
[305] Ibid.
[306] Ibid.

(4) An increase in late payment penalties.[307]

France went from handing over prosecutions to the United States' DOJ and having almost no record when it came to corruption cases to a recent judgment which shows France's new-found anti-corruption drive. A few landmark cases will be discussed further.

Alcatel Lucent SA, the telecommunications equipment maker, was accused of making payments to government officials in countries including Costa Rica, Honduras, Taiwan and Malaysia to win or keep contracts worth millions of dollars.[308] Between December 2001 and June 2006, the company used consultants who funneled more than $8 million in bribes to officials, and Alcatel also improperly hired third-party agents in countries such as Nigeria to help with winning deals.[309] Alcatel and its subsidiaries failed to have a proper detection and investigation process in place in order to efficiently identify several red flags suggesting their employees were directing pretend consultants to provide gifts and payments to foreign government officials. Overall, the company admitted it earned approximately $48.1 million in profits as a result of improper payments, and it agreed, in 2010, to pay more than $137 million to settle the charges brought by the U.S.[310]

Total S.A., the French oil and gas company that trades on the New York Stock Exchange, has agreed to pay, in 2013, a $245.2 million monetary penalty to resolve charges related to violations of the FCPA in connection with illegal payments made through third parties to a government official in Iran to obtain valuable oil and gas concessions.[311] In addition, French enforcement authorities had requested that Total, S.A., the chairman and chief executive officer, and two additional individuals be referred to the criminal court for violations of French law, including France's foreign bribery law.[312]

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[307] Gouvernement, 'Sapin II Law: transparency, the fight against corruption, modernization of the economy' (Gouvernement, April 6, 2016) < https://www.gouvernement.fr/en/sapin-ii-law-transparency-the-fight-against-corruption-modernisation-of-the-economy >, accessed July 8, 2020

[308] Jeremy Pelofsky, 'Alcatel agrees to settle bribery case for $137 million' (Reuters, December 28, 2010) < https://www.reuters.com/article/us-alcatel-settlement/alcatel-agrees-to-settle-bribery-case-for-137-million-idUSTRE6BQ3HR20101228 >, accessed July 10, 2020

[309] Ibid.

[310] Ibid.

[311] 'French Oil and Gas Company, Total, S.A., Charged in the United States and France in Connection with an International Bribery Scheme' (Department of Justice, May 29, 2013) < https://www.justice.gov/opa/pr/french-oil-and-gas-company-total-sa-charged-united-states-and-france-connection-international >, accessed July 10, 2020

[312] Ibid.

BNP Paribas, France's biggest bank, pleaded guilty in 2014 to criminal charges and agreed to pay a record-breaking penalty of almost $8.9 billion for dealing with countries that were the subject of U.S. sanctions. The bank had engaged in a long-term, multi-jurisdictional conspiracy involving currency trades for clients in Sudan, Iran and Cuba that was known at the highest level of the company.[313] The fine was bruising for BNP Paribas, which escaped the fallout from the 2008 financial crisis relatively unscathed and unlike many rival banks, it has not paid any fines or other penalties that related to the crisis.[314] The bank has been criticized for this sort of conduct, as BNP shareholders are supposed to take a more active role in choosing management which creates a healthy culture of compliance, otherwise this type of fine will most likely appear again.[315]

The case of Airbus has shown that the era of outsourcing France's strongest anti-corruption cases to the United States might be over, as Airbus' record €3.6 billion settlement in an international bribery probe proved that Law Sapin II has changed everything in France and has become a real player on the international scene.[316] The Toulouse-based aircraft maker has signed a historic three-way agreement with French, UK and US prosecutors to draw a line under more than a decade of corruption involving bribes, fraudulent contracts and fake invoices that have boosted the profits of the company by up to €1 billion over the course of its wrongdoing.[317]

For the French compliance and white-collar crime practitioners, the case of Airbus confirms the credibility of the Parquet national financier (PNF) as a key prosecuting agency in the global white-collar enforcement space, as starting with its role in the Société Générale DPAs in 2018, where it managed to include itself as an equal to the United States' DOJ, the PNF's willingness to work on transactional agreements allows France to assert its role properly in French cases where the United States' extraterritorial jurisdiction would have gone unchallenged in the past.[318] The case also evidences the success of the CJIP (Convention judiciaire d'interêt public),

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[313] Heidi Moore and Jill Treanor, 'BNP Paribas pleads guilty to criminal charges in sanctions case' (The Guardian, June 30, 2014) < https://www.theguardian.com/business/2014/jun/30/bnp-paribas-pleads-guilty-criminal-charges-sanctions >, accessed July 10, 2020
[314] Ibid.
[315] Ibid.
[316] Kate Beioley, 'Airbus case shows France's new-found anti-corruption drive' (Financial Times) < https://www.ft.com/content/fe71368e-4cf6-11ea-95a0-43d18ec715f5 >, accessed July 9, 2020
[317] Ibid.
[318] Ludovic Malgrain, Jean-Pierre Picca and Grégoire Durand, 'Compliance in France in 2020' (Global Investigations Review, June 1, 2020) < https://globalinvestigationsreview.com/insight/europe-middle-east-and-africa-investigations-review-2020/1227364/compliance-in-france-in-2020 >, accessed July 10, 2020

or the Judicial Public Interest Agreement. It has been introduced in 2016 by Sapin-II as a DPA (deferred prosecution agreement) equivalent, and it gives prosecutors transactional tools to negotiate with corporate defendants for a limited number of offenses. This tool was once frowned upon by the French authorities, which have been reticent to transactions in the sphere of criminal law, but now they are widely accepted and have proven to be essential to the resolution of several high-profile cases each year since the enactment of Sapin-II.[319] Including the case of Airbus, CJIPs have allowed France to levy more than €3 billion in fines since 2017.

The case of Airbus also highlights the benefits of cooperation efforts by corporations charged with bribery or other corruption-related wrongdoings. By conducting an internal investigation of a scale rarely seen in Europe, the company has displayed a cooperation that was taken into consideration as a mitigating factor, even though it did not self-report the wrongdoing.[320] Self-reporting and cooperation are concepts that are not yet part of the French legal culture, but start to be increasingly used and promoted in white-collar cases in conjunction with transactional tools, which can be a somewhat “Americanisation” of prosecutorial practices, as Sapin-II builds on “lessons” illustrated by both the Bribery Act 2010 of the United Kingdom as well as America’s FCPA.[321] The case of Airbus aims to remind corporations that engage in business in France or with French nationals in other countries about private or commercial-type of bribery. While other anti-bribery legislation focuses on the bribery of foreign officials, this is not the case for French law – as earlier discussed in this chapter, France has long prohibited active and passive private bribery through specific offenses outlined in the Penal Code.[322] This is why, in Airbus’ case, five counts of bribery of foreign public agents are listed, but also three counts of active private bribery are listed, as well. Therefore, corporations that engage in business in France, in particular multinational corporations with global policies should take into account the risks of private bribery in their compliance programs, such as their ethics codes, anti-bribery policies and employee training programs.[323]

In France, third-party relationships and data protection and storage are the two major areas where compliance can definitely be improved. The compliance function is increasingly called

[319] Ibid.
[320] Ibid.
[321] Ibid.
[322] Ibid.; Code pénale, Article 445-1 – 445-4
[323] Ibid.

upon when drafting customer contracts and for mergers and acquisitions, and joint ventures, as well.[324] It goes without saying that French companies have not put compliance programs on hold, waiting for hefty fines or stiffer legislation at home or abroad before taking action. Due to the subjects and areas handled by several companies, compliance can only be properly implemented within companies if it reports to executive management and interacts with various business and support demands.[325] The interaction and ties should be reinforced in order to bring the necessary answers to the companies. In France, Corporate Compliance Officers are becoming more and more well-known and prevalent, but even so, companies have faced difficulties to define the CCO's scope of action, duties and responsibilities, and the tools and resources that should be provided to them in order to help them work efficiently, thus properly controlling compliance issues and risks.[326] This is probably because, as mentioned throughout this thesis, there is not a "one-size-fits-all" type of compliance program, whether it includes the creation of a CCO position or not. The problem of hardship when defining the CCO's scope of action is even more relevant if the company is only starting to implement such compliance programs as to detect and investigate misconduct within the company. Compliance must be integrated to a great degree, cooperating with several functions such as risk management, internal control, and internal audit. Potential synergies have not been fully leveraged more often than not, and could provide companies with greater effectiveness and reassurance without additional resources which would incur higher amounts to be spent.[327]

According to this chapter's exhaustive analysis of French legislation, its interpretation as well as its application in specific notable cases, it can be concluded that several companies have room for improvement in setting up the proper structure, dimension and resources for their compliance function to be a suitable, effective and reliable function for risk management.[328] The enactment of Sapin-II has proved to move companies to meet new obligations rapidly, and it is the perfect opportunity to study compliance in greater depth and to ensure effective results.

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[324] KPMG, 'Regulatory Compliance in France' (KPMG, October 2016) 22 < https://assets.kpmg/content/dam/kpmg/fr/pdf/2017/02/fr-survey-regulatory-compliance-France-2016.pdf?logActivity=true >, accessed July 10, 2020
[325] Ibid., 23
[326] Ibid.
[327] Ludovic Malgrain, Jean-Pierre Picca and Grégoire Durand, 'Compliance in France in 2020' (Global Investigations Review, June 1, 2020) < https://globalinvestigationsreview.com/insight/europe-middle-east-and-africa-investigations-review-2020/1227364/compliance-in-france-in-2020 >, accessed July 10, 2020
[328] KPMG, 'Regulatory Compliance in France' (KPMG, October 2016) 23 < https://assets.kpmg/content/dam/kpmg/fr/pdf/2017/02/fr-survey-regulatory-compliance-France-2016.pdf?logActivity=true >, accessed July 10, 2020

SIX: THE EVALUATION OF CORPORATE CRIMINAL LIABILITY IN GERMANY – THE CRIMINAL CODE, THE ACT ON REGULATORY OFFENSES AND THE GERMAN CORPORATE GOVERNANCE CODE

Sanctioning corporations is a never-ending theme, as various names of large companies are afflicted with negative headlines caused by offenses committed by their employees, which resulted in fines up to billions.[329] The white collar crime debate in Germany is actually dominated by a draft law, which concerns the introduction of a corporate criminal law – such a law would be a novelty for the German legal system which, until now, only knows a factual, but not a codified corporate criminal law system.[330] In contrast to many other European countries, the German legal system provides the sanctioning of corporations not by a criminal sentence, but by the administrative offense law and by the possibility of recovery and forfeiture.[331] Through these opportunities, sanctioning is possible, but not by an original criminal law – an outline of the current standing of corporate criminal liability in Germany will be discussed, providing examples from the law and government recommendations.

Under German law, there is no criminal liability of corporations – the German Criminal Code (*Strafgesetzbuch, StGB*) only applies to individuals. It states that a person who offers, pays, or accepts a bribe in domestic or foreign transactions (whether it concerns the bribery of elected officials, bribery in commercial practice, in the healthcare sector, or in public office) is a criminal offense and it makes no exceptions for facilitation payments. The active or passive bribery of employees, agents, and managers of a company is criminal even if the act does not hinder competition, and the executives of a company may be held liable for the actions of the employees whom actively support or fail to prevent the commission of an offense.[332] As earlier mentioned, it is possible to impose criminal law sanctions such as forfeiture and confiscation against companies.

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[329] Jürgen Wessing, 'The New Corporate Criminal Law in Germany' (Wessing & Partner) < https://www.strafrecht.de/media/files/docs/1410_German_Criminal_Law.pdf >, accessed July 10, 2020
[330] Ibid.
[331] Ibid.
[332] Strafgesetzbuch (StGB), § 5; § 108e; § 299; § 331-335

Forfeiture,[333] pursuant to the Criminal Code, serves to remove advantages gained from criminal offenses. The pre-requisite for ordering forfeiture is that an unlawful act has been committed and that the company has obtained something for or as a result of the perpetrator's or participant's criminal activities.[334] Advantages gained from the act are all financial assets obtained by the company as a result of the offense, i.e. both material objects obtained directly as a result of the act (through fraud or deception), as well as other advantages gained from the act (profits made from unlawful excessive prices, for instance).[335]

Confiscation,[336] as outlined in the Criminal Code, means that objects generated by a criminal offense or used or intended for the commission or preparation of an offense, can be confiscated. Objects generated by the offense (also called *producta sceleris*) means objects which either originate from or whose current qualities are the result of the offense, for instance counterfeit coins or forged deeds.[337] Confiscation is only permissible if, at the time of the decision, the perpetrator or the participants own or have a claim to the objects, or if the objects due to their nature and the circumstances endanger the general public, or if there is a risk that they will be used to commit unlawful acts.[338] However, the acts committed by the perpetrator of an offense can be attributed to a company pursuant to § 75 StGB, if the perpetrator is a member of an executive body or a representative of the company, or a person responsible for the management of a business or company, and commits the relevant criminal offense in that particular capacity.[339]

The next four offenses that will be outlined further are fraud offenses under German law, applicable to natural persons rather than legal persons under the Criminal Code, and have been chosen because the topic requires the mentioning of such financial crimes applicable to natural persons (persons that can be directors, officers, employees or agents of a company).

333 Ibid., § 73
334 Lex Mundi, 'Criminal Liability of Companies Survey' (Lex Mundi, 2008) 125 <https://www.lexmundi.com/images/lexmundi/PDF/Business_Crimes/Criminal_Liability_Survey.pdf>, accessed May 17, 2020
335 Ibid.
336 Strafgesetzbuch (StGB), § 74
337 Lex Mundi, 'Criminal Liability of Companies Survey' (Lex Mundi, 2008) 126 <https://www.lexmundi.com/images/lexmundi/PDF/Business_Crimes/Criminal_Liability_Survey.pdf>, accessed May 17, 2020
338 Ibid.
339 Ibid.

The first, general fraud,[340] where a person who deceives somebody with the intent of obtaining for himself or a third person an unlawful material benefit and thereby damages the property of another commits fraud – specific intent directed at enriching oneself or a third party is required, and the offense can also be attempted.[341]

The second, subsidy fraud,[342] is a criminal offense to make incorrect or incomplete statements to a public authority competent to approve a subsidy, in relation to facts relevant for the grant of a subsidy to oneself or another party, if the statements in question are made on behalf either of himself or a third party and are advantageous either to himself of that particular third party – gross negligence is also sufficient to trigger criminal liability.[343]

The third, accounting fraud,[344] where the members of the managing board or the board of supervisors who misrepresent or conceal the state of affairs of a company (or company group) in the opening balance sheet, annual report, status report, interim balance sheet or balance sheet oath are punishable by up to three years of imprisonment or a fine.[345] The provision requires international conduct – false statements or non-disclosure of relevant information to the auditor are also punishable under this provision (supported by the regulations of the German Corporate Governance Code, as well).[346]

The fourth, embezzlement,[347] applies to persons who violate fiduciary duties and thereby cause damage to the property interests of a third party are, in the case of intentional conduct, subject to imprisonment not exceeding five years or a fine.[348] The offenses outlined earlier are not strict liability offenses and generally require criminal intent of the natural person. In general, assis-

[340] Strafgesetzbuch (StGB), § 263
[341] Ibid., § 263(2); Anna Öhmichen and Thomas C. Knierim, 'Financial crime in Germany: overview' (Practical Law) < https://uk.practicallaw.thomsonreuters.com/6-554-9114?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1 >, accessed June 12, 2020
[342] Strafgesetzbuch (StGB), § 264
[343] Ibid., § 264(4); Anna Öhmichen and Thomas C. Knierim, 'Financial crime in Germany: overview' (Practical Law) < https://uk.practicallaw.thomsonreuters.com/6-554-9114?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1 >, accessed June 12, 2020
[344] Handelsgesetzbuch (HGB), § 331
[345] Anna Öhmichen and Thomas C. Knierim, 'Financial crime in Germany: overview' (Practical Law) < https://uk.practicallaw.thomsonreuters.com/6-554-9114?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1 >, accessed June 12, 2020
[346] Ibid.
[347] Strafgesetzbuch (StGB), § 266
[348] Anna Öhmichen and Thomas C. Knierim, 'Financial crime in Germany: overview' (Practical Law) < https://uk.practicallaw.thomsonreuters.com/6-554-9114?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1 >, accessed June 12, 2020

tance and incitement are also punishable – in some cases, when the law so provides, negligence or gross negligence (such as in the case of money laundering) will suffice – some offenses can also be committed by omission (for example, if there is a duty to act and the person fails to do so).[349] In addition, attempt is only punishable if the relevant statutory offense provides so explicitly – for instance, attempted fraud under § 263(2) of the Criminal Code read in conjunction with § 22(ff).[350]

In case of certain offenses committed against the Act on Economic Offenses (*Wirtschaftsstrafgesetz, WiStG*) of 1954, instead of forfeiture the transfer of excess proceeds can be ordered.[351] This concerns criminal or minor offenses which consists in prices charged which are higher than those allowed. Excess proceeds are deemed to be the differential amount between the allowed price and the one charged.[352] According to § 10(2) in conjunction with § 8 of WiStG of 1954, the transfer of excess proceeds can be ordered against a corporation if it obtained the proceeds from an unlawful act in the sense of that relevant law.[353] The Economic Offenses Act defined economic criminal offenses according to the doctrines of the criminal law, and contained a list of such offenses, as: withholding of goods, profiteering and violation of accounting provisions, and general provisions about mistakes in motive, and sanctions (such as the earlier-mentioned confiscation, now in the Criminal Code as well).[354] The sections which still have significance are the excessive claim for rent and the payment of additional revenue.[355]

Even if there is no criminal liability of corporations, there is administrative liability of corporations under the Act on Regulatory Offenses (*Ordnungswidrigkeitengesetz, OWiG)*. Companies can be held liable if a representative of a company commits a criminal or administrative offense, the result of which is a violation of the company's incumbent duties, or where the com-

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349 Strafgesetzbuch (StGB), § 13; Anna Öhmichen and Thomas C. Knierim, 'Financial crime in Germany: overview' (Practical Law) < https://uk.practicallaw.thomsonreuters.com/6-554-9114?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1 >, accessed June 12, 2020
350 Ibid.
351 Wirtschaftsstrafgesetz (WiStG), § 8(1)
352 Lex Mundi, 'Criminal Liability of Companies Survey' (Lex Mundi, 2008) 126 < https://www.lexmundi.com/images/lexmundi/PDF/Business_Crimes/Criminal_Liability_Survey.pdf >, accessed May 17, 2020
353 Ibid.
354 Tamina Preuß, 'Introduction to German Economic Criminal Law' [2018] 6 Journal of Law and Criminal Justice, No. 1 98-106, 102
355 Wirtschaftsstrafgesetz (WiStG), § 5, § 8

pany has been enriched or intended to be enriched.[356] As such, a person who merely acts for the company will not be automatically considered a representative; the person must have a managerial function which thus entitles them to represent the company. No criminal sanctions apply, and administrative fines may amount to: €10 million in case the representative committed a criminal offense with intent; and €5 million in case the representative committed a criminal offense negligently. Provided that the representative committed an administrative offense, the administrative fine for the company is capped at the maximum fine for the individual, multiplied by 10.[357] In addition to the fine, any profit gained by officers may be forfeited. The decision as to whether and to which extent an administrative fine is imposed will be at the sole discretion of the competent authority.

While it is clear that the authorities already have the power to impose substantial fines, under the Act on Regulatory Offenses, fines are subject to the authorities' discretion, as earlier mentioned (*Oportunitätsprinzip*).[358] In contrast, if corporate offenses were to be qualified as crimes, prosecution would be mandatory (*Legalitätsprinzip*). Statistics indicate that the present system of penalties apparently lacks efficiency, as although a high number of corporate crimes come to the attention of the German authorities every year (for example, 71,000 cases in 2013 and 63,000 cases in 2014), public prosecutors only very rarely use the powers to impose regulatory fines on corporations.[359] A reason for this situation occurring is the requirement of proving the individual guilt of a member or the owner of the affected corporation.

The German Corporate Governance Code (*Deutscher Corporate Governance Kodex*) was first developed by the German government in 1995 and is a "handbook" of governmental recommendations addressed to companies to implement proper procedures for good and responsible corporate governance. At that time, the Code was only meant for German joint stock companies that were listed on the stock exchange. Eventually, corporate compliance has extended to the German private sector as well, making non-joint stock companies respect the Code. This "handbook" consists of a few important elements: first – it describes legal regulations for management

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[356] Ordnungswidrigkeitengesetz (OWiG), § 30; Andreas Lohner and Nicolai Behr, 'Corporate Criminal Liability in Germany' (Global Compliance News) < https://globalcompliancenews.com/white-collar-crime/corporate-liability-in-germany/#:~:text=1.,StGB)%20only%20applies%20to%20individuals. >, accessed July 11, 2020
[357] Ibid.
[358] 'Corporate criminal liability in Germany' (Norton Rose Fulbright, April 2016) < https://www.nortonrosefulbright.com/en-de/knowledge/publications/800922a0/corporate-criminal-liability-in-germany >, accessed July 11, 2020
[359] Ibid.

and supervision of German listed companies, which are mainly referring to the German Stock Corporation Act (*Aktiengesetz*).[360] Further elements are international and national acknowledged standards for good and responsible corporate governance, in the form of recommendations and suggestions.[361] Besides giving recommendations and suggestions that reflect the best practice of corporate governance, the Code aims at enhancing the German corporate governance's system transparency and comprehensibility, in order to strengthen the confidence of international and national investors, clients, employees and the general public in the management and supervision of German companies.[362] Among the regulations established by the Code, two of the most important are:

(1) Increasing the liability of the management and supervisory board for providing inaccurate capital market information, if the external auditors shall find inaccuracies;[363] and
(2) Introducing independent auditors.[364]

Amendments to the Corporate Governance Code place increasing personal responsibility on supervisory boards to ensure that businesses meet their legal obligations and comply with internal policies. A new assurances standard would be a great step forward, in order to establish a proper, recognized framework for compliance management aligned with internationally recognized principles. Even though this standard would be aimed more towards publicly-listed companies, the elements it should cover represents a change in regulations applicable to all kinds of companies, regulations which concern: compliance culture, objectives, risks, programs, communication, and monitoring and improvement.

After providing an exhaustive presentation of the current standing of both individual and corporate criminal liability in Germany (including relevant provisions from various Codes), the next topic which will be discussed is Germany's path towards implementing a specific corporate criminal liability Act or Code, after a draft law has been presented in 2019: the Corporate Sanc-

[360] Deutscher Corporate Governance Kodex, 'Code' (DCGK) < https://www.dcgk.de/en/code.html >, accessed July 11, 2020
[361] Ibid.
[362] Ibid.
[363] Deutscher Corporate Governance Kodex, Principle 17 (DCGK) 12 < https://www.dcgk.de//files/dcgk/usercontent/en/download/code/191216_German_Corporate_Governance_Code.pdf >, accessed July 11, 2020
[364] Ibid.

tions Act. The idea of implementing a proper corporate criminal law system in Germany was first brought forward in 2000, when a reform commission engaged to evaluate the necessity of corporate criminal law in Germany stated that no supranational regulations exist according to which it would be mandatory to introduce such laws, and the introduction of such laws could definitely give rise to various constitutional and criminal procedural problems.[365] Opponents of the introduction of a German corporate criminal code generally doubt the necessity of it as, according to many, it would not be possible to prevent corporate criminal liability in any event – options to sanction violations committed by companies or their members already exist under several Codes of Germany (such as the StGB, OWiG, HGB, WiStG). Any deficits could be overcome by amending or changing the OWiG and, further, the prevention of corporate offenses could be strengthened by the confiscation of not only the *net* profit,[366] but also the entire *gross income* in case of a violation (also known as *Bruttoprinzip*).[367]

Proponents of the introduction of a corporate criminal code in Germany have argued that the imposition of criminal sanctions against corporations (instead of just mere regulatory fines) could have proper positive preventive effects. A compliance culture (which is also supported by the German Corporate Governance Code) could become prevalent and a different perception as to white-collar crimes could be efficiently promoted.[368] It is also suggested that options for reducing threatening sentences could be installed in the event that the corporation implemented appropriate compliance measures. This principle is already in effect in the United States, where, according to the U.S. Sentencing Commission, the fine range for any organization should be based on the seriousness of the offense and the culpability of the organization. Culpability is determined by six factors – two of which are: the existence of an effective compliance and ethics program, and self-reporting, cooperation, or acceptance of responsibility.[369] As such, it would be easy to conclude that it is important to introduce a corporate criminal code in Germany for unifi-

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365 'Corporate criminal liability in Germany' (Norton Rose Fulbright, April 2016) < https://www.nortonrosefulbright.com/en-de/knowledge/publications/800922a0/corporate-criminal-liability-in-germany >, accessed July 11, 2020

366 Strafgesetzbuch (StGB), § 74

367 'Corporate criminal liability in Germany' (Norton Rose Fulbright, April 2016) < https://www.nortonrosefulbright.com/en-de/knowledge/publications/800922a0/corporate-criminal-liability-in-germany >, accessed July 11, 2020

368 Ibid.

369 United States Sentencing Commission, '2015 Guidelines Manual, Chapter 8' (USSC, 2015) < https://www.ussc.gov/guidelines/2015-guidelines-manual/2015-chapter-8 >, accessed July 6, 2020

cation reasons, since most EU countries already have implemented laws against corporate criminality.[370]

Therefore, after several debates, on August 22, 2019, the German Ministry of Justice and Consumer Protection presented the draft Corporate Sanctions Act (SCA), a bill that would establish and address corporate criminal liability in Germany.[371] The parliament of Germany is expected to adopt the SCA, which would authorize the criminal prosecution of a company under several circumstances. It is anticipated that the draft bill will be adopted in the current legislative term, which extends until the autumn of 2021, and companies should closely follow the progress of this bill and prepare accordingly.[372] The CSA would apply to all legal persons based or doing business in Germany – as such, foreign companies and associations with operations in Germany would be required to comply with the CSA's provisions and would be subject to liability, if they fail to do so. Most notably, the CSA introduces the principle of corporate criminal responsibility and finally permit the criminal prosecution and conviction of companies, but in two circumstances:

(1) Where the entity's directors or officers committed corporate crimes; and
(2) Where the entity did not take reasonable precautions to prevent employees or agents from engaging in corporate misconduct on the basis of criminal wrongdoing within the scope of their employment.[373]

Considering the aforementioned two circumstances, the draft bill builds upon the mixed provisions of the StGB, OWiG and the German Corporate Governance Code, finally arriving at the conclusion that companies should be liable criminally for the illegal activities they operate or engage in – despite the fact that such criminal activity on behalf of companies cannot be avoided.

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370 'Corporate criminal liability in Germany' (Norton Rose Fulbright, April 2016) < https://www.nortonrosefulbright.com/en-de/knowledge/publications/800922a0/corporate-criminal-liability-in-germany >, accessed July 11, 2020
371 Martin Kock, Anna Masser, Johannes Zöttl and Johannes Perlitt, 'Germany: Germany's "Corporate Sanctions Act": The Path To Corporate Criminal Liability"' (Mondaq, Jones Day, September 18, 2019) < https://www.mondaq.com/germany/corporate-crime/845680/germany39s-corporate-sanctions-act-the-path-to-corporate-criminal-liability#:~:text=The%20Draft%20Bill-,On%20August%2022%2C%202019%2C%20the%20German%20Ministry%20of%20Justice%20and,corporate%20crimi-nal%20liability%20in%20Germany.&text=It%20is%20widely%20anticipated%20that,until%20the%20autumn%20of%202021. >, accessed July 6, 2020
372 Ibid.
373 Ibid.

While this statement is true, that corporate criminal activity will not cease to exist, there is an imperative need to introduce (or amend, by case) regulations which aim at properly detecting, investigating, punishing, and preventing such crime. The bill could also be seen as a step away from an original doctrine where corporations cannot be tried criminally, that of *societas delinquere non potest* ("a legal entity cannot be guilty"), and it believes that criminal sanctions are not necessary. Because of the insufficiencies of civil and administrative liabilities, countries have distanced themselves from the German model and instead preferred to adopt a more restrictive model, one which would permit companies to be criminally liable.[374]

Corporate sanctions set forth in the CSA are serious and include the following:

(1) For a single offense, fines of up to 10% of groupwide worldwide annual sales for companies having such sales exceeding the €100 million mark (averaged over the past three years);
(2) For multiple offenses, fines of up to 20% of the last three years' annual sales;
(3) In cases involving a large number of victims, publication of the sentence imposed on the company (concept already implemented in Romanian and French law, for example, with the exception of the requirement of having a large number of victims); and
(4) A last resort solution, that of a court order for the dissolution of the company (a sanction already present in both Romanian and French laws).[375]

As it can be seen, the sanctions of the SCA are inspired by other European countries' criminal law standards (as named, France and Romania). There is enough EU and non-EU jurisprudence which has shown that adopting a more restrictive approach when dealing with the criminal liability of companies render, more often than not, positive results – the restrictive model aims to not just punish the corporations for their wrongdoings, but also to provide suitable and efficient methods (such as compliance programs) to minimize criminal activity within corporations as

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[374] Anca Iulia Pop, *Criminal Liability of Corporations – Comparative Jurisprudence* (2006) 36

[375] Martin Kock, Anna Masser, Johannes Zöttl and Johannes Perlitt, 'Germany: Germany's "Corporate Sanctions Act": The Path To Corporate Criminal Liability"' (Mondaq, Jones Day, September 18, 2019) < https://www.mondaq.com/germany/corporate-crime/845680/germany39s-corporate-sanctions-act-the-path-to-corporate-criminal-liability#:~:text=The%20Draft%20Bill-,On%20August%2022%2C%202019%2C%20the%20German%20Ministry%20of%20Justice%20and,corporate%20criminal%20liability%20in%20Germany.&text=It%20is%20widely%20anticipated%20that,until%20the%20autumn%20of%202021. >, accessed July 6, 2020

much as possible, and it will be the responsibility of the company to tailor the compliance program to their method of operation, income, risks, shareholders, and other factors (and this is why the idea that there is no "one-size-fits-all" type of compliance program is so important – the more numerous the factors, the more specific and organized the compliance program must be).

The two main takeaways from the discussion about the draft SCA are:

(1) In order to mitigate risks from corporate crimes, companies and their directors and officers are well advised to ensure that they have an effective and well documented compliance management system in place; and
(2) Conducting appropriate internal investigations after an alleged wrongdoing might also mitigate sanctions, provided that the company fully cooperates with German law enforcement authorities and properly and correctly shares with them their material results, including evidence, interview notes, and investigative reports.[376]

As such, the introduction of a corporate criminal code in Germany would definitely send a positive signal to the public, and it would help Germany to regain trust as a country with a correct, efficient, and reliable investment environment and promote responsible conduct on the part of corporations.[377] Its introduction would, as already discussed, require a fundamental rethink of German criminal law, since corporations cannot currently face criminal liability.[378] Nevertheless, the debate on this subject has already shown what experts have been studying and recommending for several years: compliance, especially criminal compliance, is an essential part of every company's corporate culture.[379] Only a fitting, efficient compliance system will protect the company from being sanctioned. A corporate criminal law system demands even more caution and investment in compliance but, from a legal policy perspective, the introduction of certain changes to the system of corporate criminal liability in Germany seems very likely to happen and should be welcomed, as it is in the interest of the companies to promote a fairer, more transparent way of conducting business, in order to increase profits and the trust of investors, healthily.

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[376] Ibid.
[377] 'Corporate criminal liability in Germany' (Norton Rose Fulbright, April 2016) < https://www.nortonrosefulbright.com/en-de/knowledge/publications/800922a0/corporate-criminal-liability-in-germany >, accessed July 11, 2020
[378] Ibid.
[379] Jürgen Wessing, 'The New Corporate Criminal Law in Germany' (Wessing & Partner) < https://www.strafrecht.de/media/files/docs/1410_German_Criminal_Law.pdf >, accessed July 10, 2020

SEVEN: THE EVALUATION OF CORPORATE CRIMINAL LIABILITY IN AUSTRALIA AND THE AUSTRALIAN CRIMINAL CODE

The prevalence of corporate governance has turned into an obsession for law academics and practitioners, and is probably inevitable in the wake of last century's organizational revolution and the newer phenomenon of globalization. In this era of rapid change, the idea of comparative law as a tool for law reform, a mechanism by which law can adapt to, or promote, social change, is somewhat appealing – in addition, in an era of corporate collapses, such as Enron in the United States and One.Tel in Australia, the concept of corporate governance has become quintessential.[380] The changes to corporate criminal liability in Australia are interesting from both a practical and theoretical perspective, as they may have a profound impact on managerial conduct and accountability at an operational level, and also affect matters which are traditionally within the sphere of corporate governance.[381]

Developments concerning corporate liability and accountability in Australia are noteworthy for a number of reasons. Firstly, they demonstrate a clear trend towards the recognition of the concept of corporate blameworthiness in relation to criminal liability, which is more consistent with an organizational, than a contractual model of the corporation.[382] Secondly, there are significant developments in the Australian context both in the range and in the severity of sanctions employed as techniques of accountability for corporate misconduct – there is a growing support for a much wider range of non-monetary sanctions enforceable against corporate offenders, such as dissolution (also applied in jurisdictions such as Romania or France), disqualification from government contracts, adverse publicity (which probably refers to the publication of the sentence imposed on the company, a sanction applied in the two aforementioned jurisdictions), corporate probation, and punitive injunctions.[383] As such, in this chapter, an outline of the current standing of corporate criminal liability in Australia will be discussed, providing examples from the law and government discussion papers.

[380] Jennifer G. Hill, 'Corporate Criminal Liability in Australia: An Evolving Corporate Governance Technique?' (2003) 1 Journal of Business Law, 2 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=429220 >, accessed June 17, 2020
[381] Ibid., 3
[382] Ibid., 6
[383] Ibid.

The criminal liability of corporate legal persons has been recognized in Australia for over a century. Principles governing corporate criminal liability mainly derive from common law, however, the Criminal Code Act 1995 provides a statutory framework for corporate criminal responsibility at federal level.[384] The general principle at common law is that a corporation is "personally" liable for the mental state and conduct of the *directing mind* of the company, which will usually be the board of directors, managing director, or another person to whom a function of the board had been fully delegated, acting on the corporation's behalf.[385] The Code applies to bodies corporate in the same way that it applies to individuals, but with modifications set out in the Code and made necessary by the fact that criminal liability is being imposed on a company rather than on an individual.[386] This is supported by *Royal Mail Steam Packet Co. v. Braham,*[387] where "person" (in the context of an "individual"), when used in a legal sense, is an apt word to describe a corporation, as well as a natural person.[388] It is true that a corporation comprises of several individuals, but is in itself a legal *person*. Even prior to the enactment of the Acts Interpretation Act 1901, the common law had already contemplated that statutory references to "persons" may, upon contemplation of the object of the Act, have been intended to also comprehend the company. Thus, if a person is prohibited from committing a certain act, that prohibition applies equally to corporations.[389]

Based on the nature of criminal offenses in Australia, some offenses are identified as strict liability ones – these offenses do not require a fault element to be established, whereas some do require so.[390] The Parliament of Australia has the power to pass Commonwealth legislation, as well as each State and Territory parliament. Furthermore, each State and Territory also has its own anti-bribery laws, and for the most part in Australia, private sector bribery is covered in State and Territory criminal codes, which have a somewhat uncertain extraterritorial application.[391] In regards to extraterritorial application, criminal liability will extend to a foreign com-

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[384] Linklaters, 'Corporate Criminal Liability. A review of law and practice across the globe' (Linklaters, 2016) 8 < https://data.allens.com.au/pubs/pdf/ibo/CorporateCriminalLiabilityPublication_2016.pdf >, accessed June 17, 2020
[385] Ibid., 9
[386] Georgie Farrant, 'Corporate Liability in Australia' (Global Compliance News) < https://globalcompliancenews.com/white-collar-crime/corporate-liability-australia/ >, accessed June 19, 2020
[387] *Royal Mail Steam Packet Co v. Braham* (1877) 2 App Cas 381
[388] Ibid., [386]
[389] Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper, No. 87, 2019) par. 1.17
[390] Ibid.
[391] Linklaters, 'Corporate Criminal Liability. A review of law and practice across the globe' (Linklaters, 2016) 8 < https://data.allens.com.au/pubs/pdf/ibo/CorporateCriminalLiabilityPublication_2016.pdf >, accessed June 17, 2020

pany in circumstances where the necessary nexus is established – the Code applies on the basis of nationality and territory and thus, as a result, for a foreign company to be subject to the Criminal Code, the conduct which constitutes the offense or the result of a criminal conduct, must occur wholly or partly in Australia.[392]

Part 2.5 of the Commonwealth Criminal Code Act 1995 (Cth) produced the greatest paradigm shift towards a holistic model by focusing on the corporate culture of organizations. It is a general form of corporate criminal liability, clearly outlining the circumstances in which a corporation is liable[393] – for instance, a body corporate may be found guilty of any offense, including one punishable by imprisonment.[394] However, this is limited to federal offenses which do not include manslaughter. Under section 12.2, the *actus reus* of the offense can be attributed to the body corporate where an employee, agent, or officer of the body corporate commits the offense while acting within the scope of employment.[395] For offenses which require a degree of negligence, the courts may view the body corporate's conduct as a whole by aggregating the conduct of its employees, agents, or officers.[396] As such, inadequate corporate management or the failure to provide an adequate system or systems for conveying relevant information may provide evidence of negligence where the respective inadequacy substantially attributed to the prohibited conduct.[397]

For offenses which require a fault element other than the one of negligence, such as intention, knowledge, or recklessness, the fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorized or permitted the commission of the offense.[398] The authorization or permission may occur through the actions of the corporation's board of directors, high managerial agents, or through the corporation's culture.[399] In this context, corporate culture refers to the attitude, policy, rule, course of conduct or practice existing within the respective body corporate. The corporate culture model is based on organizational fault rather than individ-

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[392] Ibid., 9
[393] Anca Iulia Pop, *Criminal Liability of Corporations – Comparative Jurisprudence* (2006) 38
[394] Criminal Code Act 1995, Section 12.1(2)
[395] Anca Iulia Pop, *Criminal Liability of Corporations – Comparative Jurisprudence* (2006) 38
[396] Criminal Code Act 1995, Section 12.4(2)
[397] Anca Iulia Pop, *Criminal Liability of Corporations – Comparative Jurisprudence* (2006) 38-39
[398] Criminal Code Act 1995, Section 12.3(1)
[399] Ibid., Section 12.3(2); Anca Iulia Pop, *Criminal Liability of Corporations – Comparative Jurisprudence* (2006) 39

ual fault and it captures the true nature of decision-making within modern organizations.[400] One disadvantage of the corporate culture model is the uncertainty that the concept imports into corporate criminal liability – corporate culture is a somewhat amorphous concept and, with a limited amount of case law, it is difficult to predict how the courts will interpret it.[401] Corporate culture encompasses the formal aspects of the organization, such as the organization's policies and procedures, as well as the organization's informal attitudes or practices. It is these informal aspects of corporate culture which pose evidentiary difficulties for prosecutors – evidence of a good corporate culture can definitely include the existence of compliance programs, employee training (or education) programs, methods for effective communication and employee reporting, and possibly whistle-blowing procedures.[402] In contrast, repeated offending within a corporation can definitely mean proof of a poor corporate culture which requires strict changes.

Another significant disadvantage of the corporate culture model is that companies may be able to avoid criminal liability by portraying an event as a single, isolated incident as opposed to a systemic failure.[403] In this case, prosecutors are likely to face even greater evidential difficulties in proving that a systemic failure occurred within the corporation, compared to providing an isolated incident. This model is likely to create difficulties in obtaining convictions but it may also have benefits such as drawing attention to poor corporate cultures and by incentivizing managers to develop better corporate policies in order to avoid all kinds of future difficulties.[404] This corporate culture model endangered political resistance because it is a fundamental shift away from the individualist model of corporate criminal liability (found in several EU legislations). Australian law targets both natural persons and organizations in the field of corporate regulation, thus rejecting the tenets of extreme methodological individualism or enterprise liability alone.[405] The two forms of liability targeted in Australian law are not mutually exclusive and the choice of liability is mostly based on prosecutorial discretion.[406]

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[400] Anca Iulia Pop, *Criminal Liability of Corporations – Comparative Jurisprudence* (2006) 39
[401] Ibid.
[402] Ibid., 40
[403] Ibid., 40-41
[404] Ibid., 41
[405] Jennifer G. Hill, 'Corporate Criminal Liability in Australia: An Evolving Corporate Governance Technique?' (2003) 1 Journal of Business Law, 8 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=429220 >, accessed June 17, 2020
[406] Ibid.

Regulation at a corporate, rather than individual level is, more often than not, a more appropriate way to deal with several public concerns – the prosecution of individuals only in such circumstances would allow the corporation to distance itself unjustifiably from the offense which has been committed.[407] It has also been argued that corporations, as a result of their greater resources and access to knowledge, are in fact more appropriate bearers of responsibility – they are often better able to avoid the commission of offenses than individuals, and may reduce enforcement costs through private sanctioning measures but despite the fact that they are positively able to prevent and avoid the commission of offenses, companies are still undergoing illicit activities and only a handful have managed, along the years, to implement proper procedures of combating corruption offenses through effective policies and regulations.[408] Having outlined the basic provisions of the Criminal Code, alongside the application of corporate criminal liability in general, the next subject which will be outlined is the criminal liability of corporate *groups* (which could be considered another form of corporate "personality") and the perspective of Australian law on this matter.

Given the existence of corporate liability, it is imperative to delineate the circumstances in which criminal responsibility will be attributed to a particular corporation – as such, one area in which significant difficulties have arisen is that of corporate *groups*.[409] The conjunction of globalization, which has been said to create new means of committing crime, and multinational corporate groups, has created yet another layer of complexity and accountability problems for the regulation of corporate crime. A basic principle under Australian law, firmly established by the High Court's decision in *Industrial Equity Ltd. v. Blackburn,*[410] is that each company within a corporate group is treated as a *separate* legal entity.[411] This decision has a number of important consequences – it means, for instance, that parent companies are *prima facie* insulated from liability from the debts of its subsidiaries.[412] It also has the effect that a corporation will not be criminally responsible for the acts or omissions committed by another company within the group – and this issue reflects a broader criminal law principle that responsibility is personal and not

[407] Ibid., 9
[408] Ibid.
[409] Ibid., 13
[410] *Industrial Equity Ltd. v. Blackburn* (1977) 137 CLR 567
[411] Jennifer G. Hill, 'Corporate Criminal Liability in Australia: An Evolving Corporate Governance Technique?' (2003) 1 Journal of Business Law, 13 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=429220 >, accessed June 17, 2020
[412] *Industrial Equity Ltd. v. Blackburn* (1977) 137 CLR 567, [577]

vicarious.[413] The possibility of shaping the boundaries to which corporate entities can be aided by this principle, with the possible danger that corporations engaged in certain high-risk areas may be deliberately undercapitalized to avoid exposure to damages claims in fields of law such as tort, has been strongly criticized over the years.[414] Therefore, in certain circumstances, the assumed congruence between the separate entity principle and the lack of personal responsibility will be completely absent in the *corporate group* context if there is a high level of group integration and domination by a parent company over the activities of its subsidiaries. This idea brings forth the concept of successor liability or, in other words, "transferred" liability. It would mean that traditional corporate law principles can disguise personal responsibility for the purposes of corporate accountability – where there has been a scheme of corporate reconstruction or amalgamation, the court may order the transfer of a company's liabilities to a transferee company (pursuant to the Corporations Act).[415] The next subject which will be discussed is the comprehensive review by the Australian Law Reform Commission (ALRC) of the regime of corporate criminal liability.

At the direction of the Attorney General of Australia, the ALRC has undertaken a review of Australia's Commonwealth corporate criminal liability, and has released a discussion paper on proposed reforms in November 2019. The main aim of the ALRC are to strengthen and simplify the existing statutory mechanisms and principles for attributing corporate criminal liability to companies, as established in Part 2.5 of the Criminal Code.[416] In regards to simplifying, the ALRC makes the following statement:

"*There are currently multiple methods of attributing criminal and civil liability to a corporation. (...) the ALRC considers options for reforming the way in which the criminal law attributes criminal responsibility to corporations. The ALRC proposes that across Commonwealth statutes there should be a* ***single*** *method for attribution to corporations.*"[417]

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[413] Jennifer G. Hill, 'Corporate Criminal Liability in Australia: An Evolving Corporate Governance Technique?' (2003) 1 Journal of Business Law, 13-14 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=429220 >, accessed June 17, 2020
[414] Ibid., 14
[415] Corporations Act 2001, s. 413
[416] Steven W. Fleming, Matthew Latham and Thomas Haystead, 'Changes Ahead For Australia's Corporate Criminal Liability Regime' (Mondaq, November 21, 2019) < https://www.mondaq.com/australia/crime/866484/changes-ahead-for-australia39s-corporate-criminal-liability-regime >, accessed June 21, 2020
[417] Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper, No. 87, 2019) par. 6.1

Under the same single attribution method, the ALRC has proposed expanding the individuals whose conduct may be attributed to the corporation from "officers, employees, and agents" (as outlined in the Code) to "associates" acting on behalf of the corporation.[418] This is a functional approach that looks at the substance of the relationships between the person and the corporation, rather than their formal title[419] – and the term "associate" has the following definition:

> "***Associate*** *means any person who performs services for or on behalf of the body corporate, including:*
> *(1) An officer, employee, agent or contractor; or*
> *(2) A subsidiary (within the meaning of the Corporations Act 2001) of the body corporate; or*
> *(3) A controlled body (within the meaning of the Corporations Act 2001) of the body corporate*."[420]

In order to balance the aforementioned expansion, the ALRC has proposed that a due diligence defense should be available to corporations – the absence of due diligence is a critical element in criminal liability of corporations under the model proposed by the authority.[421]

The overarching aims of the proposal made by the ALRC are to:

(1) Ensure that attribution accords with the fundamental principles of criminal law, especially blameworthiness or culpability;
(2) Achieve simplicity in procedures;
(3) Reflect the reality of corporate action and behavior (in other words, transparency, principle which be upheld only by implementing effective procedures of detection, investigation and prevention of corporate misconduct – elements of a compliance culture); and
(4) Recognizing the existing legal sphere, which includes the Code.[422]

[418] Ibid., par. 6.2
[419] Ibid.
[420] Ibid., par. 6.17
[421] Ibid., par. 6.2
[422] Ibid., par. 6.6

The proposed redrafting of Part 2.5 of the Criminal Code has taken into account the different corporate structures that already exist and therefore unique attribution models would not be required to accommodate these[423] – the proposed redrafting of sections 12.2 and 12.3 are, as following:

> "*Any conduct engaged in by one or more associates of a body corporate is deemed to have been engaged in also by the body corporate, unless the body corporate proves that it exercised due diligence to prevent the conduct.*" (section 12.2)
>
> "*If, in respect of conduct that is engaged in by a body corporate, it is necessary to establish the state of mind, other than negligence, of the body corporate, it is sufficient to show that one or more associates of the body corporate who engaged in the conduct had that state of mind, and the body corporate authorized or permitted the conduct.*" (section 12.3)[424]

As explained above, a due diligence defense will incorporate notions of organizational blameworthiness into the attribution method, which the ALRC considered to be necessary in order to impose criminal responsibility. Thus, including a due diligence defense in the proposed single attribution method will also improve consistency in the law, as currently most of the statutes of Australia include a similar defense.[425] The corporation is in an advantageous position, considering that it is able to provide evidence of its preventative procedures (in other words, compliance procedures or due diligence) than the prosecution, and as such, it is appropriate for the corporation to bear the legal burden of proving this defense.[426]

Ordinarily, under the criminal law system it is not appropriate to impose a legal burden upon a defendant – however, corporations are not humans.[427] The same concerns which give rise to necessary criminal law protections for humans do not exist for corporations – a corporation does not require the same protections as an individual, due to the fact that it is unable to be in-

[423] Ibid., par. 6.9
[424] Ibid., par. 6.7
[425] Ibid., par. 6.24
[426] Ibid., par. 6.25
[427] Australian Law Reform Commission, 'Corporate attribution – principled simplicity' (Australian Government, November 27, 2019) < https://www.alrc.gov.au/news/corporate-attribution-principled-simplicity/ >, accessed June 22, 2020

carcerated, and because it has greater access to resources, compared to an ordinary individual.[428] The very nature of corporations is such that it would be almost impossible for a prosecuting authority to find and bring evidence of the due diligence of a particular company.[429] Currently, corporations in Australia do not have this or a similar type of defense available to them – this is why, because a corporation may be either vicariously or directly liable for the actions of its associates, the arguments against a company having a legal burden of proof regarding this defense should be weighed against the current standing of the law in which corporations might not have a recourse to a defense at all.[430] In other words, the view of the ALRC is that it is essential that corporations be culpable before they are criminally responsible – pure vicarious liability on the basis of a conduct of certain individuals is insufficient with respect to this matter.[431]

Due diligence is a very elastic concept which takes its meaning from the context in which it must be exercised[432] – whether this means transactional due diligence (in most commercial contracts in mergers in acquisitions or joint ventures) or the implementation of effective due diligence procedures (which will also prove to be a valuable defense, as earlier explained). It might be reasonable to expect a corporation to take greater measures with respects to those associates with whom it has more contact or over whom it may exercise greater control and power.[433] In this context, referring to the defense of due diligence, similar defenses can be found in the UK, where two offenses relating to the failure of preventing offenses have been enacted. As such, s. 7(2) of the Bribery Act 2010 creates a defense where adequate procedures are in place for the prevention of bribery, and, secondly, the defense in the Criminal Finances Act 2017 is available where the relevant body had procedures in place as it was reasonably in all circumstances to expect to have in place.[434] Prosecuting authorities are very likely to take into account whether a company can prove that it has sufficient control mechanisms in place in order to prevent wrong-

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[428] Ibid.
[429] Ibid.
[430] Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper, No. 87, 2019) par. 6.26
[431] Australian Law Reform Commission, 'Corporate attribution – principled simplicity' (Australian Government, November 27, 2019) < https://www.alrc.gov.au/news/corporate-attribution-principled-simplicity/ >, accessed June 22, 2020
[432] Ibid., par. 6.27
[433] Ibid.
[434] Criminal Finances Act 2017, ss. 45(2)(a), 46(3)(a); Ibid., paras. 6.29-6.30

doing when considering what action to suitably take – thus, the impact of a robust and well-tailored compliance system can be extremely significant.[435]

For corruption-related offenses such as bribery, where the requisite fault element is one of intention, knowledge or recklessness, adequate compliance structures are likely to weigh against a finding that the company expressly, tacitly or impliedly authorized or permitted the commission of an offense.[436] In contrast, inadequate compliance programs may go towards a finding resulting in an imposition of criminal liability, in addition to substantial losses. Furthermore, as it has been detailed above, it is a defense to offenses such as contravening sanctions law, if the company can prove that it has taken reasonable precautions and exercised due diligence to avoid contravening the existing laws and regulations. Regulators look at substance over form when determining whether to prosecute and the courts act identically when determining liability.[437]

Corporate governance is an extremely complex ecosystem, and although criminal liability has become increasingly popular and important over recent years in several commercial practices such as banking or pharma, it has usually been treated as peripheral to it.[438] Taking ALRC's discussion paper into consideration, it can be said that Australian corporate criminal law is currently in the midst of a somewhat major shift which should be entirely supported, as it is trying to implement several principles of law which have already been present in several other countries around the world. An effective federal anti-corruption agency could also play a very important role, and should be a part of this shift. It is very possible that after the proposals outlined in ALRC's discussion paper are taken under evaluation, Australia might witness an amendment to the Criminal Code, one which will integrate issues relating to corporate criminal corporate liability at an operational level into corporate governance, as companies should ensure that their corporate cultures align with the recommendations of the government, thus providing effective detection and prevention procedures against corruption offenses, lowering the risk of criminal liability being imposed alongside reversing a long-term decline in the annual CPI.

435 Linklaters, 'Corporate Criminal Liability. A review of law and practice across the globe' (Linklaters, 2016) 10 < https://data.allens.com.au/pubs/pdf/ibo/CorporateCriminalLiabilityPublication_2016.pdf >, accessed June 17, 2020
436 Ibid.
437 Ibid., 10-11
438 Jennifer G. Hill, 'Corporate Criminal Liability in Australia: An Evolving Corporate Governance Technique?' (2003) 1 Journal of Business Law, 39 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=429220 >, accessed June 17, 2020

EIGHT: FINDINGS AND CONCLUSION

The expression "never a dull moment" is almost as if it could have easily been tailored to describe the ethics and compliance function and how it has evolved over the past decade.[439] The well-publicized scandals and corruption-related events have not only proven that the harms that can arise out of a misuse of corporate power can be devastating, but have also brought the issue of corporate criminal liability back into the legal spotlight.[440] These events have definitely reignited the debate on corporate criminal liability, and most of the arguments that have been raised over the years have proven to be all too familiar and at the same time, futile, in the combat against corruption-related crime.[441] In addition, these incidents have led several legal systems to pass sweeping legislation that has called for increased regulation, greater financial transparency, more rigorous scrutiny of large corporations, and better provisions to hold corporations liable for their actions.[442]

Suddenly, the ethics and compliance function has found itself front and center (in other words, in the aforementioned "legal spotlight"), its responsibilities greatly expanded, and its activities far more integral to the strategic core of organizations that are struggling to regain the trust of the public.[443] Furthermore, the growth of emerging technologies and big data has ushered in a new era of transparency, exposing illegal transactions and raising profound new ethical questions about the way a business is conducted.[444] The main reason why the ethics and compliance function has become so prevalent is due to the questions raised in regards to corporate criminal liability, a phenomenon that has led to the creation of regimes that could deter and punish corporate wrongdoing.[445] Along the years, critics have not held back on voicing strong arguments against the efficiency of imposing criminal liability on corporations and its consistency

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[439] Deloitte, 'Building world-class ethics and compliance programs: Making a good program great' (Deloitte) 1 < https://www2.deloitte.com/content/dam/Deloitte/no/Documents/risk/Building-world-class-ethics-and-compliance-programs.pdf >, accessed May 5, 2020
[440] Kristen Wong, *Breaking the Cycle: The Development of Corporate Criminal Liability* (2012) 5
[441] Ibid.
[442] Ibid.; Deloitte, 'Building world-class ethics and compliance programs: Making a good program great' (Deloitte) 1 < https://www2.deloitte.com/content/dam/Deloitte/no/Documents/risk/Building-world-class-ethics-and-compliance-programs.pdf >, accessed May 5, 2020
[443] Deloitte, 'Building world-class ethics and compliance programs: Making a good program great' (Deloitte) 1 < https://www2.deloitte.com/content/dam/Deloitte/no/Documents/risk/Building-world-class-ethics-and-compliance-programs.pdf >, accessed May 5, 2020
[444] Ibid.
[445] Anca Iulia Pop, *Criminal Liability of Corporations – Comparative Jurisprudence* (2006) 2, 3

with common principles of criminal law – however, in contrast, a large pool of partisans have defended this imposition and have insisted that every legal system should have in place legislation which shall address issues of such special kind of liability.[446]

This thesis has focused on an exhaustive research of six different countries, outlining the current standing of the law in regard to corporate criminal liability and compliance, research which has helped identify both similarities and differences in approaches towards the fight against corporate crime, even if some of these countries have only recently considered a push for criminal law rethinking and reform, such as Germany or Australia. Thus, it is more than reasonable to conclude that corporations *can* and *should* be held liable for the illicit activities they perform. Before expanding on the findings based on the research conducted, what has become abundantly clear is that when it comes to creating ethics and compliance procedures, organizations nowadays are not in a position where they can afford to easily settle for less – what was "good enough" two decades ago, when compliance programs were introduced in the United States as a defense against harsh prosecution, is not nearly enough in current times.

This also applies to traditional criminal law doctrines, such as *societas delinquere non potest*, doctrine which will probably never cease to be challenged, considering that *respondeat superior* plays, still, an important role in attribution of corporate criminal liability. Legal theory still argues the validity of the argument that corporations can actually be blamed for their wrongdoings, and yet, several jurisdictions have drifted considerably apart from the traditional concept of corporations being somewhat "artificial" entities that cannot possess the primary element of *mens rea* – and this is why statutory provisions have created sanctions such as fines and heavy restrictions in order to punish corporations for the acts committed by their officers, directors, agents (in other words, *associates*). Companies have responded, more often than not, positively, to the statutory provisions in relation to the attribution of criminal liability as well as those related to the implementation of ethics and compliance programs – but the laws and regulations can only provide for templates as to what an ethics and compliance program should contain; companies will tailor these programs to their structures, risks (both managerial and transactional), and to the business model they operate under. This means, as it has been noted throughout this thesis, that there is no singular type of such a compliance program that will fit to *all* companies' needs (in other words, there is no "one-size-fits-all" program). There are two key findings that will be

[446] Ibid., 3

discussed below, under specific subtitles – these findings are a summarization of the methods that each of the six discussed countries have approached towards the attribution of corporate criminal liability and towards the acceptance of a corporate compliance culture as the principle means of combating corporate crime.

FINDING I : Corporate criminal liability could not have existed without rethinking traditional criminal law principles

The legal systems of all six countries researched had to undergo substantial changes in order to integrate corporate criminal liability in criminal law, as every legal system should have in place legislation which addresses the issue of offenses committed by corporations and their directors. The main goals of corporate criminal liability do not differ from those of criminal law in general, as deterrence and retribution are the main two staples[447] – where deterrence refers to the prevention of future crimes, and retribution refers to the duty to punish those who commit crimes.

A first comparison will be drawn between Romania, France, and Germany – all civil law systems. In Romania, corporate criminal liability was created in 2006 through amendments brought to the old Criminal Code, and in the most recent version of that same piece of legislation, corporate criminal liability is based on the model of the Finnish Criminal Code, as a legal person can commit any kind of crimes as the main perpetrator, instigator, or accomplice. Even if the idea that corporations can be blamed for their illicit conduct, investigatory bodies will still approach the traditional method of imposing liability on an individual, which hinders the further efforts of "testing" and perfecting this new concept in criminal law. In addition, Romania, even after the enactment of Law No. 129/2019 for the prevention and combat of money laundering and the financing of terrorist activities, still finds itself in a position where it treats the concept of corporate criminal liability as foreign rather than one to which governmental bodies and even legal persons should be accustomed with. Despite the actual position taken by Romania towards corporate criminal liability, the rethink on criminal law has led to the implementation of this principle in national legislation and it is soon to become one of the most important developments that Romanian law has witnessed across the last decade, as efforts towards prosecuting corporations are constantly increasing.

[447] Ibid., 3

France, on the other hand, has gone an “extra mile” with respect to corporate criminal liability, as it did not only rely on the provisions of the Penal Code, but it enacted the two Sapin laws – Sapin-I and Sapin-II. Because France has been criticized for its lax approach towards combating corruption offenses, it was forced to introduce stricter and more efficient provisions in order to move companies towards meeting enacted obligations and a more transparent culture, and this led to the enactment of Sapin-I in 1993. However, even with this piece of legislation in place, France still found itself lagging behind other countries which already had proper anti-corruption procedures in place. Moreover, in 2014, the OECD expressed serious concerns about the efforts made by France to comply with the provisions of the Convention due to the low volume of prosecutions, moderate fines and suspended or partly suspended prison sentences.[448] These concerns were made in comparison to the already-existing or emerging legal frameworks of other countries such as the United Kingdom or Spain (countries that are also signatories to the Convention).[449] As such, Sapin-II was enacted in 2016 and it has proven to be the “extra mile” that France needed to go, in order for the outsourced prosecutions of corporations (mostly in the United States) to come to an apparent halt. Had it not been for Sapin-II and for this “reform” in French criminal law, the number of outsourced prosecutions would have grown and international organizations would have gradually lost faith in France’s possible redress.

Germany has relied on several statutes for the sanctioning of corporations (specifically on the StGB and the OWiG), as, until recently, the criminal liability of corporations was a factual concept, not a procedural one, which could have been an amendment to the current StGB. After several debates on whether Germany should finally create corporate criminal legislation, the German Ministry of Justice and Consumer Protection presented the SCA (discussed in Chapter VI), a bill which would establish and address corporate criminal liability in Germany.[450] The

[448] Quinton Newcomb and Olivier Lopez, ‘Sapin I to II – French anti-bribery law, an evolution’ (Fulcrum Chambers, May 4, 2017) < https://fulcrumchambers.com/wp-content/uploads/2017/05/sapin-french-anti-bribery-law.pdf >, accessed July 7, 2020
[449] Ibid.
[450] Martin Kock, Anna Masser, Johannes Zöttl and Johannes Perlitt, ‘Germany: Germany’s “Corporate Sanctions Act”: The Path To Corporate Criminal Liability”’ (Mondaq, Jones Day, September 18, 2019) < https://www.mondaq.com/germany/corporate-crime/845680/germany39s-corporate-sanctions-act-the-path-to-corporate-criminal-liability#:~:text=The%20Draft%20Bill-,On%20August%2022%2C%202019%2C%20the%20German%20Ministry%20of%20Justice%20and,corporate%20criminal%20liability%20in%20Germany.&text=It%20is%20widely%20anticipated%20that,until%20the%20autumn%20of%202021. >, accessed July 6, 2020

SCA is built by taking into consideration the laws of various legal systems (such as Romania and France with respect to several aspects, such as sanctions), and this rethinking of German criminal law would send a positive signal to the international legal and business environments, as it helps Germany to regain trust as a country with a correct, efficient, and reliable business environment which promotes responsible conduct through corporations.[451]

A second comparison will be drawn between the United Kingdom, the United States, and Australia – all common law systems. It took hundreds of years for common law countries to depart from the traditional view of corporations as artificial entities and develop laws that address the attribution of criminal liability on corporations. The UK has gained recognition for having one of the toughest anti-corruption legislations in the world after the enactment of the Bribery Act 2010, but also for upholding a restrictive direct liability model (same as France), unlike the U.S., which upholds a wide vicarious liability model, one which covers several loopholes existent in other legal systems, but which also makes it clear, predictable and efficient and preventing corporate crimes.[452] Unlike the UK and the U.S., Australia has recognized the criminal liability of corporations over a century ago, and its legislation has made it clear that a legal entity will be criminally liable in the same way an individual would, of course, subject to certain exceptions. In addition, Australia is the only one of the two aforementioned countries which is currently considering amending the existing criminal legislation, as the ALRC's discussion paper aims at strengthening and simplifying the existing statutory mechanisms and principles for attributing corporate criminal liability to companies by reformulating the Criminal Code and introducing the defense of due diligence, already available both in the UK and in the U.S.[453] Regardless of the type of model adopted by either of these countries, the fact that corporate criminal liability is recognized (or will be) means that governments have, gradually, adhered to principles existent in other countries and the rethinking of criminal law in this regard was based on solid proof that making corporate criminal liability a "mainstream" concept sends a very important message to corporations around the world to pay more attention to how business is operated.

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[451] 'Corporate criminal liability in Germany' (Norton Rose Fulbright, April 2016) < https://www.nortonrosefulbright.com/en-de/knowledge/publications/800922a0/corporate-criminal-liability-in-germany >, accessed July 11, 2020
[452] Anca Iulia Pop, *Criminal Liability of Corporations – Comparative Jurisprudence* (2006) 35
[453] Steven W. Fleming, Matthew Latham and Thomas Haystead, 'Changes Ahead For Australia's Corporate Criminal Liability Regime' (Mondaq, November 21, 2019) < https://www.mondaq.com/australia/crime/866484/changes-ahead-for-australia39s-corporate-criminal-liability-regime >, accessed June 21, 2020

FINDING II : "Prevention is key" has become the new model followed by corporations in order to avoid having corporate criminal liability imposed onto them

Corporate integrity is, after all, based on a proper compliance system, and this statement has never had more importance than now, when ethics and compliance programs are considered the bulk of corporate criminal liability.[454] As discussed in Chapter I, compliance programs entered the corporate liability landscape in 1991 with respect to the system of Federal Criminal Law of the United States. The fact that a corporation could substantially reduce its sentence if it had a proper (and effective) compliance program established has triggered a powerful and opinionated response in the corporate world.[455] This also created a path towards mitigating criminal responsibility – as earlier mentioned, if the corporation had an effective compliance program, prosecutors would have considered it a valuable factor in whether or not to charge the supposedly liable corporation. Therefore, the importance of compliance programs became paramount, and more and more corporations were eager to implement them in order to mitigate the criminal responsibility which could have been imposed upon them.[456]

Even if the concept of compliance programs has entered the corporate liability landscape more than two decades ago, a few of the countries discussed in this thesis started adhering and practically implementing corporate compliance programs much later. Romania adopts a "prevention is key" principle, even if no statutory provision makes reference to whether the existence of a compliance program will influence the prosecutors' decision to prosecute or whether the sentence will be reduced. However, in France, Sapin-II (enacted in 2016) provides that companies should establish a proper code of conduct, a whistleblowing channel, and to perform due diligence on customers, key vendors, and third-party agents. The enactment of Sapin-II shows that French companies have not put compliance programs on hold, waiting for hefty fines before taking action. Due to the numerous areas handled by several companies, compliance can only be properly implemented within companies if it reports to executive management and interacts with various business and support demands.[457] The United Kingdom and the United States both have

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[454] Zachary J. Goldberg, *Reflections on Ethics and Responsibility: Essays in Honor of Peter A. French* (Springer, 2017) 44
[455] Ibid., 44-45
[456] Ibid., 45
[457] KPMG, 'Regulatory Compliance in France' (KPMG, October 2016) 23 < https://assets.kpmg/content/dam/kpmg/fr/pdf/2017/02/fr-survey-regulatory-compliance-France-2016.pdf?logActivity=true >, accessed July 10, 2020

a similar approach to compliance programs as France has, as the current statutes (the Bribery Act 2010 and the FCPA) make it a requirement for companies to have proper procedures in place in order to detect, investigate and prevent corrupt activities.

This however does not apply in the case of Germany, which is currently considering creating a corporate criminal code. (as discussed in Chapter VI). A code which will address the attribution of corporate criminal liability and automatically implement procedures which will help in combating corporate crime. The same could be said about Australia (Chapter VII), as it finds itself in the midst of a major paradigm shift, and the ALRC's discussion paper introduces the due diligence defense available to companies accused of corporate misconduct. This supports the idea that compliance programs are important elements of corporate governance in Australia. Legislators are initiating the discussion of comprehensive compliance obligations in laws and, furthermore, courts have indicated that the cost of the absence of a compliance program can and should be significant.[458] As such, the measures taken by the six countries analyzed in this thesis are upholding the "prevention is key" principle, as corporations are implementing ethics and compliance programs more and more; an idea which proves the fact that the criminal liability of corporations is treated as a serious issue and that corporations strive to be more transparent and law-abiding, after several prosecutions have led to immense fines and a tarnished reputation which causes investors' loss of trust and a reduction in business opportunities.

Because corporate governance is an extremely complex ecosystem in which corporate criminal liability has been considered peripheral,[459] issues relating to corporate criminal liability should be integrated into corporate governance, as companies should align their corporate compliance cultures with statutory provisions and government recommendations. There is a common misconception that compliance programs are associated with non-criminal legislation when, in fact, considering these programs for the prevention of criminal behavior is crucial in our day and age. As it has been discussed throughout this thesis, there is no "one-size-fits-all" type of compliance program, but it shall include: the development, implementation, and adherence to stand-

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[458] Professional Standards Councils, 'A Framework for Compliance' (Government of Australia) 4 < https://www.psc.gov.au/sites/default/files/A%20framework%20for%20compliance.pdf >, accessed June 27, 2020; *ACCC v. MNB Variety Imports Pty Ltd.* (1998) ATPR 41-617, [40,758]

[459] Jennifer G. Hill, 'Corporate Criminal Liability in Australia: An Evolving Corporate Governance Technique?' (2003) 1 Journal of Business Law, 39 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=429220 >, accessed June 17, 2020

ardized operational compliance policies, procedures, standards of conduct, safeguards, and written guidelines that outline an organization's expectations of its employees.[460]

CONCLUSION

Corporate criminal liability and legal compliance have become top priorities that legal systems and corporations around the world should effectively address. The importance of these two concepts derives from the idea that there should be a fair, transparent and profitable conduct across all businesses, and all companies have the responsibility of administering professional standards across the entire corporate structure, from high-ranking directors to ordinary employees. A robust compliance program is needed in order to ensure that occupational associations and their members comply with their obligations under relevant professional standards imposed by codes of conduct or statutory provisions and that instances of non-compliance are addressed by national law enforcement or other action which has the ability to sanction.[461] Central to a successful compliance program is the commitment of managerial and executive staff without which an organization will fail to achieve an effective program of compliance. Managers and other executives should communicate their commitment to compliance by being involved in the provision of resources and allocation to staff in order to enable the development and successful implementation of such a program.[462]

The research conducted on the six countries within the scope of this thesis has shown that all six states adhere to principles that have been approved internationally: first, that corporations can and should be liable for corporate misconduct (including criminal activities) and, second, that compliance programs do provide for an effective prevention of corporate crime, despite the fact that they are being placed under scrutiny by legal academics due to their application to an "artificial" entity. The reason why these compliance programs prove to be effective is due to the increased number of prosecutions for illicit activities (bribery, embezzlement, etc.) and because of the increased number of corporations that are more and more eager to implement such com-

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460 'The Key Requirements for an Effective Compliance Program' (Law Compliance) < https://lawcompliance.com.au/key-requirements-effective-compliance-program-2/ >, accessed June 27, 2020
461 Professional Standards Councils, 'A Framework for Compliance' (Government of Australia) 4 < https://www.psc.gov.au/sites/default/files/A%20framework%20for%20compliance.pdf >, accessed June 27, 2020
462 'The Key Requirements for an Effective Compliance Program' (Law Compliance) < https://lawcompliance.com.au/key-requirements-effective-compliance-program-2/ >, accessed June 27, 2020

pliance programs in order to avoid the imposition of corporate criminal liability. However, this idea might seem unreasonable to some, as corporations possess far more methods of conducting investigations, and this places companies at an unfair advantage compared to individuals – but this unreasonableness is in itself justified – because an individual, even though attributed the same sort of criminal liability as corporations, does not and cannot fulfil the requirement of due diligence as, more often than not, an individual will not engage in the same type of transactions the way a company does. A company possesses several resources through which it can prove its due diligence requirement in order to be granted the defense, and this should not be considered as a legal misuse of the concept of corporate criminal liability, because the area of corporations has always been subjected to scrutiny due to its artificial and non-human characteristic – principles pertaining to natural persons are extended to legal persons as well, but taking into considerations its existence from a legal standpoint. The *actus reus* cannot differ, but the *mens rea* will always be applied guardedly, depending on the legal position of the defendant (be it a natural person or a legal person).

Corporate criminal liability would not have existed without a rethinking on traditional criminal law principles, and this has shown that governments around the world have taken the problem of attributing criminal liability on corporations very seriously, as they have taken steps in enacting and amending legislations and regulations in order to integrate corporate criminal liability within their legal systems. While some of these enactments or amendments may not be as strong as desired, they aim at leading businesses towards a concise, transparent model of operation, in hopes of achieving a proper internationally recognized standard of compliance, regaining trust as countries for international organizations tasked with the assessment of both corruption and compliance levels. This concise and transparent approach which is specific to a compliance culture has been contested by several corporations until business was negatively affected – in the international landscape, several corporations have difficulties in accepting transactional relationships with companies that do not have a proper ethics and compliance program implemented. Uncertainty has become an immense problem when entering a transactional relationship, and not having proper protections from criminal liability in place can pose problems for the effective performance of a commercial contract (be it in regards to a merger, an acquisition, or a joint venture) and this problem can lead to a termination even before the negotiation stage begins.

The current international response has not put compliance programs on hold, as their importance has grown substantially in the last decade, and the six legal systems discussed in this thesis have taken steps in trying to integrate in domestic legislation and effectively support the corporate criminal liability of corporations, despite several arguments that the traditional system did not require any kind of amendments. The concept of the compliance program is anfractuous in itself – a common template, but tailored to the needs of companies; this is why, as aforementioned, there is no "one-size-fits-all" type of such a program – as there are different corporate structures, business models, risks, and approaches to the method of conducting the activities of the business. Regardless of the problems that might arise when creating and implementing an effective compliance program, corporations cannot afford to settle for "good enough", because this can easily represent a weakness that could be susceptible to the imposition of criminal liability.

A compliance culture adopted by corporations around the world represents an effective prophylaxis of corporate crime, and the current international response is more than adequate with respect to this issue, even if it may be a challenge to adopt such a culture, due to the current tempestuous state of the business environment. Companies are facing significant economic challenges with shrinking margins and more expectations of growth across the years.[463] International markets and developing economies continue to be the focus for the increases in revenue and profits, and when considering these economic challenges and constraints, furthermore adding the unprecedented level of corruption enforcement, it is no wonder that many are daunted.[464] Notwithstanding the above-mentioned facts, it is important to conclude that no compliance program, no matter how expensive or extensive, can provide the absolute assurance of compliance, after all.[465] An effective anti-corruption compliance program will affect a company's culture in a positive way nonetheless and make non-compliance far less likely.[466] This thesis has provided an in-depth understanding of regulatory compliance and a systematic approach to the international response towards corporate crime, a response which has sent a positive signal to the public – a signal which will continue to resonate over the years, as a better handling of issues appearing within the sphere of corporate crime is to be expected.

[463] Brian Loughman and Richard Sibery, *Bribery and Corruption: Navigating the Global Risks* (Ernst & Young LLP, 2012) 6
[464] Ibid.
[465] Ibid., 72
[466] Ibid.

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ABSTRACT (ENGLISH)

In a world in which crime has increased significantly, where the law environment is in a continuous change, and the methods of committing crime are more specific than ever, it is imperative to not just know and understand the regulations, but to also take into consideration what better means of protection can spring to existence. The latter can be either through amending or creating new laws and regulations. This context and the need for operational transparency have put the organizations and companies in the position of having consolidated and harmonized compliance programs and, furthermore, the states find themselves in the same position of having strong legislation enacted in the field of corporate crime which covers offences such as bribery and money laundering. Therefore, companies develop compliance programs not just to prevent crime, but to provide for the opportunity of self-reporting through the detection of illicit activities. Evidently, even if such compliance programs will never fully deter employee or executive (upper management) misconduct and criminality, these programs will strive to prevent and combat as much and as strongly as possible.

The title of this thesis, as well as its main objectives of providing an in-depth understanding of regulatory compliance and a systemic approach to the global response towards corporate crime are encompassed by the research question herein: "*Is the current international response substantially strong enough for the prophylaxis of corporate crime through compliance programs?*". A question which, in addition, helps introduce the analysis of the response of six different countries towards the combat against white-collar crime. The countries which will be analyzed are: Romania, the United Kingdom, the United States, France, Germany, and Australia. For each country, the analysis will comprise of:

(1) the illustration of the evolution of corporate criminal liability
(2) the focus on whether domestic law is strong enough as to provide for a positive outcome, namely the decrease of corporate crime.

The structure of the paper is comprised of eight chapters, and in developing this thesis, the following publications may be helpful:

(1) *Corporate Criminal Liability*, A. Pinto and M. Evans; Third Edition, Sweet & Maxwell, 2013
(2) *Corporations and Criminal Responsibility*, C. Wells; Second Edition, Oxford University Press, 2001
(3) *Criminal Liability of Companies Survey*, Lex Mundi Business Crimes and Compliance Practice Group; Lex Mundi, 2008
(4) *Corporate Liability in Europe*, Clifford Chance; Clifford Chance, 2012
(5) *OECD Regulatory Policy Outlook 2015*, OECD; OECD, 2015
(6) *Financial Crime in Germany: overview*, A. Öhmichen and T.C. Knierim; 2015
(7) *The Romanian Criminal Code (General and Special Parts: Commentary)*, I. Pascu, V. Dobrinoiu and A. Hotca; Universul Juridic, 2016

Several other publications, including but not limited to practitioners' guides and journals, textbooks, government reports and guidelines published by associations will also be used in this thesis as and when required.

In conclusion, the thesis aims to respond to the research question: "*Is the current international response substantially strong enough for the prophylaxis of corporate crime through compliance programs?*". Furthermore, it also aims to raise awareness of the importance of the implementation of compliance programs within corporations and of the importance of properly implemented domestic regulations which provide for suitable prevention of corporate crime.

ABSTRACT (DEUTSCH)

In einer Welt, in der die Kriminalität erheblich zugenommen hat, in der sich das Rechtsumfeld ständig ändert und die Art und Weise der Begehung von Kriminalität spezifischer denn je ist, ist es unerlässlich, nicht nur die aktuellen Gesetze und Vorschriften zu kennen und zu verstehen, sondern auch zu überlegen, welche besseren Schutzmittel entstehen können, indem neue Gesetze und Vorschriften geändert oder geschaffen werden. Dieser Kontext und die Notwendigkeit operativer Transparenz haben die Organisationen und Unternehmen in die Lage versetzt, Compliance-Programme zu konsolidieren und zu harmonisieren, und darüber hinaus befinden sich die Staaten in der gleichen Position, strenge Gesetze im Bereich der Unternehmenskriminalität zu erlassen, die Straftaten abdecken wie Bestechung und Geldwäsche. Daher entwickeln Unternehmen Compliance-Programme nicht nur, um Kriminalität zu verhindern, sondern auch um die Möglichkeit der Selbstberichterstattung durch Aufdeckung illegaler Aktivitäten zu schaffen. Selbst wenn solche Compliance-Programme das Fehlverhalten und die Kriminalität von Mitarbeitern oder Führungskräften (oberes Management) niemals vollständig vereiteln, werden diese Programme offensichtlich darauf abzielen, sie so gut und so effizient wie möglich zu bekämpfen.

Der Titel dieser Master Thesis, sowie ihre Hauptziele, ein tiefgreifendes Verständnis der Einhaltung von Vorschriften und einen systematischen Ansatz für die globale Reaktion auf Unternehmenskriminalität zu vermitteln, sind in der vorliegenden Forschungsfrage enthalten: „*Ist die aktuelle internationale Reaktion im Wesentlichen stark genug, zur Prophylaxe der Unternehmenskriminalität durch Compliance-Programme?*“. Diese Forschungsfrage wird außerdem dazu beitragen, die Analyse der Reaktion von sechs verschiedenen Ländern auf die Bekämpfung der Wirtschaftskriminalität einzuführen. Die Länder, die analysiert werden, sind: Rumänien, das Vereinigte Königreich, die Vereinigten Staaten, Frankreich, Deutschland und Australien. Für jedes Land umfasst die Analyse:

(1) die Darstellung der Entwicklung der strafrechtlichen Haftung von Unternehmen, und
(2) der Fokus darauf, ob das innerstaatliche Recht stark genug ist, um ein positives Ergebnis zu erzielen, nämlich die Verringerung der Unternehmenskriminalität.

Im Laufe der Jahre hat sich gezeigt, dass mehrere Unternehmen Probleme damit haben, dass ihre Mitarbeiter die Technik der Selbstberichterstattung anwenden können. Der Hauptgrund für dieses Problem ist, dass Mitarbeiter häufig eingeschüchtert werden, um illegales Verhalten des oberes Managements zu melden, und dass Mitarbeiter seit vielen Jahren zögern, ihren eigenen Unternehmen zu helfen. Aus diesem Grund sollten Compliance-Programme von einem Aufsichtsrat strukturiert werden, der vollständig vom oberen Management des Unternehmens getrennt ist. Eine solche Trennung könnte außergewöhnliche Ergebnisse bringen, nicht nur in Bezug auf die Verhinderung von illegalem Verhalten und Kriminalität, sondern auch in Bezug auf die Schaffung einer sicheren Atmosphäre, in der Mitarbeiter anonym über Aktivitäten berichten können, die die gute Arbeitsleistung beeinträchtigen.

Einige andere Veröffentlichungen, einschließlich, aber nicht beschränkt auf Leitfäden und Zeitschriften für Praktiker, Lehrbücher, Regierungsberichte und Richtlinien, die von Verbänden veröffentlicht werden, werden bei Bedarf auch in dieser Master Thesis verwendet.

Zusammenfassend soll die Master Thesis auf die oben genannte Forschungsfrage antworten. Darüber hinaus zielt die Master Thesis darauf ab, das Bewusstsein für die Bedeutung der Umsetzung von Compliance-Programmen in Unternehmen und offensichtlich für die Bedeutung ordnungsgemäß umgesetzter innerstaatlicher Vorschriften zu schärfen, die eine angemessene Verhütung von Unternehmenskriminalität gewährleisten.

ANNEX 1

ROMANIA – The Romanian Criminal Code

Art. 135. Conditions for the criminal liability of legal entities

(1) Legal entities, except for state and public authorities, shall have criminal liability for offenses committed in the performance of the object of activity of legal entities or in their interest or behalf.

(2) Public institutions shall not be held criminally liable for offenses committed in the performance of activities that cannot be the object of the private domain.

(3) Criminal liability of legal entities does not exclude the criminal liability of the individual participating in the commission of the same act.

Art. 136. Penalties applicable to legal entities

(1) The penalties applicable to legal entities include main penalties and ancillary penalties.

(2) The main penalty is represented by fines.

(3) The ancillary penalties are:

a) winding-up of legal entities;

b) suspension of the activity or of one of the activities performed by the legal entity, for a term between three months and three years;

c) closure of working points of the legal entity for a term between three months and three years;

d) prohibition to participate in public procurement procedures for a term between one and three years;

e) placement under judicial supervision;

f) display or publication of the conviction sentence.

Art. 137. Calculating fines for legal entities

(1) A fine consists of the money a legal entity is ordered to pay to the State.

(2) The amount of the fine is determined based on the fine-days system. The amount corresponding to the fine-days, varying between Lei 100 and 5000, shall be multiplied by the number of days subject to the fine (between 30 and 600 days).

(3) The court shall decide on the number of days subject to the fine considering the general criteria for the customization of penalty. The amount of the fine-days is determined by taking into account the turnover (in case of for-profit legal entities), and the value of assets (in case of the other legal entities), as well as other obligations of the legal entity.
(4) The special limits of the days subject to the fine range between:
a) 60 and 180 days, when only the penalty consisting of the fine is provided by law for the offense committed;
b) 120 and 240 days, when the law provides a term of imprisonment of max. five years, as such or as alternative to the fine;
c) 180 and 300 days, when the law provides a term of imprisonment of max. 10 years;
d) 240 and 420 days, when the law provides a term of imprisonment of max. 20 years;
e) 360 and 510 days, when the law provides a term of imprisonment exceeding 20 years or life imprisonment.
(5) When the offense committed by legal entity was intended to the obtaining of a monetary benefit, the special limits of the fine-days provided by law for the committed offense may be increased by one-third, without exceeding the general maximum of the fine. When determining the fine, the value of the monetary benefit obtained or sought shall be considered.

Art. 139. Dissolution of legal entities
(1) The ancillary penalty consisting of the dissolution of legal entity is enforced when:
a) a legal entity was incorporated for the purpose of committing offenses;
b) the objects of a legal entity were altered for the purpose of committing offenses, and the penalty provided by law for the offense committed is a term of imprisonment exceeding 3 years.
(2) In case of failure to serve one of the ancillary penalties under Art. 136 par. (3) let. b) - e), in ill-faith, the Court shall order the dissolution of the legal entity.

Art. 140. Suspending the activity of legal entities
(1) The ancillary penalty consisting in suspending the activity of the legal entity implies the prohibition to perform the activity or one of the activities of the legal entity, during the performance of which the offense was committed.
(2) In case of failure to serve the ancillary penalty under Art. 136 let. f), in ill-faith, the court shall order the activity or one of the activities of the legal entity suspended until the service of the ancillary penalty, but no longer than three months.

(3) If the ancillary penalty is not served before the term provided under par. (2) is reached, the court shall order the dissolution of the legal entity.

Art. 142. Closure of operation locations of a legal entity

(1) The ancillary penalty consisting in the closure of operation locations of the legal entity implies the closure of one or several operation locations of the for-profit legal entity, where the activity that included the offense was performed.

(2) The stipulations under par. (1) shall not apply to legal entities performing activities in the mass-media.

Art. 143. Ban on taking part in public procurement tenders

The ancillary penalty of a ban on taking in public procurement tenders implies the prohibition to participate, either directly or indirectly, in the procedures for the awarding of public contracts, provided by law.

Art. 144. Placement under judicial supervision

(1) The ancillary penalty of placement under judicial supervision consists of the performance, under the supervision of a judicial agent, of the activity on the occasion of which the offense was committed, for a period between one and three years.

(2) The judicial agent has the obligation to inform the Court when it finds that the legal entity failed to take the necessary steps to prevent commission of new offenses. If the court finds the notification to be grounded, it shall order the replacement of such penalty with the penalty provided under Art. 140.

(3) The placement under judicial supervision shall not apply to legal entities provided under Art. 141.

Art. 145. Posting or publication of the conviction sentence

(1) The posting or publication of the final conviction sentence is done at the expense of the sentenced legal entity.

(2) Disclosure of the identity of other persons is not allowed in the posting or publication of the conviction sentence.

(3) The conviction sentence shall be posted as extract, in the manner and at the place decided by the court, for a period between one and three months.

(4) The conviction sentence shall be posted as extract and in the manner decided by the court, by means of the written or audiovisual media or using other audiovisual means of communication indicated by court.
(5) If publication is made in the written or audiovisual media, the court shall decide on the number of publications which may not be higher than ten; in case of publication using other audiovisual means, such duration shall not exceed three months.

Art. 289. Taking a bribe
(1) The action of the public servant who, directly or indirectly, for themselves or on behalf of others, solicits or receives money or other undue benefits or accepts a promise of money or benefits, in exchange for performing, not performing, speeding up or delaying the performance of an action which falls under purview of their professional duties or with respect to the performance of an action contrary to their professional duties, constitutes a violation of the law and shall be punishable by no less that 3 and no more than 10 years of imprisonment and the ban from exercising the right to hold a public office or to exercise the profession or the activity in relation to which they committed the violation.
(2) The action provided under par. (1), committed by one of the persons provided under Article 175 par. (2), shall constitute a criminal offense only when committed in relation with the performance or delaying the performance of an action related to their legal duties or related to the performance of an action contrary to such duties.
(3) The money, valuables or any other benefits received shall be subject to forfeiture , and when such can no longer be located, the forfeiture of the equivalent shall be ordered.

Art. 290. Giving a bribe
(1) The promise, the giving or the offering of money or other benefits in the conditions provided under Article 289 shall be punishable by no less than 2 and no more than 7 years of imprisonment.
(2) The action provided under par. (1) shall not constitute an offense when the bribe giver was constrained by any means by the bribe taker.
(3) The bribe giver shall not be punishable if they report the action prior to the criminal investigation bodies be notified thereupon.

(4) The money, valuables or any other assets given shall be given back to the person who gave them in the case provided under par. (2) or given following the denunciation provided under par. (3).
(5) The money, valuables or any other benefits offered or given shall be subject to forfeiture, and when such cannot be located anymore, the forfeiture of the equivalent shall be ordered.

Art. 295. Embezzlement
1) Acceptance, use or traffic of money, valuables or any other assets managed or administrated by a public servant, on their or on another person's behalf, shall be punishable by no less than 2 and no more than 7 years of imprisonment and the ban from exercising the right of holding public office.
(2) The attempt thereof shall be punishable.

Art. 298. Professional negligence
The culpable breach by a public official of a professional duty by failing to carrying it out or by faultily carrying it out, if it results in damage or violation of the legitimate rights or interests of a natural or legal entity shall be punishable by no less than 3 months and no more than 3 years of imprisonment, or by a fine.

ANNEX 2

UNITED KINGDOM – Companies Act 2006, Corporate Manslaughter and Corporate Homicide Act 2007, Bribery Act 2010

COMPANIES ACT 2006

s. 172 Duty to promote the success of the company

(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—

(a) the likely consequences of any decision in the long term,

(b) the interests of the company's employees,

(c) the need to foster the company's business relationships with suppliers, customers and others,

(d) the impact of the company's operations on the community and the environment,

(e) the desirability of the company maintaining a reputation for high standards of business conduct, and

(f) the need to act fairly as between members of the company.

(2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.

(3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company.

s. 173 Duty to exercise independent judgment

(1) A director of a company must exercise independent judgment.

(2) This duty is not infringed by his acting —

(a) in accordance with an agreement duly entered into by the company that restricts the future exercise of discretion by its directors, or

(b) in a way authorized by the company's constitution.

s. 174 Duty to exercise reasonable care, skill and diligence

(1) A director of a company must exercise reasonable care, skill and diligence.

(2) This means the care, skill and diligence that would be exercised by a reasonably diligent person with —

(a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the functions carried out by the director in relation to the company, and

(b) the general knowledge, skill and experience that the director has.

s. 175 Duty to avoid conflicts of interest

(1) A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company.

(2) This applies in particular to the exploitation of any property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity).

(3) This duty does not apply to a conflict of interest arising in relation to a transaction or arrangement with the company.

(4) This duty is not infringed—

(a) if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest; or

(b) if the matter has been authorized by the directors.

(5) Authorization may be given by the directors—

(a) where the company is a private company and nothing in the company's constitution invalidates such authorization, by the matter being proposed to and authorized by the directors; or

(b) where the company is a public company and its constitution includes provision enabling the directors to authorize the matter, by the matter being proposed to and authorized by them in accordance with the constitution.

(6) The authorization is effective only if—

(a) any requirement as to the quorum at the meeting at which the matter is considered is met without counting the director in question or any other interested director, and

(b) the matter was agreed to without their voting or would have been agreed to if their votes had not been counted.

(7) Any reference in this section to a conflict of interest includes a conflict of interest and duty and a conflict of duties.

s. 176 Duty not to accept benefits from third parties

(1) A director of a company must not accept a benefit from a third party conferred by reason of—

(a) his being a director, or

(b) his doing (or not doing) anything as director.

(2) A "third party" means a person other than the company, an associated body corporate or a person acting on behalf of the company or an associated body corporate.

(3) Benefits received by a director from a person by whom his services (as a director or otherwise) are provided to the company are not regarded as conferred by a third party.

(4) This duty is not infringed if the acceptance of the benefit cannot reasonably be regarded as likely to give rise to a conflict of interest.

(5) Any reference in this section to a conflict of interest includes a conflict of interest and duty and a conflict of duties.

s. 177 Duty to declare interest in proposed transaction or arrangement

(1) If a director of a company is in any way, directly or indirectly, interested in a proposed transaction or arrangement with the company, he must declare the nature and extent of that interest to the other directors.

(2) The declaration may (but need not) be made —

(a) at a meeting of the directors, or

(b) by notice to the directors in accordance with —

(i) section 184 (notice in writing), or

(ii) section 185 (general notice).

(3) If a declaration of interest under this section proves to be, or becomes, inaccurate or incomplete, a further declaration must be made.

(4) Any declaration required by this section must be made before the company enters into the transaction or arrangement.

(5) This section does not require a declaration of an interest of which the director is not aware or where the director is not aware of the transaction or arrangement in question.For this purpose a director is treated as being aware of matters of which he ought reasonably to be aware.

(6) A director need not declare an interest —

(a) if it cannot reasonably be regarded as likely to give rise to a conflict of interest;

(b) if, or to the extent that, the other directors are already aware of it (and for this purpose the other directors are treated as aware of anything of which they ought reasonably to be aware); or
(c)if, or to the extent that, it concerns terms of his service contract that have been or are to be considered —
(i) by a meeting of the directors, or
(ii) by a committee of the directors appointed for the purpose under the company's constitution.

CORPORATE MANSLAUGHTER AND CORPORATE HOMICIDE ACT 2007

s. 1 The offence
(1) An organization to which this section applies is guilty of an offence if the way in which its activities are managed or organized —
(a) causes a person's death, and
(b) amounts to a gross breach of a relevant duty of care owed by the organization to the deceased.
(2) The organizations to which this section applies are —
(a) a corporation;
(b) a department or other body listed in Schedule 1;
(c) a police force;
(d) a partnership, or a trade union or employers' association, that is an employer.
(3) An organization is guilty of an offence under this section only if the way in which its activities are managed or organized by its senior management is a substantial element in the breach referred to in subsection (1).
(4) For the purposes of this Act —
(a) “relevant duty of care” has the meaning given by section 2, read with sections 3 to 7;
(b) a breach of a duty of care by an organization is a “gross” breach if the conduct alleged to amount to a breach of that duty falls far below what can reasonably be expected of the organization in the circumstances;
(c) “senior management”, in relation to an organization, means the persons who play significant roles in —
(i) the making of decisions about how the whole or a substantial part of its activities are to be managed or organized, or
(ii) the actual managing or organizing of the whole or a substantial part of those activities.

(5) The offence under this section is called —
(a) corporate manslaughter, in so far as it is an offence under the law of England and Wales or Northern Ireland;
(b) corporate homicide, in so far as it is an offence under the law of Scotland.
(6) An organization that is guilty of corporate manslaughter or corporate homicide is liable on conviction on indictment to a fine.
(7) The offence of corporate homicide is indictable only in the High Court of Justiciary.

BRIBERY ACT 2010

s. 1 Offences of bribing another person
(1) A person ("P") is guilty of an offence if either of the following cases applies.
(2) Case 1 is where —
(a) P offers, promises or gives a financial or other advantage to another person, and
(b) P intends the advantage —
(i) to induce a person to perform improperly a relevant function or activity, or
(ii) to reward a person for the improper performance of such a function or activity.
(3) Case 2 is where —
(a) P offers, promises or gives a financial or other advantage to another person, and
(b) P knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.
(4) In case 1 it does not matter whether the person to whom the advantage is offered, promised or given is the same person as the person who is to perform, or has performed, the function or activity concerned.
(5) In cases 1 and 2 it does not matter whether the advantage is offered, promised or given by P directly or through a third party.

s. 2 Offences relating to being bribed
(1) A person ("R") is guilty of an offence if any of the following cases applies.
(2) Case 3 is where R requests, agrees to receive or accepts a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly (whether by R or another person).
(3) Case 4 is where —

(a) R requests, agrees to receive or accepts a financial or other advantage, and
(b) the request, agreement or acceptance itself constitutes the improper performance by R of a relevant function or activity.
(4) Case 5 is where R requests, agrees to receive or accepts a financial or other advantage as a reward for the improper performance (whether by R or another person) of a relevant function or activity.
(5) Case 6 is where, in anticipation of or in consequence of R requesting, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is performed improperly —
(a) by R, or
(b) by another person at R's request or with R's assent or acquiescence.
(6) In cases 3 to 6 it does not matter —
(a) whether R requests, agrees to receive or accepts (or is to request, agree to receive or accept) the advantage directly or through a third party,
(b) whether the advantage is (or is to be) for the benefit of R or another person.
(7) In cases 4 to 6 it does not matter whether R knows or believes that the performance of the function or activity is improper.
(8) In case 6, where a person other than R is performing the function or activity, it also does not matter whether that person knows or believes that the performance of the function or activity is improper.

s. 6 Bribery of foreign public officials
(1) A person ("P") who bribes a foreign public official ("F") is guilty of an offence if P's intention is to influence F in F's capacity as a foreign public official.
(2) P must also intend to obtain or retain—
(a) business, or
(b) an advantage in the conduct of business.
(3) P bribes F if, and only if—
(a) directly or through a third party, P offers, promises or gives any financial or other advantage —
(i) to F, or
(ii) to another person at F's request or with F's assent or acquiescence, and

(b) F is neither permitted nor required by the written law applicable to F to be influenced in F's capacity as a foreign public official by the offer, promise or gift.

(4) References in this section to influencing F in F's capacity as a foreign public official mean influencing F in the performance of F's functions as such an official, which includes —

(a) any omission to exercise those functions, and

(b) any use of F's position as such an official, even if not within F's authority.

(5) "Foreign public official" means an individual who —

(a)holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the United Kingdom (or any subdivision of such a country or territory),

(b) exercises a public function —

(i) for or on behalf of a country or territory outside the United Kingdom (or any subdivision of such a country or territory), or

(ii) for any public agency or public enterprise of that country or territory (or subdivision), or

(c) is an official or agent of a public international organization.

(6) "Public international organization" means an organization whose members are any of the following—

(a) countries or territories,

(b) governments of countries or territories,

(c) other public international organizations,

(d) a mixture of any of the above.

(7) For the purposes of subsection (3)(b), the written law applicable to F is—

(a) where the performance of the functions of F which P intends to influence would be subject to the law of any part of the United Kingdom, the law of that part of the United Kingdom,

(b) where paragraph (a) does not apply and F is an official or agent of a public international organization, the applicable written rules of that organization,

(c) where paragraphs (a) and (b) do not apply, the law of the country or territory in relation to which F is a foreign public official so far as that law is contained in—

(i) any written constitution, or provision made by or under legislation, applicable to the country or territory concerned, or

(ii) any judicial decision which is so applicable and is evidenced in published written sources.

(8) For the purposes of this section, a trade or profession is a business.

s. 7 Failure of commercial organizations to prevent bribery

(1) A relevant commercial organization ("C") is guilty of an offence under this section if a person ("A") associated with C bribes another person intending —

(a) to obtain or retain business for C, or

(b) to obtain or retain an advantage in the conduct of business for C.

(2) But it is a defense for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct.

(3) For the purposes of this section, A bribes another person if, and only if, A —

(a) is, or would be, guilty of an offence under section 1 or 6 (whether or not A has been prosecuted for such an offence), or

(b) would be guilty of such an offence if section 12(2)(c) and (4) were omitted.

(4) See section 8 for the meaning of a person associated with C and see section 9 for a duty on the Secretary of State to publish guidance.

(5) In this section — "partnership" means —

(a) a partnership within the Partnership Act 1890, or

(b) a limited partnership registered under the Limited Partnerships Act 1907,

or a firm or entity of a similar character formed under the law of a country or territory outside the United Kingdom, "relevant commercial organization" means—

(a) a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere),

(b) any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom,

(c) a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), or

(d) any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom,

and, for the purposes of this section, a trade or profession is a business.

s. 11 Penalties

(1) An individual guilty of an offence under section 1, 2 or 6 is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 12 months, or to a fine not exceeding the statutory maximum, or to both,

(b) on conviction on indictment, to imprisonment for a term not exceeding 10 years, or to a fine, or to both.
(2) Any other person guilty of an offence under section 1, 2 or 6 is liable—
(a) on summary conviction, to a fine not exceeding the statutory maximum,
(b)on conviction on indictment, to a fine.
(3) A person guilty of an offence under section 7 is liable on conviction on indictment to a fine.
(4) The reference in subsection (1)(a) to 12 months is to be read—
(a) in its application to England and Wales in relation to an offence committed before the commencement of section 154(1) of the Criminal Justice Act 2003, and
(b) in its application to Northern Ireland, as a reference to 6 months.

s. 14 Offences under sections 1, 2 and 6 by bodies corporate etc.
(1) This section applies if an offence under section 1, 2 or 6 is committed by a body corporate or a Scottish partnership.
(2) If the offence is proved to have been committed with the consent or connivance of —
(a) a senior officer of the body corporate or Scottish partnership, or
(b) a person purporting to act in such a capacity,the senior officer or person (as well as the body corporate or partnership) is guilty of the offence and liable to be proceeded against and punished accordingly.
(3) But subsection (2) does not apply, in the case of an offence which is committed under section 1, 2 or 6 by virtue of section 12(2) to (4), to a senior officer or person purporting to act in such a capacity unless the senior officer or person has a close connection with the United Kingdom (within the meaning given by section 12(4)).
(4) In this section —
"director", in relation to a body corporate whose affairs are managed by its members, means a member of the body corporate,
"senior officer" means —
(a) in relation to a body corporate, a director, manager, secretary or other similar officer of the body corporate, and
(b) in relation to a Scottish partnership, a partner in the partnership.

ANNEX 3

UNITED STATES: The Model Penal Code and Title 18 U.S.C.

MODEL PENAL CODE

Section 2.07. Liability of Corporations, Unincorporated Associations and Persons Acting, or Under a Duty to Act, in Their Behalf.

(1) A corporation may be convicted of the commission of an offense if:

(a) the offense is a violation or the offense is defined by a statute other than the Code in which a legislative purpose to impose liability on corporations plainly appears and the conduct is performed by an agent of the corporation acting in behalf of the corporation within the scope of his office or employment, except that if the law defining the offense designates the agents for whose conduct the corporation is accountable or the circumstances under which it is accountable, such provisions shall apply; or

(b) the offense consists of an omission to discharge a specific duty of affirmative performance imposed on corporations by law; or

(c) the commission of the offense was authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation within the scope of his office or employment.

(2) When absolute liability is imposed for the commission of an offense, a legislative purpose to impose liability on a corporation shall be assumed, unless the contrary plainly appears.

(3) An unincorporated association may be convicted of the commission of an offense if:

(a) the offense is defined by a statute other than the Code that expressly provides for the liability of such an association and the conduct is performed by an agent of the association acting in behalf of the association within the scope of his office or employment, except that if the law defining the offense designates the agents for whose conduct the association is accountable or the circumstances under which it is accountable, such provisions shall apply; or

(b) the offense consists of an omission to discharge a specific duty of affirmative performance imposed on associations by law.

(4) As used in this Section:

(a) "corporation" does not include an entity organized as or by a governmental agency for the execution of a governmental program;

(b) "agent" means any director, officer, servant, employee or other person authorized to act in behalf of the corporation or association and, in the case of an unincorporated association, a member of such association;
(c) "high managerial agent" means an officer of a corporation or an unincorporated association, or, in the case of a partnership, a partner, or any other agent of a corporation or association having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation or association.
(5) In any prosecution of a corporation or an unincorporated association for the commission of an offense included within the terms of Subsection (1)(a) or Subsection (3)(a) of this Section, other than an offense for which absolute liability has been imposed, it shall be a defense if the defendant proves by a preponderance of evidence that the high managerial agent having supervisory responsibility over the subject matter of the offense employed due diligence to prevent its commission. This paragraph shall not apply if it is plainly inconsistent with the legislative purpose in defining the particular offense.
(6) (a) A person is legally accountable for any conduct he performs or causes to be performed in the name of the corporation or an unincorporated association or in its behalf to the same extent as if it were performed in his own name or behalf.
(b) Whenever a duty to act is imposed by law upon a corporation or an unincorporated association, any agent of the corporation or association having primary responsibility for the discharge of the duty is legally accountable for a reckless omission to perform the required act to the same extent as if the duty were imposed by law directly upon himself.
(c) When a person is convicted of an offense by reason of his legal accountability for the conduct of a corporation or an unincorporated association, he is subject to the sentence authorized by law when a natural person is convicted of an offense of the grade and the degree involved.

TITLE 18, U.S.C.

§ 201. Bribery of public officials and witnesses

(a) For the purpose of this section —
(1) the term “public official” means Member of Congress, Delegate, or Resident Commissioner, either before or after such official has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, in-

cluding the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror;

(2) the term “person who has been selected to be a public official” means any person who has been nominated or appointed to be a public official, or has been officially informed that such person will be so nominated or appointed; and

(3) the term “official act” means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official’s official capacity, or in such official’s place of trust or profit.

(b) Whoever —

(1) directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent —

(A) to influence any official act; or

(B) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of the lawful duty of such official or person;

(2) being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for:

(A) being influenced in the performance of any official act;

(B) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(C) being induced to do or omit to do any act in violation of the official duty of such official or person;

(3) directly or indirectly, corruptly gives, offers, or promises anything of value to any person, or offers or promises such person to give anything of value to any other person or entity, with intent to influence the testimony under oath or affirmation of such first-mentioned person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the

United States to hear evidence or take testimony, or with intent to influence such person to absent himself therefrom;
(4) directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity in return for being influenced in testimony under oath or affirmation as a witness upon any such trial, hearing, or other proceeding, or in return for absenting himself therefrom;
shall be fined under this title or not more than three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.
(c) Whoever —
(1) otherwise than as provided by law for the proper discharge of official duty—
(A) directly or indirectly gives, offers, or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official; or
(B) being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of any official act performed or to be performed by such official or person;
(2) directly or indirectly, gives, offers, or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court, any committee of either House or both Houses of Congress, or any agency, commission, or officer authorized by the laws of the United States to hear evidence or take testimony, or for or because of such person's absence therefrom;
(3) directly or indirectly, demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon any such trial, hearing, or other proceeding, or for or because of such person's absence therefrom;
shall be fined under this title or imprisoned for not more than two years, or both.
(d) Paragraphs (3) and (4) of subsection (b) and paragraphs (2) and (3) of subsection (c) shall not be construed to prohibit the payment or receipt of witness fees provided by law, or the payment, by the party upon whose behalf a witness is called and receipt by a witness, of the reasonable

cost of travel and subsistence incurred and the reasonable value of time lost in attendance at any such trial, hearing, or proceeding, or in the case of expert witnesses, a reasonable fee for time spent in the preparation of such opinion, and in appearing and testifying.

ANNEX 4

FRANCE: The Criminal Code and the Commercial Code

THE CRIMINAL CODE (CODE PÉNALE)

Article 121-1
No one is criminally liable except for his own conduct.

Article 121-2
Legal persons, with the exception of the State, are criminally liable for the offences committed on their account by their organs or representatives, according to the distinctions set out in articles 121-4 and 121-7.
However, local public authorities and their associations incur criminal liability only for offences committed in the course of their activities which may be exercised through public service delegation conventions. The criminal liability of legal persons does not exclude that of any natural persons who are perpetrators or accomplices to the same act, subject to the provisions of the fourth paragraph of article 121-3.

Article 445-1
Making or tendering, at any time, directly or indirectly, offers, promises, gifts, presents or any other advantages, to obtain from a person who, not being a public official or charged with a public service mission, holds or occupies, within the scope of his professional or social activity, a management position or any occupation for any person, whether natural or legal, or any other body, the performance or non-performance of any act within his occupation or position or facilitated by his occupation or position, in violation of his legal, contractual and professional oblig tions, is punished by five years' imprisonment and a fine of €75,000. The same penalties apply to giving in to any person referred to in the above paragraph who solicits, at any time, directly or indirectly, offers, promises, gifts, presents or any other advantages, to carry out or refrain from carrying out any act referred to in the above paragraph, in violation of his legal, contractual or professional obligations.

Article 445-2

Any person who, not being a public official or carrying on a public service mission, but holding or carrying on, in the context of a professional or social activity, any management position or any occupation for any person, whether natural or legal, or any other body, solicits or accepts, at any time, directly or indirectly, promises, gifts, presents or any advantages in order to carry out or refrain from carrying any act within his occupation or position or facilitated by his occupation or position, in violation of his legal, contractual and professional obligations, is punished by five years' imprisonment and a fine of €75,000.

Article 445-3

Natural persons found guilty of the offences set out in article 445-1 and 445-2 also incur the following additional penalties:

1º: Forfeiture of civic, civil and family rights as set out in article 131-26;

2º: the prohibition to carry on the professional or social activity in the exercise or the context of which the offence was committed, for a maximum of five years.

3º: the confiscation, according to the conditions set out in article 131-21, of the thing which was used or intended for the commission of the offence or of the thing which is its product, except for articles subject to restitution;

4º: the display or dissemination of the decision according to the conditions set out in article 131-35.

Article 445-4

Legal persons can be held criminally liable, according to the conditions set out in article 121-2, for offences defined by article 445-1 and 445-2. The penalties incurred by legal persons are:

1º: a fine according to the conditions set out in article 131-38;

2º: the penalties referred to in 2º, 3º, 4º, 5º, 6º and 7º of article 131-39 for a maximum of five years. The prohibition referred to in 2º of article 131-39 concerns the activity in the exercise or the context of which the offence was committed;

3º: the confiscation, according to the conditions set out in article 131-21, of the thing which was used or intended for the commission of the offence or of the thing which is its product, except for articles subject to restitution;

4º: the display or the dissemination of the decision according to the conditions set out in article 131-35.

ANNEX 5

GERMANY: The Criminal Code (*Strafgesetzbuch – StGB*) and the Administrative Offenses Act (*Ordnungswidrigkeitengesetz – OWiG)*

THE CRIMINAL CODE (StGB)

Section 73

Confiscation of proceeds of crime from offenders and participants

(1) If the offender or participant has obtained anything by or for an unlawful act, the court orders the confiscation of that which was obtained.

(2) If the offender or participant has derived any benefits from the proceeds, the court also orders the confiscation of the benefits.

(3) The court may also order confiscation of objects which the offender or participant has obtained:

1. by way of sale of the object obtained or as compensation for its destruction, damage or confiscation or

2. on the basis of a right obtained.

Section 108e

Taking of bribes by and giving of bribes to elected officials

(1) Whoever, in the capacity as a Member of the Bundestag or as a member of one of the Länder parliaments, demands, allows themselves to be promised or accepts an undue advantage for themselves or a third party in return for performing or refraining from performing an act, upon request or instruction, in the exercise of their mandate incurs a penalty of imprisonment for a term not exceeding five years or a fine.

(2) Whoever offers, promises or grants to a Member of the Bundestag or a member of one of the Länder parliaments an undue advantage for the member themselves or a third party in return for that member performing or refraining from performing an act, upon request or instruction in the exercise of their mandate, incurs the same penalty.

(3) Members of
1. a local administrative body,
2. a body of an administrative unit established for a subarea of a Land or a local authority and elected in direct and general elections,
3. the Federal Convention,
4. the European Parliament,
5. a parliamentary assembly of an international organization and
6. a legislative body of a foreign state are considered equal to the members referred to in subsections (1) and (2).

(4) An undue advantage is in particular not deemed to exist if the acceptance of the advantage is in accordance with the relevant provisions relating to the member's legal status. The following is not considered an undue advantage:
1. a political mandate or a political function or
2. a donation which is permissible under the Political Parties Act or other relevant legislation.

(5) In addition to a sentence of imprisonment of at least six months, the court may order the loss of the ability to be elected in public elections and to vote on public matters.

Section 299

Taking and giving bribes in commercial practice

(1) Whoever, in commercial practice in the capacity as an employee or agent of a business,
1. demands, allows themselves to be promised or accepts a benefit for themselves or a third party in return for giving an unfair preference to another in the competitive purchase of goods or services in Germany or abroad or
2. without the permission of the business demands, allows themselves to be promised or accepts a benefit for themselves or a third party in return for performing or refraining from performing an act in the competitive purchase of goods or services, thereby breaching the duty incumbent on them towards the business,

incurs a penalty of imprisonment for a term not exceeding three years or a fine.

(2) Whoever, in commercial practice,
1. offers, promises or grants a benefit to an employee or agent of a business or a third party in return for giving that person or another an unfair preference in the competitive purchase of goods or services in Germany or abroad or

2. without the permission of the business offers, promises or grants an employee or agent of a business or a third party a benefit in return for performing or refraining from performing an act in the competitive purchase of goods or services, and thereby breaches the duty incumbent on them in relation to the business, incurs the same penalty.

Section 331

Accepting benefits

(1) Public officials, European officials or persons entrusted with special public service functions who demand, allow themselves to be promised or accept a benefit for themselves or for a third party in return for the discharge of a duty incur a penalty of imprisonment for a term not exceeding three years or a fine.

(2) Judges, members of a court of the European Union or arbitrators who demand, allow themselves to be promised or accept a benefit for themselves or a third party in return for the fact that they performed or will in the future perform a judicial act incur a penalty of imprisonment for a term not exceeding five years or a fine. The attempt is punishable.

(3) The offence does not entail criminal liability pursuant to subsection (1) if offenders allow themselves to be promised or accept a benefit which they did not demand and the competent authority, within the scope of its powers, either previously authorised the acceptance or offenders promptly make a report to the competent authority and it authorises the acceptance.

Section 332

Taking bribes

(1) Public officials, European officials or persons entrusted with special public service functions who demand, allow themselves to be promised or accept a benefit for themselves or for a third party in return for the fact that they performed or will in the future perform an official act, and thereby breached or would breach their official duties, incur a penalty of imprisonment for a term of between six months and five years. In less serious cases, the penalty is imprisonment for a term not exceeding three years or a fine. The attempt is punishable.

(2) Judges, members of a court of the European Union or arbitrators who demand, allow themselves to be promised or accept a benefit for themselves or for a third party in return for the fact that they performed or will in the future perform a judicial act, and thereby breached or would breach their judicial duties, incur a penalty of imprisonment for a term of between one year and

10 years. In less serious cases, the penalty is imprisonment for a term of between six months and five years.
(3) If offenders demand, allow themselves to be promised or accept a benefit in return for a future act, then subsections (1) and (2) already apply if they have indicated to the other person that they are willing
1. to breach their duties by doing the act or
2. to the extent that the act is within their discretion, to allow themselves to be influenced by the benefit when exercising their discretion.

Section 333
Granting benefits

(1) Whoever offers, promises or grants a public official, a European official, a person entrusted with special public service functions or a soldier in the Federal Armed Forces a benefit for that person or a third party in return for the discharge of a duty incurs a penalty of imprisonment for a term not exceeding three years or a fine.
(2) Whoever offers, promises or grants a judge, a member of a court of the European Union or an arbitrator a benefit for that person or a third party in return for the fact that they performed or will in the future perform a judicial act incurs a penalty of imprisonment for a term not exceeding five years or a fine.
(3) The offence does not entail criminal liability pursuant to subsection (1) if the competent authority, within the scope of its powers, either previously authorized the recipient's acceptance of the benefit or authorizes it upon prompt reporting by the recipient.

Section 334
Giving bribes
(1) Whoever offers, promises or grants a public official, a European official, a person entrusted with special public service functions or a soldier in the Federal Armed Forces a benefit for that person or a third party in return for the fact that they have performed or would in future perform an official act, and thereby breached or would breach their official duties, incurs a penalty of imprisonment for a term of between three months and five years. In less serious cases, the penalty is imprisonment for a term not exceeding two years or a fine.

(2) Whoever offers, promises or grants a judge, a member of a court of the European Union or an arbitrator a benefit for that person or a third party in return for the fact that they

1. performed a judicial act and thereby breached their judicial duties or
2. would perform a judicial act and would thereby breach their judicial duties incurs a penalty of imprisonment for a term of between three months and five years in the cases under no. 1, imprisonment for a term of between six months and five years in the cases under no. 2. The attempt is punishable.

(3) If offenders offer, promise or grant the benefit in return for a future act, then subsections (1) and (2) already apply if they attempt to induce others

1. to breach their duties by doing the act or
2. to the extent that the act is within their discretion, to allow themselves to be influenced by the benefit when exercising their discretion.

THE ADMINISTRATIVE OFFENCES ACT (OWiG)

Section 30

Regulatory Fine Imposed on Legal Persons and on Associations of Persons

(1) Where someone acting

1. as an entity authorized to represent a legal person or as a member of such an entity,
2. as chairman of the executive committee of an association without legal capacity or as a member of such committee,
3. as a partner authorized to represent a partnership with legal capacity, or
4. as the authorized representative with full power of attorney or in a managerial position as procura-holder or the authorized representative with a commercial power of attorney of a legal person or of an association of persons referred to in numbers 2 or 3,
5. as another person responsible on behalf of the management of the operation or enterprise forming part of a legal person, or of an association of persons referred to in numbers 2 or 3, also covering supervision of the conduct of business or other exercise of controlling powers in a managerial position, has committed a criminal offence or a regulatory offence as a result of which duties incumbent on the legal person or on the association of persons have been violated, or where the legal person or the association of persons has been enriched or was intended to be enriched, a regulatory fine may be imposed on such person or association.

(2) The regulatory fine shall amount
1. in the case of a criminal offence committed with intent, to not more than ten million Euros,
2. in the case of a criminal offence committed negligently, to not more than five million Euros.
Where there has been commission of a regulatory offence, the maximum regulatory fine that can be imposed shall be determined by the maximum regulatory fine imposable for the regulatory offence concerned. If the Act refers to this provision, the maximum amount of the regulatory fine in accordance with the second sentence shall be multiplied by ten for the offences referred to in the Act. The second sentence shall also apply where there has been commission of an act simultaneously constituting a criminal offence and a regulatory offence, provided that the maximum regulatory fine imposable for the regulatory offence exceeds the maximum in accordance with the first sentence.
(2a) In the event of a universal succession or of a partial universal succession by means of splitting (section 123 subsection 1 of the Reorganization Act (Umwandlungsgesetz), the regulatory fine in accordance with subsections 1 and 2 may be imposed on the legal successor(s). In such cases, the regulatory fine may not exceed the value of the assets which have been assumed, as well as the amount of the regulatory fine which is suitable against the legal successor. The legal successor(s) shall take up the procedural position in the regulatory fine proceedings in which the legal predecessor was at the time when the legal succession became effective.
(3) Section 17 subsection 4 and section 18 shall apply mutatis mutandis.
(4) If criminal proceedings or regulatory fining proceedings are not commenced on account of the criminal offence or of the regulatory offence, or if such proceedings are discontinued, or if imposition of a criminal penalty is dispensed with, the regulatory fine may be assessed independently. Statutory provision may be made to the effect that a regulatory fine may be imposed in its own right in further cases as well. Independent assessment of a regulatory fine against the legal person or association of persons shall however be precluded where the criminal offence or the regulatory offence cannot be prosecuted for legal reasons; section 33 subsection 1 second sentence shall remain unaffected.
(5) Assessment of a regulatory fine incurred by the legal person or association of persons shall, in respect of one and the same offence, preclude a confiscation order, in accordance with sections 73 or 73c of the Penal Code or in accordance with section 29a, against such person or association of persons.

(6) On issuance of a regulatory fining notice, in order to secure the regulatory fine, section 111e subsection 2 of the Code of Criminal Procedure shall be applied on proviso that the judgment is substituted by the regulatory fining notice.

ANNEX 6

AUSTRALIA: The Criminal Code Act 1995

12.1 General principles

(1) This Code applies to bodies corporate in the same way as it applies to individuals. It so applies with such modifications as are set out in this Part, and with such other modifications as are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals.

(2) A body corporate may be found guilty of any offence, including one punishable by imprisonment.

12.4 Negligence

(1) The test of negligence for a body corporate is that set out in section 5.5.

(2) If:

(a) negligence is a fault element in relation to a physical element of an offence; and

(b) no individual employee, agent or officer of the body corporate has that fault element; that fault element may exist on the part of the body corporate if the body corporate's conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers).

(3) Negligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:

(a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or

(b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.