MASTER THESIS

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„Corporate Crime and cross-border internal investigation issues“

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I. Introduction

This master thesis focuses in the first part on the important field of Corporate Crime which is increasing worldwide in recent years and nowadays. Especially huge legal processes, such as the „Dieselgate“, which originally became public in 2015 in the United States[1], are getting more attention in the media and signify not only legal problems but also economic and social issues for the companies and their employees. In this context, the detection of the impressive Siemens corruption scandal in 2008[2] should be mentioned which was „unprecedented in scale and geographic reach. The corruption involved more than $1.4 billion in bribes to government officials in Asia, Africa, Europe, the Middle East and the Americas.“[3] Furthermore, the Wirecard accounting scandal shocked the German financial market in 2020 and was one of the „biggest post-war fraud scandal.“[4] The Wirecard scandal attracted huge legal attention due to regulatory uncertainty which cast the German financial regulator „Bundesanstalt für Finanzdienstleistungsaufsicht“ (BaFin) and Wirecard's global acting auditor Ernst & Young GmbH in a critical light.[5]

Corporate Crime is a multifaceted action which includes a broad category of economic crime. Additionally, it does not exist only one legal definition of this type of crime. Therefore, it is a huge challenge to measure it and particularly, to impose criminal sanctions against corporations. To reach a better understanding what Corporate Crime is this thesis will describe the term according to the theory of Edwin Sutherland (1949). Sutherland has considered white-collar crime as a crime of the „Upper Classes“ and is one of the most popular criminologist in the field of white-collar and corporate crime.

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1 Cf. Christoph U. Schmid, Germany in Marco Frigessi di Rattalma (eds), *The Dieselgate: A legal perspective*, 2017, p. 27 and Legal Tribune Online, „Fünf Jahre Dieselgate: VW kann den Abgasskandal noch immer nicht abschließen“, 2020, *https://www.lto.de/recht/kanzleien-unternehmen/k/volkswagen-dieselgate-abgasaffaere-fuenf-jahre-juristische-aufarbeitung-strafrecht-schadensersatz/*, accessed on 19 February 2022

2 US Department of Justice, „Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines“, 2008, *https://www.justice.gov/archive/opa/pr/2008/December/08-crm-1105.html*, accessed on 19 February 2022 and BGH, 2008, 2 StR 587/07, *http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=Aktuell&nr=45994&linked=urt&Blank=1&file=dokument.pdf*, accessed on 19 February 2022

3 Bertrand Venard, „Lessons from the massive Siemens corruption scandal one decade later“, 2018, *https://theconversation.com/lessons-from-the-massive-siemens-corruption-scandal-one-decade-later-108694*, accessed on 19 February 2022

4 Reuters, „Timeline: The rise and fall of Wirecard, a German tech champion“, 2021, *https://www.reuters.com/article/us-germany-wirecard-inquiry-timeline-idUSKBN2B811J*, accessed on 19 February 2022

5 Ryan Browne, „The Enron of Germany: Wirecard scandal casts a shadow on corporate governance“, 2020, *https://www.cnbc.com/2020/06/29/enron-of-germany-wirecard-scandal-casts-a-shadow-on-governance.html*, accessed on 19 February 2022

Following this chapter an abstract overview focusing on criminal penalties against companies will be included. Based on the fact that presently a lot of companies are global acting the master thesis points out different criminal measures from the criminal law perspective of Germany and the United States. Please note that the work will illustrate only the entity liability and not the individual liability. Firstly, the legal requirements of corporate penalties have to be examined before consequently possible criminal sanctions will be analyzed according to the above mentioned two jurisdictions. In this context, it is important to mention that German criminal law does not recognize a direct liability of a company („societas delinquere non potest“) such as the criminal law in the United States. However, the German criminal law also constitutes criminal sanctions against companies.

Finally, the work will provide a brief summary of the global dimension of the „Dieselgate“ from the German and US legal perspective. The master thesis will emphasis the „Dieselgate“ (i.e. Volkswagen AG), as this is one of the biggest corporate and environmental scandals of the last years, besides the cases mentioned above.

The second part of the thesis deals with cross-border internal investigation issues. First, it was discussed how to specify Corporate Crime in general, but subsequently if such case occurs, companies must deal with it in an appropriate manner and collaborate with the respective governments and/or prosecutions by self-reporting and disclosing the relevant facts as an effective remedial measure to mitigate company's sentencing. Regarding this point it is very interesting firstly to define the term of internal investigation and how to conduct it, and secondly to describe its development, which is common practice in the US. At this point, the meaning of the Securities and Exchange Commission (SEC) in the US in the context of internal investigation will be illustrated.

The scope of internal investigation can be multi-faceted but this work should particularly contain the crucial aspect of the legal handling of (electronic) documents. The voluntarily full access to documents of a company can reduce the criminal measures taken by the prosecution. Nevertheless, it is a significant challenge to limit the cooperation to legitimate interests of the company and to avoid self-incrimination. Especially, the handling of documents containing personal information should be in line with national data protection regulations. The implementation of strong data privacy laws make cross-border investigations more challenging. Particularly, multinational companies have to be compliant while transferring personal information cross-border. This issue should be highlighted in accordance with the European General Data Protection Regulation (GDPR).

Furthermore, the thesis will illustrate the legal privilege approaches regarding the question to what extent does prosecutor's authorisation encompass the power to obtain documents generated within an internal investigation applicable to different jurisdictions, including Germany and the US. According to the Germany Code of Criminal Procedure (Strafprozessordnung, StPO) two facts outline privilege protection: „(i) legal obligation to maintain confidentiality of client information and (ii) right to remain silent as a witness in legal proceedings.“[6]

In comparison the legal situation in the US is that documents created during the course of an internal investigation are potentially protected by two principles: „the attorney-client privilege“ and „the attorney work product doctrine.“[7]

6 Cf. Wilhelm Hartung, Barry M. Hartman, Dylan G. Moses, Theodore L. Kornobis, Christoper A. Jaros and James G. Millward, „Cross-border investigations: When are documents developed in the course of an internal investigation protected by legal privilege?“, 2018, *https://www.klgates.com/Cross-border-investigations--When-are-documents-developed-in-the-course-of-an-internal-investigation-protected-by-legal-privilege-08-27-2018*, accessed on 19 February 2022

7 Cf. Eugene M. Propper, Corporate Fraud Investigations and Compliance Programs, 2000, p. 23 ff.

II. The meaning of the term Corporate Crime

Corporate Crime is a huge challenge for companies nowadays because it is constantly increasing[8] and gets more and more attention in the media. Although Corporate Crime is not a new phenomenon and „has been around as long as there have been corporations."[9] many companies realize this important issue too late. Especially, the term „white-collar crime" is often used in the public while investigating Corporate Crime. However, white-collar crime is a broad term which covers a wide range of criminal activities.[10] One example of corporate misconduct relates to „corporate white-collar crime" which is defined as a Corporate Crime „if a corporate official violates the law in acting for the corporation."[11] Typical forms of Corporate Crime are: „corporate violence, corporate theft, corporate financial manipulation, and corporate political corruption or meddling."[12] The most crime category of white-collar crime is by far fraud. Please see following Figure 1:

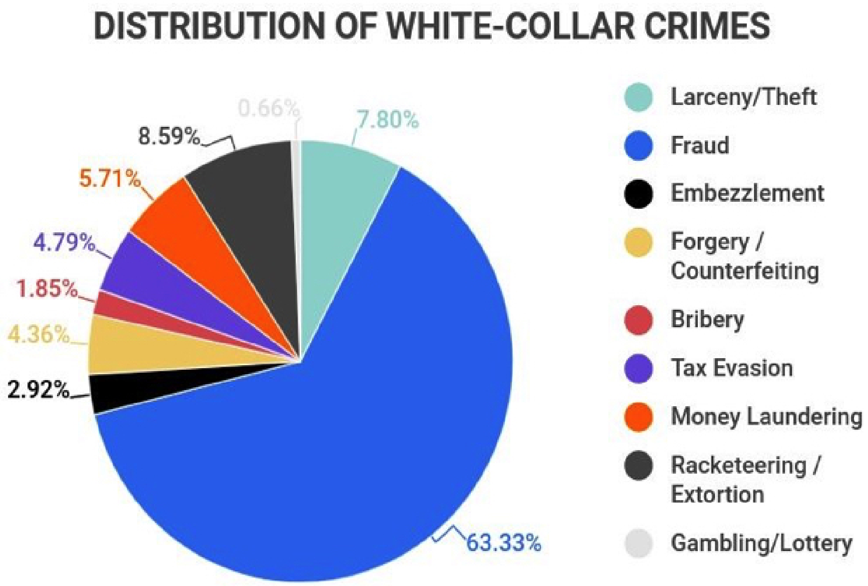

Figure 1[13]

8 PwC, „Wirtschaftskriminalität – Ein niemals endender Kampf: PwC's Global Economic Crime and Fraud Survey 2020", 2020, *https://www.pwc.de/de/consulting/forensic-services/wirtschaftskriminalitaet-ein-niemals-endender-kampf.pdf*, accessed on 20 February 2022

9 Laura Pinto Hansen, White Collar and Corporate Crime: A Case Study Approach, 2021, p. 125

10 April Wall-Parker, Measuring White Collar Crime in Melissa L. Rorie (eds), *The Handbook of White-Collar Crime*, 2020, p. 35

11 Peter Gottschalk, Corporate While-Collar Crime Scandals: Detection, Investigation, Reconstruction, 2020, p. 58

12 David O. Friedrichs, White Collar Crime: Definitional Debates and the Case for a Typological Approach in Melissa L. Rorie (eds), *The Handbook of White-Collar Crime,* 2020, p. 26

13 Jack Flynn, „20 Shocking White-Collar Crime Statistics [2022]: The State of White Collar Crime in the US", 2022, *https://www.zippia.com/advice/white-collar-crime-statistics/*, accessed on 22 February 2022

In this context, please be aware that white-collar crime includes Corporate Crime as well as occupational crime.[14] Although these two types of crimes are closely related in terms of causing financial harms, they differ in its occurrence and intention. Specifically, in the field of occupational crime the motive of personal enrichment and the offender's benefit prevails, whereas by Corporate Crime the individuals (i.e. the organizational officials like Chief Executive Officers, CEOs) seek to realize business advantages and benefits for the organization. Of course, thereby personal financial gains could also occur, but they are rather more a side effect.

a) Corporate Crime according to the theory of white-collar crime by Edwin Sutherland (1949)

To reach a better understanding for Corporate Crime it is crucial to define white-collar crime according to Edwin Sutherland's conception of crime. This pattern is based on the circumstance that „white-collar crime has long time been associated with organizations – principally, corporations“[15] – and the application of white-collar crime was „in fact exclusively about corporate crime“[16] in the classic field of Sutherland's definition of white-collar crime. The term „white-collar crime“ was first introduced by Edwin Sutherland in the United States and „culminating with the publication of his book White Collar Crime (Sutherland 1949).“[17] In his mentioned book Sutherland defined white-collar crime as „a crime committed by a person of respectability and high social status in the course of his occupation.“[18] However, this definition is problematic because it does not constitute what exactly white-collar crime is and moreover, it opens a ground for broad interpretation. Therefore, the definition is still developing in the literature but a unitary term does not exist so far. Contrary to Sutherland's definition of white-collar crime which implies „the offender-based approach“[19], Herbert Edelhertz (1970), a popular criminologist in the field of white-collar crime, used „the offense-based approach“ to determine white-collar crime as „an illegal act or series of illegal acts committed by nonphysical means and by concealment or guile to obtain money or property, to

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14 Peter Gottschalk, Types of Harm, Extent of Harm, and the Victims of Occupational Crimes in Melissa L. Rorie (eds), *The Handbook of White-Collar Crime*, 2020, p. 61
15 David O. Friedrichs, White Collar Crime: Definitional Debates and the Case for a Typological Approach in Melissa L. Rorie (eds), *The Handbook of White-Collar Crime*, 2020, p. 17
16 David O. Friedrichs, White Collar Crime: Definitional Debates and the Case for a Typological Approach in Melissa L. Rorie (eds), *The Handbook of White-Collar Crime*, 2020, p. 25
17 Aleksandra Jordanoska and Isabel Schoultz, The „Discovery“ of White-Collar Crime: The Legacy of Edwin Sutherland in Melissa L. Rorie (eds), *The Handbook of White-Collar Crime*, 2020, p. 3
18 Aleksandra Jordanoska and Isabel Schoultz, The „Discovery“ of White-Collar Crime: The Legacy of Edwin Sutherland in Melissa L. Rorie (eds), *The Handbook of White-Collar Crime*, 2020, p. 6
19 Peter Gottschalk, CEOs and White-Collar Crime: A Convenience Perspective, 2017, p. 54

avoid the payment or loss of money or property, or to obtain business or personal advantage.“[20] This definition does not take into account the characteristics of the offender which are certainly a vital aspect of white-collar crime. Edelhertz concentrated only on the elements of the crime. Furthermore, in the European literature, white-collar crime is often described by the term „economic crime“ which links „crime to economic activity that occurs within the context of the economy“, however this term failed to emphasise that white-collar crime is committed „by members of the respectable and economically advantaged and privileged segments of society.“[21]

Obviously, all terms include a dimension of white-collar crime, but it is not possible to find one unitary definition for the broad field of white-collar crime.

b) The difficulty to measure white-collar crime

The lack of an uniform term for white-collar crime and the circumstance that the term is „used to encompass an almost impossibly wide variety of criminal activities“[22] makes it very difficult to measure crime incidences accurately. Furthermore, other multiple factors play also a role due to the difficulty to measure white-collar crime. It is questionable „whether the offender is an individual or whether a corporation can be held liable for the criminal act. In large complex organizations, responsibility for projects often is diffused or spread out over a number of people. The diffusion of responsibility makes it difficult to single out a particular individual or group of individuals who ought to be held responsible when things go wrong.“[23] In addition, a „systematic attempt to count its occurrences“[24] does not exist, due to the lack of the availability of official data on crime. However, these aspects are vital and are a prerequisite for bringing corporate violations to the criminal justice system. Especially in the United States, white-collar crime data are stored in regulatory agencies which retain the investigations and do not necessarily registered them as a violation of the law.[25] For example, where the offending party (e.g. misconduct by the corporation) takes corrective action or agrees to pay their fine, no criminal offense will be recorded, but „only a violation of a regulation

20 April Wall-Parker, Measuring White Collar Crime in Melissa L. Rorie (eds), *The Handbook of White-Collar Crime*, 2020, p. 34

21 David O. Friedrichs, White Collar Crime: Definitional Debates and the Case for a Typological Approach in Melissa L. Rorie (eds), *The Handbook of White-Collar Crime*, 2020, p. 22

22 David O. Friedrichs, White Collar Crime: Definitional Debates and the Case for a Typological Approach in Melissa L. Rorie (eds), *The Handbook of White-Collar Crime*, 2020, p. 17

23 April Wall-Parker, Measuring White Collar Crime in Melissa L. Rorie (eds), *The Handbook of White-Collar Crime*, 2020, p. 38

24 April Wall-Parker, Measuring White Collar Crime in Melissa L. Rorie (eds), *The Handbook of White-Collar Crime*, 2020, p. 41

25 Cf. April Wall-Parker, Measuring White Collar Crime in Melissa L. Rorie (eds), *The Handbook of White-Collar Crime*, 2020, p. 40

and a civil action to compel correction“[26] will be noticed. Therefore, the harm from white-collar crime is enormously high. According to the PwC's Global Economic Crime and Fraud Survey 2020 the harm was measured in total with $42 billions[27], however the „detected offenders are just the tip of the iceberg of all white-collar crime.“[28] For comparison reason and a better illustration following Figures by Peter Gottschalk, a Norway's leading expert on white-collar crime, should demonstrate the shadow economy[29]:

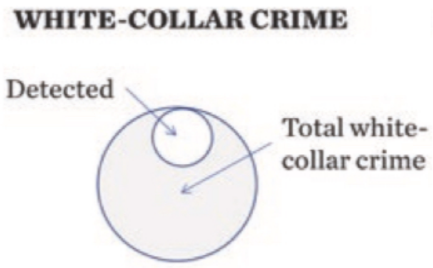
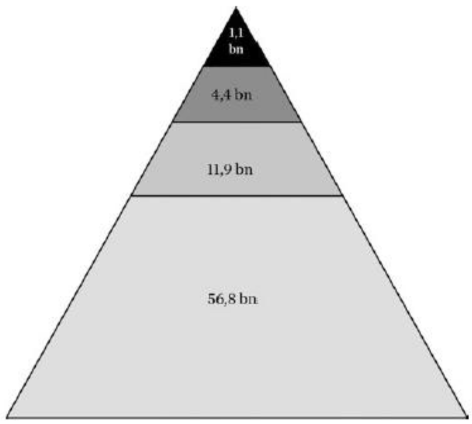


Figure 2[30]

Lower and upper bounds for the estimate of white-collar crime

Variation in estimates	
	White-collar crime (billion NOK)
Detected crime	1.1
Low estimate	4.4
Main estimate	11.9
High estimate	56.8



Tip of the iceberg for white-collar crime

Figure 3[31]

26 April Wall-Parker, Measuring White Collar Crime in Melissa L. Rorie (eds), *The Handbook of White-Collar Crime*, 2020, p. 40
27 PwC, „Wirtschaftskriminalität – Ein niemals endender Kampf: PwC's Global Economic Crime and Fraud Survey 2020“, 2020, *https://www.pwc.de/de/consulting/forensic-services/wirtschaftskriminalitaet-ein-niemals-endender-kampf.pdf*, accessed on 22 February 2022
28 Peter Gottschalk, Types of Harm, Extent of Harm, and the Victims of Occupational Crimes in Melissa L. Rorie (eds), *The Handbook of White-Collar Crime*, 2020, p. 60
29 Cf. Peter Gottschalk and Lars Gunnesdal, White-Collar Crime in the Shadow Economy: Lack of Detection, Investigation and Conviction Compared to Social Security Fraud, 2018, p. 37 ff.
30 Peter Gottschalk and Lars Gunnesdal, White-Collar Crime in the Shadow Economy: Lack of Detection, Investigation and Conviction Compared to Social Security Fraud, 2018, p. 76
31 Peter Gottschalk and Lars Gunnesdal, White-Collar Crime in the Shadow Economy: Lack of Detection, Investigation and Conviction Compared to Social Security Fraud, 2018, p. 46

c) The intention for white-collar crime

White-collar crime is a complex matter for the criminal justice, not least because of the economical, and organizational motivational aspects for misconduct by a company. Moreover, „concealment is an important aspect of white-collar crime.“[32] Increased accountability and financial pressure on a company are cornerstones for its misconduct. Therefore, monitoring the company's standards, which should be in compliance with the law, is one of the most important points to prevent the company from misconduct. Nonetheless, the cause of white-collar crime is also „social disorganization“ which influences the business behavior through „the change from a system of free competition and free enterprise to a developing system of government regulation and a corresponding upheaval of traditional social norms.“[33] Nowadays, a lot of companies are under pressure from favourable business conditions and the achievement of financial profits, so they fail to comply with moral and ethical standards as well as legal regulations. Moreover, business in general is becoming more complex and technical, so the respective organizational officials and its employers cannot properly assess the harmfulness of their business practices. Furthermore, business practices are developing and changing rapidly in the society, and loopholes in the law occur during periods of change. In addition, „violation of the legal code is not necessarily a violation of the business code.“[34] As a result, the criminal justice often responds differently to white-collar crime than to the better known „street crime“ or crime of the „lower socio-economic class“. Consequently, „the crimes of the upper class either result in no official action at all, or result in suits for damage in civil courts, or are handled by inspectors, and by administrative boards or commissions, with penal sanctions in the form of warnings, orders to cease and desist, occasionally the loss of a license, and only in extreme cases by fines or prison sentences.“[35] This statement also confirms the discussion above about the difficulty of measuring white-collar crime.

32 Peter Gottschalk, Corporate While-Collar Crime Scandals: Detection, Investigation, Reconstruction, 2020, p. 59
33 Aleksandra Jordanoska and Isabel Schoultz, The „Discovery“ of White-Collar Crime: The Legacy of Edwin Sutherland in Melissa L. Rorie (eds), *The Handbook of White-Collar Crime*, 2020, p. 6
34 Aleksandra Jordanoska and Isabel Schoultz, The „Discovery“ of White-Collar Crime: The Legacy of Edwin Sutherland in Melissa L. Rorie (eds), *The Handbook of White-Collar Crime*, 2020, p. 7
35 Aleksandra Jordanoska and Isabel Schoultz, The „Discovery“ of White-Collar Crime: The Legacy of Edwin Sutherland in Melissa L. Rorie (eds), *The Handbook of White-Collar Crime*, 2020, p. 9

d) The role of the Chief Executive Officer (CEO) in the context of Corporate Crime

Based on the fact that in the case of a Corporate Crime a CEO will also be involved, a brief characterization of the CEO should be provided. In particular, the CEO of a company is responsible for the achievement of the company's business goals. Therefore, the respective CEO is usually personally and organizationally involved when the company gets into the focus of a white-collar crime issue. The criminal behavior of a goal-oriented manager can be briefly characterized as follows: The white-collar criminal „is likely to exhibit grandiose self-perceptions in terms of narcissistic behavior and psychopathic traits. The criminal belongs to the elite in society and is often wealthy and reasonably well educated.“[36] He or she belongs „typically to the ethnic majority in the country and tends to be married.“[37] In general, „corporate offenders are older, commit crime for a larger amount of money, and are associated with larger organizations. The average age of a corporate criminal is 53 years.“[38] Another striking aspect is the „substantial gender gap, as 9 out of 10 convicted white-collar criminals are men.“[39]

e) Corporate social issues

Less ethical practices in a corporation's culture could cause great damage to its customers and employees. Negative headlines in the media could destroy the trust and the public image of a company which widely results in huge business losses. While bringing a corporation to a criminal action this will always imply a punishment to innocents, including employees and shareholders.[40] Damage to the company's reputation in the market due to corporate misbehavior will cause multiple negative business consequences in addition to criminal actions. Therefore, it is more effective to prevent Corporate Crime than to prosecute the company. Unfortunately, „laws tend to be reactive rather than preventative.“[41] The next chapter provides legal measures to curb Corporate Crime from the criminal law perspective of Germany and the US. In this context, it will be only illustrate the corporate liability and not the individual one.

36 Peter Gottschalk, CEOs and White-Collar Crime: A Convenience Perspective, 2017, p. 56
37 Peter Gottschalk, CEOs and White-Collar Crime: A Convenience Perspective, 2017, p. 55
38 Peter Gottschalk, Corporate While-Collar Crime Scandals: Detection, Investigation, Reconstruction, 2020, p. 59
39 Peter Gottschalk, CEOs and White-Collar Crime: A Convenience Perspective, 2017, p. 56
40 Cf. Laura Pinto Hansen, White Collar and Corporate Crime: A Case Study Approach, 2021, p. 126
41 Laura Pinto Hansen, White Collar and Corporate Crime: A Case Study Approach, 2021, p. 146

III. Punishing Corporate Crime from the German and US criminal law perspective

a) Corporate criminal responsibility

This chapter describes possible main criminal sanctions against Corporate Crime imposed under German criminal law as well as under US criminal law. First, it has to be pointed out that there exists a huge difference between German criminal law and US criminal law with respect to corporate punishment and sentencing. The German criminal law does not explicitly constitute a direct corporate criminal liability[42], whereas the US law entails the long-established doctrine that a corporate can be held criminal liable.[43] The German criminal law is based in this regard to the the principle that „a corporation cannot commit a crime“ („sociatas delinquere non potest“).[44] Therefore, „a major difference between US and German sanctioning styles is the higher relevance of sanctions against corporations in the United States, while in Germany investigations traditionally focus on individuals.“[45] However, „Germany recognizes an indirect form of corporate liability for wrongdoing of officers and managers of legal persons, but has so far refrained from making corporations subject to „genuine“ criminal sanctions.“[46] In this context, it is very interesting to note that other European States like Austria[47] moved forward to recognize corporate criminal liability. This development and the fact that white-collar crimes increase in companies, has motivated the German legislator to draft a new Corporate Sanction Act (in German: Verbandssanktionengesetz, VerSanG-E). „The German Federal Ministry of Justice and Consumer Protection (BMJV) presented the official draft bill of the Corporate Sanctioning Act (VerSanG-E)“[48] on 22 April 2020.

42 Thomas Weigend, „Societas Delinquere Non Potest?: A German Perspective“, 2008, Vol. 6 (5), Journal of International Criminal Justice, p. 927 ff.
43 Bryan Cave Leighton Paisner, „Corporate Criminal Liability-Perspectives from the US, UK and France“, 2018, *https://www.bclplaw.com/en-US/insights/corporate-criminal-liability-perspectives-from-the-us-uk-and.html*, accessed on 25 February 2022
44 Katja Rödiger, Strafverfolgung von Unternehmen, Internal Investigations und strafrechtliche Verwertbarkeit von „Mitarbeitergeständnissen“: Untersuchung am Beispiel der Siemens-Korruptionsaffäre, 2012, p. 36
45 Christian Walburg, White-Collar and Corporate Crime: European Perspectives in Melissa L. Rorie (eds), *The Handbook of White-Collar Crime*, 2020, p. 340
46 Thomas Weigend, „Societas Delinquere Non Potest?: A German Perspective“, 2008, Vol. 6 (5) Journal of International Criminal Justice, p. 930
47 Cf. Austrian Act on Corporate Criminal Liability (Verbandsverantwortlichkeitsgesetz), 2005, *https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2005_I_151/BGBLA_2005_I_151.pdfsig*, accessed on 25 February 2022
48 Morrison Foerster, „Germany Faces Drastic Increase of Fines on Companies for White-Collar Crimes“, 2020, *https://www.mofo.com/resources/insights/200430-germany-white-collar-crimes.html*, accessed on 25 February 2022

The aim of the draft Act was to establish a framework „for the relationship between the state and companies in the area of criminal offenses in the economic sphere (especially white-collar crime)."[49] In particular, the Act „defines the conditions under which companies can be accused of company-related offenses as well as the sanctions (including penalties, confiscation of benefits, conditions, and orders) that can be imposed on the company for such offenses."[50] Currently, the Corporate Sanctioning Act was not implemented into German law[51], however this draft Act demonstrates the importance of preventing Corporate Crime through implementing effective measures against criminal offenses (e.g. compliance measures like Corporate Compliance Management Systems and Internal Monitoring[52]). Moreover, the present German law also contains sufficient instruments for sanctioning Corporate Crime which will be illustrated in the following paragraph. Before describing the criminal sanctions, however, a closer look to the different concepts of corporate criminal liability in the jurisdiction of Germany and the US should be discussed.

b) The German law discussion of the recognition of corporate criminal responsibility

A direct corporate criminal responsibility is not in line with the „general principles of German criminal law."[53] Especially since fundamental objections exist in respect of this matter. The direct corporate criminal responsibility is still rejecting under the German criminal law theory with the main argument that the Federal Court of Appeals (in German: Bundesgerichtshof, BGH) „declared in a landmark ruling that a person cannot be found guilty of a crime if he was unable to recognize the fact that his conduct was prohibited"[54], i.e. a legal person like a corporation.

49 Morrison Foerster, „Germany Faces Drastic Increase of Fines on Companies for White-Collar Crimes", 2020, *https://www.mofo.com/resources/insights/200430-germany-white-collar-crimes.html*, accessed on 25 February 2022
50 Morrison Foerster, „Germany Faces Drastic Increase of Fines on Companies for White-Collar Crimes", 2020, *https://www.mofo.com/resources/insights/200430-germany-white-collar-crimes.html*, accessed on 25 February 2022
51 Harald W. Potinecke and Laura Posch, „Lieber ein Ende mit Schrecken als ein Schrecken ohne Ende: Verbandssanktionengesetz für diese Legislaturperiode gescheitert", 2021, *https://www.cmshs-bloggt.de/compliance/lieber-ein-ende-mit-schrecken-als-ein-schrecken-ohne-ende-verbandssanktionengesetz-fuer-diese-legislaturperiode-gescheitert/*, accessed on 25 February 2022
52 Cf. Benjamin van Rooij and Adam D. Fine, Preventing Corporate Crime from Within: Compliance Management, Whistleblowing, and Internal Monitoring in Melissa L. Rorie (eds), *The Handbook of White-Collar Crime*, 2020, p. 229 ff.
53 Thomas Weigend, „Societas Delinquere Non Potest?: A German Perspective", 2008, Vol. 6 (5), Journal of International Criminal Justice, p. 933
54 Thomas Weigend, „Societas Delinquere Non Potest?: A German Perspective", 2008, Vol. 6 (5), Journal of International Criminal Justice, p. 938, fn. 64

In particular, a corporate criminal responsibility „conflicts with basic tenets of German criminal law. They see three fatal deficiencies:

- corporations cannot act,
- corporations cannot be blamed, and
- corporations cannot be subject to criminal punishment.“[55]

The concept of criminal culpability according to the traditional German legal theory requires as primary condition morally guilty. „The criminal law presupposes the existence of and is addressed to a moral agent.“[56] A corporation, also known as legal person, „lacks all ingredients of a moral agent in the true sense: it has no moral conscience, it cannot recognize moral or legal norms, and it cannot stop itself from violating such norms.“[57] Furthermore, criminal sanctions do not apply to corporations because the „main objection to punishing corporations is that a legal person cannot realize that it is being sanctioned and cannot make a conscious effort to avoid punishment in the future.“[58] Based on these arguments, the issue of corporate criminal responsibility under German criminal law becomes more comprehensible. Nevertheless, also the jurisdiction of Germany can impose sanctions on corporations and declaring a corporate criminal responsibility through shifting the corporate officer's responsibility to the corporation. The main legal instrument in this context is the possibility of a sanction according to § 30 of the Act on Regulatory Offences (in German: Ordnungswidrigkeitengesetz, OWiG).[59] Although the Act on Regulatory Offences is more a mere administrative offense than an original criminal one, § 30 OWiG has a „quasi-criminal judicial“ function in Germany.[60]

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55 Thomas Weigend, „Societas Delinquere Non Potest?: A German Perspective“, 2008, Vol. 6 (5), Journal of International Criminal Justice, p. 936
56 Thomas Weigend, „Societas Delinquere Non Potest?: A German Perspective“, 2008, Vol. 6 (5), Journal of International Criminal Justice, p. 936
57 Thomas Weigend, „Societas Delinquere Non Potest?: A German Perspective“, 2008, Vol. 6 (5), Journal of International Criminal Justice, p. 936, fn. 54
58 Thomas Weigend, „Societas Delinquere Non Potest?: A German Perspective“, 2008, Vol. 6 (5), Journal of International Criminal Justice, p. 941, fn. 81
59 Johann Sieber, Sanktionen gegen Wirtschaftskriminalität, 2018, p. 300
60 Cf. Katja Rödiger, Strafverfolgung von Unternehmen, Internal Investigations und strafrechtliche Verwertbarkeit von „Mitarbeitergeständnissen“: Untersuchung am Beispiel der Siemens-Korruptionsaffäre, 2012, p. 36

c) The recognition of corporate criminal responsibility according to US law

In general, the US jurisdiction is based on the „common law“[61] system which „derived from judicial decisions instead of from statutes.“[62] However, in the field of criminal law this principle is limited in the US because „judges cannot create crimes“.[63] The core concept of American criminal justice is as follows: „No crime without law, no punishment without crime“ („Nullum crimen sine lege, nulla poena sine crimen“).[64] The primary criminal law source in the US is the Model Penal Code, drafted by the American Law Institute in 1962[65], which includes a „standardized set of criminal statutes“ and was adopted by the most state legislatures in their respective penal codes.[66] Generally, the US jurisdiction is divided into federal law which applies to all 50 US states and state law which applies to each specific state.[67] Therefore, in the US exists a huge numbers of criminal codes adopted by each state. In addition, the Federal Criminal Code codifies in Title 18 of the US Code[68] various types of federal crimes that are sentenced under federal criminal law.[69] In regard to white-collar crimes, a meaningful reference to the „commerce clause“[70] is indicated which empowers the federal government (i.e. the Congress) to regulate interstate and foreign commerce and also includes to enact criminal laws, especially on corporations.[71] Another significant difference in the field of criminal law between Germany and the US is the „plea bargaining“ practice under the US criminal prosecution. „Plea bargains are agreements between defendants and prosecutors in which defendants agree to plead guilty to some or all of the charges against them in exchange for concessions from the prosecutors.“[72]

61 Alton B. Parker, „The Common Law Jurisdiction of the United States Courts“, 1907, Vol. 17 (1), The Yale Law Journal, p. 1 ff.
62 Legal Information Institute, „Common Law“, 2020, *https://www.law.cornell.edu/wex/common_law*, accessed on 25 February 2022
63 Saylor Academy, „Criminal Law“, 2012, *https://saylordotorg.github.io/text_criminal-law/s05-introduction-to-criminal-law.html*, accessed on 25 February 2022
64 Saylor Academy, „Criminal Law“, 2012, *https://saylordotorg.github.io/text_criminal-law/s05-introduction-to-criminal-law.html*, accessed on 25 February 2022
65 Markus Dubber, „The American Law Institute's Model Penal Code and European Criminal Law", 2011, *https://tspace.library.utoronto.ca/bitstream/1807/88953/1/Dubber%20The%20American%20Law.pdf*, accessed on 25 February 2022
66 Katja Rödiger, Strafverfolgung von Unternehmen, Internal Investigations und strafrechtliche Verwertbarkeit von „Mitarbeitergeständnissen“: Untersuchung am Beispiel der Siemens-Korruptionsaffäre, 2012, p. 103, fn. 661 and 662
67 See for more: Henry M. Hart Jr., „The Relations between State and Federal Law“, 1954, Vol. 54 (4), Columbia Law Review, p. 489 ff.
68 United States Code, *http://uscode.house.gov*, accessed on 25 February 2022
69 Legal Information Institute, „Criminal Law“, *https://www.law.cornell.edu/wex/criminal_law*, accessed on 25 February 2022
70 See for more: Brandon L. Bigelow, „The Commerce Clause and Criminal Law“, 2000, *https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?referer=https://www.google.de/&httpsredir=1&article=2159&context=bclr*, accessed on 26 February 2022
71 Katja Rödiger, Strafverfolgung von Unternehmen, Internal Investigations und strafrechtliche Verwertbarkeit von „Mitarbeitergeständnissen“: Untersuchung am Beispiel der Siemens-Korruptionsaffäre, 2012, p. 104, fn. 670 f.
72 Legal Information Institute, „Plea bargain“, *https://www.law.cornell.edu/wex/plea_bargain*, accessed on 26 February

The consequence of „plea bargaining“ is the avoidance of official trials and the reduction of the defendant's sentence. According to the Bureau of Justice Statistics, „the overwhelming majority (90 to 95 percent) of cases result in plea bargaining.“[73]

The general elements of crime requires two conditions according to the US criminal law[74]:

- a voluntary act or omission (actus reus), accompanied by
- a certain state of mind, i.e. guilty mind (mens rea)

A huge exception in the Anglo-American law is the acceptance of liability without the „mens rea“ element. „Some penal offenses do not require the demonstration of culpable mind on the part of the accused.“[75] Such cases are defined as „strict liability“ offences. Moreover, there is another exception where the „mens rea“ element is not required and is known as „vicarious liability“.[76] The „corporate criminal liability“ is particularly based on the „vicarious liability“ doctrine. Under the theory of „vicarious criminal liability“, corporations and corporate executives are charged.[77] According to the „vicarious liability“ a corporation is subject „for a criminal act by one of its employees if the employee acted within the scope of his employment and intended, at least in part, to benefit the corporation.“[78] Such „corporate criminal liability“ is based on the „analogy of unlawful conduct of natural persons, keeping in with the mens rea principle of the common law, since, by reason and experience, high corporate management is the brain center of the corporation.“[79] The Model Penal Code contains an „attempt at rationalizing corporate criminal liability by the natural person analogy, i.e. the corporation is similar to a human being when we

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73 Lindsey Devers, „Plea and Charge Bargaining“, 2011, *https://bja.ojp.gov/sites/g/files/xyckuh186/files/media/document/PleaBargainingResearchSummary.pdf*, accessed on 26 February 2022

74 Hans-Heinrich Jescheck and Jerry Norton, „criminal law“, 2020, *https://www.britannica.com/topic/criminal-law/Substantive-criminal-law*, accessed on 26 February 2022

75 Hans-Heinrich Jescheck and Jerry Norton, „criminal law“, 2020, *https://www.britannica.com/topic/criminal-law/The-elements-of-crime#ref303259,* accessed on 26 February 2022

76 Katja Rödiger, Strafverfolgung von Unternehmen, Internal Investigations und strafrechtliche Verwertbarkeit von „Mitarbeitergeständnissen“: Untersuchung am Beispiel der Siemens-Korruptionsaffäre, 2012, p. 115 ff.

77 Joshua D. Greenberg and Ellen C. Brotman, „Strict vicarious criminal liability for corporations and corporate executives: Stretching the boundaries of criminalization“, 2013, p. 98, *https://lawprofessors.typepad.com/files/strict-vicarious-liability-for-corporations-and-corporate-executives-stretching-the-boundaries-of-criminalization.pdf*, accessed on 26 February 2022

78 Joshua D. Greenberg and Ellen C. Brotman, „Strict vicarious criminal liability for corporations and corporate executives: Stretching the boundaries of criminalization“, 2013, p. 79, *https://lawprofessors.typepad.com/files/strict-vicarious-liability-for-corporations-and-corporate-executives-stretching-the-boundaries-of-criminalization.pdf*, accessed on 26 February 2022

79 Gerhard O.W. Mueller, „Mens rea and the Corporation: A Study of the Model Penal Code Position on Corporate Criminal Liability“, 1957, Vol. 19, University of Pittsburgh Law Review, p. 47

regard its management at its brain, capable of entertaining the requisite criminal intent, so that corporate criminal liability follows management guilt.“[80] Nowadays, this approach can also be found in 1 US Code § 1[81]: „the words “person” and “whoever” include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.“

Under US law, „in case of corporate crime, no criminal intent (i.e. mens rea) is generally required. Virtually any illegal activity by an agent or employee of a corporation that takes place within the scope of their work can subject that company to criminal liability. This is true even if an employee acts against the wishes or direct instructions of company officials.“[82] The lack of proofing the „mens rea“ element and the „collective knowledge“ doctrine lead prosecuting and sentencing Corporate Crime under US law in a more efficient way in compare to the German law system. Especially in a complex and global business environment it becomes necessary to extend criminal law to corporations, as corporations are often responsible „for the bulk of business and environmental crime. At the same time, a fragmentation of tasks and responsibilities within business enterprise makes it difficult, if not impossible, to trace criminal violations back to individual actors.“[83] Large corporations often act through a combination of employees, so the „collective knowledge“ doctrine can constitute the legal culpability for a corporation act without demonstrating an individual fault, i.e. „where no single employee could be held criminally liable“.[84] The doctrine of „collective knowledge“ assumes „the aggregation of individual employees' knowledge in evaluating corporate knowledge“[85] and constitutes in this way the corporation's knowledge of a law violation.

These exceptions with regard to the non-fulfillment of the „mens rea“ element are excluded under German criminal law, since the „mens rea“ is considered there as an indispensable requirement (see Chapter III.b.).

80 Gerhard O.W. Mueller, „Mens rea and the Corporation: A Study of the Model Penal Code Position on Corporate Criminal Liability“, 1957, Vol. 19, University of Pittsburgh Law Review, p. 25
81 Cf. United States Code, *http://uscode.house.gov*, accessed on 26 February 2022
82 Mark A. Cohen, Punishing Corporations in Melissa L. Rorie (eds), *The Handbook of White-Collar Crime*, 2020, p. 315
83 Thomas Weigend, „Societas Delinquere Non Potest?: A German Perspective“, 2008, Vol. 6 (5), Journal of International Criminal Justice, p. 932
84 Bryan Cave Leighton Paisner, „Corporate Criminal Liability-Perspectives from the US, UK and France“, 2018, *https://www.bclplaw.com/en-US/insights/corporate-criminal-liability-perspectives-from-the-us-uk-and.html*, accessed on 25 February 2022
85 Timothy P. Crudo and Andrew Schalkwyk, „Prosecuting the Corporate Mind“, 2017, p. 3, *http://www.abtl.org/report/nc/abtlnorcalvol25no2.pd*f, accessed on 26 February 2022

Whereas the „corporate criminal liability“, based on the „vicarious liability“ doctrine, is in the US law recognized and was acknowledged in the Dotterweich case by the US Supreme Court.[86] The Supreme Court penalized a „transaction though consciousness of wrongdoing be totally wanting.“[87] Therefore, the US law system usually provides with the recognition of „corporate criminal liability“ a very effective and broad instrument to punish corporations.

The next paragraph contains an overview of main legal criminal sanctions against corporations from the German law and US law perspective.

d) Imposing possible criminal legal sanctions on corporations under German law

The most important criminal legal sanctions can be imposed on corporations under German law pursuant to the German Criminal Code[88] (in German: Strafgesetzbuch, StGB) and „quasi-criminal“, i.e. as an administrative offence according to the German Act on Regulatory Offences[89] (in German: Ordnungswidrigkeitengesetz, OWiG), although corporations cannot be held „genuinely“ criminally responsible under German law (see Chapter III.b.).

aa) Confiscation according to §§ 73 ff. StGB

According to the general term of „confiscation“ (in German: „Einziehung“), criminal sanctions may also be imposed on corporations, as stated in §§ 73 to 76b StGB. The main idea behind these regulations is that an offender should not obtain any economic benefit from an offence.[90] Please note that the German Criminal Code (StGB) regarding the „confiscations orders and asset recovery in criminal law“ was updated on 1 July 2017 to be in line with the EU Directive „on the freezing

86 US Supreme Court, United States v. Dotterweich, 1943, 320 U.S. 277, *https://caselaw.findlaw.com/us-supreme-court/320/277.html*, accessed on 26 February 2022
87 Joshua D. Greenberg and Ellen C. Brotman, „Strict vicarious criminal liability for corporations and corporate executives: Stretching the boundaries of criminalization“, 2013, p. 88, *https://lawprofessors.typepad.com/files/strict-vicarious-liability-for-corporations-and-corporate-executives-stretching-the-boundaries-of-criminalization.pdf,* accessed on 26 February 2022
88 German Criminal Code (StGB), 2019, *https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0651*, accessed on 27 February 2022
89 German Act on Regulatory Offences (OWiG), 2019, *https://www.gesetze-im-internet.de/englisch_owig/*, accessed on 27 February 2022
90 Rudolph Rechtsanwälte, „Consequences of a conviction – confiscation of the proceeds of a crime“, *https://criminal-law-germany.lawyer/confiscation-of-the-proceeds-of-a-crime/*, accessed on 27 February 2022

and confiscation of instrumentalities and proceeds of crime in the European Union"[91] (Directive 2014/42/EU).[92] The former version of §§ 73 to 76a StGB distinguished between „forfeiture" (in German: „Verfall") and „confiscation" (in German: „Einziehung"). The updated rules have adopted an unitary legal concept of „confiscation".[93] The intention of the German legislator in updating its Criminal Code was to create a uniform framework for „confiscation" and moreover to reduce crime and protect victims.[94]

The „core provision of asset recovery"[95], i.e. confiscation of proceeds of crime is regulated in § 73 par. 1 StGB[96] and has the following wording:

„If the offender or participant <u>has obtained anything</u> by or for an unlawful act, the court orders the confiscation of that which was obtained."

In the context of § 73 par. 1 StGB a small reference to § 73 par. 3 StGB and § 73a StGB is indicated. Particularly, § 73 par. 3 StGB[97] regulates that also a surrogate can be confiscated if the object which was obtained by or for an unlawful act is no longer available.[98] Furthermore, § 73a StGB contains the instrument of „extended confiscation" and applies to all criminal offences.[99] A closer look to the wording „has obtained anything" (i.e. something achieved) in § 73 par. 1 StGB should be taken.

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91 Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, 2014, *https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32014L0042&from=DE*, accessed on 01 March 2022
92 Gleiss Lutz, „The new regulations on confiscations orders and asset recovery in criminal law", *https://www.gleisslutz.com/en/regulations_asset_recovery.html*, accessed on 27 February 2022
93 Rudolph Rechtsanwälte, „Consequences of a conviction – confiscation of the proceeds of a crime", *https://criminal-law-germany.lawyer/confiscation-of-the-proceeds-of-a-crime/*, accessed on 27 February 2022
94 Stefan-Marc Rehm and Stefanie Siriu, „Die strafrechtliche Vermögensabschöpfung: die Entwicklung seit der Reform", 2022, *https://www.haufe.de/compliance/recht-politik/strafrechtliche-vermoegensabschoepfung_230132_506852.html*, accessed on 27 February 2022
95 Gleiss Lutz, „The new regulations on confiscations orders and asset recovery in criminal law", *https://www.gleisslutz.com/en/regulations_asset_recovery.html*, accessed on 27 February 2022
96 Cf. German Criminal Code, 2019, *https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0651*, accessed on 27 February 2022
97 *„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."*
98 Martin R. Schulz, Compliance Management im Unternehmen: Erfolgsfaktoren und praktische Umsetzung, 2020, paragraph 158
99 Gleiss Lutz, „The new regulations on confiscations orders and asset recovery in criminal law", *https://www.gleisslutz.com/en/regulations_asset_recovery.html,* accessed on 27 February 2022

Following the so-called „gross principle“ (in German: „Bruttoprinzip“[100]), i.e. „all assets may be recovered that have benefited the perpetrator, participants or third-party beneficiary in realising the offence at any stage thereof“[101] is applicated while assessing the proceeds achieved from a criminal offence. The „gross principle“ was confirmed by the reform of the above mentioned regulations in 2017. Especially, the „gross principle“ was clarified by the German legislator which determination is subject to a „two-tier test“: „In a first step, the proceeds are to be established on the basis of a "purely objective approach". This is not based on a direct causal link between the offence and enrichment. In a second step, in an evaluating approach considerations or expenses may be deducted as far as such are justified in line with statutory assessments. Non-deductibility in that regard is restricted to that which the perpetrator intentionally and knowingly spends or uses for the operations condemned under criminal law.“[102] The application of the „gross principle“ ensures that not only the profit should be confiscated, but also everything that was achieved by the unlawful act. „It actually had the effect of an evil with a sanctioning effect that went beyond mere skimming back.“[103] The approach is that „crime does not pay.“[104]

The German legislator has emphasised the importance of imposing confiscation orders also against „other persons“, e.g. corporations who are not participants or offenders of a crime but are „third beneficiary“ (in German: „Drittbegünstigter“[105]) of the unlawful act in § 73b par. 1 StGB[106]. According to the updated § 73b StGB also „crime displacement“ (in German: „Verschiebungsfälle“) can be explicitly punished which frequently occurs in the context of white-collar crime.[107]

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100 See for more: Johann Sieber, Sanktionen gegen Wirtschaftskriminalität, 2018, p. 148 to 155 and 451

101 Gleiss Lutz, „The new regulations on confiscations orders and asset recovery in criminal law“, *https://www.gleisslutz.com/en/regulations_asset_recovery.html*, accessed on 27 February 2022

102 Gleiss Lutz, „The new regulations on confiscations orders and asset recovery in criminal law“, *https://www.gleisslutz.com/en/regulations_asset_recovery.html*, accessed on 27 February 2022

103 Rudolph Rechtsanwälte, „Consequences of a conviction – confiscation of the proceeds of a crime“, *https://criminal-law-germany.lawyer/confiscation-of-the-proceeds-of-a-crime/*, accessed on 27 February 2022

104 Johann Sieber, Sanktionen gegen Wirtschaftskriminalität, 2018, p. 156, fn. 323

105 Johann Sieber, Sanktionen gegen Wirtschaftskriminalität, 2018, p. 136 ff.

106 *„The order of confiscation referred to in sections 73 and 73a is made against another person who is not the offender or participant if 1. that person has obtained something by committing the offence and the offender or participant acted on said person's behalf, 2. the object so obtained a) was transferred to that person free of charge or without legal reason or b) was transferred to that person and said person recognised, or ought to have recognised, that the object obtained was derived from an unlawful act or 3. the object so obtained a) has devolved to that person in the capacity as heir or b) has been transferred to that person in the capacity as a party entitled to the compulsory portion in an estate or as a beneficiary under a will. Sentence 1 nos. 2 and 3 has no application if the object obtained was previously transferred, for a fee and on the basis of a legal reason, to a third party who did not recognise or did not have reason to recognise that the object obtained was derived from an unlawful act.“*

107 Florian Block, „Die Reform der strafrechtlichen Vermögensabschöpfung“, 2017, *https://cms.law/en/media/local/cms-hs/files/publications/newsletters/update-compliance-11-17*, accessed on 01 March 2022

Furthermore, confiscation of the proceeds of a crime is in general a „sharp weapon“ in the field of white-collar crime. In particular, „it is also applicable if someone acted as an organ of or a representative for a company“[108] according to § 74e StGB[109].

In the context of criminal sanctions against corporations the newly included norm of § 76a par. 4 StGB[110] plays a crucial role, in particular, the new approach of „independent confiscation“. „The regulation allows the independent confiscation of assets even without proof or traceability of an illegal act, provided that the court is convinced of their illegal origin.“[111] In the case of an offence which is listed in § 76a par. 4 StGB, any property arose by the illegal activity can be independently confiscated although the party linked to such criminal act cannot be pursued or convicted. „This provision is of relevance to companies primarily since money laundering (a type of white-collar crime) is included as a listed offence in § 76a par. 4 no. 1 (f) StGB and involves all commercial criminal law.“[112] The US law also encompasses this approach under the „non conviction based confiscation“ framework.[113]

108 Michael Bohlander, Principles of German Criminal Procedure, 2021, Section 7
109 *„Whoever commits an act 1.in the capacity as an organ authorised to represent a legal entity or as a member of such an organ, 2. in the capacity as a director of an association lacking independent legal capacity or as a member of the board of directors of such an association, 3. in the capacity as a partner authorised to represent a partnership with independent legal capacity, 4. in the capacity as a general agent (Generalbevollmächtigter) or, in a management position, with general power of representation (Prokurist) or with commercial power of attorney (Handlungsbevollmächtigter) of a legal entity or of one of the associations referred to in nos. 2 or 3 or 5. as another person acting in a responsible capacity for the management of the business or enterprise of a legal entity or association referred to in no. 2 or 3, including oversight of the management of the business or other exercise of controlling powers in a senior management position, which in relation to them and under the other conditions of sections 74 to 74c would allow the confiscation of an object or of its equivalent value or justify the denial of compensation, has this act attributed and these provisions applied to the person or entity represented. Section 14 (3) applies accordingly.“*
110 Excerpt of § 76a par. 4 StGB: *„An object derived from an unlawful act which has been seized in proceedings brought on suspicion of one of the offences referred to in sentence 3 having been committed is, as a rule, even to be separately confiscated in those cases in which it is impossible to prosecute or convict the person affected by the confiscation. If the confiscation of an object is ordered, ownership of the property or the right to it devolves to the state once the order becomes final; section 75 (3) applies accordingly.“*
111 Rudolph Rechtsanwälte, „Consequences of a conviction – confiscation of the proceeds of a crime“, *https://criminal-law-germany.lawyer/confiscation-of-the-proceeds-of-a-crime/*, accessed on 01 March 2022
112 Gleiss Lutz, „The new regulations on confiscations orders and asset recovery in criminal law“, *https://www.gleisslutz.com/en/regulations_asset_recovery.html*, accessed on 01 March 2022
113 Martin R. Schulz, Compliance Management im Unternehmen: Erfolgsfaktoren und praktische Umsetzung, 2020, paragraph 162

bb) Regulatory Fine according to § 30 OWiG and § 130 OWiG

The most important instrument for sanctioning corporations under German law is still the imposition of monetary fines on companies for certain violations pursuant to § 30 OWiG. The main character of a „corporate fine“ (in German: Unternehmensgeldbuße) is to ensure an equal sanction framework for legal entities and natural persons in the imposition of sanctions resulting from a criminal or administrative offense according to § 30 OWiG.[114] Particularly, „companies can face administrative sanctions if a person representing the company has committed a criminal or administrative offence by which the company's duties were violated or by which the company was supposed to be enriched“[115] according to § 30 par. 1 OWiG[116]. The significant difference between the regulatory fine imposed on legal persons and on associations of persons and a „true“ criminal sanction under the StGB is that the element of § 30 OWiG does not required a „corporate morally guilty“ because the norm is linked to an „attribution liability“.[117] In general, the norm of § 30 par. 1 OWiG requires to fulfill two elements for imposing regulatory fines on a corporate entity:

- Firstly, „someone representing the entity must be committed to a criminal or regulatory offence and
- secondly, hereby in violation of duties imposed on the company by law or where the company has been enriched or was intended to be enriched.“[118]

114 Johann Sieber, Sanktionen gegen Wirtschaftskriminalität, 2018, p. 254
115 Anna Oehmichen and Nicola Bier, „Business Crime and Investigations in Germany: Overview“, 2022, *https://uk.practicallaw.thomsonreuters.com/w-015-9426?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a837855*, accessed on 02 March 2022
116 *„Where someone acting 1. as an entity authorised 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 authorised to represent a partnership with legal capacity, or 4. as the authorised representative with full power of attorney or in a managerial position as procura-holder or the authorised 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.“*
117 Katja Rödiger, Strafverfolgung von Unternehmen, Internal Investigations und strafrechtliche Verwertbarkeit von „Mitarbeitergeständnissen“: Untersuchung am Beispiel der Siemens-Korruptionsaffäre, 2012, p. 61
118 Jamie Nowak, „Corporate criminal liability in Germany“, 2016, *https://www.nortonrosefulbright.com/de-de/wissen/publications/800922a0/corporate-criminal-liability-in-germany*, accessed on 02 March 2022

The consequence of violating § 30 par. 1 OWiG may be a monetary fine according to § 30 par. 2 OWiG[119]. In the case of an intentional criminal offence the monetary sum of the fine can be up to €10 million and in the case of a negligent criminal offence the fine can be up to €5 million. If a regulatory offence is fulfilled, the amount of the possible fine would depend on the respective regulatory offence in question. Please note that the imposition of the regulatory fine under § 30 par. 2 OWiG could be exceeded, taking into account the financial benefit derived from the offence, in order to ensure an equitable penalty pursuant to § 30 par. 3 OWiG in conjunction with § 17 par. 4 OWiG.[120] The intention of this legal approach is that „Crime does not pay".[121]

According to § 130 par. 1 OWiG[122], the owner of a company can also be punished „as a result of breaches (including by omission) of supervisory measures required to prevent contravention of duties incumbent on the owner. Such measures include the appointment, careful selection and surveillance of supervisory personnel."[123] This norm is extremely relevant in practice relating to „directors' and officers' liability". „In principle, § 130 OWiG is intended, as a catch-all element, to close a liability gap resulting from the separation of ownership of an enterprise and the associated special positions on the one hand and the actual performance of activities on the other."[124] Consequently, a company owner remains primarily responsible for the allocation of company duties and may therefore ensure compliance with the legal rules through implementing specific security measures.

119 *„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."*

120 *„The regulatory fine shall exceed the financial benefit that the perpetrator has obtained from commission of the regulatory offence. If the statutory maximum does not suffice for that purpose, it may be exceeded."*

121 Johann Sieber, Sanktionen gegen Wirtschaftskriminalität, 2018, p. 240 f.

122 *„Whoever, as the owner of an operation or undertaking, intentionally or negligently omits to take the supervisory measures required to prevent contraventions, within the operation or undertaking, of duties incumbent on the owner and the violation of which carries a criminal penalty or a regulatory fine, shall be deemed to have committed a regulatory offence in a case where such contravention has been committed as would have been prevented, or made much more difficult, if there had been proper supervision. The required supervisory measures shall also comprise appointment, careful selection and surveillance of supervisory personnel."*

123 Jamie Nowak, „Corporate criminal liability in Germany", 2016, *https://www.nortonrosefulbright.com/de-de/wissen/publications/800922a0/corporate-criminal-liability-in-germany*, accessed on 07 March 2022

124 Susana Campos Nave, „Prevention of liability risks in companies: § 130 OWiG (Act on Regulatory Offences) and delegation", 2020, *https://www.roedl.com/insights/life-sciences-law/liability-risks-owig-delegation-criminal-law-measures-owig*, accessed on 07 March 2022

The amount of the fine is regulated in § 130 par. 3 OWiG[125] and can be imposed up to €1 million „where the breach of duty carries a criminal penalty“[126]. In the case „where the breach of duty carries a regulatory fine, the fine depends on the maximum regulatory fine imposable for the breach of duty.“[127]

The Act on Regulatory Offences (OWiG) also foresees a „confiscation“ norm in § 29a OWiG[128] („Confiscation of the Value of the Proceeds of an Offence“). Nevertheless, this regulation is rather irrelevant in practice, as the norm is generally only applicable if the „confiscation“ is excluded pursuant to §§ 73 ff. StGB (see Chapter III.d.aa.) and a regulatory fine is not imposed.[129]

The norm of § 30 par. 5 OWiG[130] stipulates that a „confiscation“ sanction for the same offence under §§ 73 ff. StGB and § 29a OWiG is precluded.

e) *Imposing possible criminal legal sanctions on corporations under US law*

This chapter should provide an overview of punishing corporations under the US federal law perspective. In general, „a corporation is criminally liable for the federal crimes its employees or agents commit in its interest.“[131]

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125 *„Where the breach of duty carries a criminal penalty, the regulatory offence may carry a regulatory fine not exceeding one million Euros. Section 30 subsection 2 third sentence shall be applicable. Where the breach of duty carries a regulatory fine, the maximum regulatory fine for breach of the duty of supervision shall be determined by the maximum regulatory fine imposable for the breach of duty. The third sentence shall also apply in the case of a breach of duty carrying simultaneously a criminal penalty and a regulatory fine, provided that the maximum regulatory fine imposable for the breach of duty exceeds the maximum in accordance with the first sentence.“*

126 Cf. § 130 par. 3 OWiG

127 Jamie Nowak, „Corporate criminal liability in Germany“, 2016, *https://www.nortonrosefulbright.com/de-de/wissen/publications/800922a0/corporate-criminal-liability-in-germany*, accessed on 07 March 2022

128 Cf. § 29a par. 1 OWiG: *„If the perpetrator has gained something by means of or for an act which may be sanctioned by a regulatory fine, and if a regulatory fine has not been assessed against him for the act, the confiscation of a sum up to the amount of the pecuniary advantage gained may be ordered.“*

129 Katja Rödiger, Strafverfolgung von Unternehmen, Internal Investigations und strafrechtliche Verwertbarkeit von „Mitarbeitergeständnissen“: Untersuchung am Beispiel der Siemens-Korruptionsaffäre, 2012, p. 70

130 *„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.“*

131 Charles Doyle, „Corporate Criminal Liability: An Overview of Federal Law“, 2013, *https://sgp.fas.org/crs/misc/R43293.pdf*, accessed on 08 March 2022

Three requirements must be met in order to punish a corporation:

- a corporate agent/employee is needed
- who commits an offense within the scope of employment
- and with intent to benefit the corporation[132]

First, it has to be emphasised that corporations are subject to corporate criminal liability under US law (see Chapter III.c.). The term „person“ explicitly includes an individual as well as a corporation. This is specified in 1 US Code § 1[133], 18 US Code § 1961 par. 3[134] and 26 US Code 7701 (a) par. 1-3[135].

The individual's scope of authority has to be determined according to the test „whether the individual engages in activities on the corporation's behalf in performance of (his) general line of work - those acts must be motivated at least in part, by an intent to benefit the corporation.“[136] Generally, the liability of officers, employees and agents of the corporation is needed. If the above mentioned requirements are fulfilled, the „corporation will be liable notwithstanding the fact that it expressly directed its agent, employee, or officer not to commit the offense at issue.“[137] Please note that a wrongdoing of lower level employee is not in any case sufficient for corporate criminal liability and depends on a misconduct of higher level employee, i.e. senior management officials. „Notwithstanding any other provisions of law, an enterprise commits an offense if: 1. The conduct constituting the offense consists of a failure to discharge a specific duty imposed by law; or 2. The conduct undertaken in behalf of the enterprise and constituting the offense, is engaged in, authorized, solicited, commanded or recklessly tolerated by the directors of the enterprise in any manner or by a high managerial agent acting within the scope of employment; or 3. The conduct constituting the offense is engaged in by an agent of the enterprise while acting within the scope of

132 Cf. Katja Rödiger, Strafverfolgung von Unternehmen, Internal Investigations und strafrechtliche Verwertbarkeit von „Mitarbeitergeständnissen“: Untersuchung am Beispiel der Siemens-Korruptionsaffäre, 2012, p. 122 ff.
133 Cf. fn. 81
134 *„"person" includes any individual or entity capable of holding a legal or beneficial interest in property“*
135 *„(1) Person: The term "person" shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation. (2) Partnership and partner: The term "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a trust or estate or a corporation; and the term "partner" includes a member in such a syndicate, group, pool, joint venture, or organization. (3) Corporation: The term "corporation" includes associations, joint-stock companies, and insurance companies.“*
136 Charles Doyle, „Corporate Criminal Liability: An Overview of Federal Law“, 2013, p. 3, fn. 15, *https://sgp.fas.org/crs/misc/R43293.pdf*, accessed on 08 March 2022
137 Charles Doyle, „Corporate Criminal Liability: An Overview of Federal Law“, 2013, p. 3, fn. 16, *https://sgp.fas.org/crs/misc/R43293.pdf*, accessed on 08 March 2022

employment and in behalf of the enterprise; and (a) the offense is a misdemeanor or petty offense; or (b) The offense is defined by a statute which imposed criminal liability on an enterprise.“[138]

In addition, a corporation may be held criminal liable based on the „knowledge and intent“ of its corporate agent (i.e. employee) as a general rule. However, the employee or agent has to act or acquire knowledge „within the scope of his or her employment, seeking, at least in part, to benefit the corporation.“[139] Furthermore, the intent of a single agent or employee is not needed subject to the „collective knowledge“ doctrine (see Chapter III.c.). „A corporation cannot plead innocence by asserting that the information obtained by several employees was not acquired by any one individual who then would have comprehended its full importance. Rather the corporation is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly.“[140]

After describing the general requirements for corporation punishment in this part, the respective sentencing possibilities will be outlined.

The imposition of criminal sanctions is influenced in the US by the Federal Sentencing Guidelines[141] which are „designed to provide just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct.“[142] The Sentencing Guidelines are mainly divided into three parts[143] in Chapter 8 of the Federal Sentencing Guidelines in respect of sentencing corporations:

- Remedying Harm from Criminal Conduct (e.g. restitution) in § 8 Part B of the Sentencing Guidelines
- Fines in § 8 Part C of the Sentencing Guidelines
- Organizational Probation in § 8 Part D of the Sentencing Guidelines

138 Charles Doyle, „Corporate Criminal Liability: An Overview of Federal Law“, 2013, p. 4, fn. 18 *https://sgp.fas.org/crs/misc/R43293.pdf*, accessed on 08 March 2022
139 Charles Doyle, „Corporate Criminal Liability: An Overview of Federal Law“, 2013, p. 4, fn. 20, *https://sgp.fas.org/crs/misc/R43293.pdf*, accessed on 08 March 2022
140 Charles Doyle, „Corporate Criminal Liability: An Overview of Federal Law“, 2013, p. 4, fn. 21 *https://sgp.fas.org/crs/misc/R43293.pdf*, accessed on 08 March 2022
141 US Sentencing Commission Guidelines Manual, 2021, *https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2021/GLMFull.pdf*, accessed on 08 March 2022
142 Eugene M. Propper, Corporate Fraud Investigations and Compliance Programs, 2000, p. 127, fn. 2
143 Cf. Katja Rödiger, Strafverfolgung von Unternehmen, Internal Investigations und strafrechtliche Verwertbarkeit von „Mitarbeitergeständnissen“: Untersuchung am Beispiel der Siemens-Korruptionsaffäre, 2012, p. 126

„Corporations and individuals alike are sentenced in the shadow of the federal Sentencing Guidelines.“[144] „The Sentencing Guidelines for organizations measure punishment according to the seriousness of the offence as well as the defendant's culpability and history of misconduct. On the other hand, they reward self-disclosure, cooperation, restitution, and preventive measures.“[145] Nevertheless, the recommendation and circumstances prescribed in 18 US Code § 3553 (a)[146] should be considered while imposing sentences.

aa) Remedying Harm from Criminal Conduct

Restitution is a key measure of remedying harm and is also pointed out in 18 US Code § 3553 (a) par. 7[147]. The court shall impose a restitution order against a convicted corporation „depending on the nature of the offense“.[148] According to a restitution order, the convicted corporation has to pay restitution to its victim. This is independent from imposing a fine.[149]

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144 Charles Doyle, „Corporate Criminal Liability: An Overview of Federal Law“, 2013, p. 20, *https://sgp.fas.org/crs/misc/R43293.pdf*, accessed on 08 March 2022

145 Charles Doyle, „Corporate Criminal Liability: An Overview of Federal Law“, 2013, p. 21, *https://sgp.fas.org/crs/misc/R43293.pdf*, accessed on 08 March 2022

146 „*(a) The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider- (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed- (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; (3) the kinds of sentences available; (4) the kinds of sentence and the sentencing range established for-(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines-(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); (5) any pertinent policy statement-(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and (B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced. (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense.*“

147 Cf. fn. 146

148 Charles Doyle, „Corporate Criminal Liability: An Overview of Federal Law“, 2013, p. 26, *https://sgp.fas.org/crs/misc/R43293.pdf,* accessed on 08 March 2022

149 Katja Rödiger, Strafverfolgung von Unternehmen, Internal Investigations und strafrechtliche Verwertbarkeit von „Mitarbeitergeständnissen“: Untersuchung am Beispiel der Siemens-Korruptionsaffäre, 2012, p. 127

Furthermore, „in the absence of other specific authority, the court may order restitution as a condition of probation or pursuant to a plea bargain.“[150] „As a general principle, the court should require that the organization take all appropriate steps to provide compensation to victims and otherwise remedy the harm caused or threatened by the offense.“[151] Other remedial sentences and organizational reforms used to prosecute white-collar crimes are contained in the same Chapter 8 of the Sentencing Guidelines, such as restitution (§ 8 Part B 1.1 of the Sentencing Guidelines) and include remedial orders (§ 8 Part B 1.2 of the Sentencing Guidelines), community service (§ 8 Part B 1.3 of the Sentencing Guidelines), and compliance programs (§ 8 Part B 2.1 of the Sentencing Guidelines) that may also be ordered by a court. If a restitution order cannot be imposed, a remedial order may be rised. „The purposes of a remedial order are to remedy harm that has already occurred and to prevent future harm.“[152]

bb) Fines

The imposition of fines is an important measure in practice against Corporate Crime pursuant to 18 US Code § 3571 (a)[153]. The terms of § 8 Part C of the Sentencing Guidelines are applicable to the determination of the fine. In general, „the Guidelines recommend that the fine level be set so as to disgorge any illegally gotten gains that would otherwise be left to a corporation after the payment of its fine, compliance with the restitution order, or other remedial costs.“[154] In cases of totally corrupt corporations, i.e. „a corporation operated for criminal purposes or by criminal means should be fined at a level sufficient to strip it of all of its assets“[155] (also called: „corporate death penalty“[156]).

150 Charles Doyle, „Corporate Criminal Liability: An Overview of Federal Law“, 2013, p. 28, fn. 216 and 217, *https://sgp.fas.org/crs/misc/R43293.pdf*, accessed on 08 March 2022
151 US Sentencing Commission Guidelines Manual, 2021, Introductory Commentary of § 8 B 1.1, p. 514, *https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2021/GLMFull.pdf*, accessed on 08 March 2022
152 US Sentencing Commission Guidelines Manual 2021, Commentary of § 8 B1.2, p. 516, https://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2021/GLMFull.pdf, accessed on 08 March 2022
153 *„A defendant who has been found guilty of an offense may be sentenced to pay a fine.“*
154 Charles Doyle, „Corporate Criminal Liability: An Overview of Federal Law“, 2013, p. 23, fn. 163, *https://sgp.fas.org/crs/misc/R43293.pdf*, accessed on 10 March 2022
155 Charles Doyle, „Corporate Criminal Liability: An Overview of Federal Law“, 2013, p. 21, fn. 144, *https://sgp.fas.org/crs/misc/R43293.pdf*, accessed on 10 March 2022
156 Katja Rödiger, Strafverfolgung von Unternehmen, Internal Investigations und strafrechtliche Verwertbarkeit von „Mitarbeitergeständnissen“: Untersuchung am Beispiel der Siemens-Korruptionsaffäre, 2012, p. 128, fn. 844

However, the court shall not impose a fine if this would make victim restitution impossible according to 18 US Code 3572 (b)[157]. This approach is also included in § 8 Part C 2.2 of the Sentencing Guidelines.

On the other hand, in the case of other organizations that are not totally corrupt, i.e. non criminal purpose organizations, different standards of fine depend upon the specific offense.[158] A complete list of (commercial) offenses covered by the Sentencing Guidelines can be found in § 8 Part C 2.1 of the Sentencing Guidelines. These include, for example, antitrust, bribery and money laundering. For other offenses not listed in § 8 Part C 2.1 of the Sentencing Guidelines, corporate fines are governed by the sentencing provisions of 18 US Code § 3571 and 18 US Code § 3553.[159] „As a general rule, a court may not impose a fine of not more than $500,000 when an organization is convicted of a felony“, however, other fine amounts are possible and, particularly, the court „may impose higher fines when Congress has authorized them for a specific crime“.[160]

There are several steps[161] to consider when imposing the ultimately fine for an offense to which § 8 Part C of the Sentencing Guidelines applies:

- „Preliminary Determination of Inability to Pay Fine“ (§ 8 Part C 2.2 of the Sentencing Guidelines)
- Determination of the „Base Offense Level“ (§ 8 Part C 2.3 of the Sentencing Guidelines)
- Determination of the „Base Fine“ (§ 8 Part C 2.4 of the Sentencing Guidelines)
- Determination of the „Culpability Score“ (§ 8 Part C 2.5 of the Sentencing Guidelines)
- Determination of the „Minimum and Maximum Multipliers“ (§ 8 Part C 2.6 and 2.7 of the Sentencing Guidelines)
- Determination of the „Fine Within the Range“ (§ 8 Part C 2.8 and 2.9 of the Sentencing Guidelines)

157 *„If, as a result of a conviction, the defendant has the obligation to make restitution to a victim of the offense, other than the United States, the court shall impose a fine or other monetary penalty only to the extent that such fine or penalty will not impair the ability of the defendant to make restitution.“*
158 Cf. Charles Doyle, „Corporate Criminal Liability: An Overview of Federal Law“, 2013, p. 21, *https://sgp.fas.org/crs/misc/R43293.pdf*, accessed on 10 March 2022
159 Charles Doyle, „Corporate Criminal Liability: An Overview of Federal Law“, 2013, p. 22, fn. 147 – 151, *https://sgp.fas.org/crs/misc/R43293.pdf*, accessed on 10 March 2022
160 Charles Doyle, „Corporate Criminal Liability: An Overview of Federal Law“, 2013, p. 22, fn. 149, *https://sgp.fas.org/crs/misc/R43293.pdf*, accessed on 10 March 2022
161 Cf. Zhonette M. Brown and Nancy Carr Lippa, „Organizational Sentencing“, 1997, Vol. 43 (841), American Criminal Law Review, p. 845 ff.

In general, „the amount of an organization's fine is determined by the applicable offense level and the level of culpability.“[162] „Unless the amount of gain or loss associated with the offense is greater“[163], the amount of the organization's base fine is corresponding to its offense level according to § 8 Part C 2.4 (d) of the Sentencing Guidelines – from $8,500 for an offense level of 6 or less and up to $150,000,000 for an offense level of 38 or more. „The applicable fine range is then ascertained by multiplying the amount assigned to the offense level by minimum and maximum factors determined by the corporation’s culpability score.“[164] In assessing the corporation's culpability, points are added or subtracted depending on the respective circumstances described in § 8 Part C 2.5 (b) to § 8 Part C 2.5 (g) of the Sentencing Guidelines.

Especially, „points are added for:

- the corporation’s involvement in or tolerance of criminal conduct,
- its history of misconduct, and
- its involvement in any obstruction of justice

Particularly, points are subtracted:

- if the corporation has an effective compliance program, and
- for its acceptance of responsibility, cooperation with authorities, or
- self-disclosure of criminal misconduct“[165]

„In determining the amount of the fine within the applicable guideline range, the court should consider“[166] in total eleven factors described in § 8 Part C 2.8 (a) of the Sentencing Guidelines. For example, „the absence of an effective ethics and compliance program is perhaps the most distinctive factor on the list. The Guidelines also identify a number of circumstances that may require or argue for a fine outside of the recommended range.“[167] In § 8 Part C 4 of the Sentencing Guidelines several examples are provided where a fine outside the range should be recognized.

162 Charles Doyle, „Corporate Criminal Liability: An Overview of Federal Law“, 2013, p. 22, fn. 153, *https://sgp.fas.org/crs/misc/R43293.pdf*, accessed on 10 March 2022
163 Charles Doyle, „Corporate Criminal Liability: An Overview of Federal Law“, 2013, p. 22, fn. 155, *https://sgp.fas.org/crs/misc/R43293.pdf*, accessed on 10 March 2022
164 Charles Doyle, „Corporate Criminal Liability: An Overview of Federal Law“, 2013, p. 23, fn. 156, *https://sgp.fas.org/crs/misc/R43293.pdf*, accessed on 10 March 2022
165 Charles Doyle, „Corporate Criminal Liability: An Overview of Federal Law“, 2013, p. 23, fn. 158, *https://sgp.fas.org/crs/misc/R43293.pdf*, accessed on 10 March 2022
166 § 8 Part C 2.8 (a) US Sentencing Guidelines
167 Charles Doyle, „Corporate Criminal Liability: An Overview of Federal Law“, 2013, p. 23, *https://sgp.fas.org/crs/misc/R43293.pdf*, accessed on 10 March 2022

For instance, „a fine above the range may be considered when the offense presented a threat to the environment or the corporation's culpability score exceeds the limit for additional multipliers. On the other side, departures below the range may be warranted when the corporation provides substantial assistance to authorities or the corporation's remedial costs far exceed its gains from the misconduct.“[168]

In conclusion, the imposition of fines on corporations under US law is a complex matter that requires several examination steps as well as the consideration of the specific circumstances of the case (including the characteristics of the organization) and the offense.

cc) Organizational Probation

According to 18 US Code § 3551 (c)[169], in the case of a federal crime committed by a corporation, the court may impose an organizational probation if the corporation is sentenced to a fine, but also if it is not. „The Guidelines call for probation as a means of ensuring that convicted corporations comply with their obligations to pay a fine or special assessment, make restitution, establish a compliance program, perform community service, or comply with the court’s remedial orders. The only mandatory condition of corporate probation is a requirement that the corporation not engage in any further criminal conduct.“[170] In some cases, organizational probation is mandatory pursuant to § 8 Part D 1.1 (a) par. 3[171] of the Sentencing Guidelines, especially in the absence of an effective compliance and ethics program of the corporation that was required by law. Pursuant to § 8 Part D 1.2 (a) par. 1 of the Sentencing Guidelines, the period of probation „shall be at least one year but not more than five years“[172] in the case of a felony. Generally, the courts are flexible to „impose any probationary condition that is reasonably necessary“[173] and related to the offense[174].

168 Charles Doyle, „Corporate Criminal Liability: An Overview of Federal Law“, 2013, p. 24, *https://sgp.fas.org/crs/misc/R43293.pdf*, accessed on 10 March 2022

169 *„An organization found guilty of an offense shall be sentenced, in accordance with the provisions of section 3553, to (1) a term of probation as authorized by subchapter B; or (2) a fine as authorized by subchapter C. A sentence to pay a fine may be imposed in addition to a sentence to probation. A sanction authorized by section 3554, 3555, or 3556 may be imposed in addition to the sentence required by this subsection.“*

170 Charles Doyle, „Corporate Criminal Liability: An Overview of Federal Law“, 2013, p. 25, fn. 181 and 186, *https://sgp.fas.org/crs/misc/R43293.pdf*, accessed on 10 March 2022

171 *„The court shall order a term of probation: if, at the time of sentencing, (A) the organization (i) has 50 or more employees, or (ii) was otherwise required under law to have an effective compliance and ethics program; and (B) the organization does not have such a program.“*

172 § 8 Part D 1.2 (a) par. 1 US Sentencing Guidelines

173 Charles Doyle, „Corporate Criminal Liability: An Overview of Federal Law“, 2013, p. 26, fn. 193, *https://sgp.fas.org/crs/misc/R43293.pdf*, accessed on 10 March 2022

174 Katja Rödiger, Strafverfolgung von Unternehmen, Internal Investigations und strafrechtliche Verwertbarkeit von

Appropriate conditions of an organizational probation are included in § 8 Part D 1.4 of the Sentencing Guidelines, e.g.:

- „establish and maintain a compliance program (cf. § 8 Part D 1.4 (b) par. 1 of the Sentencing Guidelines)
- notify its employees and shareholders of its offense and compliance program (cf. § 8 Part D 1.4 (b) par. 2 of the Sentencing Guidelines)
- undergo periodic audits at its own expense“[175] (cf. § 8 Part D 1.4 (b) par. 5 of the Sentencing Guidelines)

If the corporation fails to fulfil the conditions of the organizational probation, a „court may resentence the corporation, extend the term of its probationary period, or impose additional probationary conditions.“[176]

dd) Other sentencing measures

In § 8 Part E of the Sentencing Guidelines other sentencing measures are foreseen, such as „Special Assessments“ on corporations (see § 8 Part E 1.1 of the Sentencing Guidelines) or „Forfeiture“ to organizations (see § 8 Part E 1.2 of the Sentencing Guidelines).

Forfeiture, i.e. „the confiscation of property as a consequence of its relation to a criminal offense“[177], exists in various statutes. For instance, a „criminal forfeiture“ (different to the „civil forfeiture“[178]) is regulated in 18 US Code §§ 982, 3554.[179] „The most comprehensive statute for criminal forfeiture is 18 US Code § 982, which authorizes the court to impose a forfeiture of property involved in the offense. Section 982 lists numerous criminal statutes, the violation of which results in the forfeiture of proceeds that were derived from, or are the gross receipts obtained

„Mitarbeitergeständnissen“: Untersuchung am Beispiel der Siemens-Korruptionsaffäre, 2012, p. 131, fn. 872

175 Charles Doyle, „Corporate Criminal Liability: An Overview of Federal Law“, 2013, p. 25 f., fn. 188 f. and 191, *https://sgp.fas.org/crs/misc/R43293.pdf,* accessed on 10 March 2022

176 Charles Doyle, „Corporate Criminal Liability: An Overview of Federal Law“, 2013, p. 26, fn. 194, *https://sgp.fas.org/crs/misc/R43293.pdf*, accessed on 10 March 2022

177 Charles Doyle, „Corporate Criminal Liability: An Overview of Federal Law“, 2013, p. 25 f., fn. 188 f. and 191, *https://sgp.fas.org/crs/misc/R43293.pdf*, accessed on 10 March 2022

178 See for more: Heather J. Garretson, „Federal Criminal Forfeiture: A Royal Pain in the Assets“, 2008, Vol. 18 (1), Southern California Review of Law and Social Justice, p. 47 f.

179 Katja Rödiger, Strafverfolgung von Unternehmen, Internal Investigations und strafrechtliche Verwertbarkeit von „Mitarbeitergeständnissen“: Untersuchung am Beispiel der Siemens-Korruptionsaffäre, 2012, p. 133, fn. 882

as a result of, the criminal offense.“[180] However, „some forfeiture statutes are remedial, some punitive, and some serve both purposes. The Sentencing Guidelines confirm that the property of a corporation is no less subject to confiscation than the property of an individual.“[181]

In sum, criminal forfeiture as a sentencing measure has increased in the field of criminal law enforcement in the federal courts and has become „extremely volatile“ in the last years.[182]

ee) The aims of corporate punishment

The US criminal law pursues four major punitive objectives in imposing criminal sanctions on corporations:

- deterrence
- incapacitation
- rehabilitation
- retribution[183]

This legal intention is also codified in the federal criminal statues according to 18 US Code § 3553 („Imposition of a sentence“)[184].

Following this abstract part of corporate punishment, the next chapter analyzes the criminal sanctions imposed on the Volkswagen AG in the „Dieselgate“ under the German and US law perspective.

180 Heather J. Garretson, „Federal Criminal Forfeiture: A Royal Pain in the Assets“, 2008, Vol. 18 (1), Southern California Review of Law and Social Justice, p. 49
181 Charles Doyle, „Corporate Criminal Liability: An Overview of Federal Law“, 2013, p. 29 f., fn. 230 ff., *https://sgp.fas.org/crs/misc/R43293.pdf*, accessed on 10 March 2022
182 Cf. Heather J. Garretson, „Federal Criminal Forfeiture: A Royal Pain in the Assets“, 2008, Vol. 18 (1), Southern California Review of Law and Social Justice, p. 46
183 Cf. Mark A. Cohen, Punishing Corporations in Melissa L. Rorie (eds), *The Handbook of White-Collar Crime*, 2020, p. 315 f.
184 Excerpt of 18 US Code § 3553 (a) (2): *„The court, in determining the particular sentence to be imposed, shall consider—the need for the sentence imposed—to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; to afford adequate deterrence to criminal conduct; to protect the public from further crimes of the defendant; and o provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.“*

IV. The „Dieselgate“ (a case analysis of Volkswagen AG)

The „Dieselgate“ is one of the biggest scandals in Germany in recent years, involving about 11 million Volkswagen diesel automobiles sold worldwide with manipulated data on polluting emissions.[185] The „manipulation of exhaust emission standards through electronic devices, i.e. the use of defeat devices was made public by a notice of violation of the US environmental protection agency (EPA) in November 2015.“[186] After the emission scandal became public, Volkswagen AG Chief Executive Officer Martin Winterkorn immediately announced his resignation, although Volkswagen AG clearly promoted its diesel cars as „clean diesel“.[187] However, the „Dieselgate“ has not only affected Volkswagen AG as car-maker company, but also other car manufactures in the field of Diesel engines that have also used such electronic devices.[188] The main manipulation involved the „installation of an electronic defeat device, manufactured by Bosch, that recognizes when a car is on the test stand and reduces the emission of nitrogen oxides (NOx) so as to meet the legal emission limits – whereas these limits are grossly exceeded during the real daily use of a car.“[189] In sum, „these cars contained software that turns off emissions controls when driving normally and turns them on when the car is undergoing on emissions test.“[190] The main function of a defeat device in a car is to ensure that these cars always pass the emission tests required by the Federal Agency for Motor Vehicles in Germany (Kraftfahrzeugbundesamt, KBA) as well as by the Environmental Protection Agency in the US (EPA) before a new car can be sold.[191] Moreover, the detection of a defeat device is very difficult because it cannot be discovered through „regular testing but only through physical inspection or on-road-testing“.[192] Without the reaction of the US authorities, this massive emission scandal would not become public in Europe in this way[193],

185 Cf. Christoph U. Schmid, Germany in Marco Frigessi di Rattalma (eds), *The Dieselgate: A legal perspective*, 2017, p. 27

186 Christoph U. Schmid, Germany in Marco Frigessi di Rattalma (eds), *The Dieselgate: A legal perspective*, 2017, p. 27

187 Joseph Allan MacDougald, United States of America in Marco Frigessi di Rattalma (eds), *The Dieselgate: A legal perspective*, 2017, p. 84, fn. 7

188 Cf. Christoph U. Schmid, Germany in Marco Frigessi di Rattalma (eds), *The Dieselgate: A legal perspective*, 2017, p. 27, fn. 1 and Christian Walburg, White-Collar and Corporate Crime: European Perspectives in Melissa L. Rorie (eds), *The Handbook of White-Collar Crime*, 2020, p. 342, fn. 7

189 Christoph U. Schmid, Germany in Marco Frigessi di Rattalma (eds), *The Dieselgate: A legal perspective*, 2017, p. 28

190 Joseph Allan MacDougald, United States of America in Marco Frigessi di Rattalma (eds), *The Dieselgate: A legal perspective*, 2017, p. 83, fn. 3

191 Joseph Allan MacDougald, United States of America in Marco Frigessi di Rattalma (eds), *The Dieselgate: A legal perspective*, 2017, p. 88

192 Joseph Allan MacDougald, United States of America in Marco Frigessi di Rattalma (eds), *The Dieselgate: A legal perspective*, 2017, p. 88

193 Cf. Christian Walburg, White-Collar and Corporate Crime: European Perspectives in Melissa L. Rorie (eds), *The Handbook of White-Collar Crime*, 2020, p. 343

because the European Union emission regulations leave room for interpretation[194] when a defeat device is exceptionally allowed and create a loophole in the ban of a defeat device according to the Regulation (EC) No. 715/2007[195]. Particularly, under Article 5 par. 2 of the Regulation (EC) No. 715/2007 a defeat device is prohibited, except when „(a) the need for the device is justified in terms of protecting the engine against damage or accident and for safe operation of the vehicle; (b) the device does not function beyond the requirements of engine starting; or (c) the conditions are substantially included in the test procedures for verifying evaporative emissions and average tailpipe emissions.“[196] Therefore, Volkswagen AG was long time not aware about its corporate responsibility and wrongdoings. Especially, „high pressures on engineers to meet increasingly strict emission standards without jeopardizing customer demand by increased costs“[197] led the emission issue enhanced. The company considered the emission discrepancy due to technical issues which should be in conform with the European legal framework on vehicle emissions.[198] However, this legal situation is clearly regulated in the US, where the existence of defeat devices are prohibited actions under the Clean Air Act (CAA).[199] Moreover, the term of „defeat device“[200] is „explicitly defined in the US Code of Federal Regulations as an auxiliary emission control device...that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use.“[201] When EPA published its Notice of Violation in the US in 2015, they pointed out that Volkswagen AG used a „software contained a switch, which triggered lower emissions when it recognized the position of the steering wheel, vehicle speed, duration of the engine's operations and barometric pressure, all of which precisely track the parameters of the federal test procedure.“[202]

194 Cf. Francesca Romanin Jacur, The Environmental Dimension of the Dieselgate: a European and International Legal Perspective in Marco Frigessi di Rattalma (eds), *The Dieselgate: A legal perspective*, 2017, p. 172 ff.

195 Regulation (EC) No. 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information, 2007, *https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32007R0715&from=DE*, accessed on 16 March 2022

196 Cf. Article 5 par. 2 Regulation (EC) No. 715/2007

197 Christian Walburg, White-Collar and Corporate Crime: European Perspectives in Melissa L. Rorie (eds), *The Handbook of White-Collar Crime*, 2020, p. 342

198 Cf. Francesca Romanin Jacur, The Environmental Dimension of the Dieselgate: a European and International Legal Perspective in Marco Frigessi di Rattalma (eds), *The Dieselgate: A legal perspective*, 2017, p. 177

199 Joseph Allan MacDougald, United States of America in Marco Frigessi di Rattalma (eds), *The Dieselgate: A legal perspective*, 2017, p. 88

200 Cf. The definition of „defeat device“ in Article 3 par. 10 of the Regulation (EC) No. 715/2007 for the EU market: *„ 'defeat device' means any element of design which senses temperature, vehicle speed, engine speed (RPM), transmission gear, manifold vacuum or any other parameter for the purpose of activating, modulating, delaying or deactivating the operation of any part of the emission control system, that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use.“*

201 Joseph Allan MacDougald, United States of America in Marco Frigessi di Rattalma (eds), *The Dieselgate: A legal perspective*, 2017, p. 88 f., fn. 28

202 Joseph Allan MacDougald, United States of America in Marco Frigessi di Rattalma (eds), *The Dieselgate: A legal perspective*, 2017, p. 95, fn. 63

Therefore, a technical error was excluded in the US and the criminal prosecution has been opened against Volkswagen AG for emissions violations.[203] The Department of Justice (DOJ) in the US noticed Volkswagen AG's practice as a „massive fraud scheme to intentionally sell diesel cars that violated U.S. emissions rules".[204] This resulted in criminal penalties under section 113 (c) of the Clear Air Act, which is part of 42 US Code § 7413 (c)[205] and contains the provision for criminal penalties if „a person knowingly makes false statements, representation, or certifications".[206] In 2017, Volkswagen AG agreed to pay a $2.8 billion criminal fine in guilty plea and furthermore to serve three years on probation.[207] German courts imposed a €1 billion ($1.2 billion) criminal fine against Volkswagen AG based on the violation of § 130 OWiG for cheating on diesel emissions.[208] This is one of the highest fines ever imposed on a German company.[209]

Furthermore, the „Dieselgate" was massive in its scope, particularly in its examination of numerous criminal law violations[210] as well as civil law violations, resulting in multiple contract law and tort related claims and remedies against the company in Germany[211] and the US[212]. In addition, several investigations and claims are still ongoing.[213]

203 Joseph Allan MacDougald, United States of America in Marco Frigessi di Rattalma (eds), *The Dieselgate: A legal perspective*, 2017, p. 102, fn. 86
204 US Department of Justice, „Volkswagen AG Agrees to Plead Guilty and Pay $4.3 Billion in Criminal and Civil Penalties and Six Volkswagen Executives and Employees Are Indicted in Connection with Conspiracy to Cheat U.S. Emissions Tests", 2017, *https://www.justice.gov/usao-edmi/pr/volkswagen-ag-agrees-plead-guilty-and-pay-43-billion-criminal-and-civil-penalties-and*, accessed on 16 March 2022
205 US Clean Air Act Title I, 2022, *https://www.epa.gov/clean-air-act-overview/clean-air-act-title-i-air-pollution-prevention-and-control-parts-through-d*, accessed on 16 March 2022
206 Joseph Allan MacDougald, United States of America in Marco Frigessi di Rattalma (eds), *The Dieselgate: A legal perspective*, 2017, p. 103, fn. 90
207 Reuters, „Volkswagen Given $2.8 Billion Criminal Penalty For Cheating on Emissions", 2017, *https://fortune.com/2017/04/21/volkswagen-probation-settlement/*, accessed on 16 March 2022
208 Cf. Legal Tribune Online, „VW muss Milliarden-Bußgeld zahlen", 2018, *https://www.lto.de/recht/kanzleien-unternehmen/k/staatsanwaltschaft-braunschweig-verhaengt-bussgeld-eine-milliarde-gegen-volkswagen/*, accessed on 16 March 2022
209 Alice Cuddy, „VW fined €1 billion by German prosecutors over diesel emissions scandal", 2018, *https://www.euronews.com/2018/06/13/vw-fined-1-billion-euros-for-dieselgate-scandal*, accessed on 16 March 2022
210 See for more: Christoph U. Schmid, Germany in Marco Frigessi di Rattalma (eds), *The Dieselgate: A legal perspective*, 2017, p. 29 ff. (fraud and manipulation of capital markets) and Joseph Allan MacDougald, United States of America in Marco Frigessi di Rattalma (eds), *The Dieselgate: A legal perspective*, 2017, p. 102 ff. (criminal prosecution)
211 Cf. Christoph U. Schmid, Germany in Marco Frigessi di Rattalma (eds), *The Dieselgate: A legal perspective*, 2017, p. 34 ff. and Kristie Pladson, „Volkswagen scandal: Top German court rules automaker must pay 'dieselgate' compensation", 2020, *https://www.dw.com/en/volkswagen-scandal-top-german-court-rules-automaker-must-pay-dieselgate-compensation/a-53556743*, accessed on 16 March 2022
212 Cf. Joseph Allan MacDougald, United States of America in Marco Frigessi di Rattalma (eds), *The Dieselgate: A legal perspective*, 2017, p. 99: *„Volkswagen also announced that it has agreed with the attorneys general of 44 US states, the District of Columbia and Puerto Rico to resolve existing and potential state consumer protection claims related to the diesel matter for a total settlement amount of approximately $603 million."*
213 Joseph Allan MacDougald, United States of America in Marco Frigessi di Rattalma (eds), *The Dieselgate: A legal perspective*, 2017, p. 85 and Legal Tribune Online, „Diese Dieselverfahren stehen 2022 an", 2022, *https://www.lto.de/recht/hintergruende/h/bgh-dieselskandal-abgasaffaere-vw-uebersicht-2022-verfahren-urteile-schadensersatz/*, accessed on 16 March 2022

The „Dieselgate“ affair is such impressive because it highlights criminal behavior in large public companies. Volkswagen AG as a popular large public company shocked the whole industry. In particular, Volkswagen AG states in its code of conduct: „We stand for responsible, honest actions“.[214] Moreover, the „Dieselgate“ developments demonstrate the importance of a compliant corporate culture in relationships to national governments, regulators and key industries.[215] One of the biggest criminal industrial scandals, the „Dieselgate“, shows that voluntary instruments for monitoring[216] and ensuring corporate compliance can save a company from wrongdoings and legal issues which are very difficult to be foreseen in its consequences and can end in high economic and financial problems.

214 Francesca Romanin Jacur, The Environmental Dimension of the Dieselgate: a European and International Legal Perspective in Marco Frigessi di Rattalma (eds), *The Dieselgate: A legal perspective*, 2017, p. 174

215 Christian Walburg, White-Collar and Corporate Crime: European Perspectives in Melissa L. Rorie (eds), *The Handbook of White-Collar Crime*, 2020, p. 342

216 Cf. Francesca Romanin Jacur, The Environmental Dimension of the Dieselgate: a European and International Legal Perspective in Marco Frigessi di Rattalma (eds), *The Dieselgate: A legal perspective*, 2017, p. 178

V. Internal investigation

After detecting a suspicion of white-collar crime or misconduct in a company, the beginning of an internal investigation[217] frequently starts. The primary mechanism of an internal investigation is to enable a company to avoid or minimize the damage, especially sanctions and criminal prosecution. „Internal Investigations are invaluable to companies both in dealing with problems and in seeking to prevent them.“[218] Generally, an internal investigation is conducted by global auditing firms and local law firms.[219]

a) The development of internal investigation (a US practice)

The term „Internal Investigations“ (in German: „unternehmensinterne Untersuchungen“[220]) and its common practice is well-known in the US since 1960.[221] The Securities and Exchange Commission (SEC) which is responsible for civil and administrative proceedings started in 1960 to encourage companies to conduct their „Voluntary Programs“ in the form of internal investigations and to achieve in return less sanctions or to avoid completely investigations conducted by the SEC on its own.[222] The proceedings of the SEC may also be important for a foreign company, e.g. for a company that is registered in Germany but operates in the US or listed as well in the US stock market („dual listings“)[223] because these circumstances require the company to register at the SEC. Furthermore, the SEC is responsible as well as the DOJ for enforcing and monitoring the very relevant Foreign Corrupt Practices ACT (FCPA).[224] The application of the FCPA is very broad (known as „long arm statute“[225]) which applies to foreign companies such as mentioned above. The FCPA is relevant in the context of white-collar crime because it „prohibits to make payments to

217 Cf. For different types of investigations, e.g. government investigation: Eugene M. Propper, Corporate Fraud Investigations and Compliance Programs, 2000, p. 53
218 Eugene M. Propper, Corporate Fraud Investigations and Compliance Programs, 2000, p. XV
219 Peter Gottschalk, Corporate White-Collar Crime Scandals: Detection, Investigation, Reconstruction, 2020, p. 91
220 Philipp Reeb, Internal investigations: neue Tendenzen privater Ermittlungen, 2012, p. 20
221 Philipp Reeb, Internal investigations: neue Tendenzen privater Ermittlungen, 2012, p. 20 f.
222 Katja Rödiger, Strafverfolgung von Unternehmen, Internal Investigations und strafrechtliche Verwertbarkeit von „Mitarbeitergeständnissen“: Untersuchung am Beispiel der Siemens-Korruptionsaffäre, 2012, p. 206 f.
223 Philipp Reeb, Internal investigations: neue Tendenzen privater Ermittlungen, 2012, p. 20
224 Tamina Preuß, Die Kontrolle von E-Mails und sonstigen elektronischen Dokumenten im Rahmen unternehmensinterner Ermittlungen: Eine straf- und datenschutzrechtliche Untersuchung unter Berücksichtigung von Auslandsbezügen, 2016, p. 425 f., fn. 42
225 Tamina Preuß, Die Kontrolle von E-Mails und sonstigen elektronischen Dokumenten im Rahmen unternehmensinterner Ermittlungen: Eine straf- und datenschutzrechtliche Untersuchung unter Berücksichtigung von Auslandsbezügen, 2016, p. 423, fn. 22

foreign government officials to assist in obtaining or retaining business.“[226]

The FCPA „makes illegal 'corrupt' payments to foreign government and political officials.“[227] Especially, in the Siemens scandal the DOJ was examining violations against the FCPA.[228] The Seaboard Report[229] of the SEC as a guideline reflects a company's enforcement of cooperation and its self-report.[230]

Moreover, the internal investigation is a powerful instrument within criminal proceedings introduced by the DOJ. Based on a successfully completed internal investigation the DOJ is allowed to waive an official prosecution by its „prosecutorial discretion“ or to minimize possible criminal sanctions by reducing the „culpability score“ due to cooperation through an internal investigation.[231] These approaches are regulated in the Principles of Federal Prosecution of Business Organizations[232] of the DOJ as intern guidelines. Further the US Sentencing Guidelines contain in § 8 Part C 2.5 (g) the concept that cooperation, like an internal investigation, mitigates the „culpability score“.[233]

In general, it does not exist a legal obligation to conduct an internal investigation in the US by law[234], however this type of cooperation is equal to a de-facto obligation („carrots and sticks“[235] effect) if a company wants to achieve a favourable outcome to itself in terms of „damage limitation“.

226 US Foreign Corrupt Practice Act, 2017, *https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act*, accessed on 22 March 2022
227 Eugene M. Propper, Corporate Fraud Investigations and Compliance Programs, 2000, p. 150
228 See for more: Katja Rödiger, Strafverfolgung von Unternehmen, Internal Investigations und strafrechtliche Verwertbarkeit von „Mitarbeitergeständnissen“: Untersuchung am Beispiel der Siemens-Korruptionsaffäre, 2012, p. 215 ff.
229 Cf. Securities and Exchange Commission, „Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions“, 2001, *https://www.sec.gov/litigation/investreport/34-44969.htm*, accessed on 22 March 2022
230 Katja Rödiger, Strafverfolgung von Unternehmen, Internal Investigations und strafrechtliche Verwertbarkeit von „Mitarbeitergeständnissen“: Untersuchung am Beispiel der Siemens-Korruptionsaffäre, 2012, p. 204 f.
231 Philipp Reeb, Internal investigations: neue Tendenzen privater Ermittlungen, 2012, p. 22 f.
232 US Principles of Federal Prosecution of Business Organizations, 2020, *https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations*, accessed on 22 March 2022
233 Tamina Preuß, Die Kontrolle von E-Mails und sonstigen elektronischen Dokumenten im Rahmen unternehmensinterner Ermittlungen: Eine straf- und datenschutzrechtliche Untersuchung unter Berücksichtigung von Auslandsbezügen, 2016, p. 428, fn. 75
234 Katja Rödiger, Strafverfolgung von Unternehmen, Internal Investigations und strafrechtliche Verwertbarkeit von „Mitarbeitergeständnissen“: Untersuchung am Beispiel der Siemens-Korruptionsaffäre, 2012, p. 206, fn. 1339
235 Katja Rödiger, Strafverfolgung von Unternehmen, Internal Investigations und strafrechtliche Verwertbarkeit von „Mitarbeitergeständnissen“: Untersuchung am Beispiel der Siemens-Korruptionsaffäre, 2012, p. 222

In Germany, there is no obligation under German law to „report any wrongdoings to prosecutors or law enforcement agencies.“[236]

However, if a company undertakes an internal investigation and cooperates with prosecutors, this may be a mitigating aspect in sanctions them[237], e.g. the amount of fines under the OWiG (see Chapter III.d.bb.). In contrast to the above mentioned guidelines in the US the current German law system does not include such guidelines and specifications in respect of concrete legal requirements for the implementation of an internal investigation.[238]

b) The benefits and risks of an internal investigation

For a company two main advantages may result from conducting an internal investigation. First, in the event of wrongdoings, an internal investigation can help reduce the penalties imposed on them by the government or the judiciary. Second, they can get ahead of problems in the public (e.g. social media) and improve its image and trust in its business relationship with its customers, shareholders and investors.[239] For details in regard to the reduction of penalties please see above (Chapter V.a.). The corporate reputation is moreover a key factor in business and they can demonstrate with a „Zero Tolerance Policy“[240] that any misconduct will be investigated. Following Figure 4 illustrates which aspects affect a company's reputation and accountability:

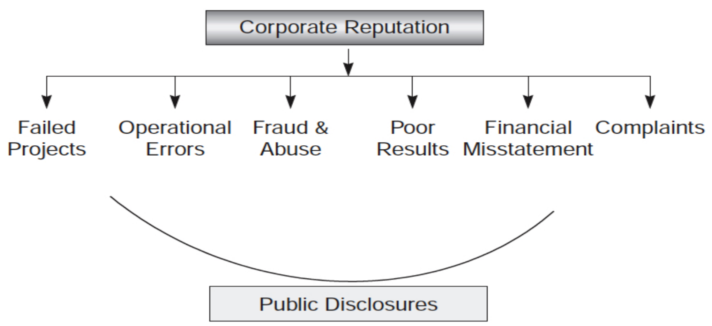

Figure 4[241]

236 Christian Pelz, „Internal investigations in Germany“, 2015, p. 2, *https://www.noerr.com/en/newsroom/news/internal-investigations-in-germany*, accessed on 22 March 2022
237 Christian Pelz, „Internal investigations in Germany“, 2015, p. 3, *https://www.noerr.com/en/newsroom/news/internal-investigations-in-germany*, accessed on 22 March 2022
238 Stephan Nakszynski, „Internal Investigations in Germany Part 1: What to consider upfront“, 2022, *https://iuslaboris.com/insights/internal-investigations-in-germany-part-1-what-to-consider-upfront/*, accessed on 22 March 2022 and Philipp Reeb, Internal investigations: neue Tendenzen privater Ermittlungen, 2012, p. 26
239 Patrick Linehan and Zoe Osborne, „The Benefits and Risks of Conducting an Internal Investigation: Is it Better to Let Sleeping Dogs Lie?“, 2020, *https://www.steptoeinvestigationsblog.com/2020/12/the-benefits-and-risks-of-conducting-an-internal-investigation-is-it-better-to-let-sleeping-dogs-lie/*, accessed on 22 March 2022
240 Tamina Preuß, Die Kontrolle von E-Mails und sonstigen elektronischen Dokumenten im Rahmen unternehmensinterner Ermittlungen: Eine straf- und datenschutzrechtliche Untersuchung unter Berücksichtigung von Auslandsbezügen, 2016, p. 50, fn. 99
241 K.H. Spencer Pickett, Internal Investigations: A Basic Guide Anyone Can Use, 2008, p. 196, Figure 8.5

Legal problems, such as „Fraud & Abuse“ or „Complaints“ are significantly influencing the corporate reputation. Nevertheless, public disclosure and dealing with the issues in an appropriate manner can protect the company from image damages by „bolstering its reputation“[242]. At this point, internal investigation is an effective tool. However, potential risks of an internal investigation has also to be considered in advance.

While implementing a corporate internal investigation some pitfalls and risks have to be taken into account. Especially during an internal investigation the company must ensure compliance with privacy laws and labour law rights.[243] Particularly, the company has to protect employees' rights. In the case that an employee could be potentially „guilty“ his or her right to protection from self-incrimination must be respected.[244] When communicating and sharing the results of the internal investigation externally, e.g. with the government or prosecutors, the report may contain data such as names of individuals or financial information which have to be restricted in the case of its transfer.[245] Another important aspect is that „an internal investigation may also result in discovery of misconduct beyond the scope of the initial allegations of wrongdoing.“[246] In this context, the company „should be careful about preemptively disclosing materials“[247] of misconduct so far not on government's or prosecution's awareness. However, this issue can be prevent by limiting properly the scope of the investigation.[248]

Moreover, the company has to avoid conflicts of interest, e.g. „where those who are undertaking the investigation are also involved in the alleged wrongdoing.“[249]

242 David I. Kelch, „Internal Investigations: Their risks and benefits“, 2019, *https://www.porterwright.com/media/internal-investigations-their-risks-and-benefits/*, accessed on 22 March 2022
243 Christian Pelz, „Internal investigations in Germany“, 2015, p. 1, *https://www.noerr.com/en/newsroom/news/internal-investigations-in-german*y, accessed on 23 March 2022
244 Katja Rödiger, Strafverfolgung von Unternehmen, Internal Investigations und strafrechtliche Verwertbarkeit von „Mitarbeitergeständnissen“: Untersuchung am Beispiel der Siemens-Korruptionsaffäre, 2012, p. 248, fn. 1540
245 Phil Ostwalt, „Navigating the pitfalls of cross-border investigations“, 2014, *https://www.financierworldwide.com/navigating-the-pitfalls-of-cross-border-investigations#.Yjr0bS9Xau4*, accessed on 23 March 2022
246 Michael J. Missal, Stavroula E. Lambrakopoulos and Curtis S. Kowalk, „Conducting Internal Investigations“, 2015, p. 8, *https://files.klgates.com/files/publication/9c8c688d-f33b-4e00-befd-067ccd918740/presentation/publicationattachment/08668f67-5813-4c92-ac28-121554cc82a2/conducting_internal_tinvestigations.pdf*, accessed on 23 March 2022
247 Jennifer L. Chunias and Roberto M. Braceras, „Conducting Effective Internal Investigations: A Corporate Counsel's Guide“, 2016, *https://www.goodwinlaw.com/-/media/files/publications/attorney-articles/2015/mcle-internal-investigations-article.pdf*, accessed on 23 March 2022
248 Michael J. Missal, Stavroula E. Lambrakopoulos and Curtis S. Kowalk, „Conducting Internal Investigations“, 2015, p. 8, *https://files.klgates.com/files/publication/9c8c688d-f33b-4e00-befd-067ccd918740/presentation/publicationattachment/08668f67-5813-4c92-ac28-121554cc82a2/conducting_internal_tinvestigations.pdf*, accessed on 23 March 2022
249 Patrick Linehan and Zoe Osborne, „The Benefits and Risks of Conducting an Internal Investigation: Is it Better to Let Sleeping Dogs Lie?“, 2020, *https://www.steptoeinvestigationsblog.com/2020/12/the-benefits-and-risks-of-conducting-an-internal-investigation-is-it-better-to-let-sleeping-dogs-lie/*, accessed on 23 March 2022

Therefore, the corporate internal investigation should be carried out by objective and external investigators who are impartial in this process. Finally, the costs of an internal investigation can be enormous and must be well managed and balanced by the company. An internal investigation „demands financial investment and as well as management time.“[250]
In sum, a well structured and prepared internal investigation can minimize the risks while the advantages of a cooperation with the regulatory environment can be significant.[251]

c) Conducting an internal investigation

Handling an internal investigation properly is a key aspect to obtain the right view of the circumstances in respect of potential wrongdoing by the company. Always keep in mind that „the importance of clarifying the investigation's scope and purpose at the outset cannot be overstated.“[252] „It is a fact-finding process that is undertaken to "get to the bottom" of potential wrongdoing by the company itself or by an officer, director or employee. A well-done investigation often includes a final report that memorializes the investigation findings and includes specific remedial steps to be taken by the company.“[253]

Therefore, each internal investigation „involves at least three basic steps:

- Planning the investigation
- Performing the fieldwork
- Presenting the results“[254]

250 Patrick Linehan and Zoe Osborne, „The Benefits and Risks of Conducting an Internal Investigation: Is it Better to Let Sleeping Dogs Lie?“, 2020, *https://www.steptoeinvestigationsblog.com/2020/12/the-benefits-and-risks-of-conducting-an-internal-investigation-is-it-better-to-let-sleeping-dogs-lie/*, accessed on 23 March 2022
251 Michael J. Missal, Stavroula E. Lambrakopoulos and Curtis S. Kowalk, „Conducting Internal Investigations“, 2015, p. 8, *https://files.klgates.com/files/publication/9c8c688d-f33b-4e00-befd-067ccd918740/presentation/publicationattachment/08668f67-5813-4c92-ac28-121554cc82a2/conducting_internal_tinvestigations.pdf*, accessed on 23 March 2022
252 Bruce E. Yannett and David Sarratt, „Beginning an Internal Investigation: The US perspective“, 2020, par. 6.5, *https://globalinvestigationsreview.com/guide/the-practitioners-guide-global-investigations/2022/article/beginning-internal-investigation-the-us-perspective*, accessed on 26 March 2022
253 David I. Kelch and Thomas S. Jones, „How To Conduct A Quality Internal Investigation“, 2019, *https://chiefexecutive.net/how-to-conduct-a-quality-internal-investigation/*, accessed on 26 March 2022
254 K.H. Spencer Pickett, Internal Investigations: A Basic Guide Anyone Can Use, 2008, p. 5

In detail, „in the course of conducting an internal investigation will almost need to:

- interview employees
- review documents
- report the facts and render legal advice to their client
- deal with the prosecutor(s)“[255]

During an internal investigation information are collecting by two main sources, namely „data screening“ of hardcopy and electronic documents which „form the foundation of the investigation“[256] and subsequently „interviewing employees“[257]. However, the following discussions will be focused on the matter of (electronic) documents, as mentioned in the introduction. „Documents often provide the best record of the conduct under investigation. Motive and intent can often be established through documents and, in white-collar criminal prosecutions, documents can play a large role in determining „intent“, particularly the company's intent.“[258] Important information can arise from a variety of data sources „beyond emails, documents, spreadsheets, and presentations, including cell phone data, online chats, audio/video files, and content from encrypted devices and files.“[259] The main tool of (electronic) document collection and production is implemented by eDiscovery technologies nowadays.[260] Nevertheless, the company has first to ensure that relevant documents „should not be moved, altered or destroyed“[261] to avoid obstruction of justice charges. Furthermore, „the key issue in reviewing an employee's files, without the employee's consent, is usually whether the employee had a „reasonable expectation of privacy“ under the circumstances.“[262] Therefore, „all documents generated during the course of the investigation should be stamped „Privileged and Confidential“.[263] The approach of legal privileges will be described in an additional paragraph below (see Chapter V.e.) and its situation in Germany and the US. Moreover, a well-done organization of documents is a vital matter. Particularly, an appropriate workplace system should „organize, maintain, number, secure and copy the documents,

255 Eugene M. Propper, Corporate Fraud Investigations and Compliance Programs, 2000, p. 61
256 Eugene M. Propper, Corporate Fraud Investigations and Compliance Programs, 2000, p. 80
257 Cf. Philipp Reeb, Internal investigations: neue Tendenzen privater Ermittlungen, 2012, p. 77 f.
258 Eugene M. Propper, Corporate Fraud Investigations and Compliance Programs, 2000, p. 80
259 Lighthouse, „eDiscovery for Investigations: Different Goal, Different Approach“, 2021, *https://www.jdsupra.com/legalnews/ediscovery-for-investigations-different-8054287/*, accessed on 26 March 2022
260 Lighthouse, „eDiscovery for Investigations: Different Goal, Different Approach“, 2021, *https://www.jdsupra.com/legalnews/ediscovery-for-investigations-different-8054287/*, accessed on 26 March 2022
261 Eugene M. Propper, Corporate Fraud Investigations and Compliance Programs, 2000, p. 80
262 Eugene M. Propper, Corporate Fraud Investigations and Compliance Programs, 2000, p. 82, fn. 63
263 Eugene M. Propper, Corporate Fraud Investigations and Compliance Programs, 2000, p. 89, point 6

and to prepare for producing them to the government."[264] Listing the documents in an index could be helpful in this context. Especially, „a list of „bad" documents, those potentially harmful to the company's position, should be compiled in one place to evaluate the potential problems."[265]

Finally, in a global company, document production will often be reviewed and produced from multiple locations.[266] In this case cross-border issues can occur and be challenging. The next paragraph contains this subject in more detail.

d) Cross-border internal investigation issues

In the last years, cross-border investigations have increased based on a global business environment. For companies operating abroad, dealing with „foreign regulators and other authorities"[267] becomes essential.

Following Figure 5 illustrates the primary trigger for cross-border corporate investigations:

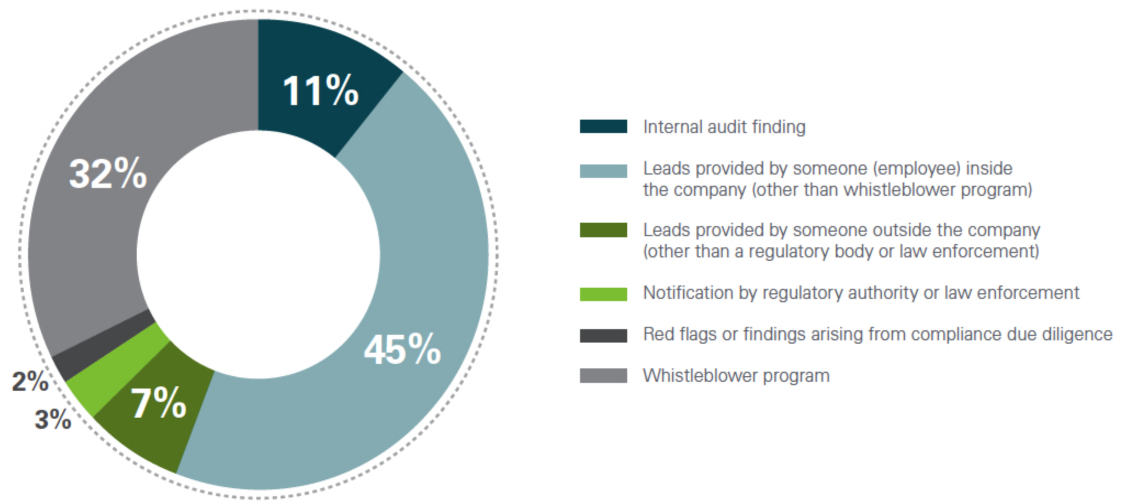

Figure 5[268]

264 Eugene M. Propper, Corporate Fraud Investigations and Compliance Programs, 2000, p. 82
265 Eugene M. Propper, Corporate Fraud Investigations and Compliance Programs, 2000, p. 82
266 Eugene M. Propper, Corporate Fraud Investigations and Compliance Programs, 2000, p. 81
267 Stéphane Eljarrat, Frédéric Plamondon and Emily Lynch, „Navigating issues in cross-border investigations", 2021, *https://www.financierworldwide.com/navigating-issues-in-cross-border-investigations#.YkA83C-21N0*, accessed on 27 March 2022
268 Petrus Marais and Phil Ostwalt, „Cross-border investigations: Are you prepared for the challenge?", 2013, p. 4, *https://assets.kpmg/content/dam/kpmg/pdf/2013/12/cross-border-investigations.pdf*, accessed on 27 March 2022

Implementing a cross-border internal investigation needs to be carefully planned based on following reasons: „Various issues arise like language barriers, different cultural perceptions, local laws, data privacy provisions, and blocking statutes.“[269] Understanding local relationships and customs as well as local law[270] are also important matters. Furthermore, „justice systems and the effectiveness of the courts in a foreign country can be very different.“[271] In addition, practices that are in one country legal or ethical may not be in the foreign country or may simply not be enforceable.[272] Questionable is also whether obtained information and/or evidence can be used in the jurisdiction of a foreign country.[273] Therefore, „companies involved in cross-border investigations are faced with navigating a variety of foreign laws and regulations that, in many respects, change the way an investigation can be conducted.“[274] All these circumstances and obstacles may lead a cross-border investigation challenging. The following explanations will be focused on data privacy issues, especially under the General Data Protection Regulation (GDPR)[275] which is directly applicable in the European Economic Area and contains strict provisions to protect the privacy of individuals.[276] The collection and transmission of data containing personal information gathered during the internal investigation must comply with data privacy regulations.[277] This is one of the most crucial step in a cross-border investigation in regard to the transfer of data within multiple jurisdictions, especially outside of the European Union. A common strategy for data originating from EU countries is to „manage as much of the data as possible in the originating jurisdiction, minimizing the amount of data that leaves the country.“[278] Privacy laws have the high aim to „protect personal data, including establishing a fundamental legal right on the privacy of personal data, even if such data are contained on an employer's system or computer.“[279]

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269 Sebastian Lach and Désirée Maier, „Cross-border Investigations“, *https://guide.hoganlovellsabc.com/cross-border-investigations*, accessed on 27 March 2022
270 Cf. Eugene M. Propper, Corporate Fraud Investigations and Compliance Programs, 2000, p. 149
271 Eugene M. Propper, Corporate Fraud Investigations and Compliance Programs, 2000, p. 150
272 Cf. Eugene M. Propper, Corporate Fraud Investigations and Compliance Programs, 2000, p. 149
273 Cf. Eugene M. Propper, Corporate Fraud Investigations and Compliance Programs, 2000, p. 148
274 Petrus Marais and Phil Ostwalt, „Cross-border investigations: Are you prepared for the challenge?“, 2013, p. 12, *https://assets.kpmg/content/dam/kpmg/pdf/2013/12/cross-border-investigations.pdf*, accessed on 27 March 2022
275 The GDPR came into effect on 25 May 2018: Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/47/EC (GDPR), 2016, *https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R0679&from=EN*, accessed on 28 March 2022
276 Cf. Bruce E. Yannett and David Sarratt, „Beginning an Internal Investigation: The US perspective“, 2020, par. 6.7, *https://globalinvestigationsreview.com/guide/the-practitioners-guide-global-investigations/2022/article/beginning-internal-investigation-the-us-perspective*, accessed on 28 March 2022
277 Sebastian Lach and Désirée Maier, „Cross-border Investigations“, *https://guide.hoganlovellsabc.com/cross-border-investigations*, accessed on 28 March 2022
278 Jeff Griffiths, „5 questions about cross-border eDiscovery challenges“, 2016, *https://www2.deloitte.com/content/dam/Deloitte/us/Documents/finance/us-fas-discovery-insights-global-5-questions.pdf*, accessed on 28 March 2022
279 Petrus Marais and Phil Ostwalt, „Cross-border investigations: Are you prepared for the challenge?“, 2013, p. 13, *https://assets.kpmg/content/dam/kpmg/pdf/2013/12/cross-border-investigations.pdf*, accessed on 28 March 2022

The GDPR „imposes certain restrictions on the transfer and processing of data to a third country outside the EU for the purposes of disclosing material to a foreign authority.“[280] Furthermore, the GDPR „broadly defines personal data as “any information relating to an identified or identifiable natural person”.[281] It restricts the collection and processing of personal data to limited circumstances such as when the individual has consented, when it is necessary to comply with a legal obligation, or when a legitimate corporate interest is not overridden by the fundamental rights and freedoms of the individual.“[282] Particularly, „another specific issue in cross-border cases is the „export“ of data to other countries. This can be problematic if such countries do not have an equivalent level of data privacy protection[283] compared to the European Union.“[284]

In the following some strategies should be pointed out which can mitigate the risks associated with cross-border data transfers:

- Obtaining consent[285] from individuals to conduct a respective disclosure and transfer of its personal data.[286]
- Data minimisation[287] or anonymisation[288] through limiting the data discloser and transfer to that extent which is necessary for the purpose. In addition, redaction of sensitive data from the documents if possible.[289]
- Concluding data processing agreements[290] if data are transferred to an affiliate or a third party which should act as a data processor under the control of the company.[291]
- Concluding „special arrangements, such as a cross-border data transfer agreement.“[292]
- Adopting corporate policies that ensure data protection laws.[293]

280 Stéphane Eljarrat, Frédéric Plamondon and Emily Lynch, „Navigating issues in cross-border investigations“, 2021, *https://www.financierworldwide.com/navigating-issues-in-cross-border-investigations#.YkA83C-21N0*, accessed on 28 March 2022
281 Cf. Article 4 par. 1 GDPR
282 Petrus Marais and Phil Ostwalt, „Cross-border investigations: Are you prepared for the challenge?“, 2013, p. 14, *https://assets.kpmg/content/dam/kpmg/pdf/2013/12/cross-border-investigations.pdf*, accessed on 28 March 2022
283 Cf. Articles 44 ff. GDPR
284 Sebastian Lach and Désirée Maier, „Cross-border Investigations“, *https://guide.hoganlovellsabc.com/cross-border-investigations*, accessed on 28 March 2022
285 Cf. Article 6 par. 1 (a) GDPR
286 Nigel Parker, „Practical steps for navigating data protection issues in cross-border regulatory investigations“, 2015, *https://www.allenovery.com/en-gb/germany/blogs/digital-hub/practical-steps-for-navigating-data-protection-issues-in-cross-border-regulatory-investigations*, accessed on 28 March 2022
287 Cf. Article 5 par. 1 (c) GDPR
288 Cf. Article 4 par. 5 GDPR
289 Nigel Parker, „Practical steps for navigating data protection issues in cross-border regulatory investigations“, 2015, *https://www.allenovery.com/en-gb/germany/blogs/digital-hub/practical-steps-for-navigating-data-protection-issues-in-cross-border-regulatory-investigations*, accessed on 28 March 2022
290 Cf. Article 28 par. 3 GDPR
291 Nigel Parker, „Practical steps for navigating data protection issues in cross-border regulatory investigations“, 2015, *https://www.allenovery.com/en-gb/germany/blogs/digital-hub/practical-steps-for-navigating-data-protection-issues-in-cross-border-regulatory-investigations*, accessed on 28 March 2022
292 Bruce E. Yannett and David Sarratt, „Beginning an Internal Investigation: The US perspective“, 2020, par. 6.7, *https://globalinvestigationsreview.com/guide/the-practitioners-guide-global-investigations/2022/article/beginning-internal-investigation-the-us-perspective*, accessed on 28 March 2022
293 Petrus Marais and Phil Ostwalt, „Cross-border investigations: Are you prepared for the challenge?“, 2013, p. 15,

In this context, please note that a data transfer within the European Union is standardized and simplified based on the unitary application of the GDPR.[294] In addition, a personal data transfer to a third country, i.e. outside of the EU might be justified on the legal ground that „the transfer is necessary for the establishment, exercise or defence of legal claims“[295].

Cross-border investigations could be very challenged for a company due to the increase of „global regulations and enforcement actions“.[296] In particular, compliance with data privacy laws such as the GDPR must be ensured because its breach could result in severe sanctions.[297] Therefore, they have to be well prepared and preferably to include a special legal team for data privacy concerns to ensure data protection.

e) Legal privileges within internal investigation (a German and US law perspective)

Legal privileges are acknowledged in both jurisdictions[298], including Germany and the US, however based on different concepts. Therefore, „documents that are privileged under foreign laws may not be under German laws, and can possibly be seized by the prosecuting authorities at the client's offices.“[299] First, the German legal situation in regard to a legal privilege will be analyzed in the context of an internal investigation.

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https://assets.kpmg/content/dam/kpmg/pdf/2013/12/cross-border-investigations.pdf, accessed on 28 March 2022

294 Cf. Tim Wybitul, Lukas Ströbel and Marian Reuß, „Übermittlung personenbezogener Daten in Drittländer“, 2017, Zeitschrift für Datenschutz (11/2017), p. 503 ff.

295 Cf. Article 49 par. 1 (e) GDPR

296 Phil Ostwalt, „Navigating the pitfalls of cross-border investigations“, 2014, *https://www.financierworldwide.com/navigating-the-pitfalls-of-cross-border-investigations#.Yjr0bS9Xau4*, accessed on 28 March 2022

297 Cf. Article 83 par. 4 GDPR: *„Infringements of the following provisions shall, in accordance with paragraph 2, be subject to administrative fines up to 10 000 000 EUR, or in the case of an undertaking, up to 2 % of the total worldwide annual turnover of the preceding financial year, whichever is higher.“*

298 Cf. Wilhelm Hartung, Barry M. Hartman, Dylan G. Moses, Theodore L. Kornobis, Christoper A. Jaros and James G. Millward, „Cross-border investigations: When are documents developed in the course of an internal investigation protected by legal privilege?“, 2018, *https://www.klgates.com/Cross-border-investigations--When-are-documents-developed-in-the-course-of-an-internal-investigation-protected-by-legal-privilege-08-27-2018*, accessed on 29 March 2022

299 Roger Burlingame and Tim Bowden, „Corporate Investigations Report 2022 Germany“, 2022, par. 5.1, *https://iclg.com/practice-areas/corporate-investigations-laws-and-regulations/germany*, accessed on 29 March 2022

Under German law the communication between an attorney and its client is generally protected.[300] This approach is implemented in the German Code of Criminal Procedure[301] (in German: Strafprozessordnung, StPO), more specific set down in § 97 of the StPO and § 160a of the StPO. „§ 97 StPO stipulates that correspondence between an accused and his lawyer, notes concerning confidential information entrusted to a lawyer by an accused, and other objects which are covered by a lawyer's right not to testify shall not be subject to seizure. According to § 160a (1) sentence 1 StPO, an investigation measure generally is inadmissible, when it is directed against a lawyer and it is expected to produce information in respect of which the lawyer would have the right to refuse to testify.[302]

In Germany, „the two pillars of legal privilege are an attorney's:

- legal obligation to maintain confidentiality of client information and
- right to remain silent as a witness in legal proceedings.“[303]

However, a huge issue under German law is how privilege protection applies to corporations that cannot commit a crime due to the requirement of individual culpability (see Chapter III.b.). Therefore, a corporate internal investigation and its handling is still a new phenomenon in Germany.[304] To reach a better understanding of privilege protection against search and seizure, the prerequisites should be pointed out.

300 Roger Burlingame and Tim Bowden, „Corporate Investigations Report 2022 Germany“, 2022, par. 5.1, *https://iclg.com/practice-areas/corporate-investigations-laws-and-regulations/germany*, accessed on 29 March 2022
301 German Code of Criminal Procedure, 2019, *https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html*, accessed on 29 March 2022
302 Markus S. Rieder and Jonas Menne, „Internal Investigations – legal situation, possible options and legal political need for action“, 2019, p. 23, *https://ul.qucosa.de/api/qucosa%3A33904/attachment/ATT-0*, accessed on 29 March 2022
303 Wilhelm Hartung, Barry M. Hartman, Dylan G. Moses, Theodore L. Kornobis, Christoper A. Jaros and James G. Millward, „Cross-border investigations: When are documents developed in the course of an internal investigation protected by legal privilege?“, 2018, *https://www.klgates.com/Cross-border-investigations--When-are-documents-developed-in-the-course-of-an-internal-investigation-protected-by-legal-privilege-08-27-2018*, accessed on 29 March 2022
304 Wilhelm Hartung, Barry M. Hartman, Dylan G. Moses, Theodore L. Kornobis, Christoper A. Jaros and James G. Millward, „Cross-border investigations: When are documents developed in the course of an internal investigation protected by legal privilege?“, 2018, *https://www.klgates.com/Cross-border-investigations--When-are-documents-developed-in-the-course-of-an-internal-investigation-protected-by-legal-privilege-08-27-2018*, accessed on 29 March 2022

Especially, following conditions have to be met cumulatively:

- „Firstly, a special client-lawyer relationship is necessary, which requires a relationship of an accused to his lawyer. Companies therefore have to be in a position similar to that of an accused due to an administrative offence or a revocation proceeding, and they must have mandated a lawyer or a law firm in connection with this proceeding.

- Secondly, the requirements for a legal entity to be considered in a position similar to an individual charged with a criminal offence (and therefore be protected from certain investigation measures). As a prerequisite, the entity has to be a possible subject to further investigations, according to objective criteria. This presupposes a „sufficient" (in German: hinreichend) suspicion for a criminal offence or a breach of the duty of supervision committed by an individual person in management (§§ 30, 130 OWiG)."[305]

These requirements were carved out in the recent decision of the German Federal Constitutional Court[306] (in German: Bundesverfassungsgericht, BVerfG) in the year 2018 „concerned the seizure of materials from Jones Day's offices in Munich, undertaken an internal investigation on behalf of its client, the supervisory board of Volkswagen AG"[307] in the case of emissions manipulation. In Germany, the legal privilege in favour of a company during an internal investigation is only possible if the company is in „a position similar to that of a person charged with a criminal offence".[308] This legal approach is very adversely for a company because it leads to the de facto result that „mandates from internal investigation generally do not require protection against searches and seizures."[309] In contrast to the German legal situation, „legal privilege under US law offers extensive protection (even during internal investigations).[310] The next paragraph illustrates the legal privileges and protections available to a company within a corporate internal investigation from the US law perspective.[311]

305 Markus S. Rieder and Jonas Menne, „Internal Investigations – legal situation, possible options and legal political need for action", 2019, p. 24 f., *https://ul.qucosa.de/api/qucosa%3A33904/attachment/ATT-0*, accessed on 29 March 2022

306 Cf. Bundesverfassungsgericht, „Constitutional complaints relating to the search of a law firm in connection with the "diesel emissions scandal" unsuccessful", 2018, *https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2018/bvg18-057.html*, accessed on 29 March 2022

307 Wilhelm Hartung, Barry M. Hartman, Dylan G. Moses, Theodore L. Kornobis, Christoper A. Jaros and James G. Millward, „Cross-border investigations: When are documents developed in the course of an internal investigation protected by legal privilege?", 2018, *https://www.klgates.com/Cross-border-investigations--When-are-documents-developed-in-the-course-of-an-internal-investigation-protected-by-legal-privilege-08-27-2018*, accessed on 29 March 2022

308 Markus S. Rieder and Jonas Menne, „Internal Investigations – legal situation, possible options and legal political need for action", 2019, p. 26 f., *https://ul.qucosa.de/api/qucosa%3A33904/attachment/ATT-0*, accessed on 29 March 2022

309 Markus S. Rieder and Jonas Menne, „Internal Investigations – legal situation, possible options and legal political need for action", 2019, p. 27, *https://ul.qucosa.de/api/qucosa%3A33904/attachment/ATT-0*, accessed on 29 March 2022

310 Markus S. Rieder and Jonas Menne, „Internal Investigations – legal situation, possible options and legal political need for action", 2019, p. 27, *https://ul.qucosa.de/api/qucosa%3A33904/attachment/ATT-0,* accessed on 29 March 2022

311 Cf. Eugene M. Propper, Corporate Fraud Investigations and Compliance Programs, 2000, p. 23

In the US, „documents created during the course of an internal investigation are potentially protected by two principles:

- the attorney-client privilege and
- the attorney work product doctrine“[312]

The „attorney-client privilege applies to protect confidential communications made between a client and an attorney for the purposes of seeking or providing legal advice.“[313] Although a corporation is not a natural person, „a corporation is treated as such for purposes of the attorney-client privilege.“[314] „In addition, to the protection of communication between lawyer and client, the work product doctrine protects the lawyer's work products from access by third parties, as long as they were created in preparation of a current or future legal dispute.“[315] Moreover, „the attorney-client privilege is absolute, while the attorney work product doctrine may be overcome for certain types of work product. Nevertheless, both the attorney-client privilege and work product doctrine protection may protect from disclosure the types of materials at issue in internal investigations, undertaken when there is the prospect of litigation.“[316] As noted, „the work product doctrine protects all the mental impressions, conclusions and legal theories of counsel.“[317] Particularly, „work products created within internal investigations may also be protected.“[318] Furthermore, the work product doctrine has greater protection than the attorney-client privilege because is is „not limited to communications.“

312 Wilhelm Hartung, Barry M. Hartman, Dylan G. Moses, Theodore L. Kornobis, Christoper A. Jaros and James G. Millward, „Cross-border investigations: When are documents developed in the course of an internal investigation protected by legal privilege?“, 2018, *https://www.klgates.com/Cross-border-investigations--When-are-documents-developed-in-the-course-of-an-internal-investigation-protected-by-legal-privilege-08-27-2018*, accessed on 29 March 2022
313 Wilhelm Hartung, Barry M. Hartman, Dylan G. Moses, Theodore L. Kornobis, Christoper A. Jaros and James G. Millward, „Cross-border investigations: When are documents developed in the course of an internal investigation protected by legal privilege?“, 2018, *https://www.klgates.com/Cross-border-investigations--When-are-documents-developed-in-the-course-of-an-internal-investigation-protected-by-legal-privilege-08-27-2018*, accessed on 29 March 2022
314 Eugene M. Propper, Corporate Fraud Investigations and Compliance Programs, 2000, p. 23, fn. 1
315 Markus S. Rieder and Jonas Menne, „Internal Investigations – legal situation, possible options and legal political need for action“, 2019, p. 28, *https://ul.qucosa.de/api/qucosa%3A33904/attachment/ATT-0*, accessed on 29 March 2022
316 Wilhelm Hartung, Barry M. Hartman, Dylan G. Moses, Theodore L. Kornobis, Christoper A. Jaros and James G. Millward, „Cross-border investigations: When are documents developed in the course of an internal investigation protected by legal privilege?“, 2018, *https://www.klgates.com/Cross-border-investigations--When-are-documents-developed-in-the-course-of-an-internal-investigation-protected-by-legal-privilege-08-27-2018*, accessed on 29 March 2022
317 Eugene M. Propper, Corporate Fraud Investigations and Compliance Programs, 2000, p. 31
318 Markus S. Rieder and Jonas Menne, „Internal Investigations – legal situation, possible options and legal political need for action“, 2019, p. 28, fn. 43, *https://ul.qucosa.de/api/qucosa%3A33904/attachment/ATT-0*, accessed on 29 March 2022

Especially, the attorney-client privilege covers only the confidential communications in the relationship between lawyer and client, i.e. „information other than „communications“ is unprotected.“[319] In Germany such an „attorney work product doctrine“ is not available.[320] However, the US law contains exceptions to these privileges. „An exception to both the attorney-client privilege and the work product doctrine is the crime-fraud exception. Protection is denied to a client's communications with an attorney, made for the purpose of committing a crime or fraud.“[321] Another legal situation in which these above mentioned privileges may be denied is where a waiver of the attorney-client privilege and work product doctrine has been given in the corporate internal investigation.[322] However, a waiver can only be considered if the attorney-client privilege and/or the work product doctrine prior exist, i.e. „come into existence.“[323] For example, a waiver is considered „when protected communication or legal work products are disclosed to third parties.“[324] Moreover, „a waiver of these privileges by voluntary disclosure of the investigative report or information to the government is possible.“[325] Some US government agencies, „including the SEC, the Department of Defence, and the Department of Justice have instituted voluntary disclosure programs, under which companies could receive more lenient treatment if they investigate themselves, disclosure the results to the government, and take steps to correct deficiencies or reform wrongdoing. In the arena of corporate criminal conduct, the Federal Sentencing Guidelines also provide incentives for internal corporate investigation, and disclosure to and cooperation with the government.“[326] Nevertheless, a waiver of attorney-client privilege and the work product doctrine is broadly discussed as an issue in the US.[327] In this context, a US court ruled that „any voluntary disclosure by the holder of the (attorney-client) privilege is inconsistent with the confidential relationship and thus waives the privilege.“[328] In particular, the government agencies should not request a waiver of these privileges in the context of cooperation, but only the disclosure of relevant facts that are not protected by these legal instruments.[329]

319 Eugene M. Propper, Corporate Fraud Investigations and Compliance Programs, 2000, p. 31
320 Cf. Roger Burlingame and Tim Bowden, „Corporate Investigations Report 2022 Germany“, 2022, par. 5.1, *https://iclg.com/practice-areas/corporate-investigations-laws-and-regulations/germany*, accessed on 29 March 2022
321 Eugene M. Propper, Corporate Fraud Investigations and Compliance Programs, 2000, p. 29 f.
322 Cf. Eugene M. Propper, Corporate Fraud Investigations and Compliance Programs, 2000, p. 35
323 Eugene M. Propper, Corporate Fraud Investigations and Compliance Programs, 2000, p. 35
324 Markus S. Rieder and Jonas Menne, „Internal Investigations – legal situation, possible options and legal political need for action“, 2019, p. 29, *https://ul.qucosa.de/api/qucosa%3A33904/attachment/ATT-0*, accessed on 29 March 2022
325 Eugene M. Propper, Corporate Fraud Investigations and Compliance Programs, 2000, p. 42
326 Eugene M. Propper, Corporate Fraud Investigations and Compliance Programs, 2000, p. 35
327 Cf. Eugene M. Propper, Corporate Fraud Investigations and Compliance Programs, 2000, p. 36, fn. 67
328 Eugene M. Propper, Corporate Fraud Investigations and Compliance Programs, 2000, p. 44
329 Cf. Katja Rödiger, Strafverfolgung von Unternehmen, Internal Investigations und strafrechtliche Verwertbarkeit von „Mitarbeitergeständnissen“: Untersuchung am Beispiel der Siemens-Korruptionsaffäre, 2012, p. 223

In sum, the above discussion illustrates the differences between the treatments of the legal privileges under German and US law. Finally, it has to be considered that these distinctions may also affect „international cooperation among government authorities conducting cross-border investigations. Specifically, when two or more countries are cooperating in an internal investigation, the compelled disclosure or seizure of internal investigation documents in one jurisdiction may taint prosecutions in the other jurisdiction(s) that would have recognized such materials to be privileged.“[330] Therefore, cross-border issues should also be carefully considered before conducting an internal investigation, as there are additional circumstances, such as the privilege protection of documents which may be handled differently in each jurisdiction based on different legal concepts.

330 Wilhelm Hartung, Barry M. Hartman, Dylan G. Moses, Theodore L. Kornobis, Christoper A. Jaros and James G. Millward, „Cross-border investigations: When are documents developed in the course of an internal investigation protected by legal privilege?“, 2018, *https://www.klgates.com/Cross-border-investigations--When-are-documents-developed-in-the-course-of-an-internal-investigation-protected-by-legal-privilege-08-27-2018*, accessed on 29 March 2022

VI. Conclusion

Corporate Crime as well as the conduct of a corporate internal investigation are complex and dynamic matters. Moreover, their legal framework may differ in each jurisdiction. This thesis examined the legal perspectives in Germany and the US. Corporate Crime is a present topic based on a constantly growing global business environment. Therefore, specific knowledge of different law regimes is meanwhile essential for every small and large company acting abroad. Ensuring legal compliance becomes a key element for the business success of any company. In addition, a company's reputation depends also on their image in the media, so safeguarding law compliance and a clean social image require more and more attention.

In its first part, the thesis pointed out the occurrence of Corporate Crime and subsequently its criminal sentencing under the German and US law regime. In Germany, the treatment of Corporate Crime and internal investigations is still quite „new“ compared to the legal situation in the US. The „pioneer“ of defining white-collar crime, which also includes Corporate Crime, was Edwin Sutherland in the US. A crucial legal difference between Germany and the US is that a direct corporate criminal responsibility is not recognized in the German legal framework. However, the German legislator realized this discrepancy and tried to implement changes through the new Corporate Sanction Act (in German: Verbandssanktionsgesetz). Although the Corporate Sanction Act has not yet entered into force, it indicates a future perspective in the context of Corporate Crime in Germany. Nevertheless, both legal criminal regimes contain sufficiently effective instruments to sentence Corporate Crime. This was analyzed in the case of Volkswagen AG regarding the emission manipulation. In Germany as well as in the US the company was sentenced to huge fines.

The second part of the thesis dealt with corporate internal investigation issues, especially cross-border concerns. Internal investigation is a powerful instrument for cooperating with the government or prosecution to obtain more lenient sanctions if a company get in the inconvenient situation of possible wrongdoings and its punishment. However, conducting a successful internal investigation requires a well structured process, including the attention of employees rights and law regulations. In particular, the implementation of the General Data Protection Regulation, which applies in the European Union, becomes a legal focus for the transfer of personal data collected within an internal investigation. Moreover, international cooperation between regulatory authorities in the context of an internal investigation is an important and complicated matter due to different legal privilege approaches, as analyzed under the German and US law perspective.

Abstract English

The first chapter analyses Corporate Crime which is rising worldwide today. Spectacular media reports on Corporate Crime and the public prosecution of its criminal punishment increase the pressure on both the company and the legal authorities. Complex legal regulations and financial aspects contribute to ever-growing corporate complexity. Ensuring legal compliance is rapidly becoming important to prevent effectively Corporate Crime. The dogmatic approach of Corporate Crime was first researched in the US by Edwin Sutherland. The master thesis deals in particular with the criminal sanctions possibilities against Corporate Crime from a German and American perspective. It describes, inter alia, in detail the German Act on Regulatory Offences (Ordnungswidrigkeitengesetz, OWiG) which allows the imposition of fines for misconduct against companies. In this context, further the US Sentencing Guidelines are described which contain complex regulatory mechanisms. Finally, the "Dieselgate" of Volkswagen AG is analysed from a comparative German and American legal perspective.

The second chapter focuses on the corporate internal investigation which can have a mitigating effect for the company in the event of possible sanctions. In particular, the European General Data Protection Regulation (GDPR) must be taken into account, in the case of its applicability, when collecting, analyzing and transferring personal data to (third) countries (i.e. outside of the EU) within the scope of the internal investigation. Finally, various legal problems that may arise in the case of cross-border internal investigations are highlighted.

Abstract German

Das erste Kapitel befasst sich mit dem Thema der Unternehmenskriminalität, welche heutzutage weltweit zunimmt. Spektakuläre Medienberichte über Unternehmenskriminalität und die öffentliche Verfolgung ihrer strafrechtlichen Bestrafung erhöhen sowohl den Druck auf das Unternehmen als auch auf die gesetzlichen Behörden. Komplexe Gesetzesregelungen und finanzielle Aspekte tragen zu einer immer wachsendender Unternehmenskomplexität bei. Die Sicherstellung von rechtlicher Compliance (Regelkonformität) gewinnt rasant an Bedeutung zu, um Unternehmenskriminalität effektiv zu vermeiden. Die dogmatische Erfassung von Unternehmenskriminalität wurde erstmals in den USA durch Edwin Sutherland erforscht. Die Masterarbeit behandelt insbesondere die strafrechtlichen Sanktionsmöglichkeiten gegen Unternehmenskriminalität aus deutscher und amerikanischer Sicht.

Dabei wird unter anderem tiefergehend auf das Ordnungswidrigkeitengesetz (OWiG) eingegangen, welche die Verhängung von Geldbußen bei Fehlverhalten gegen Unternehmen ermöglicht. In diesem Zusammenhang werden zudem die amerikanischen Sentencing Guidelines (Leitlinien für strafrechtliche Sanktionen) geschildert, welche komplexe Regelungsmechanismen enthalten. Abschließend wird der „Dieselskandal" der Volkswagen AG rechtsvergleichend aus deutscher und amerikanischer Sicht analysiert.

Im zweiten Kapitel steht im Mittelpunkt die unternehmensinterne Untersuchung, welche sich im Fall von Sanktionsmöglichkeiten gegen das Unternehmen strafmildernd auswirken kann. Dabei ist bei der unternehmensinternen Sammlung, Auswertung und Übermittlung der personenbezogenen Daten in (Dritt)Ländern (= außerhalb der Europäischen Union) insbesondere die europäische Datenschutzgrundverordnung (DSGVO) im Falle ihrer Anwendbarkeit zu beachten. Abschließend werden verschiedene möglich auftretende Rechtsprobleme bei grenzüberschreitender unternehmensinterner Untersuchung aufgezeigt.

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