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BUSINESS-RELATED CRIMINAL LAW IN EUROPE:
A CRITICAL INVENTORY*

Klaus Tiedemann

Translated from German by *Edgardo Rotman***

I.

Business-related criminal law has experienced in the last decades a worldwide upturn and expansion that only few criminal law scholars had anticipated. Even though globalization and financial crisis are relatively new phenomena of business life, business-related criminology¹ had previously thrust these new phenomena under the spotlight because of its relevance to multinational enterprises and offshore banking. Traditionally, only balance sheet and other accounting offenses – predominantly as a result of insolvency – were the objects of reference for business-related criminology and business-related criminalistics.² Business-related criminology experienced a remarkable expansion by adding corporate crime and

* This article is based in part on Professor Tiedemann's contribution in honor of Hans Achenbach, edited by Uwe Hellman and Christian Schröder, C.F. Müller 2011.

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Editor's Note: In order to preserve the integrity of the original work, the Editor has decided to maintain the citations of the original author, Klaus Tiedemann, as opposed to translating them into the traditional Bluebooking format. Notably, formal citation in Germany, unlike the Anglo-American legal system is quite discretionary as it is left to the editors and authors of the piece to determine how they wish to cite; in this area, there is no right and wrong. Dr. Thomas M.J. Möllers, *Juristische Arbeitstechnik und wissenschaftliches Arbeiten* 141 (Verlag Franz Vahlen München 2012).

¹ Compare with *Tiedemann* (eds.), *Multinationale Unternehmen und Strafrecht* (1980), with contributions from *Bacigalupo, Delmas-Marty, Kamiyama, Pedrazzi, Rajan, Shibahara and Sieber*; *Tiedemann* in the *Gedächtnisschrift* in honor of Sasse Vol. II (1981) p. 629 et seq., and: *Wirtschaftskriminalität und Wirtschaftsstrafrecht in den USA und in der Bundesrepublik Deutschland* (1978).

² In this respect see the classic work "Wirtschaftskriminalität" by *Zirpinski/Terstegen* (1963); see also *Gössweiner-Saiko*, *Wesen und Probleme der Bilanzdelikte* (1970).

corporate delinquency. This expansion has been promoted by *Geerds*, but also by *Sutherland* through the empirical research of cartel offenses, by *Kellens* through the empirical research of bankruptcy-related criminality, and by *von Weber* through the Ph.D. theses written under his direction.³

At the same time, however, business-related criminal law, both in theoretical understanding and in actual legislation, remained attached to its historical root, which was the reinforcement of governmental intervention in an economy considered "free." It was administrative criminal law in a double sense: on the one side its subject matter consisted of regulations issued by the state to protect itself from threats against its economic interests, especially in times of crisis, while on the other hand, it covered administrative sanctions imposed by administrative agencies (*Ordnungsstrafe*), later called administrative fines (*Geldbuße*), together with typical administrative measures, such as closure of businesses, occupational bans, and seizure and disgorgement of profits. Well-known examples of this situation are the German laws on business-related crimes of 1949 and 1954, as well as the Dutch law on business-related crimes of 1951 (*Wet op Economische Delicten*).⁴

The blossoming and liberalization of the Western economic system facilitated a vast number of damaging actions against its participants and against governments. Such damaging actions to individual and collective property could only fit, within the

³ On the development of research, see *Tiedemann* in *Festschrift Lange* (1976) p. 541 (542 et seq.), and in *Festschrift Pallin* (1989) p. 445 et seq., each with references; on the development of legislation, see *Achenbach* *Jura* 2007, 342 et seq.

Translator's note: Fredrich Geerds contributed to this expansion of business related criminology through his book on insurance abuses, among others (*Versicherungs Misbrauch: Strafrechtliche, Kriminologische und Kriminalistische Probleme dieser sozialbetruerischen Praktiken*), Luebeck : Schmidt-Roemild, 1991.

⁴ For a summary see *Eb. Schmidt*, *Das neue westdeutsche Wirtschaftsstrafrecht* (1950); *Achenbach* *ZStW* Vol. 119 (2007) p. 789 (792, 799 et seq.), *Jescheck*, *JZ* 1959, 457 et seq. and *Tiedemann*, *GA* 1969, 71 et seq., see also *ÖJZ* 1972, 285 et seq. On the evolution in the Netherlands, see *de Doelder*, in *Schünemann/Suárez González* (eds.), *Bausteine des europäischen Wirtschaftsstrafrechts*, Madrid Symposium for Klaus Tiedemann (1994) p. 311 et seq., and previously A. *Mulder*, *Wet op de Economische Delicten*, 2nd edition 1970 as well as *ZStW* Vol. 88 (1976) p. 281 (284 et seq.).

traditional arsenal of the criminal law systems, in the category of crimes against property, primarily fraud through false pretenses. This crime, which only took shape in the 19th century, was limited to private business dealings between two or three persons. The provision on fraud through false pretenses had to be stretched to its limits in all cases where the criminal courts were faced with new forms of business-related criminality. The ostensibly restrictive French model of *escroquerie*,⁵ with its often imitated deceit requirement contained in the expression “manœuvres frauduleuses” – as well as at first sight the narrow *truffa*⁶ of the Italian Penal Code through its requirement of “artifizi o raggiri”⁷ – has been interpreted by the courts in such a way that it almost amounted to punishing simple lies. For the French system, this exclusive focus on deceptive maneuvers was even more serious because the Penal Code of 1810 completely omitted the material element of property damage in its definition of fraud through false pretenses.⁸ Very similarly, the British Fraud Act of 2006 still refrains from including the occurrence of harm in its provisions, and formulates the notion of deceptive action in a broad manner, either through the inclusion of an implied “false representation” or through a wrongful omission encompassing also deception through computers and systems, and deception about legal questions.⁹

⁵ Translator’s note: *Escroquerie* is the French term meaning fraud through false pretenses.

⁶ Translator’s note: *Truffa* is the Italian term meaning fraud through false pretenses.

⁷ Translator’s note: *Artifizi* and *raggiri* are the Italian terms meaning scams and deceptive behavior.

⁸ For a detailed treatment of the subject, see T. *Walter* *Betrugsstrafbarkeit in Frankreich und Deutschland* (1999) p. 80 et seq., 239 et seq., and most recently *Pradel/Danti-Juan*, *Droit Pénal Spécial* (5th edition 2010) nos. 872 et seq. p. 515 et seq., n. 890 p. 527 et seq. (Deprivation of the freedom to dispose as “préjudice” [damage]). -*Antolisei/Grosso*, *Manuale di Diritto Penale Parte Speciale Vol. I* (15th edition 2008) p. 367 et seq. (“la semplice menzogna” as “raggiro” [the simple lie as deceit]).

⁹ See on this topic *Farrell/Yeo/Ladenburg*, *Blackstone’s Guide to The Fraud Act 2006* (2007) n. 2. 32 et seq.; *du Bois-Pedain ZStW* Vol. 122 (2010) p. 325 (328 et seq.).

Translator’s Note: Fraud Act 2006, Chapter 35; Royal Assent 8 (November 2006).

In contrast, the German provision regarding fraud through false pretenses (*Betrug*), the same as the Swiss and Austrian provisions, uses the narrowing element of harm to property, which the German court decisions have significantly expanded by underscoring the economic impact of the offense as a guiding principle. This broad conception of fraud through false pretenses based on economic harm has only recently been significantly narrowed demanding danger to property or fraudulent inducement to contract.¹⁰

The German concept of deception excludes legal circumstances and future events, and thereby attempts to assure an objective basis for rational decision-making. This attempt has, in turn, been reversed in great part through the inclusion of "internal" facts, such as intentions and beliefs, whereas the Greek law on fraud through false pretenses, very similar to the German law, does not recognize "internal" facts as a point of reference in determining the existence of the deception.¹¹ In the case of gross contributory fault on the part of the victim, the imposition of criminal liability for fraud is frequently considered inadequate by German scholarship. To reach this position, German scholarship refers to Swiss criminal law, where decisions of the Federal Court have, as a matter of principle, negated the legal requirement of malicious intent (*Arglist*) of the perpetrator when the victim appears to have failed to take adequate self-protective measures, or when the victim has special business experience.¹² The logical consequence would be to investigate the victim, and also in the cases of fraud on a massive scale, where the victim is unknown, to assume attempt liability on the part of the perpetrator. In any event, this restriction is considered in Switzerland to be an inconsistency in the system.¹³ It is possible to find a relatively balanced solution in the Spanish law regarding fraud through false pretenses. After having at earlier times copied from the French Model, the Spanish law introduced in the

¹⁰ For a summary, see *Tiedemann*, in *Strafgesetzbuch Leipziger Kommentar*, 12th edition 2011, § 263 n. 168 et seq. with further references.

¹¹ *Bitzilekis* in *Festschrift Hirsch* (1999) p. 29 (40 et seq.); *Tiedemann* (fn. 10), n. 60 Vor § 263 with further references.

¹² For a summary see *Arzt* in *Basler Kommentar Strafgesetzbuch II* (2003) Art. 146 57 et seq.; *Hurtado Pozo*, *Droit Pénal Partie Spéciale* (2009) § 40 n. 1180 et seq., each with references.

¹³ *Arzt*, in *Festschrift Tiedemann* (2008) p. 595 (598 et seq.).

*estafa*¹⁴ provision of its new Penal Code of 1995 the requirement that the perpetrator carry out a deception (“engaño bastante”)¹⁵ of such a magnitude as to be capable of inducing a mistake.¹⁶ This is precisely the formula that has been recently used by the German Federal Court of Justice in recurring cases, but hardly with the intent to fundamentally modify its decisions in the cases of true advertising material directed to selected addressees.¹⁷

German scholarship maintains that through a pro-European interpretation of national law, the directive 84/450 EEC and directive 2005/29 EC “concerning unfair business-to-consumer commercial practices in the internal market” imposes a partial limitation on the protection against fraud, restricting it to the average reasonable consumer.¹⁸ If this scholarship opinion prevails, the German concept of fraud will need to be readjusted accordingly. In this respect, deception to the public is distinguished from deception to the individual, which is meaningful from a crime policy perspective, as the latter is more dangerous and therefore requires more protection for the victim.¹⁹

¹⁴ Translator’s note: *Estafa* is the Spanish term meaning fraud through false pretenses.

¹⁵ Translator’s note: “Engaño bastante” is Spanish for sufficient deception.

¹⁶ See on this topic *Ludwig*, *Betrug und betrugsähnliche Delikte im spanischen und deutschen Strafrecht* (2002) p. 21 et seq.; *Bajo Fernández*, *Los delitos de estafa en el Código Penal* (2004) p. 38 et seq.; *Perez Manzano*, in *Schünemann/Suárez/González* (fn. 4) p. 213 et seq.; *Vives Antón/González Cussac* in *Vives Ant n et al.*, *Derecho Penal Parte Especial* (2nd edition 2008) p. 413 et seq. with further references.

Translator’s note: *Código Penal* (Penal Code), article 248.

¹⁷ BGHSt 47, I (5); see also BGHSt 46, 196 (199) and OLG Koblenz NJW 2001, 1364; approving *Beukelmann* in *v. Heintschel-Heinegg* (eds.), *StGB Kommentar* (2010) § 263 n. 9 and *Fischer* *StGB Kommentar*, 58th edition 2011, § 263 n. 14.

¹⁸ In this respect, see *Hecker*, *Strafbare Produktwerbung im Lichte des Gemeinschaftsrechts* (2001) p. 322 et seq.; *Janssen* in *Achenbach/Ransiek* (eds.), *Handbuch Wirtschaftsstrafrecht* (2nd edition 2008), chap. V I n. 65 et seq.; *Ruhs* in *Festschrift Rissing-van Saan* (2011) p. 567 (576 et seq.); *Soyka* *wistra* 2007, 127 et seq.; *Satzger* in *Satzger/Schmitt/Widmaier* (eds.), *StGB Kommentar* (2009) § 263 n.68; *Vergho*, *Der Maßstab der Verbrauchererwartung im Verbraucherschutzstrafrecht* (2009) p. 297 et seq.; *Wohlers/Kudlich*, *ZStW* Vol. 119 (2007) p. 366 (368 et seq.).

¹⁹ *Tiedemann*, *LK* (fn. 10) n. 40 Vor § 263 and already in *Festgabe BGH* Vol. IV (2000) p. 551 (555).

II.

At least at this point, it is clear that further development of the European business-related criminal law has been influenced both by the European Union as source of law, and by comparative law. Both factors lead - in a unified economic space that allows free movement of goods, services, and payment instruments - towards the broad *harmonization of criminal law provisions*, as expressly established at the end of 2009 in the Treaty of Lisbon amending the Treaty of the European Union. The criminal law jurisdictional catalogue²⁰ contained in the Treaty on the Functioning of the European Union (TFEU), as well as the supranational prohibition of competition restraints, concern the *Special Part*²¹ of the criminal law. However, both may be interpreted as an implied authorization to regulate specific areas of the *General Part* under the reservation to respect the Member State's different traditions.²²

The *General Part* of the current European penal codes has primarily developed basic general legal principles in the structuring of the notions of attribution²³ and validity,²⁴ as well as rules of priority that are at the core of the common European "philosophical"

²⁰ Translator's note: The Consolidated Version of the Treaty on the Functioning of the European Union contains under the title "Categories and Areas of Union Competence" (Part One Title I Article 2) a distribution among the European Union and the Member States of exclusive and common areas for legislation and policy-making.

²¹ Translator's note: Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, 13 December 2007, 2008/C115/01. The *Special Part* of the criminal codes belonging to the Civil Law tradition define specific offenses, while the *General Part* addresses issues that cut across the individual offenses, such as accomplice liability, attempts, defenses and other general provisions.

²² Tiedemann, *Wirtschaftsstrafrecht Besonderer Teil* (3rd edition 2011) n. 54 and in Festschrift Jung (2007) p. 987 (1002 et seq.), as already in Festschrift Geerds (1995) p. 95 (110 et seq.); approving H. Stein, *Die Regelungen von Täterschaft und Teilnahme im europäischen Strafrecht am Beispiel Deutschlands, Frankreichs, Österreichs und Englands* (2002) p. 7 et seq. with further references.

²³ Translator's note: The offense cannot be attributed to the perpetrator when, for example, the causal link is absent or the perpetrator is found insane.

²⁴ Translator's note: Penal Codes establish rules of spatial validity, i.e. geographical scope of their application, and temporal validity (statutes of limitation).

body of thought. These basic principles, which belong to the domain of criminal jurisprudence and the rationalistic legal thought of the Enlightenment, are based on abstract and systemic reasoning. Both basic principles and rules of priority have been reflected and refined in the General Part of the present European penal codes.

1. The task of the European Court of Justice in Luxembourg of consolidating the business-related criminal law's rules and principles into a supranational general part on the subject, initially resulted from a confrontation of the Court with retroactivity issues and situations of necessity in the area of administrative offenses contained in both cartel law and European Coal and Steel Community law. This development is explained by the fact that from its beginnings, the European community possessed in this area its own power to impose sanctions, while the "fined" corporations enjoyed the right to appeal these decisions to the European Court of Justice.

Decades of European Court of Justice jurisprudence, subjected to intensive legal comparison, led to judicial recognition of the legality and culpability principles, as well as the development of an extensive theory about the perpetrator, which culminated in the legal notion of the "unitary economic enterprise" composed of groups of companies inside or (partially) outside the European Union.²⁵

A partial codification, including a circumvention provision,²⁶ was carried out in 1995 on the basis of a comprehensive draft from *Bacigalupo, Grasso, and Tiedemann*, through the Council Regulation No 2988/95 of December 18, 1995, "on the protection of the European

²⁵ Achenbach, GA 2004, 559 (568) correctly refers to the "model of community-wide valid law of repressive sanctions." For summaries see Dannecker/Biermann in Immenga/Mestmäcker (eds.), *Wettbewerbsrecht EG/Part 2* (4th edition 2007) n. 112 et seq. Vor Art. 23 VO 1/2003; Kindhäuser in *Frankfurter Kommentar zum Kartellrecht* (status 2009) Art. 81 n. 97 et seq. Tiedemann *Wirtschaftsstrafrecht Allgemeiner Teil* (3rd edition 2010) n. 259 et seq. and in *Festschrift Jescheck* (1985) p. 1411 et seq., each with references. For a general overview of the law on fines for antitrust violations, see Achenbach in Achenbach/Ransiek (fn. 18), chap. III 6 n. 10 et seq.

²⁶ Translator's note: The perpetrator is punishable even when he has tried to circumvent the law by adjusting his behavior to conform to its wording, but actually violating its spirit.

Communities' financial interests" against "irregularities." This codification is related to the international convention of 1995 (PIF-Protection des Intérêts Financiers)²⁷ that has been in force since 2002, which established among other provisions *the criminal responsibility of the "heads of businesses"* (Art. 3) in an effort to facilitate the functional efficiency of this European Union main sector.²⁸

2. The issue of the criminal responsibility of corporations, especially important for business-related criminal law, was already introduced by Noll in the German debate during the 49th German Jurists' Conference regarding the decision of the Swiss Federal Court in the case "Bührle,"²⁹ of great notoriety at the time. The case continued the ongoing Swiss and German debate about the criminal responsibility of the owners of corporations (including holding companies!) and of executives for criminal offenses committed by other members of the enterprise. It seems that today it is recognized that there is a guarantor position³⁰ on the part of the management body in the German-speaking ("Germanic") legal sphere, with exception of Austria, as a result of the power of direction and the organizational responsibility of the management body.³¹ Such

²⁷ Translator's note: Protection of Financial Interests.

²⁸ The Regulation and Convention are also published in *Tiedemann Wirtschaftsstrafrecht Allgemeiner Teil* (fn. 40) Appendix I. 1. and 8. p. 131 et seq., 147 et seq.

²⁹ SchwBGE 96 (1970) IV 174 et seq.; for subsequent case law and discussion in Swiss literature see *Heine*, SchwZStrafR Vol. 121 (2003) p. 24 (29) and *Hurtado Pozo*, Droit Pénal Partie Générale (2008) chap. 18 § 3, 4 E n. 1333 with numerous further references.

Translator's note: Bührle was the only personally liable partner of a limited partnership that delivered weapons to South Africa in violation of an embargo decision. Bührle later learned about the deliveries and only mentioned that they should cease without taking further measures. The Court found Bührle a co-perpetrator of the embargo violation because his special command position imposed on him a special duty to act immediately.

³⁰ Translator's note: The "guarantor position" has been conceived by the German criminal law doctrine as providing the foundation for the criminalization of omissions in situations where the perpetrator has a legal duty to act.

³¹ See *Achenbach* (fn.12), chap. I 3 n. 32 et seq. with references for German literature; *de Doelder* in *Festschrift Tiedemann* (fn. 13) S. 563 (570 et seq.); *Hurtado Pozo* (fn.11); *Tiedemann* (fn. 25) n. 185, each with further references; for an in-depth analysis, see *H. Stein* (fn. 22) p. 31 et seq. (Germany), 116 et seq. (France)

guarantor position is also recognized in recent Spanish scholarship. Both the legal doctrines of *responsabilité d'autrui* (responsibility for others) in French criminal law and *vicarious liability* in English business-related criminal law demonstrate that this criminal responsibility for the behavior of others is clearly deemed appropriate.

The same assumption was the basis of both "The Implementation of the *Corpus Juris* in the Member States" (2002) under the supervision of *Delmas-Marty*, and *Tiedemann's* 2002 draft of Euro-criminal offenses. In a lecture given at the University of Luzern in 2006, *Roxin* correctly interpreted the criminal responsibility for acts of subordinates as an autonomous form of indirect perpetration,³² whereas some divisions (Strafsenate) of the German Federal Court of Justice, as it is generally known, have evolved towards establishing an indirect perpetration of crimes through the dominion exercised by an organization (Organisationsherrschaft). For this indirect perpetration neither the good nor bad faith of the immediate actor is relevant. The same applies to the fungibility of immediate perpetrators and to the principal's knowledge of every single offense.³³ The Dutch penal code has included in § 51 a comparable provision. There the person behind the scene in fact plays an "actually controlling role." The Hoge Raad (Supreme Court) had already recognized a "functional perpetration" in the organizational context.³⁴

responsabilité pénale du fait d'autrui"), 190 et seq. (Spain), 253 et seq. (Austria), 326 et seq. (England -"vicarious liability"). Supplemented by *Greve* in *Schünemann/Suárez González* (fn. 4), p. 313 (317 et seq. -"ansvarplacering"); *Crespo* Responsabilidad penal por omisión del empresario (2009), *Lascurain* in *Schünemann/Suárez González* (fn. 4), p. 35 et seq. and *Nieto Martín* in *Festschrift Tiedemann* (fn. 13) p. 485 (496); *Nisco* Controlli sul Mercato Finanziario e Responsabilità Penale (2009) p. 139 et seq. with comprehensive references of Italian and German literature.

³² *Roxin* *SchwZStrafR* Vol. 125 (2007) p. 1 (17 et seq.) with references.

³³ BGHSt 48, 331 (342); 49, 147 (163 et seq.) with commentary by *Tiedemann* *JZ* 2005, 45 et seq.; BGH *wistra* 1998, 148 (150) and *NStZ* 1997, 544; for the opposing view see especially *Roxin* (fn. 32) p. 19 et seq. and *Rissing-van Saan* in *Festschrift Tiedemann* (fn. 13) p. 319 (401 et seq.) each with further references.

³⁴ See *de Doelder* (fn. 8), p. 312 ("feitelijk leiding geven"), (fn. 31), p. 565 et seq. (theory of "the functional offender in an organisational context") with references.

3. The issue of the criminal punishment of management and executive staff acting at the top of the enterprise logically leads to the additional issue of *criminal responsibility* and punishment of the *enterprise* itself. Paragraph 30 of the Administrative Offenses Act (Ordnungswidrigkeitengesetz [OWiG]) only provides in this respect for the possibility of the imposition of monetary penalties on corporate organs or on the executive staff who have committed crimes or administrative offenses, including violations of the duty of supervision (§ 130 of the Administrative Offenses Act).³⁵ While Italy recognizes only the quasi-criminal responsibility of associations, German law represents the tail-end of a European-wide trend, promoted by the European Union, to introduce a genuine criminal responsibility for legal entities, following in this way the modern Anglo-American tradition. This was first undertaken by the Netherlands in 1951, by France following its new Penal Code of 1994, and by Switzerland since 2003. After introducing the corresponding reforms, the same has been recognized by Belgium, Austria, Portugal, Scandinavia, Finland and Eastern Europe, and most recently by Spain with the partial reform of December 23, 2010.³⁶ The comparison between the Spanish and Swiss alternatives is of particular dogmatic³⁷ interest. Following the French model, Spain seeks a

³⁵ On the expansion of the circle of addressees and perpetrators, *Achenbach* (fn. 25), chap. I 2 A n. 1 et seq. and *wistra* 2002, 441 (443), on the predicate offenses of § 130OWiG chap. 13 E n. 38 et seq. with numerous references.

³⁶ For an up-to-date overview (with the exception of Spain) see *Kelker* in *Festschrift Krey* (2010) p. 221 et seq.; previously *de Doelder/Tiedemann* (eds.), *Criminal Liability of Corporations* (1995) (with extra-European and European national reports on Belgium, Finland, France, Italy, Netherlands, Portugal, Switzerland and United Kingdom); additionally: *Delmas-Marty, Greve, Rostad, Ruiz Vadillo* and *Schünemann*, in *Schünemann/Suárez González* (fn. 4): Denmark, Norway and (dated) Spain. On Austria see *Schick* in *Festschrift Tiedemann* (fn. 13), p. 851 et seq. who understands monetary fines imposed on entities as a real criminal sanction that has been falsely labeled. Corporate fines in Sweden, understood as real criminal sanction, pose a similar problem (“företagsbot”) (*Cornils/Jareborg*, *The Swedish Criminal Code*, *Brottsbalken*, 2000, p. 22). On the terminology within this context see *Schroeder* in *Festschrift Tiedemann* (fn. 13) p. 353 (354 et seq.).

³⁷ Translator’s note: The expression “dogmatic” has been adopted by countries belonging to the Civil Law system that follow the German model, meaning the scholarly reconstruction of positive law. In this scheme, all the logical and systemic approaches are elaborated around positive law, which is respected as a “dogma.”

“classic” solution by limiting the addressees of criminal sanctions to legal entities only, and admits as predicates only those crimes committed by institutional organs and by legal or *de facto* business managers, relying for the latter on a cautious expansion of commercial law (Art. 31 *bis* section 1 of the Penal Code [Código Penal]). Thus, the Spanish legislator uses the attribution model (“modelo vicarial”)³⁸ as a basis for the determination of the scope of liability according to legislative materials.³⁹ This model is also used for the German administrative offenses (Ordnungswidrigkeitenrecht),⁴⁰ but not when the production and distribution of goods (as decided by the Supreme Federal Court BGHSt 37, 106 (114)) and the discharge of waste (as decided by the Supreme Federal Court BGH NStZ 1997, 544 (545)) constitute an action of the association itself.

In sum, the Administrative Offenses Act (OwiG) coincides with the new Spanish law insofar as it treats the mentioned groups of persons in the same way as persons with supervisory duties who, through their control failures, make the commission of offenses by their subordinates possible. The requirement of a full demonstration of this causal link will, of course, diminish the practical application of the new regulation considerably. To the contrary, the new Swiss criminal law (Art. 102 of the Penal Code) introduces from the outset organization failures not only as a basis of attribution, but also as an element of the definition leading to the imposition of criminal sanctions against each and every enterprise, including those that are not acting formally as a legal entity.⁴¹ The

³⁸ Translator’s note: The attribution model uses the representation theory that has traditionally operated in private law, attributing to a legal entity the behavior of its organs. Thus, the intent or negligence of their administrators is considered to be the intent or negligence of the legal entity itself.

³⁹ Translator’s note: Statement of reasons contained in the governmental proposal and parliamentary discussions.

⁴⁰ Representative in this respect *Achenbach* (fn.25), chap. I A n. 3 and 5; see also *Frankfurter Kommentar* (fn. 16), n. 47 vor § 81 GWB; approving: *Tiedemann* (fn.16), n. 244 (also relating to the French Code Pénal). For the new Spanish criminal law, see *Rodriguez Mourullo* in *Festschrift Tiedemann* (fn. 13), p. 545 (557) for a justification of the draft, statute in German translation p. 558).

⁴¹ Translator’s note: Article 102 of the Swiss Penal Code establishes that “If a felony or misdemeanor is committed in an enterprise in the exercise of commercial

Swiss Penal Code expressly obligates the enterprise itself to take adequate organizational measures to prevent the occurrence of offenses capable of being committed by any employee or worker, regardless of their position in the corporate hierarchy. Thus, the failure to control ("faulty risk management") may trigger the criminal responsibility of the whole enterprise and, in this way the Swiss have established their own *enterprise blameworthiness*. The evidence of such blameworthiness demands in practice a comprehensive disclosure of the enterprise structure and its crime-prevention measures and provisions.⁴² This is also true for the new Italian law on administrative sanctions and for the English law on bribery since 2011 (UK Bribery Act of 2010). Also, the new Spanish solution is based on blaming the legal entity itself, because the law expressly excludes as irrelevant the wrongful acts of natural persons from enterprise blameworthiness (Art. 31 *bis* section 3 of the Spanish Penal Code). This type of blameworthiness is actually *social culpability*, and is conceived as a violation of the duty of self-organization primarily in cases of negligence and omission. From a legal norms perspective, this legal duty derives from the public's prevailing expectation of careful behavior. More specifically, this duty is derived from organizational and supervisory duties, from the size of the association, the association's position in the market, its type of activity, and its business policies. This conforms to the case law of the EU Commission regarding competition offenses, which follows the French administrative theory of "faute de service."⁴³ As with European Union practices, psychological

activities in accordance with the objects of the enterprise and if it is not possible to attribute this act to any specific natural person due to the inadequate organization of the enterprise, then the felony or misdemeanor shall be attributed to the enterprise. In such cases, the enterprise shall be liable to a fine not exceeding 5 million francs."

⁴² *Geiger* Organisationsmängel als Anknüpfungspunkt im Untemehmensstrafrecht (2006); *Hurtado Pozo* in Festschrift N. Schmid (2001) p. 204 (206 et seq.); *Macaluso* La responsabilité pénale de l'entreprise (2004) p. 148 et seq.; *Pieth* in Festschrift Jung (fn. 15), p. 717 (724 et seq.), each with further references.

⁴³ *See especially*, among others, *Nieto Martín* (fn. 19), p. 499; *Paliero* in Festschrift Tiedemann (fn. 19), p. 503 (522 et seq.); *Pieth* (fn. 26), p. 725. On the practice of the EU, *see Dannecker/Biermann* (fn. 16), n. 169 et seq. and *Kindhäuser* (fn. 16), n. 36 et seq., each with references; for a summary, *see Tiedemann* (fn. 16), n. 244 a and 270.

conditions such as intent and purpose should in fact be determined in natural persons and, through the legal norms, be attributed to the legal entity as a whole. This characterization of intent within the act that conforms to the definition of the offense, and which is attributed to the enterprise through the legal norm, does not, from a German legal viewpoint, constitute a systemic breach. In sum, according to our evaluation, “organizational fault” is the legitimizing argument for criminal responsibility of associations in Spanish and in Swiss criminal law. However, with the exception of Switzerland and Italy, organizational fault is not the only controlling element of corporate liability. In any event, the Spanish Penal Code does not require proof of the organizational deficiencies in order to attribute to the organization predicate offenses committed by organs and representatives.

In all, German law provides a foundation for legitimizing these new legislative solutions when the primary duty to take the necessary measures of supervision according to §130 OWiG (Administrative Offenses Act) is understood as a primary duty of an association as owner of the enterprise.⁴⁴ This duty of supervision should, however, not be interpreted as concerning the organization as a whole. The Spanish, Swiss, and Italian literature also refers constantly to our article on the new version of §30 of the Administrative Offenses Act revised by the Second Act on Combating Economic Crime about organizational deficiencies as a legitimation for associational responsibility, which was published in NJW 1988 p. 1169 et seq.⁴⁵

Translator’s note: In France, the Conseil d’ Etat (Council of State) has gradually distinguished between faults committed by a government official within the scope of his employment (*faute de service*) and personal faults.

⁴⁴ *Achenbach* (fn. 25), chap. I 3 E n. 42, (fn. 40), n. 68 et seq. and in Coimbra-Symposium for Claus Roxin (1995) p. 283 (288); *Engelhart*, Sanktionierung von Untemehmen und Compliance (2010) p. 415, 509 et seq.; *Tiedemann* (fn. 25), n. 248 and NJW 1988, 1167 (1173), 29, each with references; for opposing view, see *Schünemann* in Festschrift Tiedemann (fn. 13), p. 429 (437).

⁴⁵ See especially, among others, *Bajo Fernández/Bacigalupo Derecho Penal Econmico* (2nd edition 2010), chap. V n. 21 et seq. and 89; *Hurtado Pozo* (fn. 12) n. 1260 and 1265 as well as (fn. 42), p. 205; *Nieto Martín* (fn. 31), p. 498 (et seq.); *Paliero* (fn. 43), p. 507 et seq. (p. 511 on the draft *Grosso* regarding a corresponding regulation of the General Part of the Italian Penal Code); *Rodriguez Mourullo* (fn.

4. *Compliance programs* undoubtedly belong to the organizational measures necessary for commerce in the case of corporations that reach certain size, an idea that has been imported from the U.S. as a possible method to avoid criminal responsibility.⁴⁶ Although they do not reflect any specific legal principle, compliance programs can produce indirect legal effects. Similar to their predecessors, the voluntary codes of conduct for multinational enterprises, compliance programs play a remarkable role in the determination of duty violations that constitute the crime of fraudulent administration (*Untreue*), and also, in a very general way, determining the duty of care violations in negligent crimes and omissions. In Germany, § 161 of the Stock Corporation Act (*Aktiengesetz*) correctly indicates that the “Deutscher Corporate Governance Kodex” (German Corporate Governance Code) contains only recommendations. The observance or non-observance of such recommendations, together with the reasons for doing so, is part of the disclosure obligation and therefore must be declared in a company’s annual final report. In the case “Kirch v. Deutsche Bank,” the German Federal Court of Justice decided for the first time that falseness of this report is punishable pursuant to the criminal provisions regarding false balance sheets contained in the Commercial Code.⁴⁷ Likewise, the infringement of corporate compliance rules was among the bases for the conviction of the Siemens enterprise for its fraudulent administration (*Untreue*) through payments of bribes in the case Siemens/ENEL decided by the German Federal Court of Justice in 2008.⁴⁸

5. The evidence obtained from comparative legal research of the existence of similarities between the general parts of business-related criminal laws should be interrupted at this point with an

40), p. 559.

⁴⁶ In further detail, see *Sieber* in *Festschrift Tiedemann* (fn. 13, p. 449 (468 et seq.) and also *Nieto* (fn. 31), p. 489 et seq. and *Tiedemann* (fn. 25), n. 8a and 8b, each with references; see also *Engelhart* (fn.28), p. 502 et seq. (sector-specific duties).

⁴⁷ BGH ZIP 2009, 460 (464); see *Tödtmann/Schauer*, ZIP 2009, 995 (999) with further references – On § 331 Nr. 1 HGB see *Achenbach*, NSTZ 2005, 621 (625).

⁴⁸ BGHSt 52, 323 (335) with commentary by *Ransiek* NJW 2009, 95 et seq., *Ronnau* StV 2009, 246 et seq. as well as *Festschrift Tiedemann* (Fn. 13), S. 713 (721) and *Satzger* NSTZ 2009, 297 et seq.. Compare also BGHSt 50, 331.

almost anecdotal example taken from the unappealing area of criminal liability that stems from defective products. This area typically presents *causation problems* that can hardly be resolved through criminal law theory. These problems occur in recurring cases of health damage, or death resulting from the use of a product, when either the causation or the toxic substance is unknown.

The German Federal Court of Justice decided in 1990 in the case of a leather spray produced by Erdal, that it is enough to demonstrate the existence of a causal link between the use of the product and the ensuing bodily harm (in the case at bar the unlawful result was primarily a pulmonary edema) when all other possible causes may be excluded by the trier of fact, namely contingent or alternative ones. Furthermore, the Court decided that an explanation of the “why?” was not required.⁴⁹ Because of its predominantly procedural approach, this decision has been vividly debated in German scholarship, as it has also been the case with the *Bührle* decision in Switzerland.⁵⁰ When the Criminal Chamber of the Spanish Tribunal Supremo had to decide the considerably more serious case of contaminated canola oil (“colza”)⁵¹ the judge- rapporteur travelled to Freiburg im Breisgau⁵² to study the arguments for and against liability. The Spanish Criminal Chamber eventually followed the analysis of their German colleagues, a reasoning which was also favored by the vast majority of German scholars. The Spanish decision of April 23, 1992, was published in *NStZ* 1994 pages 37 et seq. in German language.

⁴⁹ BGHSt 37, 106 (111 et seq.) with commentary by *Beulke/Bachmann*, *JuS* 1992, 737 et seq., *Kuhlen* *NStZ* 1990, 566 (f) *see also* *JZ* 1994, 1142 et seq.

⁵⁰ Translator’s note: *See* fn 29.

⁵¹ Translator’s note: This is a case about intoxication that caused widespread health damage and death to thousands of individuals throughout Spain. The epidemic was connected with the importation of canola oil that had been mixed with two percent of anilin. The Court found that, in order to establish criminal causation, it was not necessary to determine the precise mechanism that had caused the result, so long as a correlation or a connection could be found between the events in question, and alternative causes could be excluded.

⁵² Translator’s note: In the library of the Institute of Business-related Criminal Law and Criminology at the University of Freiburg, and in the library of the Max-Planck Institute of Criminal Law.

III.

To begin with, one should close certain *gaps* in the *Special Part* of the Penal Code that result from developments in the field of technology.

1. The most obvious example is the failure of the provision of fraud through false pretenses to include computer manipulations, because they lack the element of human error. With the exception of France, where the general erroneous impression of the system operator is considered sufficient,⁵³ almost all European penal codes introduced special provisions criminalizing such manipulations. New provisions also became necessary in the area of forgery of instruments because of the requirement of visibility.⁵⁴ The national legislators were faced with new technical challenges, such as the intrusion into information systems (“hacking”) (also aimed at computer and software espionage), the capture of data (“phishing”), as well as data intrusion and data alteration (“computer-sabotage”). The legislators responded to these challenges with the creation of an abundance of criminal law provisions in compliance with the 2001 European Convention on Cyber Crime and in line with several EU directives. These new offenses were summarized and further harmonized in the controversial EU proposal on “Attacks against Information Systems” etc. (COD 2010/0273). The equally fully automated *cashless payment transactions* were subjected to a special protection because, according to the civil rules regarding the use of

⁵³ *Pradel /Danti-Juan* (fn. 5) no. 873 p. 515; *T. Walter* (fn. 5), p. 435 et seq. each with references.

⁵⁴ Translator’s note: The German provision on fraud through false pretenses is only applicable when the perpetrator generates error upon a victim that in turn causes the victim to dispose of property. Because a machine cannot suffer from such error, the legislator introduced the provision of *computer manipulation* pursuant to § 263 (a) to close this gap in criminal liability. A parallel development took place in the area of forgery of instruments. Even though hardcopies of electronic data are recognized as an instrument within in the meaning of § 267 of the German Penal Code, this provision fails where data already entered is being manipulated at the processing stage. § 267 does not apply in such cases because “instrument,” within the meaning of § 267, is only a physical embodiment of thought that is visually perceivable. The legislator introduced § 269 (forgery of material data) to close this gap.

either credit cards, debit cards, or traveler's checks, mistake of the other party to the transaction cannot be assumed. Art. 148 of the Swiss Penal Code is partially viewed as a model and imitated by numerous countries, but without the Swiss self-protection reservation clause.⁵⁵ This model was followed in Spain only after the partial reform of 2010, whereas in Germany it was limited to credit cards, without providing good reasons for this limitation.⁵⁶

2. In the related field of *banking and securities markets*, the introduction of new criminal provisions and the reform of old ones were compelled by Switzerland's significance as a financial center, by the scandals in the financial market in the 1960s and early 1970s, and by the readiness of the EU Commission to issue directives binding its Member States.

The criminal provision of money-laundering, completely unknown in the old Europe until the Swiss reforms and often perceived in Switzerland as "lex Americana"; and the criminalization of abuse of inside information on securities, both of which originated in the United States; together with *market price manipulation*, already well known in Germany, hardly attracted the attention of European criminal law scholars. This was likely because the new criminalization of money-laundering was also based on the International Convention on the Fight against Organized Crime, and also because criminal provisions regarding stock markets were not included in the Penal Code (with the exception of Switzerland and the new 2010 version of the Spanish Penal Code), but were rather placed in special ancillary statutes, such as the German Securities Exchange Act. Criticism about the prohibition of money-laundering ignited as its sphere of application continuously expanded. As areas of private professional activity were absorbed by the State, the international debate about the legal interests protected by the norm brought little clarification, and this legal comparison revealed a EU-

⁵⁵ Translator's note: Article 148 of the Swiss Penal Code exempts for criminal punishment when the use of credit or debit cards in cases of inability or unwillingness to pay affects enterprises that could fairly have been expected to take reasonable self-protective measures.

⁵⁶ Persuasively advocating a legislative expansion *see Möhrenschrager* in LK (fn. 10), § 266 b n. 4.

wide failure to harmonize the structuring of criminal provisions.⁵⁷

In the cases of insider abuse and market manipulation, investors' assets are hardly ever harmed by actions that conform to the definitions of fraud through false pretenses or fraudulent administration,⁵⁸ and this is why at this point in time one must abandon the classification of business-related crimes as property crimes; although these definitions can still be minimally expanded, considering for example, that infringements to foreign trade law embargos, and customer-friendly or neutral cartel agreements were fitted into the definition of property crimes.

3. A first theoretical step towards a convincing solution was offered by the recognition of "intermediate legal interests," which, endowed with relative autonomy, can be located between the valuable interests of individuals and the superior welfare interest of the community that are incapable of being protected through criminal sanctions.⁵⁹ Above all, the so-called Frankfurt School, and a considerable part of the Italian criminal law scholarship, have

⁵⁷ In detail *see* Vogel, ZStW Vol. 109 (1997) p. 335 et seq.; additionally: *Bajo Fernández/Bacigalupo* (eds.), *Política criminal transnacional para la lucha contra el blanqueo de capitales* (2009); *Gentzik* Die Europäisierung des deutschen und englischen Geldwäschereistrafrechts (2002); *Jacs -Potyka* Bekämpfung der Geldwäsche in Europa (2007); *Pieth* Die Bekämpfung der Geldwäscherei (2002); *Siska* Die Geldwäsche und ihre Bekämpfung in Österreich, Deutschland und der Schweiz, 2nd edition 2007; *see also* *Yenisey*, in Festschrift Tiedemann (fn. 13), p. 1191 et seq. (Turkey).

⁵⁸ *Fischer* (fn. 12), § 263 n. 13 and 13 a, § 266 n. 52; *Tiedemann* in LK (fn. 10) n. 323 *see also* *Wirtschaftsstrafrecht und Wirtschaftskriminalität 2* (1976) p. 69 with references; *Vogel* in *Assmann/Schneider* (eds), *Wertpapierhandelsgesetz*, 5th edition 2009, n. 14 and 15 Vor § 38 each with further references - similarly for Switzerland *Hurtado Pozo* in *Schünemann/Suárez González* (fn. 4) p. 407 (411, *see also* p. 413 et seq.).

⁵⁹ *Tiedemann* *Tatbestandsfunktionen im Nebenstrafrecht* (1969) p. 119 et seq., 400 et seq.; *see also*: *Wirtschaftsstrafrecht und Wirtschaftskriminalität 1* (1976) p. 50 et seq., 83 et seq. and in LK (fn. 7) § 265 b n. 14; approving *Botke* in *Schünemann/Suárez González* (fn.4), p. 109 (112) and *Lampe* in Festschrift Tiedemann (fn.13), p.79 (101) as well as *Schünemann*, JA 1975, 793 (798); in detail *Hefendehl* *Kollektive Rechtsgüter im Strafrecht* (2002) p. 175 et seq. with further references. – Approving in part *Martínez-Buján Pérez* *Parte General del Derecho Penal Económico* (1998) p. 100 et seq. On the reform's significance *see* *Achenbach* in Festschrift Tiedemann (fn. 13), p. 47 (57) with further references.

declared themselves against such intermediate legal interests because they are prone to terminological abuse (moreover, such legal interests do not carry the constitutional foundation required by the Bricola⁶⁰ School of Bologna).⁶¹

The second theoretical step emphasized, on the one hand, the unquestionable supra-individual nature of state property and other social financial assets in which social aims do not directly serve the economy, and on the other hand, the indispensable nature of certain instruments of today's economic life, such as the already mentioned (non-cash) transactions and credit, especially in the form of business loans from banks or other suppliers. We can of course expect the objection that we are again dealing here with the protection of property, because a consideration of all factors can only lead to the conclusion that social property is only the sum of individual properties.⁶²

A third epistemological step merges these approaches into the concept of *institution* that has been well established in legal thought since Maurice Hauriou.⁶³ Institutions are conceptualized as social phenomena that not only exist in the sociological sense, but must also be acknowledged in the economic and legal spheres

⁶⁰ Translator's note: Franco Bricola has developed a constitutionally oriented theory of legal values and interests protected by criminal law. See Franco Bricola, *Politica criminale e scienza del diritto penale*, 1997.

⁶¹ *Hassemer Theorie und Soziologie des Verbrechens* (1973) p. 75, 77 and *JuS* 1990, 850; see also Hassemer/Neumann in *Nomos Kommentar Strafgesetzbuch*, 3rd edition 2010, n. 108 et seq. vor § 1; *Manes ZStW* Vol. 114 (2002) p. 724 et seq. with references; on the same topic previously *Tiedemann Tatbestandsfunktionen* (fn. 59), p. 121 and *Wirtschaftsstrafrecht* 1 (fn. 59), p. 86. In the same way *Nisco* (from *Bricola/Sgubbi-School*) (fn. 31), p. 91 et seq. with further references.

⁶² See BGHSt 36, 130 (131) with comments by *Kindhäuser* JR 1990, 520 et seq.; on the same topic again previously *Tiedemann Tatbestandsfunktionen* (fn.59), p. 118 and in LK (fn. 10) § 265 b n. 14; in agreement *Hefendehl* (fn.59) p. 262; in the same way *Wohlers* in *Münchener Kommentar zum Strafgesetzbuch* (2006) § 265 b n. 1 with further references – On the Italian concept of savings and investments (“risparmio”) as a supra-individual legal value, *Nisco* (fn. 31), p. 91 et seq. (“mercato finanziario come istituzione”).

⁶³ Translator's note: In his “*Précis élémentaire de droit constitutionnel*,” 2nd edition, p. 75 (1930), Maurice Hauriou defines institution as a social organization created by a power that has continuity, because it is based on a fundamental idea accepted by the majority of the group members.

in order to deserve criminal law protection. We are dealing here – to mention only some important examples – with the competition and the freedom in the formation of market prices, guaranteed by the economic constitution (*Wirtschaftsverfassung*);⁶⁴ the banking system, with its specific tasks of granting loans and processing payments; commercial accounting with respect to actual or potential creditors through balance sheets and bookkeeping; the social insurance system as institution for the financial security of workers; private insurances protecting against entrepreneurial and other risks such as economic risks and life risks; state-owned assets and their system of collection and distribution for social purposes.⁶⁵ These institutions manifest themselves in an external formal way as supervisory authorities that have recently been in a similar way organized as panels of judges (“*Autorités Administratives Indépendantes*” [Independent Administrative Authorities], in Germany, for example, as the Federal Competition Authority (Bundeskartellamt) and the Federal Financial Supervisory Authority (BaFin)).

⁶⁴ “*Wirtschaftsverfassung*” is a legal term meaning in Germany the totality of the legal rules of constitutional rank that organize the economy, as well as the fundamental norms belonging to the European Union’s supreme legal order.

⁶⁵ *Lampe* in *Festschrift Tiedemann* (fn. 13), p. 90, 98 et seq.; *Tiedemann* *Wirtschaftsstrafrecht* General Part (fn. 25), n. 45 and 58 see also previously *Tatbestandsfunktionen* (fn. 59), p. 122, 372 and *Wirtschaftsstrafrecht* I (fn. 59), p. 51, 84 et seq.; *Vogel* in *Schünemann* (ed.), *Strafrechtssystem und Betrug* (2002) p. 89 (101); *Wohlers* *Deliktstypen des modernen Präventionsstrafrechts* (2000) p. 159 et seq. and (fn. 40) § 264 n. 8. Similar approaches already in “value makers” (State, Church, Legal System) in *Erik Wolf*, *Die Typen der Tatbestandsmäßigkeit* (1931) p. 56. *Roxin* in *Festschrift Hassemer* (2010) p. 573 (588) designates public administration, currency and tax system as well as the ecological system, and as *Wolf* in part, directly approaches superior values related to the common good. *Hassemer/Neumann* (fn. 61), n. 131, 134 and 140 design as universal legal interest at least data processing and denominate as institutions, apart from property and administration of justice, insurances (sic) and in general the economy. A summary of *Achenbach*’s “phenomenological” view can be inferred from *Jura* 2007, 342 et seq. (commercial accounting, check and bill of exchange). *Hans Achenbach* correctly finds that fraud through false pretenses perpetrated against an indeterminate plurality of victims, major fraud and the corresponding fraudulent administration, pursuant to §§ 263, 266, have a supra-individual dimension (compare §§ 263 sec. 3 no. 2, 266 sec. 2 of the German Penal Code); similarly *Tiedemann* (fn. 22), n. 1.

Criminal law secures the essential conditions for the proper functioning of such institutions according to their hierarchical placement in the social system of values. The special criminal law definitions are primarily related to the correspondent administrative institutional duties to warn, as for example the rules of conduct regarding fair information and disclosure (publicity and transparency) in the case of *securities listed in the stock exchange*.⁶⁶

These special definitions are acknowledged under the constitutional criterion of proportionality in cases where the fraud provision and other general property crimes do not provide sufficient protection or are inadequate, especially because one does not specifically deal here with individual loss of economic assets, but rather with the special vulnerability to harm inherent to each institution (this is called “*offendibilità*” by *Marinucci’s* Milan School).⁶⁷ In this sense, the legal values protected by enacting the stock-exchange related crimes include the transparent formation of prices for securities and the preservation of equal opportunity for market participants. Additionally, in the case of tenders (for example, the electronic ones through the internet), and auctions, the main focus is on the procedural formation of prices through competition, as emphasized in the Spanish Tribunal Supremo’s clear legal decisions,⁶⁸ and also what the German Federal Court of Justice refers to when it discusses “*procedure-related offenses*.”⁶⁹ If we consider

⁶⁶ On a comparative analysis and on German law, see *Seminara* in Festschrift Tiedemann (fn. 13), p. 1085 et seq. and *Ziouvas* in Festschrift Tiedemann (fn. 13), p. 123 (133 et seq.), p. 140 (“institutional special duties”); in agreement regarding Spanish law *Arroyo Zapatero* in Schünemann/Suárez González (fn. 4), p. 387 (388 et seq.) and *Bajo Fernández/Bacigalupo* (fn. 45), chap. XII n. 405 et seq. with further references. On regulatory models of stock market-related criminal law advocated in European countries *Vogel* (fn. 58), n. 20 et seq. Vor § 20 (a) and n.5 et seq. Vor § 38.

⁶⁷ Translator’s note: See G. *Marinucci*, E. *Dolcini*, *Corso di diritto penale*, vol. I, 3rd ed., Milan 2001, p. 549 et seq. where the authors find a definite “*offendibilità*” (criminal vulnerability) in certain collective entities, among them the savings institutions.

⁶⁸ Compare *Bajo Fernández/Bacigalupo* (fn. 45), n. 460 with references.

⁶⁹ BGRSt 49, 201 (209) following T. *Walter* GA 2001, 131 (140); approving *Tiedemann* in LK (fn. 7), § 298 n. 9 with further references.

damage to price formation already as a type of property damage,⁷⁰ then the general definition of fraud suffices; however, in other cases a special definition becomes necessary, as adopted, for example, by countries such as Great Britain, France, Belgium, the Netherlands, Italy, Spain, and Germany.⁷¹ At the same time, it is remarkable from a systemic viewpoint how the Spanish Criminal Code has compressed the space devoted to manipulation in the formation of prices. The decisions of the criminal tribunals in Germany and Austria, as well as part of the Swiss scholarship, predicate fraud-related harms on the basis of the hypothetical market price, which can be difficult to ascertain. The same Swiss scholars also discuss the existence of fraud in the performance (*Leistungsbetrug*),⁷² pursuant to the Swiss federal legislation on administrative criminal law.⁷³ Alternatively, the tax evasion and the surreptitious obtainment of subsidies are apt to be deemed frauds because of their likely potential to affect property. To that extent, one deals here with the special protection of public property as an institution. This institution provides for special rules of conduct that govern legal relationships emerging from taxes and subsidies. In this respect, the protection of public property possesses a special status.⁷⁴ Because these public assets are tied to a normative goal, a large part of the German, Italian, as well as the

⁷⁰ In this sense OLG Frankfurt a. M. NJW 1990, 1057 (1058 – Stream Development Rhine I) following *Tiedemann Wettbewerb und Strafrecht* (1976) p. 17 et seq. (and now in LK [fn. 10] § 263 n. 165 with further references).

⁷¹ *Bender Sonderstrafatbestände gegen Submissionsabsprachen* (2005) p. 201 et seq. (France), 218 et seq. (Italy); *Tiedemann* in LK (fn. 10), n. 11 et seq. Vor § 298 (Austria, France, Italy, Spain, Great-Britain, also the Netherlands). On France additionally: T. *Walter* (fn. 8), p. 314 et seq.

⁷² Translator's note: Fraud in which the perpetrator promises to carry out a performance that he or she does in fact not carry out and nevertheless obtains a consideration for that performance. A well-known subcategory is welfare fraud, the fraudulent obtainment of a social benefit.

⁷³ *Arzt* (fn. 12), n. 85; *Tiedemann* in LK (fn. 10), n. 11 and 12, each with references.

⁷⁴ *Berger Der Schutz Öffentlichen Vermögens durch § 263 StGB* (2000) p. 6 et seq.; *Tiedemann* (fn. 22), n. 92, 98, 122 and 133 as well as previously on this topic *Wirtschaftsstrafrecht 2* (fn. 58), p. 118 et seq.. From a comparative legal perspective *Morales Prats* in G mez Colomer/González Cussac (eds.), *La reforma de la Justicia Penal - Festschrift für Klaus Tiedemann* (1998) p. 49 (64 et seq.) (also on social security law).

Spanish criminal law theory favor the special regulation of intentional misuse of subsidies with separate legal provisions that stand apart from the traditional fiscal criminal law special regulation. The majority of national legislators have meanwhile provided for such special regulations, while the EU has prescribed them because supranational subsidies have been increasingly manipulated, and artificial controls⁷⁵ can only prevent such manipulations to a limited extent. Hans Achenbach has correctly characterized this steering of the economy through subsidies as “highly criminogenic.”⁷⁶ However, the fraudulent acquisition of national subsidies is still covered by the general provision of fraud in Austria, Greece, Great Britain, and Sweden, and in Switzerland is only applicable to cantonal subsidies, whereas for confederate subsidies, only the less grievous administrative criminal law sanctions are applicable. The subsequent deviation of legally obtained EU subsidies from their purpose is criminalized through special provisions in practically most of the EU Member States (with the exception of Great Britain and France), because in these countries such behavior is neither contained in the definition of false pretenses nor in the definition of embezzlement or fraudulent administration.⁷⁷

4. *Business-related corruption* is not covered by the fraud through false pretenses provisions, and is only partly addressed by the fraudulent administration provision. For this reason, the offenses requiring the involvement of public officials (*Amtsträgerdelikte*), which were created according to the earlier model contained in the US Foreign Corrupt Practices Act of 1977, were expanded to include foreign public officials pursuant to the OECD Convention of 1997, and were recently acknowledged by the Great Britain Bribery Act of 2010. In addition, the bribery of employees and agents of private business enterprises and their readiness to accept bribes are criminalized separately. Traditionally, a

⁷⁵ Translator’s note: Artificial controls are those exercised by administrative supervisors and inspectors. In normal business life there are natural controls because the buyer has the possibility to scrutinize the quality of the product (*caveat emptor*). In the case of subsidies there is a unilateral relationship with the beneficiary. This is why artificial controls are necessary.

⁷⁶ Achenbach (fn. 25 (GA), p. 565 (following Tiedemann).

⁷⁷ See Tiedemann in LK (n. 7), § 264 n. 20–21a.

provision specifically applicable to corruption cases was neither known in the Romanic criminal law system nor in Greece. Consequently, the EU legislator was confronted with considerable resistance in these countries. Nonetheless, these provisions were included both in the Convention of 1999 on Corruption of the Council of Europe and in the United Nations Convention of 2003.

Accordingly, one deals here with the protection of genuine competition, modernly expressed as fair competition in the mandatory EU Framework Decision of July 22, 2003, which has not been implemented by Germany within the deadline prescribed by such Framework Decision. One also deals with the protection of service contracts with an offense similar to fraudulent administration. This protection of fair competition has earlier been incorporated into Swiss Law (in its Federal Law against Unfair Competition), French Codes (Code Napoléon and Labor Code (Code du Travail), and the Netherlands Penal Code ([Wetboek van Strafrecht]).⁷⁸

In current German practice, acceptance of advantages by purchasing agents of department stores (Media Markt case)⁷⁹ and by HMO doctors (Ratiopharm case)⁸⁰ belonging to the social insurance system has played a controversial role in the central question of whether accepting an advantage is “undue” in a specific

⁷⁸ For summaries see *Tiedemann* in LK (fn. 10), n. 22 et seq. Vor § 298 and *Vogel* in *Festschrift Weber* (2004) p. 395 et seq.

⁷⁹ Translator’s note: Philips’ employees bribed purchasing agents of large electronic stores, including employees of the chain Media Markt/Saturn. Their purpose was to bring more Philips household appliances into the stores. In two instances, in 2002 and 2003, Philips employees offered the purchasing agents bonuses if they increased the sales of Philips appliances. In these cases, the majority of German scholars focuses on how likely it is that the grantor of the advantage enjoys a preferential treatment *because of* the advantage. Some indicators are the value of the advantage granted and its likelihood to squeeze out competitors. See *Tiedemann*, *Wirtschaftsstrafrecht* BT n. 207 (3rd edition 2011).

⁸⁰ Translator’s note: The case *Ratiopharm*: The Regional Court of Hamburg sentenced in December 2010 a physician, general practitioner, to 90 daily fines at 300 euros per day for passive corruption pursuant to § 299 of the German Penal Code. Between 2004 and 2005, the physician had accepted seven checks in the total amount of 10,641 Euros from a medical representative as a commission for the prescription of drugs produced by a specific pharmaceutical company. The medical representative was also sentenced to 90 daily fines.

case. However, this appeal to business ethics, also employed by the EU legislator, is just as vague as a similar element introduced by the EU - a breach of duty not included in the express terms of a service contract. To this end, the 1906 British Prevention of Corruption Act, originally held as a model for German law, simply used the word "corruptly" until its replacement by the Bribery Act of 2010.

Business corruption should be narrowly defined, in the same way as the general fraudulent administration provision (in Spain: corporate fraudulent administration), as recommended by the Spanish scholarship.⁸¹ The definition should be similarly restricted to serious breaches of duty, and the bribee should have the authority to decide or the power to influence, in accordance with the reasons stated in the above-mentioned international legal instruments.⁸² Instead of this restrictive interpretation conforming to the Constitution and the EU, the new Greek criminal law (law number 3560/2007) enumerates the sources of legal duties exhaustively, and in this manner attains a higher degree of legal certainty concerning the criminal provisions than it might have through a restrictive judicial interpretation.

As a general problem, an additional question arises as to whether the consent (knowledge) of the principal precludes a finding of criminal liability for the administrator (this happens in the EU regulation because of the way it deals with the crime of fraudulent administration), and whether criminal liability must be barred based on the constitutional principle of proportionality that underlies the European Court of Justice decisions on export of dual use goods⁸³ in cases where the degree of quality of the merchandise favored by the buyer or the medication prescribed by the physician is beyond dispute. This is suggested by a significant part of the German scholarship that stands against constant judicial decisions.⁸⁴

⁸¹ *Bajo Fernández/Bacigalupo* (fn. 45), chap. XIII n. 68; *Muñoz Conde* in Spanish Festschrift Tiedemann (fn. 74), p. 137 (149).

⁸² *Tiedemann* in LK (fn. 10), § 299 n.46 with further references and in Festschrift Rissing-van Saan (fn. 18) p. 685 (690 et seq.).

⁸³ Translator's note: Goods and technologies are considered to be dual-use when they can be used for both civil and military purposes.

⁸⁴ See BGH NJW 2006, 3290 (3298) (Allianz Arena Munich) with opposing reviews *Gercke/Wollschläger* wistra 2008, 5 et seq., *Kienle/Kappel* NJW 2007, 3530 et seq.,

5. In questioning the relevance of the exclusion of actual danger from *offenses of abstract endangerment*,⁸⁵ we return again to the General Part to find another mechanism of modern business-related criminal law: the so-called *aptitude offenses* (*Eignungsdelikte*).⁸⁶ Aptitude offenses can be found where protection of the public is involved, especially consumer protection, and in situations where fraud through false pretenses only applies to a limited extent because this crime requires individuals as victims in most legal systems (*supra* Part I). In such cases, the *aptitude offenses* work as catch-all provisions that do not take into account the occurrence of a harm, and that are based on the capacity of a public offer to deceive an average reasonable person (the special provisions of the Spanish Penal Code do not mention the element of aptitude because it is already incorporated into the general notion of fraud through false pretenses [*Betrug*]). Insofar as the propensity to cause harm is concerned, including harm to health, general or statistically- based causation

Klengel/Rübenstahl HRR p. 2007, 52 et seq. and *Tiedemann* in *Festschrift Gauweiler* (2009) p. 533 (541 et seq.). For restrictive interpretation advocated by the scholarship, particularly in the case of bribery for the purpose of promoting sales, see *Tiedemann* in *LK* (fn. 10), § 299 n. 41 and n. 42 with further references –For a summary of criticism of the envisioned expansion of § 299 see *Lüderssen* in *Festschrift Tiedemann* (fn. 13), p. 889 et seq. On the criticism of the “empty formula or general clause” of honesty, loyalty etc. by the (Italian and Spanish) scholarship *de la Mata Barranco*, in *Festschrift Tiedemann* (fn. 13), p. 869 (872 et seq.) with further references.

⁸⁵ Translator’s note: Offenses of abstract endangerment punish behaviors only because they are typically dangerous, as opposed to offenses of concrete endangerment that require a concrete danger to the legal values or interests protected.

⁸⁶ Translator’s note: Aptitude offenses were formerly labeled abstract-concrete endangerment offenses; this term has been replaced by the terms *aptitude offenses* or *potential endangerment offenses*. A feature that distinguishes aptitude offenses from pure abstract endangerment offenses is partial concretization. The characterization of aptitude offense depends on the particular offense in question. For example, in environmental criminal law, in order to establish criminal liability certain substances do not only have to be pollutants *per se*, but also in order to incur criminal liability for water pollution (§ 324 of the German Penal Code) certain concrete factors must be present, such as the course and force of the wind. Another example is food fraud where not only the food itself has to be noxious *per se*, but also the health and age of the victim are necessary concrete factors to determine criminal liability (§§ 58, 59 *Lebens- und Futtermittelgesetzbuch* [German Food and Feed Code]).

applies, not individual causation, which is difficult to prove, as for example, in the case of use of “unsafe” products that lead to bodily harm or even death (compare with the above-mentioned German and Spanish cases, *supra* II. 5.) The prime example of such *aptitude-based offenses* is provided by modern environmental criminal law, but only where this law does not operate with threshold⁸⁷ values,⁸⁸ and by business-related criminal law, which already contains the traditional provisions regarding *false advertising* and introduction of falsified food, cosmetics, fodder, *medicines, finished materials or articles*, and *wine products* into the stream of commerce. In the EU Member States, the element of deception, controlled by the notion of “consumer expectation,” is shaped by numerous noncriminal regulations and directives set forth by the European Union, as for example the Council Regulation (EC) number 834/2007 on organic production and labeling of organic products (the German criminal provisions can be found in § 12 of the Organic Farming Act of December 7, 2008 and § 3 of the Eco Labeling Act of January 20, 2009).

The European Union relies in the area on consumer protection more on information and warnings than on repression, which remains however indispensable as a criminal law response to infringements when prevention fails. As a final example, one can mention, on the one hand, the area of protection of *intellectual and industrial property*, and on the other hand, the protection of the employee and the labor market. Because of the international magnitude of *product and trademark piracy*, the EU has imposed on its member states in 2004 the introduction of criminal sanctions for serious offenses into their laws. In the countries belonging to the

⁸⁷ Translator’s note: As for example, the minimum tolerable amounts of pollution.

⁸⁸ On the different regulation models see *Tiedemann Die Neuordnung des Umweltstrafrechts* (1980) p. 23 et seq.; from a comparative law view see *Knaut Die Europäisierung des Umweltstrafrechts* (2005) p. 146 et seq. (Austria), p. 151 et seq. (Sweden), p. 156 et seq. (Portugal), p. 160 et seq. (Spain), p. 166 et seq. (Denmark), p. 169 et seq. (Finland), p. 179 et seq. (Switzerland), p. 185 et seq. (France), p. 201 et seq. (Belgium), p. 204 et seq. (Italy), p. 210 et seq. (Greece), p. 217 et seq. (Netherlands), p. 221 et seq. (Great Britain). On aptitude offenses in Spanish and German criminal environmental law see *Silva Sánchez* in *Spanish Festschrift Tiedemann* (fn. 55) p. 151 (163 et seq.).

Romano-Germanic tradition *labor criminal law*, elaborated in detail by scholars, became subject of the EU criminal law jurisdiction only with the Treaty of Lisbon at least as far as the residence and immigration of workers is concerned.⁸⁹ Above all, the trafficking of aliens, like other areas of business-related criminal law, spills over into the ambit of organized crime.

⁸⁹ See *Achenbach* (fn. 3), p. 343 and 346; *Böxler*, *wistra* 2011, 11 et seq. from a comparative law viewpoint on this area *Arroyo/Nieto* in Tiedemann (eds.), *Wirtschaftsstrafrecht in der Europäischen Union - Freiburg-Symposium (2002)*, p. 199 et seq., 213 et seq. On both areas summarizing *Tiedemann* *Wirtschaftsstrafrecht Besonderer Teil* (fn. 22), n. 600 et seq.