

## THE PROBLEM OF IMPOSING CRIMINAL LIABILITY ON LEGAL PERSONS IN GERMANY AND RUSSIA

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*The article is devoted to the consideration of problems in connection with the introduction of the institution of criminal liability for legal persons in Germany and Russia. The authors analyze the doctrinal discussions that have been held for over 200 years with respect to this problem and the arguments raised by supporters and opponents of introducing criminal liability for legal persons. They also consider the modern practice of making legal persons liable. In particular, the institution of “quasi criminal” liability of legal persons in Germany and their administrative liability in Russia is examined. The comparative study shows that there are many similarities with regard to this question in both Germany and Russia.*

*Keywords: criminal liability of legal persons; regulatory fines; administrative offences; “quasi criminal” liability of legal persons; criminal law.*

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## Introduction

The German and Russian legal systems do not provide for the criminal liability of legal persons ("*societas delinquere non potest*"). Liability arises only according to the law on regulatory offences (II.). However, reform debates have been taking place for quite some time in both legal systems (III.). Recently, they have intensified (IV.).

### 1. Liability of Legal Persons Under the Current Legal Framework in Germany and Russia

#### 1.1. Regulatory Fines in Germany

In general, pursuant to § 30 of the German Act of Regulatory Offences (Ordnungswidrigkeitengesetz – OWiG), a *regulatory fine* ("*Verbandsgeldbuße*") can be imposed on a legal person or an association of persons. In addition, European legislation in certain areas, particularly capital markets law and accounting law, has introduced special regulations in recent years that make it possible to impose significantly higher fines. The conditions of § 30 OWiG are strict:

Only *legal persons* (e.g. a limited liability company (GmbH); a stock corporation (AG)) or *associations* without legal capacity or (since 30 August 2002)<sup>1</sup> *partnerships* with legal capacity are sanctionable (§ 30(1) No. 1–3 OWiG). Previously, only commercial partnerships (a general commercial partnership (OHG) or limited partnership (KG)) were sanctionable. Once the commentaries had acknowledged that civil law partnerships (BGB-Gesellschaften) themselves (and not only the partners) could be holders of rights and duties, equal treatment had become necessary. Legal persons *under public law* (e.g. public corporations) are also included.<sup>2</sup> Nevertheless, the state and its institutions (at federal, state and municipal level) cannot be sanctioned.<sup>3</sup> In the case of a (*partial*) *universal legal succession*, the regulatory fine may be imposed

<sup>1</sup> Cf. Martin P. Waßmer, *Die Sanktionierung von Auslandsbestechung nach dem OWiG* [Sanctioning Foreign Bribery Under the Regulatory Offences Act] in *Das Verbot der Auslandsbestechung* [The Prohibition of Foreign Bribery] 165, 165–166 (E. Hoven & M. Kubiciel (eds.), Baden-Baden: Nomos, 2016).

<sup>2</sup> Klaus Rogall in *Karlsruher Kommentar zum OWiG* [Karlsruhe Commentary to the Regulatory Offences Act] (5<sup>th</sup> ed., Munich: C.H. Beck, 2018), § 30 marginal no. 35 with further references.

<sup>3</sup> *Id.* § 30 marginal no. 37 with further references.

on the successor(s) as of 30 June 2013 (§ 30(2a) OWiG). Before that there was a gap since a regulatory fine could only be imposed if identicalness or “near” identicalness existed from an economic point of view.<sup>4</sup>

The *offender* must be a natural person in a management position (§ 30(1) No. 1–5 OWiG). *Executive bodies* are covered first. The person must be an entity authorised to represent a legal person or a member of such an entity (No. 1), a chairman of the executive committee of an association without legal capacity or a member of such committee (No. 2) or a partner authorised to represent a partnership with legal capacity (No. 3). Second, as of 1 November 1994, *certain representatives*, namely an authorised representative with full power of attorney or in a managerial position as procura-holder or with a commercial power of attorney (No. 4), have been included. This enlargement counteracts a concealment of responsibility.<sup>5</sup> Third, as of 30 August 2002, *all other persons responsible* on behalf of the management have been added, also covering supervision of the conduct of business (e.g. supervisory boards) or other exercise of controlling powers in a managerial position (No. 5). This addition counteracts the shift of responsibility to subordinates.<sup>6</sup>

The *linking offence* must be a criminal or regulatory offence as a result of which duties incumbent on the legal person or on the association have been violated, or where the entity has been enriched or was intended to be enriched (§ 30(1) sentence 1 OWiG). It does not matter whether this offence is a special (e.g. insolvency offence) or general offence (e.g. fraud). The offence must have been committed *culpably*, as the entity is blamed for the natural person’s guilt. The most important linking offence is § 130 OWiG (violation of obligatory supervision).<sup>7</sup> This allows the entity to be held liable if an *employee* has committed an offence and the intentional or negligent violation of obligatory supervision by a *person in a management position* is established. Nevertheless, there may be gaps which can be exploited by transferring supervision to persons below the management level.<sup>8</sup>

Finally, there must be a *link to representation*, i.e. the natural person must have acted “as” an entity authorised to represent a legal person or an association. According to the legal explanation the offender generally does not act as a representative if he “acts in his own interest.”<sup>9</sup> For this reason, German law followed the *interest theory* for a long time,<sup>10</sup> according to which the link to representation was missing if the

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<sup>4</sup> See Martin P. Waßmer, *Anmerkung zu BGH KRB 55/10* [Note on BGH KRB 55/10], 5 Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht 184, 187 (2012).

<sup>5</sup> Bundestagsdrucksache [Bundestag Document], No. 12/192, at 32.

<sup>6</sup> Bundestagsdrucksache [Bundestag Document], No. 14/8998, at 11.

<sup>7</sup> Waßmer 2016, at 169.

<sup>8</sup> Rogall 2018, § 30 marginal no. 92.

<sup>9</sup> Bundestagsdrucksache [Bundestag Document], No. V/1269, at 61.

<sup>10</sup> See only Bundesgerichtshof [Federal Supreme Court], Neue Juristische Wochenschrift, 1981, at 1793 f.

offender acted exclusively in his own benefit. However, this differentiation led to a reduction in insolvency offences and was hardly feasible in negligence offences. Thus, in criminal science a *theory of function* was established, according to which the offender must have used legal or actual possibilities of action arising from his position.<sup>11</sup> Finally, in 2012 the German Federal Supreme Court (BGH) abandoned the interest theory.<sup>12</sup> Since then, action “within the business sphere” of those represented is necessary, i.e. not just “on occasion.”

*Sanctioning the natural person* is not mandatory. A regulatory fine may be imposed *independently* if proceedings are not commenced or discontinued, or if imposition of a criminal penalty is dispensed with (§ 30(4) sentence 1 OWiG). It is even possible to impose an “*anonymous*” regulatory fine if the identity cannot be ascertained, but it is clear that a person in a management position must have committed the offence.<sup>13</sup> Nevertheless the independent assessment of a regulatory fine shall be precluded where the offence cannot be prosecuted for legal reasons (§ 30(4) sentence 3 OWiG), i.e. in particular in the case of a statute of limitation, but also in the case of immunity, amnesty or lack of criminal request.<sup>14</sup>

The *regulatory fine* usually consists of two parts. Pursuant to § 30(2) sentence 1 OWiG, the *sanctioning part* may total up to 10 million euro in the case of an intentional crime (No. 1), and in the case of negligent conduct up to 5 million euro (No. 2). This framework has been in force since 30 June 2013 (previously: 1 million/500,000 euro). The tenfold increase has been imposed in order to raise the fine to an “effective, proportionate and deterrent” level.<sup>15</sup> In contrast to this, pursuant to § 30(2) sentence 2 OWiG, the maximum amount for the commission of a *regulatory offence* shall be determined by the maximum regulatory fine. The *recapturing part* of the regulatory fine recaptures the *financial benefits* of an offence in accordance with § 17(4) OWiG. This part can be very large. In the Siemens corruption scandal in 2008, a regulatory fine of approximately 395 million euro was imposed, of which 394.74 million euro served to recapture the benefits that inured to the company.<sup>16</sup> In other words, the regulatory fine in substance consisted of the unlawfully obtained benefits! Since introduction of the tenfold increase, the sanctioning part could amount to up to 10 million euro – but this does not represent a significant increase for a large corporation with sales in the billions.

<sup>11</sup> Walter Perron in *Schönke/Schröder, StGB, Kommentar [Commentary to the Criminal Code]* (29<sup>th</sup> ed., Munich: C.H. Beck, 2014), § 14 marginal no. 26.

<sup>12</sup> Bundesgerichtshof [Federal Supreme Court], *Neue Juristische Wochenschrift*, 2012, at 2366 ff.

<sup>13</sup> Bundesgerichtshof [Federal Supreme Court], *Neue Zeitschrift für Strafrecht*, 1994, at 346.

<sup>14</sup> Franz Gürtler in *Erich Göhler, OWiG, Kommentar [Commentary to the Regulatory Offences Act]* (17<sup>th</sup> ed., Munich: C.H. Beck, 2017), § 30 marginal no. 42.

<sup>15</sup> Bundestagsdrucksache [Bundestag Document], No. 17/11053, at 21.

<sup>16</sup> Cf. Waßmer 2016, at 173 f.

In German *capital market law*, the regulatory fines on credit institutions, financial institutions and investment firms have already been increased, and very drastically. The Market Abuse Regulation (EU) No. 596/2014<sup>17</sup> requires administrative pecuniary sanctions on the basis of total annual turnover. The high pecuniary sanctions in European antitrust law served as a model. Germany implemented these requirements in § 39 Securities Trading Act (Wertpapierhandelsgesetz – WpHG),<sup>18</sup> today's § 120 WpHG. Since July 2016, a regulatory fine may be imposed of up to 15 million euro or 15% of the total annual turnover of the legal person according to the last available financial reports approved by the management body. In addition, the offence can be sanctioned with a maximum regulatory fine of *at least three times the amount of the profits gained or losses avoided*. In April 2017, similar regulations were integrated into German *accounting law* (§ 334 of the German Commercial Code (Handelsgesetzbuch – HGB)).<sup>19</sup>

The assessment of a regulatory fine precludes *confiscation of the financial benefit* obtained pursuant to § 73 or § 73c of the German Criminal Code (Strafgesetzbuch – StGB), or pursuant to § 29a OWiG (cf. § 30(5) OWiG). This serves to prevent impermissible double sanctioning is.<sup>20</sup> However, if a regulatory fine has not been assessed, confiscation of a sum up to the amount of the financial benefit reaped may be ordered (§ 29a OWiG). Finally, § 74e StGB (respectively § 29 OWiG) allows the confiscation of *products or means of the offence* or their value from a legal person or an association if one of the organs or representatives acted.

The decision on a regulatory fine is taken in principle with the decision on the offence committed by the natural person in an *integrated procedure*.<sup>21</sup> § 30(4) OWiG only allows *independent proceedings* if proceedings are not commenced or discontinued, or if imposition of a criminal penalty is dispensed with. According to § 444(1) sentence 1 of the German Criminal Procedure Code (Strafprozeßordnung – StPO), if in criminal proceedings a decision has to be given on imposition of a regulatory fine against a legal person or an association, the court shall order their participation (as *subsidiary participant* (Nebenbeteiligter)<sup>22</sup>). This provision secures

<sup>17</sup> Regulation (EU) No. 596/2014 of the European Parliament and of the Council of 16 April 2014 on Market Abuse (Market Abuse Regulation) and Repealing Directive 2003/6/EC of the European Parliament and of the Council and Commission Directives 2003/124/EC, 2003/125/EC and 2004/72/EC, 2014 O.J. (L 173) 1.

<sup>18</sup> Erstes Finanzmarktnovellierungsgesetz [First Financial Market Amendment Act], 30 June 2016, BGBl. I at 1514.

<sup>19</sup> CSR-Richtlinie-Umsetzungsgesetz [Corporate Social Responsibility Directive Implementation Act], 11 April 2017, BGBl. I at 802.

<sup>20</sup> Bundestagsdrucksache [Federal Parliament Paper], No. 7/550, at 344.

<sup>21</sup> Wilhelm Schmidt in *Karlsruher Kommentar zur StPO* [Karlsruhe Commentary to the Criminal Procedure Code] (7<sup>th</sup> ed., Munich: C.H. Beck, 2013), § 444 marginal no. 1.

<sup>22</sup> OLG [Higher Regional Court] Hamm, *Neue Juristische Wochenschrift*, 1973, at 1851, 1852.

the right to a hearing (Art. 103(1) of the German Basic Law). According to § 88(1) OWiG, the same applies to regulatory fining proceedings.

Hence, one feature of the criminal law regulation pertaining to the liability of legal persons in Germany is a system of sanctions that extend beyond penal law and take into account the right of administrative misconduct.<sup>23</sup> That is why, according to E. Antonova, Germany is said to impose “quasi-criminal (administrative-criminal) liability” on legal persons.<sup>24</sup> Other Russian scholars note the fact that instead of the institution of criminal liability for legal entities in Germany a complex of administrative and criminal law rules regulate matters related to corporate criminal law relations is applied. They conclude that German lawmakers believe that the use of administrative responsibility with respect to corporations fully fulfils its duties to curb offences.<sup>25</sup> However, it seems that based on the analysis of individual law enforcement practice statistics the position on this issue is not so unambiguous.

### **1.2. Administrative Offences in Russia**

In 2001, the Code of the Russian Federation on Administrative Offences was adopted, containing provisions on the administrative liability of legal persons. Set forth in part 1 of Art. 2.10 of the Code of Administrative Offences of the Russian Federation, the norms directly defining the administrative responsibility of a legal person may be included not only in the framework of Section II of the Code of Administrative Offences of the Russian Federation, but also in the laws of the subjects of the Russian Federation on administrative offences. Asserted by the legislator in part 2 of Art. 2.1 of the Code of Administrative Offences of the Russian Federation, the concept of a legal person’s guilt, referred to in the domestic legal doctrine as an “objectivistic” or “behavioural” concept,<sup>26</sup> is largely similar to the theory of “past culpability” in the legal doctrine of countries of the common law family. As set forth in the provisions of administrative and tort legislation, the involvement of legal

<sup>23</sup> Хайне Г. Юридические лица и их ответственность в немецком административном праве: проблемы реформации // Уголовное право. 2001. № 1. С. 100 [Günter Heine, *Legal Persons and Their Responsibility in German Administrative Law: The Problems of the Reformation*, 1 Criminal Law 99, 100 (2001)].

<sup>24</sup> Антонова Е.Ю. Концептуальные основы корпоративной (коллективной) уголовной ответственности [Elena Yu. Antonova, *Conceptual Foundations of Corporate (Collective) Criminal Liability*] 29 (St. Petersburg: Yuridicheskii tsentr Press, 2011).

<sup>25</sup> For more details see Кибальник А.Г., Волосюк П.В., Демин С.Г. Вопросы уголовной ответственности юридических лиц: Монография [Aleksey G. Kibalnik et al., *Issues of Criminal Liability of Legal Entities: Monograph*] 55 (Moscow: Yurlitinform, 2017).

<sup>26</sup> For more details see Есаков Г.А. Меры уголовно-правового характера в отношении юридических лиц: критическая оценка // Уголовное право. 2011. № 3. С. 28 [Gennady A. Esakov, *Measures of a Criminal-Legal Nature with Regard to Legal Entities: Critical Evaluation*, 3 Criminal Law 28 (2011)]; Панова И.В. Еще раз о двух тенденциях, разрушающих целостность института административной ответственности // Вестник Высшего Арбитражного Суда РФ. 2007. № 8. С. 14 [Inna V. Panova, *Once Again About Two Trends Destroying the Integrity of the Institute of Administrative Liability*, 8 Bulletin of the Supreme Arbitration Court of the Russian Federation 14 (2007)] and others.

persons in administrative responsibility is possible in various areas: the administrative responsibility of legal persons is provided for in articles of almost all chapters of Section II “Special Part” of the Code of Administrative Offences of the Russian Federation, with the exception of its last Chapter 21 “Administrative Offences in the Field of Military Registration.” The majority of articles setting forth the administrative offences that establish the liability of legal persons is contained in Chapter 9, “Administrative Offences in Industry, Construction and Energy” – approximately 96% of articles, in Chapter 10, “Administrative Offences in Agriculture, Veterinary and Land Reclamation” – about 93% of articles, and in Chapters 14, “Administrative Violations in the Field of Entrepreneurial Activity and Activities of Self-Regulatory Organizations” and 16, “Administrative Offences in the Field of Customs (Violation of Customs Regulations)” – approximately 92% of articles. A total of 687 articles of the Code of Administrative Offences of the Russian Federation offsetting forth administrative offences in 472 articles (accounting for almost 69% of all articles of the Special Part of the Code of Administrative Offences of the Russian Federation) govern with respect to liability of legal persons. It should be noted that the number of articles establishing the responsibility of these entities has grown in both absolute and relative terms over time.<sup>27</sup>

With respect to a legal person, the following administrative penalties may be imposed for committing administrative offences: a warning, an administrative fine, confiscation of the instrument of the offence or the subject of an administrative offence or administrative suspension of activities. In this case, as some scholars have noted, administrative law sanctions approximate those of the criminal law in their severity.<sup>28</sup> In particular, the upper limit of punishment in the form of an administrative fine, established for a legal person, is differentiated depending on the type of offence committed. In the case of one administrative offence, it is organized in the amount of 1 million rubles, others – 3 million rubles, the third – 5 million rubles, and the fourth – as many as 60 million rubles (see part 1 of Art. 3.5 of the Code of Administrative Offences of the Russian Federation).

### **1.3. Practise in Germany and Russia**

In German practise, however, legal persons or associations are *rarely fined*, since in regulatory offences law, in contrast to criminal law, where the principle of legality must be taken into account, the *principle of opportunity* (§ 47 OWiG) applies.

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<sup>27</sup> In a training manual published in 2008, Yu. Kuzyakin wrote that “out of 414 articles of the Administrative Offences Code of the Russian Federation that set forth the content of administrative offenses, 222 articles (which constitute 54% of all articles of the Special Part of the Code of Administrative Offences of the Russian Federation) refer to the liability of legal persons.” See Кузякин Ю.П. Административная ответственность: Учебное пособие [Yury P. Kuzyakin, *Administrative Responsibility: Textbook*] 47 (2<sup>nd</sup> ed., Moscow: MGIU, 2008).

<sup>28</sup> Kibalnik et al. 2017, at 83.

Prosecutions and sanctioning are within the duty-bound discretion of the authorities. Though the guiding principles are the principle of equality and of proportionality, a *widespread lack of application and enforcement* is observed.<sup>29</sup> Furthermore, statistics show that the regulatory fines are *generally mild*. The Federal Office of Justice (Bundesamt für Justiz) collects all decisions pursuant to § 30 OWiG if the regulatory fine amounts to more than 200 euro (see § 149(2) No. 3 of the German Trade Code (Gewerbeordnung – GewO)). In 2015,<sup>30</sup> only 2,907 registrations were made: in 17.4% of cases the regulatory fine was up to 300 euro, in 48.0% of cases it ranged from 300 to 1,000 euro, in 25.4% of cases from 1,000 to 5,000 euro, in 5.9% of cases from 5,000 to 20,000 euro, in 1.1% of cases from 20,000 to 50,000 euro, and just in 2.2% of cases it was over 50,000 euro.

In contrast, it should be noted that the involvement of legal persons in administrative responsibility in Russia occurs quite often. Accordingly, in 2015, 214,821 legal persons were subjected to punishment for committing administrative offences, in 2016 – 217,507, and for the first half of 2017 – 114,797 legal persons, with a fine of 83.1% being imposed in the form of a fine, 84.1% and 82% of cases, respectively.<sup>31</sup>

## 2. Discussion on the Introduction of Criminal Liability in Germany and Russia

The introduction of criminal liability of legal persons in the German legal system has been the subject of *intense debate* for more than 200 years.

1. In the *medieval period*,<sup>32</sup> in the *Holy Roman Empire of the German Nation*, spatial associations (farming unions, market cooperatives, rural and urban communities) and personal associations (e.g. citizens' associations, guilds) became increasingly important. The teachers of secular and ecclesiastical law created the legal basis for the *punishment* of these associations, in particular through fines, but also through

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<sup>29</sup> Elisa Hoven et al., *Der nordrhein-westfälische Entwurf eines Verbandsstrafgesetzes* [The North Rhine-Westphalian Draft of an Association Criminal Law], 6 Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht 201, 209 (2014).

<sup>30</sup> Bundesamt für Justiz [Federal Office of Justice], Übersicht über die Eintragungen im Gewerbezentralregister (Teilregister juristische Personen und Personenvereinigungen) [Overview of Entries in the Central Trade Register (Subregisters for Legal Persons and Associations of Persons)], 31 December 2016, table 01 (Aug. 10, 2018), available at [https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/GZR/statistik\\_jurPersonen2016.pdf?\\_\\_blob=publicationFile&v=3](https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/GZR/statistik_jurPersonen2016.pdf?__blob=publicationFile&v=3).

<sup>31</sup> See Reports on the work of courts of general jurisdiction to review cases of administrative violations for 2015, 2016, and the first half of 2017 (form No. 1-AP) on the website of the Judicial Department of the Supreme Court of the Russian Federation (Aug. 10, 2018), available at <http://www.cdep.ru/index.php?id=79>.

<sup>32</sup> Charlotte Schmitt-Leonardy, *Unternehmenskriminalität ohne Strafrecht?* [Corporate Crime Without Criminal Law?] 346 ff. (Heidelberg: C.F. Müller, 2013).

the withdrawal of privileges, destruction and conquest. The so-called *glossators* assumed that there were groups of persons who, regardless of changes to their memberships, were holders of rights and that the whole as such was liable under civil and criminal law. The so-called *canonists* developed the concept of the legal person, which was characterized by a legal capacity to be distinguished from the members, the "*universitas*," which could assume tort and criminal liability. On the other hand, at the Council of Lyon (1245), *Pope Innocent IV* took the view that the "*universitas*" was incapable of action and thus impervious to punishment (*impossible est quod universitas delinquat*). However, very influential *postal glossators*, e.g. *Bartolo da Sassoferrato* (1313–1357), affirmed punishability. Although it was recognised that collective punishment could be unfair, and efforts were made to exempt innocent people, there were provisions on punishing towns, communities and guilds for political or economic offences. For example, the Reichskammergerichtsordnung of 1555 contained provisions governing proceedings against municipalities. These procedures existed until the 18<sup>th</sup> century.

In the age of *Enlightenment*, in the German legal area collective punishment was abandoned.<sup>33</sup> This was brought about by the then well-known book "*Observationes quaedam ad delicta Universitatum spectantes*" (1792/93) by *Julius Friedrich von Malblanc* (1752–1828), a professor from Erlangen. However, Malblanc repeated only well-known objections: Neither can "*posteriori*" (individuals who only became members of an association after an offence has been committed) be blamed, nor can an association be punished by criminal law. The real reason for the abandonment of collective punishment was that the Enlightenment concentrated on the freedom of the individual, with which punishment as a member of a collective is incompatible.

As early as the beginning of the 19<sup>th</sup> century, in 1801, *Paul Johann Anselm v. Feuerbach* (1775–1833) stated:

Every subject that is to be considered the subject of a crime must necessarily be an individual. A moral (mystical) person and especially a Universitas is not capable of crime.<sup>34</sup>

*Friedrich Carl v. Savigny* (1779–1861) justified this in 1840 based on his (Romanist) theory of fiction and representation as follows:

Criminal law has to do with the natural person, as a thinking, wanting and sentient being. The legal person, however, is not such a person, but only a person

<sup>33</sup> Rudolf Schmitt, *Strafrechtliche Maßnahmen gegen Verbände* [Criminal Measures Against Associations] 27 ff. (Stuttgart: Kohlhammer, 1958).

<sup>34</sup> Paul Johann Anselm von Feuerbach, *Lehrbuch des gemeinen in Deutschland geltenden Peinlichen Rechts* [Textbook on Common Criminal Law in Germany] 29 (Giessen: Heyer, 1801).

with assets, and is therefore completely outside the area of criminal law. Her existence is based on the representative will of certain individuals, which, as a result of fiction, is credited to her as her own will. Such representation, however, without its own will, can only be observed in civil law, never in criminal law.<sup>35</sup>

Accordingly, the Criminal Code of Bavaria of 1813 expressly ruled out the criminal liability of legal persons. In the Prussian Criminal Code of 1851, and later in the Imperial Criminal Code of 1871 (RStGB), such punishment was already considered unthinkable, so that no mention of it was made. In 1887, the *German Imperial Court* (Reichsgericht) confirmed that point of view and stated that the legal person “as a fictitious legal entity is deprived of the natural capacity to act and thus at the same time of the criminal responsibility for of its organs acting as their representatives.”<sup>36</sup>

On the other hand, at the *end of the 19<sup>th</sup> century* there were also very influential voices in favour of criminal liability. *Franz v. Liszt* (1851–1919) stated in 1881:

The punishment of legal persons would not only be legally possible, but would also be recommendable within certain limits according to the example *de lege ferenda* given by the English-American practice.

[T]he prerequisites for the capacity of the collective personality to act in the field of criminal law are in principle none other than those of civil law.

[T]he collective personality is also the holder of legal assets, which can be penalized or destroyed.<sup>37</sup>

*Otto v. Gierke* (1841–1921) presented his (Germanic) theory of the real personality of the association in 1887, according to which associations are found in social reality, are “real” and act “themselves” through their organs.<sup>38</sup> However, despite lively discussion, this did not lead to a change of mind.

Nevertheless, in 1919, after World War I, § 357 of the Imperial Fiscal Code (RAO) was introduced which established the criminal liability of legal persons in tax law, likely based on the interest of fiscal authorities. However, this provision did not gain any practical significance until it was repealed because the German Imperial Court

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<sup>35</sup> Friedrich Carl von Savigny, *System des heutigen Römischen Rechts. Bd. 2 [System of Contemporary Roman Law. Vol. 2]* 312 f. (Berlin: Veit, 1840).

<sup>36</sup> RGSt 16, 121, 123 f.

<sup>37</sup> Franz von Liszt, *Das deutsche Reichsstrafrecht [The German Imperial Criminal Law]* 100 f. (Berlin; Leipzig: Guttentag, 1881).

<sup>38</sup> Otto von Gierke, *Die Genossenschaftstheorie und die deutsche Rechtsprechung [Cooperative Theory and German Jurisprudence]* 743 ff., 771 ff. (Berlin: Weidmann, 1887).

ruled in 1926<sup>39</sup> that the punishment of management excluded punishment of the legal person. During the *Weimar Republic* and the period of *National Socialism*, the prevailing view was that only natural persons were punishable. The assumption that the topic had become “highly relevant,” since in the “total state the interests of the national community and the state leadership are emphasized more strongly,”<sup>40</sup> did not prove to be true.

After *World War II*, the policy debate was revived in Western Germany as provisions that were enacted by the Allied occupation forces imposed criminal sanctions against legal persons. In 1953 the BGH considered these provisions as applicable, but contrary to German criminal law principles.<sup>41</sup> During the Criminal Law Reform of the 1950s and 1960s, the Great Criminal Law Commission rejected the notion of imposing criminal liability on legal persons, but voted in favour of including at least a provision that would allow “monetary sanctions” to recapture illegal benefits.<sup>42</sup> Eventually a compromise was reached. Thus, § 23 OWiG (the later § 30 OWiG) was introduced on 1 October 1968 as a general, uniform and conclusive provision allowing the imposition of *regulatory fines* on legal persons as well as on associations.

In the 1990s the policy debate was reopened. The Sandoz chemical accident in the Schweizerhalle industrial complex, caused by a fire that subsequently led to tons of pollutants being spilled into the Rhine turning it red (November 1986), and embargo violations by German companies during and after the Second Gulf War (1990/91), attracted a lot of attention. As a result, the fines imposed under § 30 OWiG were often no longer considered adequate.<sup>43</sup> In May 1993, the criminal liability of legal persons was discussed at length at the conference of German-speaking criminal law teachers in Basel.<sup>44</sup> In July 1997, the Federal State of Hesse, then led by a “red-green” state government, proposed the introduction of a *new title* in the StGB (Verbandsstrafe und Maßregeln, §§ 76b–76h StGB). About a year later, the 69<sup>th</sup> Conference of Ministers of Justice in Rostock-Warnemünde (17/18 June 1998) stated that, with regard to corporate crime and in line with developments abroad, there was a need to improve the sanctions applicable to legal persons. On 9 July 1998, the State of Hesse presented

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<sup>39</sup> *Entscheidungen des Reichsgerichts in Strafsachen. Bd. 61* [Decisions of the Imperial Court in Criminal Matters. Vol. 61] 92, 95 ff. (Leipzig: Veit & Comp., 1906).

<sup>40</sup> Richard Busch, *Grundfragen der strafrechtlichen Verantwortlichkeit der Verbände* [Basic Questions of Criminal Liability of Associations] V (Leipzig: Theodor Weicher, 1933).

<sup>41</sup> Bundesgerichtshof [Federal Supreme Court], *Neue Juristische Wochenschrift*, 1953, at 1838, 1839.

<sup>42</sup> *Niederschriften der Großen Strafrechtskommission. Bd. 4* [Transcripts of the Great Criminal Law Commission. Vol. 4] 329 ff., 333 ff., 574 (Bonn: Gedruckt in der Bundesdruckerei, 1958).

<sup>43</sup> Cf. the overview by Kurt Seelmann, *Buchbesprechungen Verbandsstrafbarkeit* [Book Reviews on Criminal Liability of Associations], 108 *Zeitschrift für die gesamte Strafrechtswissenschaft* 652, 652 ff. (1996).

<sup>44</sup> Cf. Elmar Vitt, *Diskussionsbeiträge der Strafrechtslehrertagung 1993 in Basel* [Contributions to the 1993 Criminal Law Teachers' Conference in Basel], 105 *Zeitschrift für die gesamte Strafrechtswissenschaft* 803, 813 ff. (1993).

a motion for a resolution “on the introduction of criminal liability for legal persons and associations of persons,” which, however, was withdrawn 11 months later, on 8 June 1999, by the newly elected “black-yellow” state government.<sup>45</sup>

In *January 1998*, the Federal Justice Minister (Schmidt-Jortzig), member of a “black-yellow” coalition under Chancellor Helmut Kohl, appointed a “Commission to reform the sanctions system.” The preparatory working group was very sceptical about introducing criminal liability of legal persons and described it as a “path to a different criminal law” that would pose “complex problems in constitutional, criminal and criminal procedural terms.”<sup>46</sup> At its meeting on 29 and 30 November 1999, the Commission voted by a large majority against the introduction, since existing regulatory fines were considered to be sufficient and an implementation of the criminal liability of legal persons would be opposed by strong concerns.<sup>47</sup>

Even today, there are considerable *dogmatic and constitutional objections* to the introduction of criminal sanctions against legal persons. According to the *prevailing opinion*,<sup>48</sup> *criminalisation* is not compatible with the basic categories of criminal law. The argument here is that legal persons cannot act, are neither culpable nor punishable. Legal persons cannot suffer and learn from criminal sanctions. Introducing criminal liability would bear the risk that natural persons could face individual criminal sanctions, and, additionally, would be burdened with corporate criminal sanctions. The *counterargument* – rightly<sup>49</sup> – does not share these objections, and assumes that corporations act either by an “original” organisational action, as independent and responsible subjects with a corporate culture, or by the “attribution” of the culpable conduct of the persons acting on their behalf. In addition, there is no risk of double jeopardy as the individual persons and the legal person are different entities.<sup>50</sup> The basic arguments of supporters and opponents of criminal liability of legal persons are similar in many respects in the Russian and German criminal law doctrine.

2. In Russia, issues surrounding the imposition of criminal liability on legal persons also began to be discussed at the beginning of the 19<sup>th</sup> century.

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<sup>45</sup> Bundesratsdrucksache [Federal Council Publication], No. 690/98 and 385/99.

<sup>46</sup> *Abschlussbericht der Kommission zur Reform des strafrechtlichen Sanktionensystems* [Final Report of the Commission] in *Reform des Sanktionenrechts. Bd. 3* [Reform of the Sanctions Law. Vol. 3] 351 f. (M. Hettinger (ed.), Baden-Baden: Nomos, 2002).

<sup>47</sup> *Id.* at 354 ff.

<sup>48</sup> Cf. only Bernd Schünemann, *Die aktuelle Forderung eines Verbandsstrafrechts* [The Current Request of an Association Criminal Law], 1 *Zeitschrift für Internationale Strafrechtsdogmatik* 1, 1 ff. (2014).

<sup>49</sup> See Waßmer 2016, at 178 ff.

<sup>50</sup> On the constitutional objections to an association penal code under the German Basic Law see Matthias Jahn, *There Is No Such Thing as Too Big to Jail* in *Das Unternehmensstrafrecht und seine Alternativen* [Corporate Criminal Law and Its Alternatives] 53 (M. Jahn et al. (eds.), Baden-Baden: Nomos, 2016).

In one of the “first, in the definition of G. Feldstein, attempts to scientifically process the material of Russian criminal law in the period preceding the publication of the Code of Laws”<sup>51</sup> (the Russian criminal law, which Gabriel Solntsev presented in Kazan in 1820, was one of the first lectures on criminal law in Russia), G. Solntsev, analyzing the position of foreign scholars with respect to this issue, came to the conclusion that

moral persons, i.e. society, can fall into crimes and then be subjected to legitimate punishments.<sup>52</sup>

At the beginning of the 19<sup>th</sup> century, G. Solntsev was one of the few domestic forensic scholars who shared this point of view. For the sake of justice, we should note that even in a later period, in the pre-revolutionary doctrine of domestic criminal law, this approach did not enjoy a broad base of support. Thus, in particular, V. Spasovich wrote that

a crime can be committed... only a person is a physical, and not a legal one. An old school question about whether a person can be a legal culprit for a crime is not worth the length of it.<sup>53</sup>

S. Budzinsky<sup>54</sup>, N. Neklyudov<sup>55</sup> and other scholars adhered to a similar position on this issue. In a certain sense, summing up the views of contemporary forensic scientists, A. Kistyakovsky pointed out that

a long-standing dispute about whether a legal person can commit a crime is usually resolved in the negative sense.<sup>56</sup>

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<sup>51</sup> Солнцев Г.И. Российское уголовное право [Gavriil I. Solntsev, *Russian Criminal Law*] XXX (G.S. Feldshteyn (ed.), Yaroslavl: s.n., 1907).

<sup>52</sup> *Id.* at 73.

<sup>53</sup> Спасович В. Учебник уголовного права (выпуск первый) [Vladimir Spasovich, *Criminal Law Textbook (Issue One)*] 112 (St. Petersburg: Tip. Iosifa Ogrizko, 1863).

<sup>54</sup> Будзинский С. Начала уголовного права [Stanislav Budzinsky, *The Beginning of Criminal Law*] 82–83 (Varshava: Glavnyi sklad v knizhnykh magazinakh Kozhanchikova v S. Peterburge, Varshave i Kazani, 1870).

<sup>55</sup> Неклюдов Н.А. Общая часть уголовного права (конспект) [Nikolai A. Neklyudov, *The General Part of the Criminal Law (Abstract)*] 22–23 (St. Petersburg: Tip. P.P. Merkulyeva, 1875).

<sup>56</sup> Кистьяковский А.Ф. Элементарный учебник общего уголовного права. Т. 1: Общая часть [Aleksandr F. Kistyakovsky, *Elementary Textbook of General Criminal Law. Vol. 1: The General Part*] 61 (Kiev: Univer. tip., 1875).

At the same time, it is interesting that, despite the fact that only individuals were recognised as the subject of a crime in pre-revolutionary criminal legislation, there were provisions that also provided for the responsibility of collective entities. Such norms existed both in the original version of the Code of Criminal and Correctional Penalties of 1845 and in its later versions. Thus, in accordance with Article 1199 of the Regulations on Punishments in Penal and Correctional Institutions in 1845,

in the provinces of Lifland, Estland and Kurland, rural societies, which were guilty of harbouring fugitives with knowledge of their condition, are subject to: collecting at once for each fugitive triple from the whole peasant society of per capita taxes...

and according to Article 1893 of the same Code,

urban societies for the formulation of provisions which are contrary to the laws, are subjected to: the pecuniary punishment of one hundred rubles from all those who attended and signed this provision, and above all especially thirty rubles of the Graded Chapter.<sup>57</sup>

In the Penal and Penal Corrections Ordinance, in the version of 1885 there are also norms that provide for collective criminal responsibility. As an example, we can cite para. 2 of Article 530, according to which, in addition to the personal responsibility of the Jews,

moreover, from the Jewish society in which the military fugitive from the Jews was hiding, no more than three hundred rubles are paid for each person, if it did not find it and did not submit it to the proper superiors,

Article 661, according to which

the salt administration is subject to liability and penalties for failure to perform the duties assigned to it, in accordance with general rules, in section V of this Code of Crimes for Service ordered,

Article 1078,

places and persons, who are instructed by the government to monitor the good maintenance and timely correction of roads, bridges, crossings

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<sup>57</sup> Уложение о наказаниях уголовных и исправительных [Ordinance on the Penalties of Criminal and Correctional] 497, 731 (St. Petersburg: Tip. Vtorogo Otdeleniya Sobstvennoi Ego Imperatorskogo Velichestva Kantselyarii, 1845).

over rivers, other waters, etc., for non-performance are subjected to: penalties determined for negligence in Arts. 410 and 411 of this Code

and some other articles<sup>58</sup>.

Separate acts adopted in the 1920s to early 1930s also established the criminal liability of collective entities, although only individuals were recognised as criminal entities under post-revolutionary criminal law. Thus, in accordance with the note to clause 3 of the Decree of the All-Russian Central Executive Committee and the Council of People's Commissars of the RSFSR of 21 September 1922 "On Involving the Population in Labour and County Service for the Elimination of Natural Disasters,"

in cases of extreme and urgent need, the right to involve the population in work labour and horse-drawn service is granted to the county executive committees and parish executive committees (depending on the area to which the natural disaster extends), provided that the provincial executive Committee should be informed immediately on the same day to declare the guilt. For failure to fulfil this condition, the county executive committees and parish executive committees are punished under Art. 106 of the Criminal Code of the RSFSR as for excess of power.<sup>59</sup>

After the Revolution of 1917, the possibility of criminal liability of legal persons was rejected by almost all scientists in the field of criminal law. In particular, in his monograph "Protecting the World and Fighting Crimes Against Humanity" (1956) A. Trainin wrote:

Both the theoretical considerations and the experience of the Nuremberg Trials convincingly show that not only the state, but also other legal persons cannot bear criminal responsibility, be subjects of crime.<sup>60</sup>

In this respect, virtually throughout the entire Soviet period of development of our country, there has been no significant discussion on the issue of criminal liability of legal persons.

<sup>58</sup> Уложение о наказаниях уголовных и исправительных 1885 г. [*The Code of Criminal and Correctional Penalties, 1885*] 417–418, 446, 564 (N.S. Tagantsev (ed.), 13<sup>th</sup> ed., St. Petersburg: Gos. tipografiya, 1908).

<sup>59</sup> Постановление ВЦИК и СНК РСФСР от 21 сентября 1922 г. «О привлечении населения к трудовой и гужевой повинности для ликвидации стихийных бедствий» (утратило силу), Собрание узаконений РСФСР, 1922, № 54, ст. 685 [Resolution of the All-Russian Central Executive Committee and the Council of People's Commissars of the RSFSR of 21 September 1922. On the Involvement of the Population to Labor and Livestock Services for the Elimination of Natural Disasters (lost force), Collection of Legal Ordinances of the RSFSR, 1922, No. 54, Art. 685].

<sup>60</sup> Трайнин А.Н. Избранные труды [Aron N. Traynin, *Selected Works*] 724 (N.F. Kuznetsova (comp.), St. Petersburg: Yuridicheskiy tsentr Press, 2004).

Under the conditions of the Soviet planned economy, in which not only the costs of goods produced by state enterprises but also criminal administrative sanctions were planned, there was a time when it was not appropriate to recognize the institution of administrative liability of legal persons. In accordance with clause 6 of the Decree of the Presidium of the Supreme Soviet of the USSR of 21 June 1961, "On Further Restriction of the Use of Fines Imposed Administratively,"<sup>61</sup> the imposition of administrative fines on institutions, enterprises and organizations was abolished and the prohibition on classifying superimposed on officials fines at the expense of institutions, enterprises and organizations. As V. Sorokin indicates, the main idea of the Decree was to stop the practice of imposing administrative fines on enterprises and institutions which were not justified. In accordance with the decree, specific culprits – officials, whose actions constituted an administrative offence, were to be brought to administrative responsibility.<sup>62</sup> Neither in the Fundamentals of the Legislation of the USSR and the Union Republics on Administrative Offences,<sup>63</sup> adopted on 23 October 1980 by the Supreme Soviet of the USSR, nor in the Code of Administrative Offences of the RSFSR<sup>64</sup> adopted on 20 July 1984 – the first law specially systematised and entirely devoted to the regulation of the institution of administrative liability, legal persons were not viewed as subjects of such liability. As V. Sorokin notes that since the beginning of the 1990s a tendency has developed that actually "erodes" the single legal space of administrative responsibility... at the federal level, normative acts are adopted that formulate new administrative offenses that are not included in the Administrative Code – a law specially designed for them... Approximately from the beginning of the 1990s laws, which began to spread administrative responsibility to enterprises, institutions and organizations, appeared in our legislation... One of the first such acts was the Federal law of 17 December 1992 No. 4121-I "On the Administrative Responsibility of Enterprises, Institutions, Organizations and Associations for Violations

<sup>61</sup> Указ Президиума Верховного Совета СССР от 21 июня 1961 г. «О дальнейшем ограничении применения штрафов, налагаемых в административном порядке» (утратил силу), Ведомости Верховного Совета СССР, 1961, № 35, ст. 368 [Decree of the Presidium of the Supreme Council of the USSR of 21 June 1961. On the Further Restriction of the Application of Fines Imposed Administratively (lost force), Gazette of the Supreme Council of the USSR, 1961, No. 35, Art. 368].

<sup>62</sup> *Сорокин В.Д.* Правовое регулирование: Предмет, метод, процесс (макроуровень) [Valentin D. Sorokin, *Legal Regulation: Subject, Method, Process (Macrolevel)*] 440 (St. Petersburg: Yuridicheskiy tsentr Press, 2003).

<sup>63</sup> Основы законодательства Союза ССР и союзных республик об административных правонарушениях (приняты Верховным Советом СССР 23 октября 1980 г.) (утратили силу), Ведомости Верховного Совета СССР, 1980, № 44, ст. 909 [Fundamentals of the Legislation of the USSR and the Union Republics on Administrative Violations (adopted by the Supreme Council of the USSR on 23 October 1980) (lost force), Gazette of the Supreme Council of the USSR, 1980, No. 44, Art. 909].

<sup>64</sup> Кодекс РСФСР об административных правонарушениях (утв. Верховным Советом РСФСР 20 июня 1984 г.) (утратил силу), Ведомости ВС РСФСР, 1984, № 27, ст. 909 [Code of Administrative Offences of the RSFSR (approved by the Supreme Council of the RSFSR on 20 June 1984) (lost force), Gazette of the Supreme Council of the RSFSR, 1984, No. 27, Art. 909].

in the Field of Construction.”<sup>65/66</sup> In the future, the number of such regulatory legal acts has increased significantly, including on the basis of some codified acts, such as Urban Planning, Customs, Tax Codes, etc. The appearance in the 90s of the 20<sup>th</sup> century of norms governing the administrative responsibility of legal persons was largely due to changes in the economy of the country.

With changes to the economic foundations of the state, some scholars in the field of criminal law began to posit the potential introduction of the institution of criminal liability for legal persons. In particular, in his article, “Criminal Law in the Conditions of Transition to a Market Economy,” A. Naumov wrote:

[T]he development of market relations in our country can make legal persons the subject of a number of economic crimes for which they could be prosecuted.<sup>67</sup>

Overall, the scientists who developed the concept of criminal law of the Russian Federation in 1992 adopted a positive attitude towards the criminal liability of legal persons. As such, the developers of the concept noted:

The question of the appropriateness of imposing criminal liability on legal persons requires special attention; it appears that the application of appropriate sanctions against them, for example for environmental crimes, could enhance the criminal law protection of key institutions.<sup>68</sup>

In the first of the drafts of the new Criminal Code of the Russian Federation, submitted to the Supreme Council of the Russian Federation in 1992, only individuals were recognized as subjects of criminal responsibility.<sup>69</sup> However, a number of authors

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<sup>65</sup> Закон РФ от 17 декабря 1992 г. № 4121-1 «Об административной ответственности предприятий, учреждений, организаций и объединений за правонарушения в области строительства» (утратил силу), Ведомости Съезда народных депутатов Российской Федерации и Верховного Совета Российской Федерации, 1993, № 2, ст. 58 [Law of the Russian Federation No. 4121-1 of 17 December 1992. On the Administrative Responsibility of Enterprises, Institutions, Organizations and Associations for Violations in the Field of Construction (lost force), Gazette of the Congress of People's Deputies of the Russian Federation and the Supreme Soviet of the Russian Federation, 1993, No. 2, Art. 58].

<sup>66</sup> *Сорокин В.Д.* Избранные труды [Valentin D. Sorokin, *Selected Works*] 613, 619 (D.N. Bakhrakh & V.V. Denisenko (preface), St. Petersburg: Yuridicheskiy tsentr Press, 2005).

<sup>67</sup> *Наумов А.В.* Уголовный закон в условиях перехода к рыночной экономике // Советское государство и право. 1991. № 2. С. 35 [Anatoly V. Naumov, *Criminal Law in the Conditions of Transition to a Market Economy*, 2 Soviet State and Law 35 (1991)].

<sup>68</sup> Концепция уголовного законодательства Российской Федерации // Государство и право. 1992. № 8. С. 44 [The Concept of Criminal Legislation of the Russian Federation, 8 Soviet State and Law 44 (1992)].

<sup>69</sup> Уголовный кодекс Российской Федерации (проект) // Юридический вестник. Спецвыпуск. 1992. Октябрь. № 20(22) [The Criminal Code of the Russian Federation (draft), 20(22) Special Issue of the Juridical Gazette (1992)].

of this document later proposed to supplement the draft with several provisions relating to the possibility of imposing criminal liability on organisations (legal persons) for environmental crimes. The proposed punishment for a legal person: imposition of the obligation to repair the damage caused, a fine and suspension of the legal person.<sup>70</sup> The draft of the General Part of the Criminal Code of the RF by the RF Ministry of Justice and the State Legal Department of the President of the Russian Federation in 1994 initially provided for the institution of criminal liability of legal persons. In the explanatory note to the project, the drafters pointed out that,

the introduction of criminal liability imposed on legal persons for economic, environmental and some other crimes will help to increase the effectiveness of the fight against these crimes. As punishment, the draft provides for a fine, a ban on certain activities, confiscation of assets and liquidation of the legal person (Articles 107–111).<sup>71</sup>

Finally, proposals on the criminal liability of legal persons were not included in the text of the Criminal Code of the Russian Federation, adopted in 1996. In this regard, B. Volzhenkin writes,

Thus, Russian legislation does not yet provide for criminal liability of legal persons. There is no recommendation to impose such a responsibility in the Model Criminal Code for States. However, there is some reason to assert that in the near future the question of establishing criminal liability for legal persons will again be posed with sufficient severity.<sup>72</sup>

At the end of the 20<sup>th</sup> and beginning of the 21<sup>st</sup> century, the Russian Federation became a party to many international conventions (the International Convention for the Suppression of the Financing of Terrorism of 9 December 1999, the Council of Europe Convention on Criminal Responsibility for Corruption of 27 January 1999, the UN Convention against Transnational Organized Crime of 15 November 2000, the UN Convention against Corruption of 31 October 2003), providing, as E. Antonova noted, the duty of our state to ensure the application of effective, proportionate and deterrent sanctions, including criminal ones, against legal persons brought to justice in connection with the commission of crimes.<sup>73</sup>

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<sup>70</sup> Волженкин Б.В. Уголовная ответственность юридических лиц [Boris V. Volzhenkin, *Criminal Liability of Legal Persons*] 7 (St. Petersburg: Editorial and Publishing Department of the St. Petersburg Law Institute of the Prosecutor General's Office of the Russian Federation, 1998).

<sup>71</sup> Уголовный кодекс Российской Федерации (Общая часть): Проект [The Criminal Code of the Russian Federation (General Part): Draft] 8 (Moscow, 1994).

<sup>72</sup> Volzhenkin 1998, at 23.

<sup>73</sup> Antonova 2011, at 7.

As indicated earlier, in 2001, the Code of Administrative Offences of the Russian Federation was adopted. With respect to this, G. Esakov rightly said that these provisions on the administrative liability of legal persons may well be considered a “testing ground” for future criminal law norms.<sup>74</sup> Against this background, some scholars in the field of criminal law continue to insist that

the question of the criminal liability of legal persons cannot be regarded as conclusive from a criminal law, legal theory or practical point of view. But it needs a new understanding, in a deep, integrated and interdisciplinary development, which involves experts from different fields of modern science as different branches of national law as well as criminal law abroad.<sup>75</sup>

### 3. Recent Developments and Outlook

1. In recent years, the debate in Germany has flared up again, as legal persons can now be held criminally liable in most states of the European Union.

In *September 2013*, the Minister for Justice of the Federal State of North Rhine-Westphalia (Thomas Kutschaty), then member of a “red-green” state government, presented the draft of a *Criminal Code for Associations* (Verbandsstrafgesetzbuch – VerbStrG),<sup>76</sup> which was to be introduced “soon” into the legislative procedure. In addition, in *November 2013*, the coalition agreement of the newly elected “black-red” Grand Coalition under Chancellor Angela Merkel promised to extend the law of administrative offences and to “examine” a “corporate criminal law for multinational corporations.”<sup>77</sup> The draft in North Rhine-Westphalia was the subject of controversy and discussion within criminal science.<sup>78</sup> Not only has the need been called into question, but also whether the provisions can be integrated into the existing system. Ultimately, the proposal failed to be implemented by the end of the legislative period (October 2017).

<sup>74</sup> *Есаков Г.А. Юридические лица и ответственность за убийство (о новом английском законе) // Уголовное право. 2007. № 6. С. 19 [Gennady A. Esakov, *Legal Persons and Responsibility for the Murder (on the New English Law)*, 6 Criminal Law 19 (2007)].*

<sup>75</sup> *Коробеев А.И. § 8 «Юридическое лицо как субъект уголовной ответственности» гл. X «Субъект преступления» // Полный курс уголовного права. В 5 т. Т. 1: Преступление и наказание [Aleksandr I. Korobeev, § 8. *Legal Person as a Subject of Criminal Responsibility of Chapter X. Subject of Crime in Full Course of Criminal Law. In 5 vol. V. 1: Crime and Punishment*] 434–435 (A.I. Korobeev (ed.), St. Petersburg: Yuridicheskiiy tsentr Press, 2008).*

<sup>76</sup> See <http://www.strafrecht.de/media/files/docs/Gesetzentwurf.pdf>.

<sup>77</sup> *Deutschlands Zukunft gestalten. Koalitionsvertrag zwischen CDU, CSU und SPD [Designing Germany's Future. Coalition Agreement Between CDU, CSU and SPD], 27 November 2013, at 101 (Aug. 12, 2018), available at [https://www.bundesregierung.de/Content/DE/\\_Anlagen/2013/2013-12-17-koalitionsvertrag.pdf?\\_\\_blob=publicationFile](https://www.bundesregierung.de/Content/DE/_Anlagen/2013/2013-12-17-koalitionsvertrag.pdf?__blob=publicationFile).*

<sup>78</sup> Cf. only Frank Zieschang, *Das Verbandsstrafgesetzbuch – Kritische Anmerkungen zu dem Entwurf eines Gesetzes zur Einführung der strafrechtlichen Verantwortlichkeit von Unternehmen und sonstigen Verbänden [The Criminal Code of Associations – Critical Remarks on the Draft Law Introducing Criminal Liability of Companies and Other Associations]*, 161(2) *Goldammer's Archiv für Strafrecht* 91, 91 ff. (2014).

The new coalition agreement of February 2018 of the re-elected “black-red” coalition again promises a reform of the “sanctions law for companies.”<sup>79</sup> In contrast to the former agreement, concrete statements are made: The plan is to turn away from the principle of opportunity and to create regulations on procedural suspensions as well as allocation rules in order to eliminate the actual application and enforcement deficits. The sanction instruments are also to be expanded. The amount of the fine shall be based in the future on the economic strength of the company, whereby for companies with an annual turnover of more than 100 million euro the maximum limit is to be 10 percent of turnover. This would generalise the severe sanctions already in place in capital market and accounting law, which are based on European law. In addition, legal requirements for internal investigations are to be created. The introduction of criminal liability is not mentioned. It is therefore to be expected that only the existing provisions will be extended.

This is in line with the fact that in terms of *criminal policy*, there is no compelling need for the criminal liability of legal entities. So far, neither European nor international regulations require the creation of corporate criminal law. Furthermore, the *existing system* appears to be generally sufficient to combat corporate crime. Progress can be achieved by eliminating the deficits of application and enforcement and by expanding preventive measures. In this respect, in the recent past many companies have established *compliance programmes*. As an empirical study<sup>80</sup> indicates, these measures have led to a significant decline in corporate crime.

However, the *introduction* of corporate criminal law would have advantages. It could have a stronger *detrimental effect on corporate crime*, since prosecution would take place in accordance with the principle of legality, and a criminal fine, which has a stigmatising effect, would be imposed in a public criminal trial. Moreover, only criminal punishment *adequately reflects injustice and guilt* of a crime committed by a person acting on behalf of a legal entity. And finally, account would be taken of the fact that most states of the European Union have a corporate criminal law.

*Conceptually*, future German criminal law should not be based on the *model of original responsibility*, which is tied to the (alleged) legal entity’s “own” organisational guilt. Such a model has a connection to Swiss law,<sup>81</sup> and also to the draft of the Criminal

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<sup>79</sup> Ein neuer Aufbruch für Europa. Eine neue Dynamik für Deutschland. Ein neuer Zusammenhalt für unser Land. Koalitionsvertrag zwischen CDU, CSU und SPD [A New Start for Europe. A New Dynamic for Germany. A New Cohesion for Our Country. Coalition Agreement Between CDU, CSU and SPD], 7 February 2018, at 126 (Aug. 12, 2018), available at <https://www.zeit.de/politik/deutschland/2018-02/koalitionsvertrag.pdf>.

<sup>80</sup> Wirtschaftskriminalität und Unternehmenskultur 2013 [White-Collar Crime and Corporate Culture 2013], PricewaterhouseCoopers (2013), at 16 ff. (Aug. 10, 2018), available at <https://files.vogel.de/vogelonline/vogelonline/files/5947.pdf>.

<sup>81</sup> Cf. Martin Böse, *Strafbarkeit juristischer Personen – Selbstverständlichkeit oder Paradigmenwechsel im Strafrecht* [Criminal Liability of Legal Persons – A Matter of Self-Evidence or Paradigm Shift in Criminal Law], 126 *Zeitschrift für die gesamte Strafrechtswissenschaft* 132, 140 (2014).

Code for Associations of North Rhine-Westphalia from 2013. However, fact that “original” guilt can only be attributed to natural persons runs counter to this model. Preference should be given to the *attribution model*, in which the guilt of a natural person is attributed. This model can be used to sanction criminal offences committed by a manager himself or his subordinates, provided a violation of an obligatory supervision has been committed. It is not only supported by the fact that the European rules on the (non-compulsory criminal) liability of legal persons rest on it. But Austrian law as well is based on it,<sup>82</sup> as is the draft of the Federal Ministry of Justice,<sup>83</sup> which was submitted to the Commission appointed in 1998. Finally, the attribution model is often favoured in criminal science,<sup>84</sup> particularly because § 30 OWiG is also based on it.

The *Cologne Draft of a Sanctions Code for Associations* (Verbandsstrafgesetzbuch – VbStG),<sup>85</sup> presented on 6 December 2017 at the University of Cologne, which emerged from a research group comprising scientists and practitioners, is also based on the attribution model. This draft contains extensive substantive and procedural rules designed to resolve many difficulties. It has a special preventive orientation.<sup>86</sup> This is expressed above all in the fact that part of the criminal sanctions, which can amount to up to 15% of the annual turnover, can be waived, if the caused damage is compensated and suitable organizational and personnel measures are taken, in order to avoid future offences. In addition, representatives of an association have the right to silence. Finally, with regard to internal investigations, it is stipulated that not only lawyers and advisors, but also the interviewed persons have the right to refuse to testify and are not subject to confiscation.

After all, it is now up to the *German legislator* to decide on the introduction of corporate criminal liability. The Grand Coalition has the historic opportunity to introduce a modern Code. The Cologne draft offers a broad basis for future discussion. In this context, not only should the sanctions be expanded with a sense of proportion, but also the rights of defence be sustainably strengthened. In the *long term*, particularly with regard to European criminal law, criminal liability should be provided for.

2. Recently, the problem of imposing criminal liability on legal entities has been actively discussed at various scientific forums in Russia. In particular, at Moscow State University the Russian-German criminal legal seminar, “Criminal and Legal

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<sup>82</sup> Bundesgesetz über die Verantwortlichkeit von Verbänden für Straftaten (Verbandsverantwortlichkeitsgesetz – VbVG) [Federal Act on the Responsibility of Associations for Criminal Offences], BGBl. I Nr. 151/2005.

<sup>83</sup> Bundesjustizministerium, *Zurechnungsmodell [Attribution Model] in Reform des Sanktionenrechts*, supra note 46, at 155 ff., 178 f.

<sup>84</sup> See Rogall 2018, § 30 marginal no. 287.

<sup>85</sup> See <http://www.verbandsstrafrecht.jura.uni-koeln.de>.

<sup>86</sup> Martin Henssler et al., *Kölnener Entwurf eines Verbandsstrafgesetzbuchs [Cologne Draft of an Association Sanctions Law]*, 1 Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht 1, 10 (2018).

Impact on Legal Entities” was held in 2012, the French-Russian Conference “Criminal Responsibility of Legal Entities”<sup>87</sup> was held in 2015, etc. About a dozen candidate and doctoral dissertations have been written on these issues.

In 2011 the Investigative Committee of the Russian Federation prepared and sent to the Administration of the President of the Russian Federation a draft federal law, “On Amending Certain Legislative Acts of the Russian Federation in Connection with the Introduction of the Institute of Criminal Legal Influence on Legal Entities.”<sup>88</sup> This bill was never submitted to the State Duma of the Federal Assembly of the Russian Federation and, in general, received a negative evaluation in the scientific community. In particular, according to G. Esakov’s comment, the project is not only crude (there are many gaps in it; it is necessary to amend the Civil Code of the Russian Federation, the Penal Enforcement Code of the Russian Federation, a number of other laws), but it is also more than controversial in terms of the idea embedded within it. Instead of the concept of imposing liability on legal entities for crimes committed, we are offered an artificial construction of “involvement in a crime.” This means that the most important and conceptual comment on the draft law results in the ability to impose upon a legal person criminal responsibility without a culpable act.<sup>89</sup>

In 2015 the next draft “On Amending Certain Legislative Acts of the Russian Federation in Connection with the Introduction of the Institution of Criminal Responsibility of Legal Entities”<sup>90</sup> was introduced, but not adopted by the State Duma of the Federal Assembly of the Russian Federation. Among the numerous remarks on the draft federal law, in particular, it was noted that

the currently extant administrative and legal measures and their consequences are approaching the criminal law in nature, and in some cases exceed them.

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<sup>87</sup> For more details see Уголовно-правовое воздействие в отношении юридических лиц: материалы российско-немецкого уголовно-правового семинара (26 июня 2012 г.) [*Penal Influence Regarding Legal Persons: Materials of the Russian-German Penal Seminar (26 June 2012)*] (Moscow: Yurlitinform, 2013).

<sup>88</sup> Проект федерального закона «О внесении изменений в некоторые законодательные акты Российской Федерации в связи с введением института уголовно-правового воздействия в отношении юридических лиц» (подготовлен Следственным комитетом России) [*Draft Federal Law “On Amending Certain Legislative Acts of the Russian Federation in Connection with the Introduction of the Institute of Criminal Legal Influence on Legal Entities”*] (ConsultantPlus Legal Database, 2012).

<sup>89</sup> Esakov 2011, at 30, 27.

<sup>90</sup> Проект федерального закона № 750443-6 «О внесении изменений в некоторые законодательные акты Российской Федерации в связи с введением института уголовной ответственности юридических лиц» [*Draft Federal Law No. 750443-6 “On Amending Certain Legislative Acts of the Russian Federation in Connection with the Introduction of the Institution of Criminal Responsibility of Legal Entities”*] (Aug. 10, 2017), available at <http://asozd2.duma.gov.ru/main.nsf/%28Spravka%29?OpenAgent&RN=750443-6>.

Since the bill proposes a radical change in the concept of criminal law and, accordingly, the criminal legal doctrine regarding the responsibility of legal entities, the bill requires additional comprehensive discussion and theoretical justification.

### Conclusion

The analysis of the developmental history and current status of the doctrinal criminal law dispute, as well as legislative developments with respect to the introduction of the institution of criminal responsibility in Germany and Russia, has demonstrated a number of similarities. In the legal doctrine of both countries, discussions on the criminal liability of legal persons have been held with varying degrees of success for about two hundred years. Recently, discussions in this direction have intensified considerably. It is worth noting the similarity of the basic arguments raised by supporters and opponents of the institution of criminal liability for legal persons in the Russian and German criminal law doctrines. A few years ago there were certain legislative initiatives on this subject in both countries. In Germany, a complex system of administrative liability is applied instead of imposing criminal liability on legal persons. At this stage, a reform is in sight, which is expected to take place during the current legislative period, even if it is not yet clear whether only the existing administrative liability will be extended or whether legal persons will be held criminally liable. In Russia, the number of standards that lay down provisions on the administrative liability of legal persons is gradually growing, which some scientists believe can be regarded as a “testing ground” for future criminal law standards.

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