

Introduction to German Economic Criminal Law

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Abstract

“Economic criminal law: the growth sector of criminal law”(unknown author). In Germany Economic criminal law has high practical relevance and is very present in media and public. Economic crime or, in other words, “white-collar crime” causes enormous financial and immaterial damages. Currently the so-called anti-cancer medication scandal is decided by the district court Essen in North Rhine-Westphalia, Germany. The following article gives a review about this case and discusses the definition of economic crime. Afterwards the authoress gives insight into the historical development and the legal sources and explains the regulatory system of German economic criminal law.

1. Introduction

Economic crime causes serious financial damages. For example in the year 2015 the damage was 2.970million Euro. This was almost half of the total damage of 6.888 million Euro caused by crime in Germany (*BKA, Bundeslagebild Wirtschaftskriminalität 2016*, p. 5). Furthermore, economic crimes cause immaterial and indirect damages, like distortion of competition, termination of business relations, negative effects on business partners, negative effects on the corporate image or even the image of the whole branch of trade, health damages and health hazards caused by violations of pharmaceutical law or food law, loss of taxes and social insurance contributions and job losses (*BKA, Bundeslagebild Wirtschaftskriminalität 2016*, p. 5; Wittig, 2017, § 2 Rn. 16). Additionally, there is a large number of unreported cases because the willingness to report an offence is extremely low (Schwind, 2016, § 21 Rn. 41). Persons who lost “dirty money” do not make a report against the offender because they fear criminal consequences. Other victims are afraid of reputational damages(Wittig, 2017, § 2 Rn. 16). The clear-up rate is quite high compared to criminality in general. In 2016 the clear-up rate for economic crime was 94 percent, whereas the general clear-up rate was 56,2 percent (*BKA, PKS Jahrbuch 2016, Bd. 4*, p. 157; *PKS Jahrbuch 2016, Bd. 1*, p. 13). This is because the complainant usually knows the offender. In 2016 17,1 percent of the economic crimes were internet crimes, for example by the use of social bots that spread false reports (*BKA, Bundeslagebild Wirtschaftskriminalität 2016*, p. 6 f.). Economic crime is committed against companies, private individuals and the state. The most frequently committed offence is fraud (*BKA, Bundeslagebild Wirtschaftskriminalität 2016*, p. 4) as investment fraud and credit fraud. A recent form of fraud is the so-called CEO-fraud in which the offenders pretend to be chief executive officers (CEO) of another company and instruct the employees to transfer a large sum of money to a foreign bank (*BKA, Bundeslagebild Wirtschaftskriminalität 2016*, p. 8 f.).

The judges adjudicating on white-collar crimes are confronted with complicated facts and they have to consider economic and technical development. The defendants are able to pay renowned and capable defence lawyers who are very committed to attaining an acquittal or a mild sentence for their clients. Often criminal proceedings result in an abatement of action, a plea bargain or a mild sentence and in some cases in a suspended sentence. In the public opinion, in many cases the penalties are too moderate.

The offences of economic criminal law are not regulated in an uniform act but in German Penal Code (*Strafgesetzbuch, StGB*) as well as in accessory criminal law. The reason for this is, that most offences depend on administrative law provisions.

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Therefore, the offences are regulated in the last section of these codes, for example in the Securities Trading Act, the Law on Foreign Trade and Payments and German Food and Feed Code (Tiedemann, 2010, § 1 Rn. 2 ff.).

The typical economic criminal is male, well-educated, married, about 40 years of age and belongs to the middle class society. Ordinarily he is a German citizen and in most cases he was not previously convicted. Besides, he is single-minded and persistent in pursuing his goals, assertive, unscrupulous and prepared to take risks. When committing the offence he has worked for the same company approximately for ten years and for seven years in the same position. Often he is deeply indebted (Bussmann, Salvenmoser, 2006, 207; Göppinger, 2008, § 25 Rn. 11; Kaiser, 1996, § 73 Rn. 5; Schwind, 2016, § 21 Rn. 21). The self-image of economic criminals differentiates from other criminals. Usually they define themselves as “men of honour” not as criminals and they have no sense of misconduct (Bussmann, Salvenmoser, NStZ 2006, 207; Schneider, 1981, p. 361; Schwind, 2016, § 21 Rn. 23). According to recent studies economic criminals often are narcissistic or hedonistic personalities (*Bückle, Schlegel, Fassbender, Klein*, 2006, 222; Göppinger, 2008, § 25 Rn. 13).

Usually the public is very interested in important economic criminal proceedings. In present day the media are constantly reporting about the proceedings of relevant cases. Prominent cases are FlowTex, the donations scandal of the CDU, the Mannesmann proceeding (BGH NJW 2006, 522; LG Düsseldorf NJW 2004, 3275), Siemens/ENEL (BGH NJW 2009, 89), Siemens/AUB (BGH NJW 2011, 88), the fraud scandal of Heros, the corruption affair at VW, the Cologne refuse incineration scandal and the data protection scandals of some German companies, for example Lidl and the Deutsche Bahn AG.

2. Anti-cancer medication scandal

Currently the district court Essen in North Rhine-Westphalia, Germany is deciding about the so called anti-cancer medication scandal (or “cyto-scandal”), the largest medication scandal in Germany since “Contergan”. The main hearing has started in November 2017 and shall end in March of this year. The indictment has 820 pages (Wernicke, 2017). The pharmacist Peter S., owner of the “Alte Apotheke” (“Old Pharmacy”) in Bottrop, is being accused of violation against the German Medicines Act (Arzneimittelgesetz, AMG), attempted bodily injury and fraud. He is being accused of diluting anti-cancer medication in more than 61.000 cases and delivering the ineffective medication to physicians in several federal states of Germany for more than 4.000 patients suffering from cancer. Peter S., who had a special admission to produce cancer medication (so-called cytostatic drug), bought just a small amount of the expensive starting substance in wholesale trade and diluted the cancer medication. Peter S. charged the health insurances the full price. In this way he made a profit of 56 million euro. In the course of a search the police could seize several infusion bags. Some of them were extremely underdosed, some contained no active substance and some a wrong active substance (Apotheke Adhoc, 2017; Schraven, 2017, Ein Beutel). The offences were discovered by two employees of Peter S., his commercial executive Martin Porwoll and his pharmacy technician Maria-Elisabeth Klein, who received the German whistleblower award in the end of 2017 (DAZ.online, 2017). 45 persons suffering from cancer joint the action. The joint plaintiffs demand convicting Peter S. of attempted murder, not only attempted bodily harm, but it is almost impossible to prove, which lives Peter S. has terminated or shortened because of these ineffective medicines. Some patients have already passed away but it is not proven that they died because of underdosed medicine (Wernicke, 2017). The judges hear many witnesses and expert witness. Up until now, Peter S. largely refused to give evidence. He has been in custody for more than fourteen months. His defence lawyers are of the opinion, that attempted bodily injury has not been proven because Peter S. has not allowed the delivery of the infusion bags seized by the police (DAZ.online, 2018). Besides they doubt the substance analysis of the infusion bags and they claim that Peter S. has a restricted criminal responsibility because of a cerebral organ damage (Apotheke Adhoc, 2018; Helberg, 2018). A verdict has not been pronounced yet. In the beginning of the preliminary proceedings the investigative authorities have recorded a judgment creditor's mortgage of approximately 2,5 million Euro in a private property of Peter S. In January 2017 Peter S. transferred the “Alte Apotheke” to his mother and he gave her several mortgages.

In August 2017 the prosecutor arrested 5,6 million Euro but this sum will not be enough to settle all claims (Schraven, 2017, Alte Apotheke). The anti-cancer medication scandal has provoked a discussion about the control of pharmacies by the federal states of Germany (Klein, 2018).

3. Definition of economic crime

There is no legal definition for economic crime although the term “economic crime” has been used for decades. Neither § 30 V Nr. 4 of the German Tax Act (Abgabenordnung, AO) nor § 74c of the German Judicature Act (Gerichtsverfassungsgesetz, GVG) contains a definition (Wittig, 2017, § 2 Rn. 1 f.). Nevertheless, there are several different approaches to define “economic crime”.

3.1 Criminological definition

The criminological approach tries to comprehend economic crime as a matter of fact, not as a legal term (Wittig, 2017, § 2 Rn. 6). A distinction is drawn between a definition related to the offender (particularly “white-collar crime”) and a definition related to the company.

3.1.1 Definition related to the offender (particularly “white-collar crime”)

The American criminologist and sociologist Edwin H. Sutherland (1883-1950) defined economic crime as “white-collar crime”, that means a crime committed by a person of respectability and high social status in the course of his occupation (*Sutherland*, 1940). Sutherland wanted to reveal, that persons committing economic crimes differ from other criminals (Wittig, 2017, § 2 Rn. 8) and to overcome the prejudice that crimes are only committed by lower class (“blue collar worker”) (Dannecker, Bülte, 2014, Kap. 1 Rn. 6; Schwind, 2016, § 21 Rn. 16). On the one hand Sutherlands approach goes too far because there are also crimes committed within the professional activity but not in connection with economy, for example the negligent homicide of a patient as a result of a medical malpractice or the collusion of a lawyer (Wittig, 2017, § 2 Rn. 10). On the other hand economic crimes are also committed by persons with a low social standing, for example if workers bill unnecessary repairs or if farmers sell diluted milk (Dannecker, Bülte, 2014, Kap. 1 Rn. 6). Besides persons of a high social status also commit crimes without any connection to economy, like traffic offences (Brettel, Schneider, 2014, § 1 Rn. 12). For reasons of legal certainty, modern criminal law is predicated on the criminal conduct not on the offender (Wittig, 2017, § 2 Rn. 11).

3.1.2 Definition related to the company

For these reasons Sutherlands approach was refined and modified. In criminology economic crime is defined as “Occupational crime” (*Clinard, Quinney*, 1973, p. 188), “corporate crime” or as “special opportunity crime” (Brettel, Schneider, 2014, § 1 Rn. 13), but these definitions include crimes without any economical context as well (Kudlich, Oğlakcioğlu, 2014, § 1 Rn. 5). Besides there are also economic crimes that have no relation to a company such as tax fraud and credit fraud (Brettel, Schneider, 2014, § 1 Rn. 17; Wittig, 2017 § 2 Rn. 14). Nevertheless corporate crime is a significant part of economic crime (Schünemann, 1982).

3.2 Definition of criminal proceedings

§ 74c I of the German Judicature Act lists several economic offences, that require specialized knowledge in the field of economic life, to concretize the competence of the commercial crime court (Wirtschaftsstrafkammer). The commercial crime court is, like the jury court (Schwurgericht) and the state protection crime court (Staatsschutzkammer), a special criminal division of the district court (Brettel, Schneider, 2014, § 1 Rn. 5). § 74c I GVG differs between two categories of economic offences. The offences listed in § 74c I Nr. 1-5a GVG are specific economic crimes. Which means, that they can only be committed in commercial trade, such as offences referred to Patent Act, Trademark Act, Copyright Act, Law Against Unfair Competition, Corporation Law, Insolvency Act, Wine Act and food law and economic subsidy fraud, credit fraud and investment fraud. Furthermore the commercial crime court is the competent court for the offences listed in § 74c I Nr. 6 GVG on a case-by-case basis if specialized knowledge in the field of economic life is necessary, for example breach of trust, fraud, computer fraud, corruption offences and usury. § 74c I Nr. 6 GVG, to give an example, includes the accounting fraud of a statutory health insurance physician which requires special knowledge about the accounting methods (Brettel, Schneider, 2014, § 1 Rn. 5).

The list in § 74c I GVG is a rough guideline for a definition and makes clear that not every economic crime is a property crime (Kudlich, Oğlakcioğlu, 2014, § 1 Rn. 8). § 74c I GVG is also a rough indication for crime statistics, like the statistics of the Federal Criminal Police Office, and for criminological research (Brettel, Schneider, 2014, § 1 Rn. 6; Wittig, 2017, § 2 Rn. 25).

3.3 Definition of criminal law doctrine

The criminal law doctrine tries to distinguish the specific injustice of economic offences from other crimes. In the prevailing opinion economic crime includes all offences and administrative offences which are committed

within economic activity and violate public interests (Otto, 1984, 342; Schwind, 2016, § 21 Rn. 17). The crimes are committed using the confidence necessary in business life (Otto, 1984, 342). Economic crime is characterized by collectivity and anonymity of victims and low conspicuity of the offenders (Dannecker, Bülte, 2014, Kap. 1 Rn. 9; Kaiser, 1996, § 73 Rn. 5).

4. Historical development and legal sources

The development of economy was accompanied by the development of economic crime and the punishment of this behaviour (Brettel, Schneider, 2014, § 1 Rn. 26).

4.1. History until 1945

Economic crimes, such as fraud, exist since the beginning of economic life. Since ancient times such offences are punishable.

4.1.1. Early modern era and Middle Ages

Already under Roman law the forbidden export of iron and arms was punished by a fine (Tiedemann, 2010, § 2 Rn. 48). During the Middle Ages the use of false measure and weight was punished severely (Brettel, Schneider, 2014, § 1 Rn. 28). Since 16th century fraud was penalised in different provisions and since 18th century the provisions have differentiated between theft and embezzlement (Brettel, Schneider, 2014, § 1 Rn. 28).

4.1.2 Age of industrialisation and beginning of the 20th century

During the 19th century, the age of industrialisation in Germany, criminal law just protected individual rights. Public interests were protected by commercial administrative law (Brettel, Schneider, 2014, § 1 Rn. 32 f.). In the beginning of the 20th century economic law was more and more regulated and violations of commercial administrative law were sanctioned (Wittig, 2017, § 3 Rn. 3). The “Reichskaligesetz” (RBGl. 1910, p. 775), an act concerning the sales of potash, that should ensure the global monopoly of German potash industry, established in 1910, was the first modern economic criminal act (Dannecker, Bülte, 2014, Kap. 1 Rn. 57). During the 1st World War (1914-1918) economic criminal law should regulate the distribution of goods. In 1914 the upper house of the German parliament was enabled to enact emergency decrees to prevent financial damages during the war (RBGl. 1914, p. 327). On the basis of this enabling act several provisions to ensure the distribution of goods and the price regulation including criminal offences were passed (Dannecker, Bülte, 2014, Kap. 1 Rn. 57). Furthermore special courts were established, such as the usury court in 1919 (Dannecker, Bülte, 2014, Kap. 1 Rn. 58). In 1919 the Reich tax code (Reichsabgabenordnung, RAO) was enacted to systematise the tax law (Tiedemann, 2010, § 1 Rn. 49). In 1923 the antitrust regulation (RBGl. 1923, p. 1067, Kartellverordnung), the foundation for modern antitrust law, was enacted (Dannecker, Bülte, 2014, Kap. 1 Rn. 58). The antitrust regulation differentiated between administrative and criminal penalties (Tiedemann, 2010, § 1 Rn. 49).

Since the global economic crisis in 1929 the competences of administrative authority to impose sanctions were extended. Besides the flight from the currency was sanctioned (Dannecker, Bülte, 2014, Kap. 1 Rn. 58). All in all economic criminal law became steadily more confusing because it was regulated in several different acts (Dannecker, Bülte, 2014, Kap. 1 Rn. 58).

4.1.3 Period of National Socialism

During the National Socialism economic criminal law was part of war criminal law. In 1939 the wartime economic regulation came into force and penalised offences against the wartime economy, like the destruction or secretion of essential raw materials (Brettel, Schneider, 2014, § 1 Rn. 38). Several acts containing administrative fines were enacted and often the administrative fines were imposed by professional associations without judicial control (Dannecker, Bülte, 2014, Kap. 1 Rn. 59). The provision typically contained indefinite legal concepts and a wide range of punishment (Brettel, Schneider, 2014, § 1 Rn. 39). In 1939 the Reich tax code was reformed to harmonise the criminal tax law (RBGl. 1939 I, p. 1181 ff.; Dannecker, Bülte, 2014, Kap. 1 Rn. 59).

4.2. History after 1945

After 1945, the constitutional state has been rebuilt, the penal power of the economic administration has been restricted and the state-directed economic provisions have been repealed (Dannecker, Bülte, 2014, Kap. 1 Rn. 60). In 1949 the German Basic Law (Grundgesetz, GG) came into force and the social market economy has been established.

Economic criminal law restricted free-market economy (Brettel, Schneider, 2014, § 1 Rn. 40 ff.). In 1949 the Economic Offences Act (Wirtschaftsstrafgesetz, WiStG) came into force. This act was the first uniform codification of economic criminal law (Dannecker, Bülte, 2014, Kap. 1 Rn. 60).

The Economic Offences Act defined economic criminal offences according to the doctrines of the criminal law dogmatist and legal historian Eberhard Schmidt (1951) and contained a list of economic crimes, like withholding of goods, profiteering and violation of accounting provisions, and general provisions about mistakes in motive, sanctions (plant closure, occupational ban, confiscation etc.), proceedings etc. It differed between economic criminal offences and administrative offences (§ 6 I, III WiStG 1949), as the posterior Administrative Offence Act (Ordnungswidrigkeitengesetz, OWiG; Dannecker, Bülte, 2014, Kap. 1 Rn. 60 f.). Already in 1954 several offences of the Economic Offences Act were repealed. Since then the Economic Offences Act has been only of less importance (Wittig, 2017, § 3 Rn. 9). Only excessive claim for rent (§ 5 WiStG) and payment of additional revenue (§ 8 WiStG) have practical significance (Brettel, Schneider, 2014, § 1 Rn. 44).

In 1952 the Administrative Offences Act (BGBI I, p. 177) was enacted. A division between criminal offences and administrative offences was established. The administrative authorities were not allowed to impose criminal sanctions anymore but only administrative fines (Wittig, 2017, § 3 Rn. 10). Solely the penal power of tax authorities existed up until 1967 (BVerfGE 22, 49; Dannecker, Bülte, 2014, Kap. 1 Rn. 63). Later the Administrative Offence Act was reformed several times. Among other things in 1968 an association fine (§ 30 OWiG) had been established. In 1986 the range of fine was increased and in 1994 the group of people the company is liable for was amended (Dannecker, Bülte, 2014, Kap. 1 Rn. 76 f.).

In 1957 the Act Against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen, GWB) was passed (BGBI I, p. 2114). The centrepiece is the cartel ban under § 1 GWB (Brettel, Schneider, 2014, § 1 Rn. 47). The German Tax Act (Abgabenordnung, AO), enacted in 1976 (BGBI I, p. 613), reformed criminal tax law (Wittig, 2017, § 3 Rn. 14).

In 1976 the First Act Against Business Crime (Erstes Gesetz zur Bekämpfung der Wirtschaftskriminalität, 1. WiKG) entered into force (BGBI I, p. 2034). As a result several criminal provisions, as subsidy fraud (§ 264 StGB) and credit fraud (§ 265b StGB), were enacted. Usury (§ 291 StGB) and insolvency criminal law (§§ 283 ff. StGB) were reformed (Dannecker, Bülte, 2014, Kap. 1 Rn. 81 f.). In 1986 by reason of the Second Act Against Business Crime (2. WiKG, BGBI I, p. 721) computer fraud (§ 263a StGB), credit card misuse (§ 266b StGB) and non-payment and misuse of wages and salaries (§ 266a StGB) were enacted (Dannecker, Bülte, 2014, Kap. 1 Rn. 83 ff.). Besides § 17 of the Act Against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb, UWG), “Disclosure of trade and industrial secrets”, was reformed (Brettel, Schneider, 2014, § 1 Rn. 51).

4.3. Recent legislative process

Until now, economic criminal law has gone through many changes often influenced by European community law and international law. There were several reforms in labour criminal law, as the reforms of the Act Against Illegal Employment (Dannecker, Bülte, 2014, Kap. 1 Rn. 86a ff.), in environmental criminal law, in insider law and in insolvency criminal law and to combat organised crime.

In 1992 the legislation penalised money laundering (§ 261 StGB) to fulfil international obligations (Dannecker, Bülte, 2014, Kap. 1 Rn. 96). Money laundering prevents illegally obtained assets reaching the legal business and money cycle (BT-Drucks. 12/989, p. 26; Neuheuser, 2017, § 261 Rn. 2). Later on, § 261 StGB has been tightened. Since then the predicate offence needs not to be an organised crime (Dannecker, Bülte, 2014, Kap. 1 Rn. 97). The prevention of money laundering act (Geldwäschegesetz, GwG) obliges the credit institutions to report suspicious transactions (Dannecker, Bülte, 2014, Kap. 1 Rn. 100 ff.). In 1994 the Securities Trading Act (Wertpapierhandelsgesetz, WpHG) has passed (BGBI I, p. 1759). In the year 1998 fraud under § 263 StGB was reformed (Brettel, Schneider, 2014, § 1 Rn. 58).

In 1997 the corruption offences were reformed (§§ 298, 299 StGB; §§ 331 ff. StGB) and the term of a public official (§ 11 I Nr. 2 StGB) was modified. Since the year 2015, European officials can commit a corruption offence under German criminal law, too (Wittig, 2017, § 3 Rn. 19). Since 2016, corruption in the healthcare sector is penalised in §§ 299a, 299b StGB (Dann, Scholz, 2016).

In addition the provisions concerning asset recovery and the criminal procedural law have been reformed several times. Among other things the plea bargain, that was previously regulated by case law, was codified in § 257c of the German Code Of Criminal Procedure (Strafprozessordnung, StPO). Recently the confiscation law was fundamentally reformed (Köllner, Mück, 2017; Trüg, 2017).

5. Regulatory system of economic criminal law

The regulatory system and the principles of economic criminal law partly differ from criminal law in general (Kudlich, Oğlakcioğlu, 2011, § 2 Rn. 36).

5.1 Special offences

Often economic crimes are special offences. That means the principal (§ 25 StGB) has a special attribute. Other persons can only be punished as abettor (§ 26 StGB) or aider (§ 27 StGB) (Wittig, 2017, § 6 Rn. 1 f.). The principal of § 266 StGB (“embezzlement and abuse of trust”) has to have an obligation of safe-guarding the assets of another person or company. That means, he has to safeguard the financial interests of another person or company independently in the interest of the others and as a main duty (BGH NJW 1985, 2280 [2282]). The principal of § 327 StGB (“Unlawful operation of facilities”) has to be the operator of an illegal facility. Another example of special offences are the criminal insolvency offences (§§ 283 ff. StGB): Only the debtor can be the principal of those offences (Radtke, Petermann, 2014, Vorbemerkungen zu den §§ 283 ff. Rn. 26 ff.). The offender of non-payment and misuse of wages and salaries under § 266a StGB is the employer. § 14 StGB enables to attribute the special personal attributes, relationships or circumstances of the company to the representatives or company organs. This provision also includes representatives without authorisation (§ 14 III StGB).

5.2 Offences of abstract endangerment

In economic criminal law the legislation occasionally uses offences of abstract endangerment to avoid difficulties of proof. These offences neither require a concrete endangerment nor a damage (Brettel, Schneider, 2017, § 2 Rn. 16; Wittig, 2017, § 6 Rn. 7 ff.). For example subsidy fraud under § 264b StGB is already completed after the perpetrator has given false information. An authorisation of a payment or a payment is not necessary. The same applies to credit fraud under § 265b StGB. If the offender of a credit fraud also commits a fraud under § 263 StGB, he will only be punished for fraud (BGH NJW 1989, 1868).

5.3 Blanket laws

Another peculiarity is the use of so-called blanket laws. The criminal act is not self-contained but refers to another act regulating a part of the crime (Wittig, 2017, § 6 Rn. 14). The reference provision can be an act of parliament or another provision like an enactment. According to § 283 I Nr. 5 StGB (“bankruptcy”) whosoever due to his liabilities exceeding his assets or current or impending inability to pay his debts fails to keep books of account which he is statutorily obliged to keep, or keeps or modifies them in such a manner that a survey of his assets is made more difficult shall be liable to imprisonment not exceeding five years or a fine. § 283 I StGB not specifies which books of account the merchant is obliged to keep but the German Commercial Code (Handelsgesetzbuch, HGB) contains the relevant provisions about books of account (§§ 238 ff. HGB) (Heine, Schuster, 2014, § 283 Rn. 29). Occasionally it is very problematic to distinguish between blanket laws and normative elements of an offence (Wittig, 2017, § 6 Rn. 17). Furthermore it is controversial which consequences a mistake in motive has if the offender does not know the regulatory content or the scope of a blanket law (Wittig, 2017, § 6 Rn. 171 f.). The reference has to be clear and the reference provisions have to be precise as well. Otherwise the blanket law violates the rule of certainty of law codified in § 1 StGB and in Article 103 II GG (BVerfGE 78, 374; Tiedemann, 2010, § 4 Rn. 106).

5.4 General clauses

Some economic offences include general clauses, that are terms open to interpretation (Brettel, Schneider, 2014, § 2 Rn. 6; Wittig, 2017, § 6 Rn. 20), like the phrase “in a manner contrary to regular business standards” in § 283 I Nr. 3 StGB.

According to § 283 I Nr. 3 StGB whosoever due to his liabilities exceeding his assets or current or impending inability to pay his debts procures goods or securities on credit and sells or otherwise distributes them or items produced from these goods substantially under their value in a manner contrary to regular business standards shall be liable to imprisonment not exceeding five years or a fine. Not every sale below value is a selling “in a manner contrary

to regular business standards”, such as loss leader and the sale of goods that will spoil shortly (Heine, Schuster, 2014, § 283 Rn. 23). General clauses are important because the legislation is not able to regulate every single situation in an own provision (Tiedemann, 2010, § 3 Rn. 73). Economic activity always involves a risk. Therefore general clauses require a narrow interpretation. Otherwise, they could violate the rule of certainty or the *ultima ratio principle* (Brettel, Schneider, 2014, § 2 Rn. 6; Kudlich, Oğlakcioğlu, 2014, § 3 Rn. 74; Wittig, 2017, § 6 Rn. 24).

5.5 Simulated transactions and evasive transactions

Economic criminals often try to find legal loopholes, but in many cases also simulated and evasive transactions are penalised (Dannecker, Bülte, 2014, Kap. 1 Rn. 110). For example § 145c StGB sanctions the violation of a professional disqualification even if the offender allows another to engage in a profession, branch of profession, trade or branch of trade for him (Tiedemann, 2010, § 4 Rn. 145). § 4 of the German Subsidy Act (Subventionsgesetz, SubvG) and subsidy fraud (§ 264 IV StGB) also encompass evasive transactions. According to § 41 of the German Tax Act simulated and evasive transactions are irrelevant for taxation. Whosoever declares he lives in Monaco although he lives in Germany gives false information and may commit a tax fraud under § 370 I AO (Wittig, 2017, § 6 Rn. 25).

5.6 Criminal liability of negligence and recklessness

In many cases, the economic offences can be committed negligently or recklessly (Wittig, 2017, § 6 Rn. 28). Recklessness means an increased degree of negligence. The most economic offenders are professionals that have to review the legal situation and their own behaviour very carefully (Kudlich, Oğlakcioğlu, 2014, § 2 Rn. 44). For example money laundering (§ 261 V StGB) and subsidy fraud (§ 264 StGB) can be committed recklessly. Another example is the reckless tax evasion in § 378 AO. According to § 15a V of the German Insolvency Act (Insolvenzordnung, InsO) the negligent delayed filing of insolvency is punishable.

5.7 Causality

In the case of result crimes (“Erfolgsdelikte”) the act of the offender has to cause the result of the offence (“Taterfolg”). According to the so-called “*conditio-sine-qua-non*”-theory without the behaviour of the offender the result of the offence does not occur. Otherwise, only the attempt can be punished (Wittig, 2017, § 6 Rn. 34). In criminal product liability it is often difficult to prove the causality between the deficient product and the damage to health because the precise mechanism of action is not clear. The “Bundesgerichtshof” (BGH), the highest appellate court in Germany for civil and criminal cases, is of the opinion that it is sufficient that other causes can be excluded (BGHSt 37, 106 [111]).

The causality can also be very problematic if a committee, for example the supervisory board of the stock company, takes a decision. Often important decisions are majority decisions. In many cases, every member of the committee could assert that the same decision would have been passed without his vote (Wittig, 2017, § 6 Rn. 46). But the BGH considers that the vote of every member causes the result of the offence because everyone is obligated not to contribute in an unlawful decision. Furthermore he treats the members of the committee as joint principals (§ 25 II StGB). In this way every member of the committee is liable for the votes of the other members (BGHSt 37, 106). The BGH also supposes the causality of abstention from voting if the participation caused the quorum of the committee (BGH NJW 2006, 522 [527]).

5.8 Justificatory defences

In economic criminal law justificatory defences do not play a major role (Wittig, 2017, § 7 Rn. 1). The question is whether the offender is justified by necessity according to § 34 StGB when he commits a crime, for example a water pollution (§ 324 StGB), to save jobs and to maintain the production capability of his company. § 34 S. 1 StGB states that a person who, faced with an imminent danger to life, limb, freedom, honour, property or another legal interest which cannot otherwise be averted, commits an act to avert the danger from himself or another, does not act unlawfully, if, upon weighing the conflicting interests, in particular the affected legal interests and the degree of the danger facing them, the protected interest substantially outweighs the one interfered with.

According to § 34 S. 2 StGB this shall apply only if and to the extent that the act committed is an adequate means to avert the danger. Every object of legal protection is another legal interest (Erb, 2017, § 34 Rn. 55; Perron, 2014, § 34 Rn. 9; other view Neumann, 2017, § 34 Rn. 26 ff.), also the interest to save jobs and to maintain the production. But the protected interest does not outweigh the one interfered with, the public health in this case. Apart from that, economic difficulties do not justify violations of laws restricting the freedom of economic activity (Erb,

2017, § 34 Rn. 187). Otherwise a distortion of competition would occur and sooner or later every company would violate the law (Erb, 2017, § 34 Rn. 188). A justification according to § 34 StGB is only given in exceptional cases (Wittig, 2017, § 7 Rn. 4).

In environmental criminal law and in accessory criminal law the official permits an important justificatory defence, for example according to § 22a I of the German War Weapons Control Act (Wittig, 2017, § 7 Rn. 10 ff.).

5.9 No statutory presumptions

Statutory presumptions are not compatible with the *principle of guilt, the presumption of innocence and the principle of principle of “in dubio pro reo” of German criminal law* (Brettel, Schneider, 2017, § 2 Rn. 18). Recently there is a debate whether the confiscation of assets, whose derivation is not clear, under § 76a IV StGB, § 437 StPO is an unconstitutional reversal of evidence (Gebauer, 2016, 104; Köllner, Mück, 2017, 598).

6. Conclusion

Economic criminal law is a field of law influenced by various social, technical and legal changes. Besides the interpretation of the provisions by case law plays a major role (Achenbach, 2017). In recent years international law has become more and more important for economic criminal law. For example in 2017 the Fourth Money Laundering Directive (Müller, 2017) and the **Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (ABl. Nr. L 141 p. 19, ber. 2016 Nr. L 349 p. 6)** have been implemented in a national law (Klose, 2018, 11). In the future more reforms are expected.

References

- Achenbach, H. (2017). Aus der 2016/2017 veröffentlichten Rechtsprechung zum Wirtschaftsstrafrecht. *Neue Zeitschrift für Strafrecht*, 12: 689-693.
- Apotheker Adhoc (2017), Pfusch-Apotheker: 56 Millionen Euro Schaden. [Online] Available: <https://www.apotheker-adhoc.de/nachrichten/detail/apothekenpraxis/bottrop-zyto-skandal-pfusch-apotheker-anklage-wegen-koerperverletzung-zytostatika/> (July 19, 2017).
- Apotheker Adhoc (2018), Gutachten: Peter S. hat „schwere Hirnschädigung“. [Online] Available: <https://www.apotheker-adhoc.de/nachrichten/detail/apothekenpraxis/gutachten-peter-s-hat-schwere-hirnschaedigung-alte-apotheker/> (February 22, 2018).
- Blickle, G., Schlegel, A., Fassbender, P., Klein, U. (2006). *Some Personality Correlates of Business White-Collar Crime. Applied Psychology: An International Review*, 55: 220-233.
- Brettel, H., Schneider, H. (2014). *Wirtschaftsstrafrecht*. Baden-Baden, Nomos Verlagsgesellschaft.
- Bundeskriminalamt (2016). *Bundeslagebild Wirtschaftskriminalität 2016*. Wiesbaden, BKA.
- Bundeskriminalamt (2016). *Polizeiliche Kriminalstatistik, Bundesrepublik Deutschland, Jahrbuch 2016, Band 1, Fälle, Aufklärung, Schaden*. Wiesbaden, BKA.
- Bundeskriminalamt (2016). *Polizeiliche Kriminalstatistik, Bundesrepublik Deutschland, Jahrbuch 2016, Band 4, Einzelne Straftaten/-gruppen und ausgewählte Formen der Kriminalität*, Wiesbaden, BKA.
- Bussmann, K.-D., Salvenmoser, S. (2006). Internationale Studie zur Wirtschaftskriminalität. *Neue Zeitschrift für Strafrecht*, 4: 203-209.
- Clinard, M. B., Quinney, R. (1973). *Criminal Behavior Systems, A Typology* (2nd ed.), New York, Routledge.
- Dann, M., Scholz, C. (2016). Der Teufel steckt im Detail – Das neue Anti-Korruptionsgesetz für das Gesundheitswesen. *Neue Juristische Wochenschrift*, 29: 2077-2080.
- Dannecker, G., Bülle, J. (2014). 1. Kapitel. Die Entwicklung des Wirtschaftsstrafrechts in der Bundesrepublik Deutschland. In Wabnitz, H.B., Janovsky, T. (Eds.), *Handbuch des Wirtschafts- und Steuerstrafrechts* (pp. 3-78). München, C.H. Beck.
- DAZ.online (2017), Whistleblower-Preis für PTA und Apotheken-Mitarbeiter. [Online] Available: <https://www.deutsche-apotheker-zeitung.de/news/artikel/2017/10/30/whistleblower-preis-fuer-pta-und-apotheken-mitarbeiter> (October 30, 2017).
- DAZ.online (2018), „Wir haben überhaupt kein Signal gesehen“. [Online] Available: <https://www.deutsche-apotheker-zeitung.de/news/artikel/2018/01/11/wir-haben-ueberhaupt-kein-signal-gesehen/> chapter:3 (January 11, 2018).
- Erb, V. (2017). § 34 StGB Rechtfertigender Notstand. In von Heintschel-Heinegg, B (Ed.), *Münchener Kommentar zum Strafgesetzbuch*, Band 1, §§ 1-37 StGB (3rd ed.). München, C.H. Beck.
- Gebauer, T. (2016). Reform der strafrechtlichen Vermögensabschöpfung. *Zeitschrift für Rechtspolitik*, 4: 101-104.
- Göppinger, H. (2008). *Kriminologie* (6th ed.) München, C.H. Beck.
- Helberg, Cristina (2018), Der Prozess, Tag 23. [Online] Available: <https://correctiv.org/blog/ruhr/artikel/2018/02/22/der-prozess-tag-23/> (February 22, 2018).

- Heine, G., Schuster, F. P. (2014). § 283 StGB Bankrott. In Eser, A. (Ed.), Schönke/Schröder, Strafgesetzbuch Kommentar (29th ed.). München, C.H. Beck.
- Kaiser, G. (1996). *Kriminologie* (3rd ed.), Heidelberg, C.F. Müller.
- Klein, L. (2018), BMG sieht Länder in der Kontrollpflicht. [Online] Available: BMG sieht Länder in der Kontrollpflicht (February 19, 2018).
- Klose, B. (2018). Aktuelle Entwicklungen des Wirtschaftsstrafrechts für die gerichtliche und die staatsanwaltschaftliche Praxis. *Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht*, 1: 11-20.
- Köllner, R. E., Mück, J. (2017). Reform der strafrechtlichen Vermögensabschöpfung. *Neue Zeitschrift für Insolvenz- und Sanierungsrecht*, 15-16: 593-599.
- Kudlich, H., Oğlakcioğlu, M. T. (2014). *Wirtschaftsstrafrecht* (2nd ed.). Heidelberg, München, Landsberg, Frechen, Hamburg, C.F. Müller.
- Müller, N. (2017). Transparenz auf allen Ebenen – Zur Umsetzung der Vierten Geldwäscherichtlinie – Teil 1. *Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht*, 3: 87-99.
- Neuheuser, S. (2017). § 261 StGB Geldwäsche; Verschleierung unrechtmäßig erlangter Vermögenswerte. In Sander, G. M. (Ed.), *Münchener Kommentar zum Strafgesetzbuch*, Band 4, §§ 185-262 StGB (3rd ed.). München, C.H. Beck.
- Neumann, U. (2017). § 34 StGB Rechtfertigender Notstand. In Kindhäuser, U., Neumann, U., Paeffgen, H.U. (Eds.), *Nomoskommentar Strafgesetzbuch* (5th ed.). Baden-Baden, Nomos.
- Otto, H. (1984). Konzeption und Grundsätze des Wirtschaftsstrafrechts (einschließlich Verbraucherschutz), *Dogmatischer Teil I. Zeitschrift für die gesamte Strafrechtswissenschaft*, 96: 339-375.
- Perron, W. (2014). § 34 StGB Rechtfertigender Notstand. In Eser, A. (Ed.), Schönke/Schröder, Strafgesetzbuch Kommentar (29th ed.). München, C.H. Beck.
- Radtke, H., Petermann, S. (2014). Vorbemerkungen zu den §§ 283 ff. In Hefendehl, R., Hohmann, O. (Eds.), *Münchener Kommentar zum Strafgesetzbuch*, Band 5, §§ 263-358 StGB (2nd ed.). München, C.H. Beck.
- Schmidt, E. (1951). Straftaten und Ordnungswidrigkeiten, Betrachtungen zum Entwurf eines Gesetzes über Ordnungswidrigkeiten. *Juristenzeitung*, 4: 101-104.
- Schneider, H.J. (1981). *Psychologie des 20. Jahrhunderts*. Band 14: Auswirkungen auf die Kriminologie. 359-376. Zürich, Kindler Verlag AG.
- Schraven, David (2017), Alte Apotheke: Zu spät beschlagnahmt. [Online] Available: <https://correctiv.org/blog/ruhr/artikel/2017/10/09/alte-apotheke-zu-spaet-beschlagnahmt/> (October 9, 2017).
- Schraven, David (2017), Ein Beutel ohne Wirkstoff, Der Fall der Alten Apotheke in Bottrop. [Online] Available: <https://correctiv.org/blog/ruhr/artikel/2017/05/25/ein-beutel-ohne-wirkstoff/> (May 25, 2017).
- Schünemann, B (1982). Strafrechtsdogmatische und kriminalpolitische Grundfragen der Unternehmenskriminalität. *Zeitschrift für Wirtschaft, Steuer, Strafrecht*, 2: 41-50.
- Schwind, H.-D. (2016). *Kriminologie und Kriminalpolitik, Eine praxisorientierte Einführung mit Beispielen* (23rd ed.). Heidelberg, C.F. Müller.
- Sutherland, E. H. (1940). White-Collar Criminality. *American Sociological Review*, 5: 1-12.
- Tiedemann, K. (2010). *Wirtschaftsstrafrecht, Einführung und Allgemeiner Teil mit wichtigen Rechtstexten* (3rd ed.). Köln, Carl Heymanns Verlag.
- Trüg, G. (2017). Die Reform der strafrechtlichen Vermögensabschöpfung. *Neue Juristische Wochenschrift*, 27: 1913-1918.
- Wernicke, Christian (2017), Skrupellose Geschäfte mit gepanschten Krebsmedikamenten. [Online] Available: <http://www.sueddeutsche.de/panorama/medizinskandal-wie-ein-apotheker-sich-mit-gepanschten-krebsmedikamenten-bereicherte-1.3747601> (November 13, 2017).
- Wittig, P. (2017). *Wirtschaftsstrafrecht* (4rd ed.), München, C.H. Beck.