



GERMANY

SURVEY QUESTIONS & RESPONSES¹

Survey conducted as part of *Commerce, Crime, and Conflict: A Comparative Survey of Legal Remedies for Private Sector Liability for Grave Breaches of International Law And Related Illicit Economic Activities*.

I. Disclosure requirements for business entities

1. What sort of material information are business entities required to provide to their shareholders and/or public under your jurisdiction's company law or securities laws that may be relevant to potential litigants? For example, are such entities required to provide information about:

- material civil litigation?
- Risk factors that would impact a shareholder's investment in the company?
- Any reported violations of law or pending proceedings arising from such violations?
- Revenues received from, or amounts paid to or on account of, a government or its officials or agents?

There are two different ways to attain information about business activities of enterprises under German law:

On the one hand they are subject to statutory public disclosure (A.); on the other hand their shareholders have rights to be informed (B.).

A. Statutory Public Disclosure

¹ The initial responses to this survey of German law were provided by Dr. Remo Klinger, Attorney-at-law, Geulen & Klinger Attorneys, Germany. Comments on the responses have been provided by Professor Anthony Sebok, Brooklyn Law School, USA. The contents of this survey response are intended for research purposes only and continue to be revised in light of peer review. The contents of this survey response are in no way intended as comment on specific cases or judgements, nor are they intended as legal advice on any of the issues covered. Due to constraints of space, many responses in this text provide only a basic introduction to the issue and the complexities of specific cases or provisions may not be fully explicated. Readers seeking practical legal advice should consult a lawyer in the relevant jurisdiction. Citations and references to this survey response should adhere to the following format: "Survey Response, Laws of Germany (Remo Klinger), 'Commerce, Crime and Conflict: A Survey of Sixteen Jurisdictions' Fafo AIS, [date accessed] 2006". The contents of this survey response are published by Fafo AIS under a Creative Commons Attribution-Share Alike 2.5 License.

The statutory public disclosure is based on the principle of business law publicity. Every enterprise has according to § 242 *Handelsgesetzbuch* (HGB / Code of Commercial Law) the duty to prepare financial statements showing his assets and liabilities (so called *Bilanz* / balance sheet) (see I.) as well as a profit and loss statement (see II.). Corporations are according to § 264 HGB obliged to supplement the balance sheet with more accurate notes and a so-called management report (see III.).

Corporations are obliged according to § 325 II HGB to file the designated reports at the commercial register at their corporation's domicile and to publish them in the *Bundesanzeiger*. The *Bundesanzeiger* is the German Federal Gazette published by the German Federal Ministry of Justice (www.Bundesanzeiger.de).

In particular are public limited companies (compare § 1 Aktiengesetz – AktG / Stock Corporation Act) - the legal form of company which is predominant among cross-border operating companies - counted among the corporate enterprises, Minor companies, with less than 32 billion Euro sales revenue and less than 250 employees respectively only have to meet restricted report requirements and statutory public disclosure respectively (compare §§ 267 associated with §§ 325 I, 276, 264 I sentence 3 HGB). First of all they have no duty to bring a management report and they have more time to prepare the balance sheet.

I. Balance Sheet Items (particularly with regard to provisions)

The content and classification of the balance sheet is strictly regulated (compare § 266 HGB). Amongst others accruals have to be made on the debtor side, to provide for “uncertain liabilities” (§ 249 HGB). These include in particular threatened claims for compensation (*Ballwieser*, in: Münchener Kommentar zum Handelsgesetzbuch, 2001, 4th volume, § 249, marginal number 10).

Such undetermined claims are only to be considered in the balance sheet in the course of a correct accounting if both their legal existence and a hereunto based claim seem to be adequate likely. (*Ballwieser*, loc.cit., § 249, marginal number 10-13 and 17-21; *Morck*, in: Koller/Roth/Morck, HGB, 5th edition 2005, § 249, marginal number 5 and 6). The jurisprudence is geared to the circumstances if a claim is “likely assumed” (BFH, BStBl. 1981 II, 669*), because “more reasons argue for than against the claim” (BFH BStBl. 1985 II, 44*).

These so called “other provisions“ have, as far as they have to be provided, to be separately showed in the balance sheet (compare § 266 Abs. 3 HGB), or to be included and explained in the notes (§ 285 Nr. 12 HGB) alternatively. If the possible amount is substantial, has to be determined in proportion to the point balance and the charge against the annual profit caused by this respectively (*Lange*, in: Münchener Kommentar zum Handelsgesetzbuch, 2001, 4th volume, § 285, marginal number 239). What the elaboration has to be – particularly, if besides the sort of provision, amount and occasion have to be declared too - is subject to a dispute not yet ruled by the jurisprudence (compare *Lange*, loc.cit., § 285, marginal number 238).

If the accusation of violation of human rights is only directed against a subsidiary company, corresponding provisions have to be shown in the consolidated balance sheet anyhow (compare §§ 290, 297 HGB). This applies, even so if it is a matter of a

foreign subsidiary company, which is not subject to German requests on the reporting procedure.

II. Profit Commission Statement

The likewise required profit commission statement, listing source and utilisation of the corporate resources, provides little information for potential legal disputes.

This is caused by the fact, that the positions within the arrangement, which has to be provided to the different types of income (compare § 275 HGB), don't have to be sub-classified into the single dealings and payment transactions respectively (§ 265 para. 1 e contrario). Exceptional is the so called extraordinary income, which does arise outside the corporation's normal business operations and which is as a result of its specific volumes not of minor importance for evaluating the income situation, which has to be shown and to be discussed according to § 277 para. 4 HGB if they are substantial. However, the obligation to report exists according to the precise wording of the law only regarding to the amount and the nature of the earnings, but not regarding to its origin.

III. Management Report

The management report has to contain a comprehensive analysis of the current business situation of the enterprise as well as its development trend (compare § 289 HGB).

Since January 1st 2005 are so called non-financial performance indicators to be considered for the first time, which are of importance for the review of the course of business (§ 289 para. 3 HGB). The law mentions environmental and employee concerns as examples (*Morck*, in: Koller/Roth/Morck, HGB, 5. ed. 2005, § 289, marginal number 8). All circumstances that are able to affect the development of a company essentially have to be shown. This applies also to those circumstances affecting the reputation of the company and their products and for these reasons their sales opportunities. (*Morck*, loc. cit., with reference to the motives in the Bundestags-Drucksache 15/3419, p. 31).

There is hardly another charge, which can affect the reputation of a corporation as effective as a possible involvement in violations of human rights. This applies even to affiliated companies, which are to be taken into account at the latest in the management report of the enterprise (§ 315 para. 3 HGB). However, a statutory public disclosure only exists (as shown above under I 1), as far as you may reckon that the activities are to be revealed anyway, because otherwise no adverse effect on the business development is to be expected (or it will rather be enabled by the report in the first place).

The reorganisation of § 289 para. 3 HGB could turn out to be the gateway for the consideration of social standards in the framework of publicity under commercial law; a review of its effectiveness will only be possible after a test period.

IV. Duty Of Disclosure under Negotiable Instruments Law

The information about amounts of holding, which are available under the Wertpapierhandelsgesetz (German Securities Trade Act / WpHG), is only of indirect relevance for the prosecution of human rights violations.

These duties oblige everybody transacting securities business and whose shareholding in a listed company, quoted on the stock exchange and having its registered office in Germany, reaches, exceeds or falls short thereby certain proportions of voting rights: The shareholder whose shareholding reaches, exceeds or falls short of 5 per cent, 10 per cent, 25 per cent, 50 per cent or 75 per cent has to notify the Federal Financial Supervisory Office as well as the company concerned (§ 21 WpHG), which in turn has to publish a notification in a supra-regional official stock exchange gazette (§ 25 WpHG). There are special regulations for foreign enterprises (§ 26 WpHG)

The knowledge of the distribution of ownership makes it not only possible to ascertain who participates in the economic profit of an enterprise (and who possibly worked towards it), but also gives links for a possible piercing the corporate veil under company law (for details see question 15).

B. Rights To Be Informed

The right of the stockholders to demand information acting on their own initiative supplements the general statutory public disclosure of the companies. The shareholders rights to be informed (see I.) are especially relevant. The rights to be informed, applying to other legal forms of companies, which are mostly rudimentarily developed (see II.), shall only be mentioned by the way.

I. Shareholders Right to Information

The right to information as stated in § 131 para. 1 Aktiengesetz (German Stock Companies Act / AktG) is to be performed at the shareholders' meeting and exists regarding the company's affairs (1), to the extent that such information is necessary to permit a proper evaluation of the relevant item on the agenda (2) and the management board may not refuse to provide information in the particular case (3).

Not only internal matters (like HR issues) do rank among company's affairs but also external relations with contractual partners. Indirectly also those circumstances, which could affect the company legally or actually, do belong to company's affairs, i.e. occurrences in affiliated companies or the political climate at a foreign manufacturing base (*Kubis*, in: Kropff/Semler, Münchener Kommentar zum Aktiengesetz, 2nd ed. 2004, § 131 marginal number 35, with further references).

Violations of human rights by foreign subsidiary companies or the cooperation with questionable regimes are also a conceivable subject of the shareholders right to information. The *Organisation Kritischer Aktionäre* ("Organisation Of Critical Shareholders") in Germany is using this possibility of investigation and public relations. For example, the possible involvement of the Argentine Mercedes Benz subsidiary in abduction and assassination of members of the works committee, in the times of the Argentine Junta, repeatedly has been mooted at the shareholders' meeting of the Daimler Chrysler Inc.

However, the criterion of the evaluation relevancy has a limiting effect. In particular the question posed has to be associated with the debated agenda item. The difficulties, which can result from this, can be demonstrated by the fact, that, according to a widespread opinion, already the specification of employment data has to be linked to the agenda items “presentation of the annual financial statement” or “discharge of the executive board” (*Kubis*, loc. cit., § 131, marginal number 169). Information about fringe benefits - except those for single exposed employees – shall not be of relevance for a proper evaluation under any imaginable agenda item (*Kubis*, loc. cit., § 131, marginal number 209, with further references; *KG*, NJW-RR 1995, page 98 (103)). The question for contractual or co-operation partners is also only permitted if it concerns commercial operations which are - particularly according to their pricing - unusual (*Kubis*, loc. cit., § 131, marginal number 210).

A request for information directed on the subclassification of single points of the balance sheet or the profit commission statement, is associated with the agenda (“balance sheet“), but it is only well-founded, if the specific amount is not only of marginal importance (compare *KG*, DB 2001, p. 1080, (1082)) and the shareholder is able to substantiate his concerns (*Kubis*, loc. cit., marginal number 170, footnote 339).

The right to refuse provisions of information exists according to § 131 para. 3 AktG in particular if the danger of non-irrelevant disadvantages is posed through this upon the enterprise. In this process advantages and disadvantages has to be measured against each other. Damage to the image, originating from the publication of the companies (indirect) involvement in violations of human rights, is regularly seen as serious. Since the right to be informed has no protective impact on third parties (here the victims), a straight economical perspective could lead to the opinion, that a nondisclosure would be legitimate. Otherwise it has to be considered, that the incidents could become public by some means or other, so that an early self-operated exposure is preferable under economic considerations.

II. Other Rights to Information

Within the other types of company only the private limited company (Ltd) is subject to a similar far reaching right to information (compare § 51 lit. a GmbHG / Limited Liability Company Law). It is limited for the shareholders of unincorporated companies (compare § 118 HGB) and for the limited partner of a limited partnership it is reduced to the notification of the annual balance sheet (§ 166 HGB).

2. Is there a right to know statute enabling one to obtain information from your government?

The citizen is entitled to obtain certain official information upon request (see A.). Furthermore, the state is obliged to announce certain knowledge acting on its own initiative (see B.)

A. Rights of Access to Information

I. Informationsfreiheitsgesetz (Freedom Of Information Act)

Until December 31st 2005 Germany and Luxembourg were the only states of the European Union with no laws managing the access to information of the Federal Authorities. It was only possible to obtain information from the Federal Authorities of the federal states of Brandenburg, Berlin, Schleswig-Holstein and Nordrhein-Westfalen based on special federal state laws. Germany, being a federal republic, is partitioned into the Federal Government and 16 Federal States.

The Informationsfreiheitsgesetz (IFG / Freedom Of Information Act) went into force on January 1st 2006. It grants henceforward an absolute access to information of the Federal Authorities. A substantive catalogue contains the exemptions. A good introduction to this was written by *Kloepfer / v. Lewinsky*, “Das Informationsfreiheitsgesetz des Bundes“, DVBl. (2005, p. 1277 et seqq).

The claim refers to every kind of official information (§ 2 No. 1 IFG), which is available to the Federal Authorities (as information of the federal state authorities is concerned parallel federal state laws do exist / *Kloepfer / v. Lewinsky*, loc. cit., p. 1278, footnote. 8 ff.). Everybody is entitled to request for information. This applies also to aliens staying outside of Germany (loc. cit., p. 1280).

The claim is narrowed as it refers to information about enterprises. As far as trade secrets are concerned, they are only subject to disclosure if the enterprise agrees (§ 6 p. 2 IFG); this requirement is absolute and even in the case of a predominant interest in disclosure not dispensable (critically *Kloepfer / v. Lewinsky*, loc. cit., p. 1283). But the information has to concern actual trade secrets. This requirement is only met if there is a justifiable interest in the nondisclosure (loc. cit., p. 1284).

Limitations of the right to information exists also for other cases (§§ 3 - 6 IFG); possible negative effects to international relations (§ 3 no. 1 lit. a IFG) and international negotiations respectively (§ 3 no. 3 lit. a IFG) are highly relevant; the access to information about current trials or preliminary proceedings is denied too (§ 3 no. 1 lit. g IFG).

As far as the claim to information exists, it has to be met within one month after application (§ 7 para. 5 IFG). Information affecting the interests of a company only has to be provided after having heard the company and after the decision to provide the information became final to the company (§ 8 para. 2 IFG). The applicant has to demonstrate, that a legitimate interest in nondisclosure of the company does not exist. Legal action against a refused permission has to be taken within one month (§ 9 para. 4 IFG).

II. Umweltinformationsgesetz (Environmental Information Act / UIG)

The UIG also grants an absolute right to information as far as the environment is concerned. The right is based on an EG Directive and features some peculiarities, if it is compared with the right based on the IFG (compare as an introduction *Näckel / Wasielewski*, DVBl. 2005, p. 1351 et seqq.).

Since the amendment of February 14th 2005, also data on the human living conditions, caused by environmental measures, counts as environmental information under the

UIG (§ 2 para. 3 no. 6 UIG). As far as ecological devastation accompanies violations of human rights, these circumstances could be subsumed under this act.

The UIG contains a catalogue of exemptions - like the one under the IFG - to the right to information (§§ 8, 9); its catalogue contains amongst others the protection of business secrets. However this exemption is not absolute like the one under the IFG, but subject to the reservation that no predominant public interest legitimates the disclosure (§ 9 para. 1 no. 3 sentence 1 UIG). Furthermore, certain information has to be published by the authorities acting on their own initiative, unlike according to the IFG.

As far as environmental data is concerned there is an independent claim in § 9 sentence. 1 Umwelthaftungsgesetz (Environmental Liability Act / UmwHG)) next to the one under the UIG. This rule is to be applied if damaging effects are caused by facilities, which have to be licensed by the German authorities. Again legitimate interest in nondisclosure is to be taken into account (§ 9 sentence. 2 UmwHG).

III. Other Rights to Information

In addition to the special rights to information under the IFG, UIG and UmwHG there are traditional rights to information and rights to inspection according to general administrative law. The claimant has to prove a legitimate interest in the information. Moreover are those rights mostly restricted to the parties of the proceedings (e.g. § 29 Verwaltungsverfahrensgesetz / Act on Administrative Proceedings) or persons otherwise individually affected (e.g. in the process of data handling (§ 19 Bundesdatenschutzgesetz / Federal Data Protection Act)).

An exception to this is § 475 Strafprozessordnung (StPO / Criminal Procedure Code) which allows the access to files of closed criminal procedures. Following criminal investigations even information not subject to the publicity of the hearing can be used to lodge a claim under private law. However the request for information has according to § 475 I sentence 2 StPO to be denied if third party interests oppose the right. These interests are e.g. legitimated trade secrets, which have to be balanced with the interest in information (compare *Meyer-Goßner*, StPO, 46th edition 2003, § 475, marginal number 3).

B. Duties To Supply Information

Under special circumstances the state has to inform the public on its own initiative. In particular to protect consumers from dangers caused by electronic equipment (§ 10 Geräte- und Produktsicherheitsgesetz / Equipment Safety Act).

Moreover, a catalogue of environmental information (laws, political concepts, data, licences) has to be publicised pursuant to § 10 UIG. How extensive this active duty to supply information is, is still unsettled at present (*Näckel / Wasielewski*, DVBl. 2005, p. 1353).

II. Status of business entities under criminal law

3. Does your penal code (or judicial interpretations thereof) provide that business entities may be prosecuted criminally for violations of such code?

4. What type sanctions are applied to business entities, as opposed to natural persons?

Basically the answer is no.

Traditionally only natural persons are subject to prosecution under German criminal law. The idea, that a company could be held to account under criminal law and be accused as a company, is an idea unknown to the German law. There is just one exception to be mentioned later in this context. The public prosecution office is, if company action is relevant under criminal law aspects, obliged to find out individual allegations against single employees of the company and to accuse these employees individually. It is not possible to accuse the company as such in the first place.

This approach to prove individual guilt leads to serious difficulties according to the prosecution of action relevant under criminal law within and by companies. The more complex the procedures are, the harder it is to individualise the guilt of the individual within the company.

Furthermore the public prosecution office may dispense with prosecution if the proved culpability of the individual is due to separated fields of duty considered to be of minor nature (§§ 153 et seqq. StPO). An example is the train accident in Eschede in 1998, which was the worst one in German history leaving 101 people dead. The author represented the majority of surviving dependents as joint plaintiff in the criminal proceedings. A broken wheel caused the train accident. This wheel was used after abridged test series, because it was cost-efficient to maintain. The Deutsche Bahn AG was not charged. Four individuals were accused instead. They had different duties during the introduction of the wheel. The proceedings against all four of them were closed, because their culpability was of minor nature. The fact that the culpability of the Deutsche Bahn AG was not of minor nature was irrelevant, because the company was not charged.

The only breach of the principle of the accountability of the individual is regulated in § 30 Gesetz über Ordnungswidrigkeiten (OWiG / Administrative Offences Act).

Under this act a fine can be imposed on a legal entity or association, if a person

1. acting in the capacity of an agency authorised to represent a legal entity, or as a member of such an agency,
2. as the board of an association not having legal capacity, or as a member of such a board,
3. as a partner of a commercial partnership authorised to representation, or
4. as the fully authorised representative or in a leading position as a procura holder, or as general agent of a legal entity or of an association as specified in Nos. 2 or 3

has committed a criminal or administrative offence by means of which duties incumbent upon the legal entity or the association have been violated, or the legal entity or the association has gained or was supposed to gain a profit.

The fine can be up to EUR 500.000,00 in cases of wilfully committed offence and up to EUR 250.000,00 in cases of negligently committed offence. Imprisonment is not possible.

It is the company, which has to pay the fine according to this section. But it is still the individual who is the accused in the criminal proceedings. And it is the culpability of the natural person, which has to be proved. It is the purpose of this section to make the companies estates subject to sanctions.

The company shall also be subject to the consequences of an offence according to § 30 OWiG. Nevertheless the public prosecution office would not charge a company but its representative. Because the German criminal law is based on culpability, the culpability of the individual representative has to be proved not to be of minor nature so that the proceedings are not closed.

This restriction of a necessary criminal procedure against a representative of the company is eased by § 30 para. 4 OWiG. Even if the public prosecution office dispenses with preferment of public charges or proceedings are terminated, the fine can still be imposed on the company. The fine shall not only be a consequence of the criminal offence of a representative, but to be imposed autonomously. The Bundesgerichtshof (BGH / Federal Court Of Justice) stated in its decision on December 5th 2000 (1 StR 411/00), that the requirement of the representative's culpability shall become less important. Procedurally this was accomplished by § 444 StPO. According to § 444 StPO the court shall order the participation of the legal person or association in the proceedings.

The German law opens gradually up to a company's liability under criminal law. As far as company liability is possible according to § 30 para. 4 OWiG it has to be pointed out that this provision ekes out a miserable existence in practise. Research of criminal law jurisprudence did not lead to noteworthy rulings referring to § 30 OWiG.

This scepticism against liability of legal entities in the German legal tradition has its reasons in the history of law. It is basically unknown to the German criminal law. Only penalties against associations were provided under the law of occupation during the allied occupation of Germany in the area of anti trust law and exchange law. Even though the prevailing opinion in the literature argued against such a criminal responsibility of associations according to the laws of the allied occupation, it was explicitly confirmed by the BGH (compare BGHSt 5, p. 28 et seqq. = NJW 1953, p. 1838; BGH DeVR 1954, p. 10). At the same time the BGH took into considerations, that it is contradictory to the hitherto existing German principles of law to impose a penalty against a legal entity or other association. It would not suit the social and ethical understandings of guilt and punishment as developed under German law (BGHSt 5, p. 32 = NJW 1953, p.1838).

The further developments lead to an express rejection of sanctions against legal entities. Both the Große Strafrechtskommission (big commission for criminal law) and the 40th German Juristentag (legal expert conference) voted against the imposition of penalties on legal entities under criminal law in 1953. The select committee of the German Bundestag (Lower House of German Parliament) for the criminal law reform objected to the introduction of sanctions against companies under criminal law during the debates on the new general part of the criminal code too (report no. IV p. 397 et seqq., p. 419 et seqq.; report no. V page 1079 et seqq.). The leading point was the opinion that the imposition of a sanction under criminal law was incompatible with the German criminal law which is based on culpability and which requires the possibility of a social and ethical charge. It was assumed that it is not possible to expose a company to a social and ethical accusation. On this account only a fine according to § 30 OWiG, being an impartial sanction instead of punishment under criminal law, seems to be appropriate if it was the representative of a company who incurred a penalty. This close connection to the individual offence maintains basically until today under German law.

The developments under US law that the prosecutor, esp. in environmental law, has an option of proceeding either civilly or criminally are still unknown in Germany.

5. What are the standards applied in your jurisdiction for attributing criminal liability to a business entity for the actions of individual servants? For example:

- a. What must one demonstrate in order to convince the court that the actions of the servants of the business entity may be attributed to the business entity to establish the guilt of the business? and;**
- b. If, in order to find a business entity guilty of a crime, the court must find that the business entity intended to carry out an activity that is a crime, how must the prosecution demonstrate that such intent (*mens rea*) was present?**
- c. What are the standards applicable in your jurisdiction for attributing the criminal liability of a business entity to the servants of the business entity?**

The answers result from the answer to the questions 2. and 3. as a result of the basically non-existing culpability of companies under German law.

6. Under your criminal law (penal code) what is the legal standard for convicting someone of being an accomplice to or aiding and abetting the commission of a crime by another (complicity)? What is the legal standard for convicting someone of plotting with another to commit a crime (criminal conspiracy)?

The rules on perpetration and complicity are found in §§ 25 – 27 Strafgesetzbuch (StGB / criminal code).

§ 25 StGB defines the perpetrator:

“(1) Whoever commits the crime himself or through another shall be punished as a perpetrator.

(2) If more than one person commit the crime jointly, each shall be punished as a perpetrator (co-perpetrator).

§ 26 StGB rules the incitement:

“Whoever intentionally induces another to intentionally commit an unlawful act, shall, as an inciter, be punished the same as a perpetrator.”

Thereafter the accessoryship is ruled in § 27 StGB:

“(1) Whoever intentionally renders aid to another in that person's intentional commission of an unlawful act shall be punished as an accessory.

(2) The punishment for the accessory corresponds to the punishment threatened for the perpetrator. It shall be mitigated pursuant to Section 49 subsection (1).“

The one who induces another to intentionally commit an unlawful act shall be punished the same as a perpetrator according to the definition of perpetration and accessoryship under German penal law. If more than one person commits the crime jointly, each shall be punished as a perpetrator (§ 25 para. 2 StGB) (“conspiracy”).

Whoever commits the crime through another shall also be punished as a perpetrator (§ 25 para. 1, 2nd variant StGB). The punishment of the accessory of an unlawful act shall be mitigated.

The German literature on the differentiation between perpetration, perpetration of an offence using an innocent agent, complicity, conspiracy, incitement and accessoryship under criminal law could fill whole libraries. In particular the differentiation became relevant in association with the penal analysis of the injustice under National Socialism and political motivated offences in the German Democratic Republic and lead to intensive discussions exceeding professional circles. The following is to be pointed out according to the essential differentiation criteria:

According to § 25 para. I, 1st variant StGB whoever commits the crime himself, i.e. whoever meets the conditions precedent to the offence in his person and his action, and by this constitutes an offence, shall be punished as a perpetrator. It is irrelevant if the perpetrator is acting out of self-interest or someone else’s interest and for what reasons he constituted an offence. He is still the direct perpetrator. Specific difficulties in relation to whether someone is the direct perpetrator or not, arise from complex forms of organisation and systematic processes in private corporations. Mostly the intention to commit a crime cannot to be found at the management level. The management, as a general rule, is only interested in a certain result, but not in the method of its causation.

This is especially apparent in the case of offences committed by omission. Generally it is difficult for the public prosecution office and the criminal courts to prove direct perpetration at the management level of enterprises. This applies also to the so-called indirect perpetration. Indirect perpetrations means to commit the crime through another (the other being kind of a tool). The qualifications of this kind of perpetration are not without controversy. The indirect perpetration is based on a vertical attribution. Whoever prompts someone to fulfil an element of a penal norm by force, deception or other means to pursue his overall plan is legally responsible. This can be caused by the superior will or the superior knowledge of the backer. Then the backer has to be punished like the direct perpetrator.

During the so-called “Mauerschützen“-Prozesse (the proceedings against East German border guards) the legal concept of indirect perpetration was applied to the masterminds behind the scenes very often. Members of the former politburo of the GDR were sentenced for the killings committed by East German border guards at the border to the FRG. The penal analysis for the sentences were developed by law academics after the war regarding the injustice under National Socialism. In fact: The German courts don't used the method against Nazis. This was the main reason why using this system against the members of the former politburo of the GDR was hardly discussed in German public.

The jurisprudence of the German Federal Court of Justice pointed out, how in nearly every form of organisation, especially within big enterprises, the concept of indirect perpetration could be applied to the de facto leading persons, if organisational structures created by the enterprise are used to fulfil an element of a penal norm.

As far as incitement is concerned it is essential that the inciter actually causes the decision of the perpetrator intentionally. If the perpetrator already is intent on committing an offence (so called “*omnimodo facturus*”) the inciter's action cannot become causal. Such an “inciter” is only liable to prosecution due to (psychic) accessoryship in Germany.

Primarily every explicit request can be considered as incitement, e.g. an assignment, a persuasion, a plea or the promise of a reward. But implied requests like mere motivations or questions can also suffice in the individual case.

The lowest degree of participation in a crime is the accessoryship. The punishment for the accessory shall be mitigated compared to the perpetrators punishment. The aid rendered can be of physical, psychical or intellectual nature. Precise suggestions, which affect the crime, can also be punished as accessoryship. Even the accessoryship to the accessoryship (so called “*Kettenbeihilfe*”) is accessoryship to the intentional commission of an unlawful act and to be punished according to the concepts of accessoryship.

It is important that only the one who intentionally renders aid shall be punished as an accessory. Negligent conduct is not subject to prosecution. This means too that the person who aids or abets must intend the specific crime. He must have an “double intention”: First to intend aiding or abetting, second intending the specific crime he is aiding or abetting. The attempted accessoryship is unsuitable too. It is also important that accessoryship is only punishable if the main actor intentionally commits an

unlawful act. If the underlying act is not committed, the accessoryship is non-prosecutable.

It is not necessary that the judgement on the underlying act becomes legally binding first. Both acts (perpetration and accessoryship) can be accused in the same proceedings and thereafter adjudicated upon.

7. Are there any other practical considerations or factors that must be present when the defendant in a criminal proceeding is a business entity rather than a natural person?

Since a legal entity can basically not be the defendant of criminal proceedings in Germany, no information according to the situation in Germany can be provided. The answers to question 3. and 4. apply accordingly.

III. Status of International Law/International Humanitarian Law in your Country's Legal Framework

8. Which international crimes have been incorporated into your domestic criminal law? Please include any crimes enumerated in the Rome Statute of the International Criminal Court such as genocide, war crimes, crimes against humanity, and other relevant instruments.

The Rome Statute of the International Criminal Court and the Völkerstrafgesetzbuch (VStGB / Code of Crimes against International Law), which incorporated the norms of the statute nearly identical and exceeds those to some extent (compare as an introduction *Zimmermann*, "Bestrafung völkerrechtlicher Verbrechen durch deutsche Gerichte nach In-Kraft-Treten des Völkerstrafgesetzbuches", NJW 2002, p. 3068-3070), went into force in Germany at the same time.

The exceeding part of the VStGB is, that *all* war crimes even in non-international armed conflicts are penalised, while this is only partially the case under the statute (Art. 8 para. 2 c). The legal regulations of the four Geneva Conventions and the first Additional Protocol respectively were hereby integrated in the German law (compare *Zimmermann*, loc. cit., p. 3069). In addition the Statute differs formally from the VStGB. It lists all war crimes somewhat confusing in art. 8, while the VStGB redistributes them according to their scope of protection into §§ 8 till 12 and sorts them again due to their seriousness. There are hardly any differences as regards the content in the special part - apart from linguistic diversities.

9. Do your country's laws modify the provisions of the ICC Statute, such as concepts of aiding and abetting and conspiracy or liability of business entities rather than only natural persons?

Regarding general teachings § 2 VStGB refers to the general part of the German Criminal Code, i.e. especially its §§ 13ff.

These norms correspond with the art. 25 and 30 to 33 of the Statute in many points.

Some differences shall be pointed out hereafter.

I. Perpetration and Incitement or Accessoryship

The rules on perpetration of art. 25, para. 3, no. 3, lit. a ICC Statute does correspond with those of § 25 StGB. The incitement as ruled in art. 25, para. 3, lit. b does correspond in its meaning with § 26 StGB. Only the accessoryship is ruled more complex in art. 25 para. 3, lit. c and d than in § 27 StGB; anyway, both versions require intentional conduct. The direct and public incitement of art. 25 para. 3, lit. e finds its equivalent rather than anything else in the special acti rei of § 130 StGB.

II. Subjective Elements

The required general mental element according to art. 30 para. 1 ICC Statute corresponds with § 15 StGB. But under German law conduct is already intentionally if the person acting considers the constitution of an offence possible and accepts this (so called “*dolus eventualis*”). According to art. 30, para. 2 ICC Statute the requirements of the mental element are only met if the actor is aware that the consequences will occur in the ordinary course of events (and in this respect definitely); the Statute requests the more precise defined *dolus directus*. It is recommended with good reasons that the cross reference of § 2 VStGB has to be interpreted restricted due regard to public international law, so that under German law the *dolus directus* shall also be required (compare *Zimmermann*, loc. cit., p. 3069 first column).

The mistake of fact is according to art. 32 para. 1 ICC Statute and § 16 StGB substantial in equal measure. For a mistake of law there are only slightly different rules according to art. 32 para. 2 ICC Statute than according to § 17 StGB: If the perpetrator could have avoided the mistake, the punishment may be mitigated pursuant to § 49, para. 1 StGB while according to the ICC Statute it depends on, if the mistake was negligent or grossly negligent (“manifestly unlawful”, art. 33 para. 1 lit. c). This shall make allowance for the special situation of someone taking orders.

III. Criminal Responsibility

According to the guilt, art. 31 para. 1, lit. a and b does not distinguish between the diminished capacity to be adjudged guilty and the lack of capacity to be adjudged guilty, as ruled in §§ 20 and 21 StGB.

Moreover, the ICC Statute recognizes the *actio libera in causa*, which allows the punishment of someone who causes his lack of capacity to be adjudged intentionally. This question is highly debated in Germany.

Therefore we come to the conclusion that there are some minor differences, which are not of high relevance.

10. Do your criminal courts have jurisdiction over those international crimes that have been not incorporated into your domestic law?

The short answer is no. German criminal courts have no jurisdiction if the international crime is no offence under German law.

But this is theory. In practise all international crimes are incorporated into German law. Esp. every action constituting an offence under the VStGB is according to § 1 VStGB subject to the German jurisdiction. The hereby-confirmed principle of international prosecution does without German links.

But to balance this out, the public prosecution office may dispense with prosecuting an offence, punishable pursuant to §§ 6 to 14 of the VStGB, if the accused is not present in Germany and such presence is not to be anticipated. The same applies under certain premises, if the offence is prosecuted by an international court or by another state (§ 153 lit. f StPO).

The efficiency of the VStGB will depend on to what extent the prosecuting authorities exercise the option of dispensing the court action (*Zimmermann*, loc. cit., p. 3070 right column). Hitherto no information according this is available.

The first well-known example for the exercise of the new provisions is the complaint against the US minister of defence Donald Rumsfeld and other high-ranking officers and public officers initiated by the Centre for Constitutional Rights based on the abuses in the Abu Ghraib prison. The complaint reached the attorney general in November 2004. However, on February 10th 2005 the attorney general refused to initiate investigation proceedings. This was justified with the reason that the criminal proceedings in a third state, which is not involved in the conflict, shall help to punish the perpetrator according to the principle of international prosecution, but such criminal proceedings has to take the principle of non-interference in the internal affairs of states into account. These allegations of torture were already subject to criminal proceedings in the USA.

According to the attorney general, even the International Criminal Court is only allowed to open judicial investigation, if the state, which is holding substantive jurisdiction, is unwilling or incompetent to prosecute the crime committed. Due to the same reasons a third state like the FRG may not revise or even substitute the legal praxis of other states according to their own standards.

Proceedings to compel public charges were instituted at the appellate court at Stuttgart, which was competent in respect of the dismissal of the complaint by the attorney general. The plaintiffs criticised that the criminal procedures in the USA were restricted to nearly a dozen soldiers of lower ranks. No investigations against superior officers up to Rumsfeld were made.

The court dismissed the application on September 15th 2005. It reasoned its decision inter alia with the attorney generals accurate review and dismissal. Furthermore the legislator set the option of a legal review of the attorney generals decisions intentionally aside during the incorporation of the VStGB into German law.

11. May a business entity be prosecuted for violations of international law in the courts of your country, whether under domestic law or with references to international law? If yes, under what circumstances??

The prosecution of business entities is subject to the same principles as shown in the answers to questions 3) and 4). The same applies to breaches of international law, because the international norms have been incorporated into national law (please see question 9).

IV. Alternative Mechanisms: Civil Law/Tort

12. Can you think of any bases in your country's tort law (civil law) for suing individuals and/or business entities for violations of international criminal law, IHL, (whether or not incorporated into domestic law)?

Indeed this is a very interesting question, which will soon be ruled by the Federal Court of Justice, Germany's highest civil court.

At present it is (yet) the prevailing opinion, that a natural person cannot be subject of public international law according to its traditional conception as a law between the states. That means that public international law does not award direct protection to individuals as opposed to states.

If a crime was committed according to public international law against a foreign citizen, it is not the citizen, who is entitled to lodge the claim, but his country of origin, which will then lodge its claim, that public international law has to be complied against its citizens (diplomatic protection). Then the individual is allowed to pursue his claims through his home state.

The Federal Court of Justice confirmed this procedure lately on June 28th 2004 (NJW 2004, p. 3257 upholding BVerfGE 94, p. 315). The decision emphasises, that since codification of rules protecting the individual in the areas of human rights is continuing, the individual may possibly have own claims under public international law. Also certain conventions provide protection and the individual's possibility to lodge his claim. This corresponds approximately with the European Convention on Human Rights and Fundamental Freedoms. Still this does not include protection of the individual under civil law according to breaches of public international law.

But a protection under civil law could arise from the German tort law if its principles can be implemented on breaches of public international law.

This legal question was ruled both in the Distomo-case and the Varvarin-case discussing the claims of Greek citizens according to war crimes in the first and the claims of injured victims of an air strike during the war in Kosovo in the latter case.

a) Distomo-Case

On June 26th 2003 the Federal Court of Justice had in the Distomo-case to decide upon compensation claims of Greek citizens against the FRG for human rights breaches (NJW 2003, p. 3488). 300 Greeks were shot during a massacre in 1944 in Greece.

The Federal Court of Justice concluded, that the claim for damages was without merit. The court based its decision inter alia on the fact, that at least during the time until the end of World War Two, it was the prevailing opinion that war was a state of emergency under public international law. It was of violent character and the legal system of peacetime got suspended. The liability for the outbreak of a war and the inevitably resulting consequences of collective use of force were, like the liability for individual crimes of war, committed by persons acting for the involved powers, defined on state level. It was not argued that a state waging a war could become liable for victims damages caused by crimes committed by its armed forces abroad.

The Court specifically left the question of whether its analysis is transferable to state liability law as it stands today unanswered. The analysis only applies to the time until the end of World War Two. It does not involve a judgement concerning breaches of public international law as we see them today.

On February 15th 2006 the Federal Constitutional Court (Bundesverfassungsgericht - BVerfG) confirmed the decision (EuGRZ 2006, p. 105). Also the Constitutional Court left the question unanswered if today's state liability law contains a right of compensation. The court judged only the situation in 1944.

b) Varvarin-Case

In the Varvarin-Case (also called Malenkovic-Case) the Higher Regional Court at Cologne had to judge upon a civil law suit against the state of Germany, seeking compensation which was filed by the Serbian victims and the surviving dependents of an NATO air raid on the bridge of Varvarin during the so called Kosovo-War.

In the first judgment, the District Court at Bonn had dismissed the case as a matter of principle, since it did not recognise any legal basis for a compensation claim. It held, that any entitlement, which was based on public international law, only existed between states. Individuals could pursue their claims through their home state (diplomatic protection). The German law on state liability was held to be inapplicable to armed conflicts, because war as a state of emergency under public international law suspended the legal system of peacetime.

In its appellate ruling, the Higher Regional Court at Cologne explicitly did not confirm this interpretation of law.

The higher Regional Court at Cologne did not exclude individual compensation claims of affected victims under German national tort law next to the home states claim to diplomatic protection under international law. This different result follows from a construction of the basic rights of the 1949 constitution. According to the Higher Regional Court at Cologne human dignity and the protection of the human being are the predominant principles within the scope of application of the moral standards of the German constitution. A complete suspension of German state liability in times of war or regarding to military action is not possible, since it is a general liability claim against the state, which cannot be negated. The Higher Regional Court at Cologne comes to the conclusion, that parallel to the claim of the country of origin

under public international law, a claim of the individual under national law against the injuring party exists.

The judgement of the HRC at Cologne could pave the way to a general entitlement of the individuals compensation claim, based on public international law. The final judgement has to be made by the Federal Court of Justice. It has to be expected in the second half of the year 2006.

However, the Regional Court denied, that the German state bore any responsibility in the instant case. Because the air raid on the bridge of Varvarian was not judged to be an arbitrary act of war, the FRG could not be sentenced. It was also relevant, that no planes of the BFRG were directly involved in the mission, so that the Higher Regional Court rejected liability only based on complicity due to Germanys membership in the NATO and participation in the war.

This is the German discussion to the possibilities of state liability. The possibility of private liability is much easier: If a German individual commit crimes of mass rape, torture, unlawfull killing etc. abroad the victim can sue him in Germany for such torts. The victim can sue for civil damages and inform the public prosecution for further criminal actions. If a foreigner wants to sue another foreigner for civil damages he needs a link to Germany which are shown in the answer to question 13 b). The jurisdiction for criminal action follows under question 13 a).

V. Jurisdiction and related issues

13. On what bases do the courts of your country assert jurisdiction over criminal and civil defendants?

To answer the question of the courts jurisdiction it is important to distinguish between criminal law and civil law:

a) Criminal Law

According to § 7 StGB the German criminal law shall also apply to acts, which were committed abroad against a German. Another condition precedent is, that the act is punishable at the place of its commission. In detail § 7 StGB regulates the following:

“(1) German criminal law shall apply to acts, which were committed abroad against a German, if the act is punishable at the place of its commission or the place of its commission is subject to no criminal law enforcement.

(2) German criminal law shall apply to other acts, which were committed abroad, if the act is punishable at the place of its commission or the place of its commission is subject to no criminal law enforcement and if the perpetrator:

1. was a German at the time of the act or became one after the act; or

2. was a foreigner at the time of the act, was found to be in Germany and, although the Extradition Act would permit extradition for such an act, is not extradited, because a request for extradition is not made, is rejected, or the extradition is not practicable.”

§ 6 StGB constitutes the principle of international prosecution. That means, that German criminal law shall apply regardless of the law of the place of the commission of the act and other links to German law. § 6 StGB states the following explicitly:

“German criminal law shall further apply, regardless of the law of the place of their commission, to the following acts committed abroad:

1. (repealed)
2. serious criminal offences involving nuclear energy, explosives and radiation in cases under Sections 307 and 308 subsections (1) to (4) and Section 310;
3. assaults against air and sea traffic (Section 316c);
4. trafficking in human beings (Section 180b) and serious trafficking in human beings (Section 181);
5. unauthorized distribution of narcotics;
6. dissemination of pornographic writings in cases under Section 184 subsection (3) and (4);
7. counterfeiting of money and securities (Sections 146, 151 and 152), payment cards and blank eurosheques (Section 152a subsections (1) to (4), as well as their circulation (Sections 149,151,152 and 152a subsection (5);
8. subsidy fraud (Section 264);
9. acts which, on the basis of an international agreement binding on the Federal Republic of Germany, shall also be prosecuted if they are committed abroad.”

The application of the principle of international persecution was expanded by the VStGB, which was adopted on June 26th 2002 (BGBl. 2002, p. 2254). It defines war crimes and crimes against humanity as crimes according to criminal law. § 6 VStGB reads as follows:

“(1) Whoever with the intent of destroying as such, in whole or in part, a national, racial, religious or ethnic group

1. kills a member of the group,
2. causes serious bodily or mental harm to a member of the group, especially of the kind referred to in § 226 of the StGB,

3. inflicts on the group conditions of life calculated to bring about their physical destruction in whole or in part,
4. imposes measures intended to prevent births within the group,
5. forcibly transfers a child of the group to another group,

shall be punished with imprisonment for life.

(2) In less serious cases referred to under subsection (1), numbers 2 to 5, the punishment shall be imprisonment for not less than five years.”

§ 7 reads as follows:

“(1) Whoever, as part of a widespread or systematic attack directed against any civilian population,

1. kills a person,
2. inflicts, with the intent of destroying a population in whole or in part, conditions of life on that population or on parts thereof, being conditions calculated to bring about its physical destruction in whole or in part,
3. traffics in persons, particularly in women or children, or whoever enslaves a person in another way and in doing so arrogates himself a right of ownership over that person,
4. deports or forcibly transfers, by expulsion or other coercive acts, a person lawfully present in an area to another state or another area in contravention of general rule of international law,
5. tortures a person in his or her custody or otherwise under his or her control by causing that person substantial physical or mental harm or suffering where such harm or suffering does not arise only from sanctions that are compatible with international law,
6. sexually coerces, rapes, forces into prostitution or deprives a person of his or her reproductive capacity, or confines a woman forcibly made pregnant with the intent of affecting the ethnic composition of any population,
7. causes a person’s enforced disappearance, with the intention of removing him or her from the protection of the law for a prolonged period of time,
 - a) by abducting that person on behalf of or with the approval of the State or a political organisation, or by otherwise severely depriving such person of his or her physical liberty, followed by a failure immediately to give truthful information, upon inquiry, on that person’s fate and whereabouts, or

b) by refusing, on behalf of the State or of political organisation or in contravention of a legal duty, to give information immediately on the fate and whereabouts of the person deprived of his or her physical liberty under the circumstances referred to under letter (a) above, or by giving false information thereon,

8. causes another person severe physical or mental harm, especially of the kind referred to in section 226 StGB,

9. severely deprives, in contravention of a general rule of international law, a person of his or her physical liberty, or

9. persecutes an identifiable group or collectivity by depriving such group or collectivity of fundamental human rights, or by substantially restricting the same, on political, racial, national, ethnic, cultural or religious, gender or other grounds that are recognised as impermissible under the general rules of international law

shall be punished, in the cases referred to under numbers 1 and 2, with imprisonment for life, in the cases referred to under numbers 3 to 7, with imprisonment for not less than five years, and, in the cases referred to under numbers 8 to 10, with imprisonment for not less than three years.

(2) In less serious cases under subsection (1), number 2, the punishment shall be imprisonment for not less than five years, in less serious cases under subsection (1), numbers 3 to 7, imprisonment for not less than two years, and less serious cases under subsection (1), numbers 8 and 9, imprisonment for not less than one year.

(3) Where the perpetrator causes the death of a person through an offence pursuant to subsection (1), numbers 3 to 10, the punishment shall be imprisonment for life or for not less than ten years in cases under subsection (1), numbers 3 to 7, and imprisonment for not less than five years in cases under subsection (1), numbers 8 to 10.

(4) In less serious cases under subsection (3) the punishment for an offence pursuant to subsection (1), numbers 3 to 7, shall be imprisonment for not less than five years, and for an offence pursuant to subsection (1), numbers 8 to 10, imprisonment for not less than three years.

(5) Whoever commits a crime pursuant to subsection (1) with the intention of maintaining an institutionalised regime of systematic oppression and domination by one racial group over any other shall be punished with imprisonment for not less than five years so far as the offence is not punishable more severely pursuant to subsection (1) or subsection (3). In less serious cases the punishment shall be imprisonment for not less than three years so far as the offence is not punishable more severely pursuant to subsection (2) or subsection (4).”

According to the Principle of Mandatory Prosecution, German public prosecution offices shall be obliged to take action in the case of all criminal offences, which may be prosecuted under the VStGB, provided there are sufficient factual indications. Exceptions to this principle exist especially, if Investigation proceedings have been opened in the directly affected states.

If the prosecuted individual is living abroad Germany has the duty to lead the other country to arrest the person and extradite him to Germany to stand trial for his actions. In practise this is not easy. The situation vice versa (another country wants the extradition of a German citizen from Germany) makes it difficult for Germany. Article 16 para. 2 of the German constitution (Grundgesetz) rules the prohibition of extradite Germans to any other country. There is only an exception for member states of the EU.

b) Private Law

The venue of juristic persons under civil law is basically determined by § 17 Zivilprozessordnung (ZPO / Civil Procedure Code). It reads as follows:

“The general venue of communities, corporate bodies, as well as of those societies, cooperative societies and other associations and of trusts, institutions and funds, which may be sued as such, is determined by their seat. Their seat is deemed to be, unless there is a contrary conclusion, the place where the administration is carried on.”

Subsequently § 17 ZPO regulates basically the principle of the seat.

§ 21 ZPO amends this by the special venue at place of establishment.

It reads as follows:

“If a person has an establishment for operating a factory, a business or some other trade form which business is transacted directly, all claims against him relating to the carrying on of business at the establishment may be brought in the court of the place where the establishment is located.”

If an enterprise neither has a seat nor an establishment in Germany, the special venue of property and object of litigation according to § 23 ZPO comes into consideration. It reads as follows:

“Lawsuits concerning financial claims against a person who has no residence within the country come within the jurisdiction of the court within whose district the property of the latter or the thing demanded in the claim is found. With regard to claims, the place where the property is deemed to be is the residence of the debtor, and if there is a pledge for the claim, also the place where the property pledged is located.”

Also the special venue in case of unlawful acts according to § 32 ZPO is important. It reads as follows:

“Claims relating to unlawful acts are within the jurisdiction of the court in the district of which the act was committed.”

This means, that irrespective of the enterprise’s seat and irrespective of the place of establishment, the claim for compensation can be lodged at the court within whose district the act was committed. For instance: If a foreign corporation (organized in

another country and having its principle place of business in that country) sells only one faulty medicine in Germany and this medicine harms a person in Germany this corporation can be sued in Germany. The personal jurisdiction follows the unlawful act in Germany. The jurisdiction of the unlawful act is the most common jurisdiction in Germany. Everyone (if corporation or individual) can be sued in Germany if committing a tort in Germany.

According to the plaintiff's choice the place where the action took place or where the damage occurred is authoritative. This was amended by the international jurisdiction according to art. 5 no. 3 and 4 EuGVÜ. This leads to an international jurisdiction under § 32 ZPO, because even foreign companies can be sued at German courts irrespective of their seats or places of establishment, if the place where the act was committed and the place where the damage occurred respectively were in Germany.

If several venues exist the plaintiff may choose among several courts having jurisdiction (§ 35 ZPO).

14. When parent and subsidiary entities are involved in a multinational setting, how does a court assert personal jurisdiction over parents or subsidiaries located out of country? What are the standards for overcoming limitations on jurisdictions over business entities within a multinational corporation?

The jurisdiction over parent and subsidiary entities with seats abroad is subject to the same principles as presented above under question 13.

That means, that the action committed or its effect triggering the claim for compensation has to be committed within Germany, so that a claim against a company with a seat abroad and no seat or establishment within Germany can be subject to proceedings in Germany.

A victim can sue the parent corporation for a tort of his foreign subsidiary if the parent corporation has his seat in Germany or if the damage of the act of the foreign subsidiary occurred in Germany. If the action is successful follows the complex problems of "piercing the corporate veil" presented under question 15. The same vice versa: The victim can sue a German subsidiary regarding a tort/offense committed by the foreign parent corporation. German courts have personal jurisdiction over the German subsidiary because of the seat in Germany. The problem is that the action will be unsuccessful if the subsidiary committed no tort.

15. How may a court attribute the actions of a subsidiary to a parent business entity, i.e. "pierce the corporate veil"?

The catch phrase "pierce the corporate veil" describes one of the most complex problems of German company law. The scientific discussion about this topic did not start in Germany before the end of the Second World War and generated a plenitude of legal concepts. The following abstract is based on the description of *Karsten Schmidt*, in: *Gesellschaftsrecht*, 4th. edition. 2002, p. 217 et seq.

According to Schmidt it can be distinguished between three case groups. A prosecution of the parent business entity has to be considered, if the economic spheres are mixed (I.), the subsidiary entity is under qualified control (II.), and if it is undercapitalised (III.).

I. Mixture of Spheres

If assets are used by the subsidiary and the parent entity collaboratively and no well-documented appropriation of assets exists, they are altogether subject to the subsidiary company's creditors access. A partner shall not be allowed to refer to the corporate veil of the company, if he himself frustrates the identification of what this privilege refers to. According to the jurisprudence this sanction requires, that the commingling was known or could have been known.

II. Control

The matter of fact, that the parent entity holds all shares of the subsidiary entity, does not cause a piercing of the corporate veil itself. Additionally the subsidiary entity has to be widely deprived of its autonomy by the kind of cooperation with the parent entity. But even than proceedings have to be initiated first against the subsidiary entity. Compensation within the internal relationship of the companies is based on the obligation of the parent entity to make up for the subsidiary entities losses.

A qualified control exists with regard to the requirements of § 302 AktG if,

- (1) there is a control or profit transfer agreement between the controlled company and the controlling enterprise or
- (2) if such an agreement does not exist, but the controlling enterprise manages the controlled company's business to such an extent, as if such an agreement exists (so called qualified trust) - § 302 AktG applies analogously.

III. Underfundment

Another possibility to pierce the corporate veil exists in the case of undercapitalisation of the subsidiary entity.

If a subsidiary company was capitalized with not enough equity capital, the creditors benefit from the fact, that in the case of bankruptcy the loans granted by the parent entity (so called kapitalersetzende Darlehen) are considered as liable equity capital (compare § 32 GmbHG). If such loans do not exist and the company is completely without recourse it depends on if the bodies of the parent entity realised the underfundment and the thereby originating demerit of the creditors: Then the liability results from § 826 Bürgerliches Gesetzbuch (BGB / Civil Code), which provides compensation in case of damages wilfully caused in a manner contrary to public policy. Alternatively the management can be claimed personally according to § 823 para. 2 BGB, if they neglected to petition for the commencement of insolvency proceedings in due time contrary to §§ 92 AktG, 64 GmbHG.

16. What type of actions (civil and criminal) might be asserted against a business entity respect to activities taking place outside of your jurisdiction by a business entity over which your courts have jurisdiction?

Companies can be held responsible for their actions committed abroad without further requirements under German civil law.

It is crucial, that the German company has its place of business in Germany and subsidiaries in Germany respectively. Claims for compensation, as well as all other suitable claims under German law, can be lodged.

The extraterritorial jurisdiction of German criminal law follows the answer under question 13 a. § 6 StGB and § 7 VStGB ruling the principles of German criminal court jurisdiction in respect to activities taking place outside of Germany. German law knows the so called “Weltrechtsprinzip” (world law principle). This means the German criminal law apply regardless of the law of the place of their commission for special crimes in § 6 StGB. The new § 7 VStGB add further crimes against humanity to this list. Beside these crimes § 7 para. 2 StGB rules wheter German criminal law applies to acts committed abroad. This is the case if the perpetrator is a German or – if he is a foreigner – he was found in Germany and an extradition failed (see § 7 para 2 StGB under question 13 a).

This means, if such a crime as bribery of foreign officials is not in the lists of § 6 StGB or § 7 VStGB (bribery is not in the lists) the crime is only punished in Germany if the person who took the bribe is German or – if he is not German – if he was found in Germany and the extradition failed in the situation decribed in § 7 para 2 StGB (see question 13 a). This prevails in any other crimes like money laundering, importation of stolen property or drug trafficking, too.

17. If plaintiffs wanted to sue a business entity in your jurisdiction, what are some of the jurisdictional and procedural obstacles that they (and their lawyers) might face?

The German civil procedure law shows essential disadvantages, if compared with the US civil procedure law.

Generally the plaintiff has to bring forward all evidences, which could substantiate his claim. He has no possibility to demand documents from the defendant (so called pre-trial-discovery). Only if only excerpts of the documents are available, the plaintiff can demand that the whole document is produced. An advanced claim to presentation of documents does not exist. The plaintiff has to provide all evidences himself.

Furthermore it has to be considered, that the defeated party of a German lawsuit has to pay all costs incurred. That means, that he has to pay the court costs of all instances, its own lawyer’s fees as well as those of the other party and all expenses including survey fees and travelling expenses.

The only exception is if the victim is asking for compensation in connection with a criminal proceeding. The concept of seeking compensation in connection of criminal

proceedings is known in German law (§§ 403 et seqq. StPO, so called “Adhäsionsverfahren”). But the court has broad possibilities to reject a compensation decision. The main reason is that the questions of compensation would delay the criminal proceedings. In practise many compensation claims in criminal proceedings failing very fast. The victim has to sue in civil court again. The concept of seeking compensation in connection with criminal proceedings is more or less theoretical in Germany.

The court costs, as well as the lawyer’s fees, are measured according to the amount in dispute. The higher the amount in dispute is, the higher the court costs and the lawyer’s fees are. Before a writ is served to the defendant the plaintiff has to pay all court costs for the first stage of appeal.

This risk discourages many plaintiffs in the first. Only poor plaintiffs have the possibility to make application for legal aid. Consumer protection organisations can apply for a decrease of the legal costs in their favour due to proceedings under competition law.

Furthermore the compensations for pain and suffering granted in Germany are not comparable with those in the USA. They are much lower. A compensation for surviving dependents of culpably killed persons is only paid, if the surviving dependent himself suffers damages to his health caused by the information (e.g. a shock). A general compensation for immaterial damage in case of loss of a relative does not exist.

Also compensation under criminal law - comparable to the one under US law - is unknown to German law. It is just possible according to §§ 403 et seqq. ZPO to lodge claims for compensation under civil law during the criminal proceedings. This serves the purpose to avoid another suit next to or after the criminal proceedings. A following punishment under civil law is not possible.

As far as the limitation of a claim is concerned, it has to be considered, that next to the standard limitation period of three years for claims on compensation additionally a so-called absolute limitation period of 30 years exists. This period does not depend upon knowledge of the injured of the claim of the injuring party. That means, that the claim is limited, if the claimant does not come to know who the injuring party was within 30 years.

18. Do the courts of your country sometimes decline to exercise jurisdiction over matters where the events occurred in another country and/or the majority of witnesses and the bulk of other evidences is outside of your country, thereby making it more convenient for the parties to litigate in the courts of another jurisdiction (sometimes referred to as doctrine of forum non conveniens)?

No doctrine like the doctrine of forum non conveniens, is known under German civil procedure law.

But the public prosecution office may dispense with prosecuting criminal offences, which have been committed outside the territorial scope of this statute (§ 153, lit. c, para. 1 StPO). The same applies to criminal offences committed within, but through an act committed outside, the territorial scope of this statute, if the conduct of pro-

ceedings would pose the risk of serious detriment to Germany or if other predominant public interests present an obstacle to prosecution (§ 153c, para. 2 StPO). The same applies to acts under the VStGB committed abroad according to § 153f read in conjunction with § 153c StPO. The public prosecutor's offices legal discretion to dispense with prosecution, if the act committed has no linkage to the FRG, counterbalances the overall competence of the German courts under the principle of international prosecution of § 1 VStGB (compare question 10).

19. Are there any checks and balances on prosecutorial discretion or decision making (e.g. when a prosecutor declines to prosecute a case, are there any measures in place to review his or her decision or an appeals mechanism?)

First it shall be described according to which principles the public prosecution office decides to begin or end investigation proceedings (A.). Then the possibilities of legal protection are discussed (B.).

A. Investigation Proceedings

As soon as the public prosecution office obtains knowledge of a suspected criminal offence, it shall investigate the facts according to § 152 para. 1 StPO. This principle is called principle of mandatory prosecution. The question, if the public prosecution office has to investigate, is not part of its discretion. It only has scope for judgement evaluation according to the question, if a probable cause exists. According to the prevailing case law, this only applies, if there are sufficient factual indications, under which, according to criminological experience, the commitment of a crime can be considered possible. (compare *BGH*, StV 1988, p. 441).

The decision to close the proceedings can only be based on two considerations. On the one hand proceedings can be closed if the suspicions proves not true, so that a charge would not succeed (I.); on the other hand the crime may be provable but it is not necessary to persecute it based on other grounds (II.)

I. Termination Of the Proceedings for lack of Suspicion

According to § 172 para. 2 StPO the public prosecution office shall terminate the proceedings, if the suspicion after exhaustion of all reasonable criminological investigations does not become probable cause. Again the public prosecution office has no discretion; but it has scope for judgment evaluation in regard to the probable cause. A probable cause exists, if it is probable that the accused committed a criminal offence and will be sentenced for that (compare *BGH*, StV 2001, p. 579).

II. Termination Of Proceedings for lack of Necessity

The different possibilities of non-prosecution according to §§ 153 et seqq. StPO are a breach of the principle of mandatory prosecution. This is the case if the perpetrator's culpability is considered to be of a minor nature (§ 153 StPO) or if the act committed is not particularly significant in addition to another act (§ 154 StPO) or based on political grounds (§ 153e StPO).

Finally the subsidiary principle has to be applied according to § 153f in conjunction with § 153c StPO for crimes under the VStGB committed abroad. The public prosecutor's offices legal discretion to dispense with prosecution, if the act committed has no linkage to the FRG, counterbalances the overall competence of the German courts under the principle of international prosecution according to § 1 VStGB (compare question 10). If the accused is a German citizen, the principle of mandatory prosecution is invoked and the public prosecution office is obliged to take action. Exceptions are made if another court (including the ICC) already opened judicial investigations (§ 153f para. 1 sentence 2 StPO). The prosecutor has guidelines for criminal proceedings ("Richtlinien für das Straf- und Bußgeldverfahren), which says in number 93 et seqq. how he can use these instruments. The prosecutor has discretion to decide the termination. The victims have legal remedies against his decision which are shown under B.

Those alternatives tied in with the perpetrator's minor culpability require generally consent of the competent court (compare §§ 153, 153a, 153b StPO). Exceptions are only made regarding to less serious criminal offences, if the consequences ensuing from the offence are minimal (§ 153 para. 1 sentence 2 StPO).

B. Legal Remedies

The public prosecution offices decision to dispend with investigation proceedings can be proceeded against with two different legal remedies.

The proceeding to compel public charges opposes the decision on the merits as such (see I.), while the supervisory complaint accuses the administrator of neglect of duty (II.). The first is tied to stricter precedents, the second possibility only successful in rare exceptional cases.

I. Proceeding to Compel Public Charges (§ 172 et seqq. StPO)

The termination of the proceedings by the public prosecution office can be checked by the injured as far as the Proceeding to compel public charges is admissible.

Basically only termination of proceedings due to lack of suspicion can be subject to a claim to proceed to compel public charges. For once contrary to the mistakable formulation of § 172 para. 2 3 StPO are also rulings to be reviewed which are based on §§ 153 et seqq. StPO. This claim does not exist according to the exercised discretion, but to settle the question, if the respective absolute prerequisites of the statutory definition of the offence have been met (compare *Ranft*, Strafprozessrecht, 3rd edition 2005, marginal number 1251). The question is for example if the crime committed was a serious criminal offence or just a less serious criminal offence.

Only the injured, who is directly affected in his individual rights by the predicated crime and who was to be protected by the violated rule, has the power of filing applications under § 172 para. 1 StPO (loc. cit., marginal number 1257). His application is regularly directed on the preferring of public charges, and just exceptionally on the continuation of investigational proceedings (loc. cit., marginal number 1269).

A complaints procedure is preceded to the court decision: If the public prosecution office does not grant an application, it shall notify the applicant according to § 171 StPO. If the applicant is the aggrieved party at the same time, he shall be entitled to lodge a complaint against the notification to the official superior of the public prosecution office within two weeks after receipt of such notification under § 172 StPO. Then he may apply for a court decision in respect of the dismissal of the complaint by the superior official of the public prosecution office within one month of receipt of notification.

II. Disciplinary Complaint

Everybody can suggest, without compliance with form or deadline, the review of the official procedure by the general prosecution office. It is an institutional guarantee to get an answer. The proceeding is almost always unsuccessful.

Sgd. Dr. Remo Klinger

May 28th 2006