Criminal Liability of Managers for Excessive Risk-Taking?

Strafrechtelijke aansprakelijkheid van leidinggevers voor het nemen van buitensporige risico's?
(met een samenvatting in het Nederlands)

Proefschrift

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door

Stanisław Tadeusz Tosza

geboren op 25 september 1982
te Katowice, Polen

Promotoren:
Prof. dr. K. Ligeti
Prof. dr. J.A.E. Vervaele
Prof. dr. F. de Jong

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CONTENTS

List of Abbreviations:

Abs.	Absatz (subsection)
AG	Aktiengesellschaft
AktG	Aktiengesetz
All ER	All England Law Reports
art.	article
Bafin	Bundesanstalt für Finanzdienstleistungsaufsicht
BayObLG	Bayerisches Oberstes Landesgericht
BeckRS	Beck online Rechtsprechung (C. H. Beck)
BGB	Bürgerliches Gesetzbuch
BGH	Bundesgerichtshof
Bull. crim.	Bulletin des arrêts de la Cour de cassation (chambre criminelle)
BVerfG	Bundesverfassungsgericht
Cass. crim.	Cour de cassation, chambre criminelle
CEO	Chief Executive Officer
CP	French Penal Code (Code Pénal)
CPS	Crown Prosecution Service
Cr App R	Criminal Appeal Reports
Crim LR	Criminal Law Review
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ed(s).	editor(s)
et al.	and other persons or places
EWCA Crim	England and Wales Court of Appeal Criminal Division
f.	following (one more page)
FA	The Fraud Act 2006
ff.	following (two or more pages)
fn	footnote

GenG	Gesetz betreffend die Erwerbs- und Wirtschaftsgenossenschaften
GG	Grundgesetz für die Bundesrepublik Deutschland
GmbH	Gesellschaften mit beschränkter Haftung
GmbHG	Gesetz betreffend die Gesellschaften mit beschränkter Haftung
HC	House of Commons
HGB	Handelsgesetzbuch
HL	House of Lords
InsO	Insolvenzordnung
KB	King's Bench
KritV	Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft
KWG	Gesetz über das Kreditwesen
Law Com	Law Commission
LG	Landgericht
LIBOR	London Interbank Offered Rate
MDR	Monatsschrift für Deutsches Recht
N°, No	Number
NJW	Neue Juristische Wochenschrift
NStZ	Neue Zeitschrift für Strafrecht
NStZ-RR	Neue Zeitschrift für Strafrecht Rechtsprechungs-Report
OLG	Oberlandesgericht
p.	page
para	paragraph(s)
PDG	Président-directeur general
pp.	pages
QB	Queen's Bench
RGSt	Entscheidungen des Reichsgerichtes in Strafsachen
SA	société anonyme
SARL	société à responsabilité limitée
SAS	Société par actions simplifiée (simplified joint-stock company)

SCA shares)	Société en commandite par actions (partnership limited by
SE	Société européenne, European Company
SEAG	Gesetz zur Ausführung der Verordnung (EG) Nr. 2157/2001 des Rates vom 8. Oktober 2001 über das Statut der Europäischen Gesellschaft (SE)
SFO	Serious Fraud Office
StGB	Strafgesetzbuch
StPO	Strafprozeßordnung
StV	Strafverteidiger
TFEU	Treaty on the Functioning of the European Union
VAG	Gesetz über die Beaufsichtigung der Versicherungsunternehmen
wistra	Zeitschrift für Wirtschafts- und Steuerstrafrecht
WLR	Weekly Law Reports
ZPO	Zivilprozessordnung
ZStW	Zeitschrift für die gesamte Strafrechtswissenschaft
ZVG	Gesetz über die Zwangsversteigerung und die Zwangsverwaltung

"Of all injustice, none is more grave than that of the people who, when they are most false, conduct their affairs as if they were good men."

Cicero, *On Duties*

"Fraud against the trusting fails to heed not only natural love but the added bond of faith, which forms a special kind of trust. Therefore, in the tightest circle, the centre of the universe and seat of Dis, all traitors are consumed eternally."

Dante, *Inferno*, canto 11

"In retrospect, many firms […] took on too much risk and did not have sufficient resources to manage those risks effectively in a rapidly changing environment."

John J. Mack, Chairman, *Written Submission of Morgan Stanley to the Financial Crisis Inquiry Commission*

Chapter I. INTRODUCTION

1. Objectives and context of the research

The aim of this study is to analyse and evaluate the criminalisation of excessively risky decisions taken by managers of limited liability companies.

The study will analyse possibilities to punish excessive risk-taking in three selected legal orders representing three different models of criminalisation (England and Wales[1], France and Germany). It will compare the scope of possible criminal reactions towards overly-daring managerial decisions in those legal systems and evaluate whether these models are justified and proportionate. Furthermore, this study will provide *de lege lata* and normative proposals as to how criminal law can and should be used as a reaction to excessively risky decisions and the factual and legal background within which such a criminalisation would have to be fitted.

The last of three quotations cited at the beginning of this dissertation comes from John J. Mack, who was CEO of Morgan Stanley when the financial crisis of 2007-08 started and chairman of the Board of this corporation when he gave the statement containing these words to the Financial Crisis Inquiry Commission in order to explain what triggered the most recent financial crisis.[2] It is an almost universal opinion that the essential cause of the financial crisis was "the combination of a credit boom and a housing bubble",[3] in particular linked with extending credit to borrowers, whose credit ratings were low.[4] This was combined with financial market innovation

[1] For the sake of brevity further references to the legal system of England and Wales will only use 'England' or 'English'.

[2] *Written Submission of Morgan Stanley to The Financial Crisis Inquiry Commission*, John J. Mack, Chairman, January 2010, http://fcic-static.law.stanford.edu/cdn_media/fcic-testimony/2010-0113-Mack.pdf.

[3] Viral Acharya, Thomas Philippon, Matthew Richardson, Nouriel Roubini, 'The Financial Crisis of 2007-2009: Causes and Remedies', *Financial Markets, Institutions & Instruments*, 18 (2009) Issue 2, pp. 89–137, 98.

[4] Tobias F. Rötheli, 'Causes of the financial crisis: Risk misperception, policy mistakes, and banks' bounded rationality', *The Journal of Socio-Economics*, 39 (2010), pp. 119-126, p. 119. There is vast literature analysing the causes of the financial crisis, stemming from public institutions, non-governmental and academic institutions. Besides publications cited in this section, see for example the following publications: *The Financial Crisis Inquiry Report, Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States*, January 2011, available on: http://fcic.law.stanford.edu/report (retrieved on 12.07.2015); *The Causes of the Global Financial Crisis and Their Implications for Supreme Audit Institutions*, The International Organisation of Supreme

and the practice of rating agencies of granting excellent ratings to financial assets based on underlying credit claims turning them into very attractive investments in view of their risk-return profiles.[5] While the crisis began in the USA with the collapse of the Lehman Brothers bank, it spilled into Europe as European banks had also invested intensively in the American mortgage market. Moreover European markets and institutions were affected by distressed financial markets in the USA and the resulting limited access to capital.[6] This evolved into a sovereign debt crisis due to the costs of the efforts of governments to rescue systemically important financial institutions together with already existing high government debts as well as in view of the deterioration of the lending climate in general.[7]

When discussing the causes of the financial crisis, excessive risk-taking is mentioned in various contexts, which include external market factors and internal business culture factors, such as: imprudent mortgage lending,[8] amassing of vast highly correlated housing risks,[9] problems regarding sophisticated credit derivatives

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Audit Institutions (INTOSAI), October 2010, http://www.intosai.org/uploads/gaohq4709242v1finalsubgroup1paper.pdf (retrieved on 12.07.2015); Carmen M. Reinhart, Kenneth S. Rogoff, *This time is different. Eight Centuries of Financial Folly* (Princeton and Oxford: Princeton University Press, 2009); Stephany Griffith-Jones, José Antonio Ocampo, Joseph E. Stiglitz (eds.), *Time for a Visible Hand. Lessons from the 2008 World Financial Crisis* (Oxford University Press, 2010); Stijn Claessens, M. Ayhan Kose, Luc Laeven, Fabián Valencia (eds.), *Financial Crises: Causes, Consequences, and Policy Responses* (International Monetary Fund, 2014).

[5] Rötheli, 'Causes of the financial crisis…' (note 4) p. 119; See also: Martin F. Hellwig, 'Systemic Risk in the Financial Sector: An Analysis of the Subprime-Mortgage Financial Crisis', De Economist, 157 (2009), Issue 2, pp. 129-207, p. 166; Adair Turner *The Turner Review: A Regulatory Response to the Global Banking Crisis*, Financial Services Authority, March 2009, available on http://www.fsa.gov.uk/pubs/other/turner_review.pdf (retrieved on 12.07.2015), p. 13ff.

[6] *The Causes of the Global Financial Crisis and Their Implications for Supreme Audit Institutions* (note 4) p. 15[49].

[7] *The Causes of the Global Financial Crisis and Their Implications for Supreme Audit Institutions* (note 4); DG Economic and Financial Affairs, *Why did the crisis happen?* on: http://ec.europa.eu/economy_finance/explained/the_financial_and_economic_crisis/why_did_the_crisis_happen/index_en.htm (retrieved on 19.08.2015); See also : DG Economic and Financial Affairs, *Economic Crisis in Europe: Causes, Consequences and Responses*, EUROPEAN ECONOMY 7 (2009), http://ec.europa.eu/economy_finance/publications/publication15887_en.pdf (retrieved on 19.08.2015).

[8] Mark Jickling, *Causes of the Financial Crisis*, Congressional Research Service, Report for Congress, 29 January 2009, p. 5.

[9] Subchapter 'The Ten Essential Causes of the Financial and Economic Crisis' of the Dissenting Statement of Commissioner Keith Hennessey, Commissioner Douglas Holtz-Eakin, and Vice Chairman Bill Thomas, in: *The Financial Crisis Inquiry Report, Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States*, January 2011, available on: http://fcic.law.stanford.edu/report (retrieved on 12.07.2015), p. 418.

instruments,[10] failure of risk management systems,[11] in particular "[g]reedy and potentially incompetent executives and senior managers, who have been blamed for encouraging or at best turning a blind eye to excessive risk taking",[12] homogenisation of assumptions about risk among financial actors,[13] limited information on risk exposure as regards over-the-counter derivatives,[14] short-term incentives in the form of annual bonuses, while risky strategies may become failures in the much longer run.[15] Another factor is connected with the longevity of the economic boom. The longer it lasts, the more there are persons in decision making positions not having experienced a serious downturn and thus showing a tendency to favour riskier strategies.[16] Some of these risks are linked with individual decisions; some are more systemic.

Whilst the consequences of excessive risk-taking are not solely linked to the most recent or any other financial crisis, it powerfully highlighted the potentially disastrous results when this phenomenon gets out of hand, sensitising also the wider public about it. Moreover excessive risk-taking is not limited to the financial market as managerial decisions in any domain of business may be overly-daring. Therefore, although the financial crisis was an inspiration for this study, it will take a broader approach.

Risk taking is at the very beginning and at the very core of business activity. Since time immemorial, one of the typical business activities has been bringing merchandise from one region to another. Once arrived at their destination, the goods are sold at a higher price than that for which they were acquired. This surplus was the

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[10] Jongho Kim, *From Vanilla Swaps to Exotic Credit Derivatives: How to Approach the Interpretation of Credit Events*, Fordham Journal of Corporate & Financial Law, 13 (2008), Issue 5, pp. 705-804, p. 708.

[11] Simon Ashby, *The 2007-09 Financial Crisis: Learning the Risk Management Lessons, Centre for Risk, Banking and Financial Services*, (University of Nottingham) Research Report, January 2010, http://www.nottingham.ac.uk/business/businesscentres/crbfs/research/researchreports.aspx (retrieved on: 12.07.2015), pp. 12-13; Jickling, *Causes of the Financial Crisis* (note 8) p. 8.

[12] Ashby, *The 2007-09 Financial Crisis: Learning…* (note 11) p. 13.

[13] Andrew G. Haldane, Robert M. May, 'Systemic risk in banking ecosystems', Nature 469 (20.01.2011), pp. 351–355; Robert Skidelsky, 'What the Wolves of Wall Street can teach us about risk', Project Syndicate, *The Guardian*, 24 March 2014 (retrieved from http://www.theguardian.com on 12.07.2015).

[14] Jickling, *Causes of the Financial Crisis* (note 8) p. 9.

[15] Association of Chartered Certified Accountants, *Corporate Governance and the Credit Crunch*, Discussion Paper, London: 2008, available on: http://www.accaglobal.com/gb/en/technical-activities/technical-resources-search/2008/november/corporate-governance-and-the-credit-crunch.html (retrieved on 12.07.2015).

[16] Rötheli, 'Causes of the financial crisis…' (note 4) p. 120.

merchant's gain and at the same time his compensation for the risk he took while transporting the goods, which was the risk of being robbed by brigands or pirates or having the merchandise be destroyed by a natural disaster.

It is a truism that today's much more sophisticated businesses also carry an element of risk. An investment can always turn into a financial disaster, be it because of the action of others (criminal or legal) or because of unexpected events (e.g. change of prices or natural catastrophes) or simply because of miscalculations (as to costs, demand, supply, etc.). Many successful businessmen make bad investments and one can say that failure is as much a part of business as is success.

The nature and level of risk can vary. It can be very limited if one invests in government bonds, although it is not impossible that the government will go bankrupt. The risk can be much higher if one invests in complicated financial instruments. One may risk less by investing in the production of commodities that are of common use, while investing in commercial scientific research carries the risk that it will bring no result or that it will not be useful in practice. Even investments that look *prima facie* bound to be successful may turn into failures. In one of his short stories, the Hungarian writer Sándor Márai writes of an investment that appeared to guarantee a success and for no explicable reason fails. A waiter, tired of his profession, acquires a restaurant that had always attracted clients. Although he makes no particular mistake, from the moment he takes over the restaurant, clients stop coming without any rational explanation and at the end he is forced to sell the place. When the new owner reopens it, the flow of clients begins immediately.[17]

While Márai's is a work of fiction, it points out that an element of luck is inevitably present in every investment. When contemplating the criminalisation of excessively risky decisions by managers, one has to bear in mind that risk is always present in business and doing business is a question of measuring, accommodating and preventing risk according to the rules of the domain in question. However, even when done properly, there will always be a margin of unknown factors and their appreciation and how to evade them is left to those who take the decisions. Furthermore, risk, regardless of whether its source is natural or human created, is a

[17] Sándor Márai, '"Three Swans"' in: *Magia* (a collection of his short stories, read in the Polish translation published by Czytelnik, Warszawa 2008, pp. 103-113).

social phenomenon, i.e. depending on dynamic factors (cultural, economic, legal etc.). The answer to the question whether risk is excessive depends on a variety of factors and perception thereof and will thus be subject to change over time.[18]

Another relevant context is the divide between capital and management, which is the common model of limited companies. Investors entrust their money to professionals who are supposed to manage the company's affairs in a way that brings profit. The relationship between the company (and the shareholders) and the managers relies on trust in that the managers are expected to use the assets in the best interests of the company. Managers to whom the company assets have been entrusted are accountable vis-à-vis the investors according to rules provided for by company law, their contracts and a plethora of other rules regulating the particular domain of business.

For the most serious breaches of law managers may be held criminally liable. However, as will be demonstrated in the following chapters, there is a consensus at least in the three selected legal orders, which will be analysed *infra*, that criminal conviction is not the appropriate response to business decisions which were simply risky and turned out to be disadvantageous. At the same time all three legal orders (as well as many others, if not all) criminalise misappropriation of company assets by its managers or the use of assets contrary to the interests of the company, or to relevant rules, in a way that results in a loss.

The problem of criminalisation of excessively risky decisions appears to be located between these opposite positions.

While most commonly managers who act contrary to the company interests or breach relevant rules would be subject to criminal liability when they cause loss to the company, the question of the need to punish excessively risky decisions can appear in three situations. Firstly and most typically it would be the case where an act of mismanagement was detected, but no loss occurred. The prosecution may also be

[18] This aspect is also reflected in the changes of the standards in domains where risk is more comprehensively regulated, such as banking (for example the evolution of Basel Accords I, II, III), See: Laurent Balthazar, *From Basel 1 to Basel 3. The Integration of State of the Art Risk Modelling in Banking Regulation*, (Palgrave Macmillan, 2006). Similarly, the FATF Recommendations evolved over time (see: http://www.fatf-gafi.org/topics/fatfrecommendations/documents/review-and-history-of-fatf-standards.html, last visited: 20.08.2015).

inclined to look for a possibility to punish excessively risky management, if it is impossible to prove the loss according to the relevant standard of proof or where it is impossible to link it to the manager's act.

These cases will remain at the borderline between causing a loss to the company because of wilful misuse of the company assets and decisions, which were technically correct and taken without breaching any applicable rules, but turned out to be failures, which resulted in a loss for the company. The excessively risky decision in this context does not cause loss (at least not yet), but there is a need to demonstrate that the risk was excessive, thus its analysis must significantly enter into the sphere of the quality of the business decision.

In order to examine criminalisation of excessive risk-taking three legal orders containing relevant provisions have been identified: England and Wales, France, Germany. As to the first, the Fraud Act 2006, in particular fraud by abuse of position provided for in Section 4, provides a possibility to punish a manager who dishonestly abuses his position by exposing the company to excessive risk. The French offence of *abus de biens sociaux* (provided mainly by Article L241-3 4° and 5° as well as Article L242-6 3° and 4° of the Commercial Code – *Code de commerce*) punishes high-level managers for acting against the company's interests. Exposing the company to excessive risk is one of the forms of acting against these interests. The offence of *Untreue* in German law (Section 266 of the Criminal Code, StGB) punishes improper conduct in relation to entrusted property if the conduct results in damage. However the theory of *"schadensgleiche Vermögensgefährdung"* associates, under certain conditions, endangerment with damage and thus excessive risk-taking is also incriminated.

By criminalising managers' excessive risk-taking criminal law enters a sphere, which is at the core of the activity it affects. At the same time it provides for criminal punishment for courses of conduct that without doubt can be extremely harmful. In none of the chosen countries is taking excessive risk criminalised as such, but rather remains one of the possibilities to commit the offence mainly targeting acts causing effective loss. It is therefore highly relevant to shed light on this type of managerial misconduct in existing law and to evaluate whether it is justified and proportionate to criminalise it, and if so, under which conditions and to what extent.

The importance of the analysis is linked with its novelty. The problem of risk as such is not new in legal scholarship and policy discourse, including the criminal law doctrine.[19] As to the latter, risk is particularly relevant in the context of liability for omission, *mens rea* in the form of *dolus eventualis*, recklessness or negligence, as well as regarding justifications linked to permitted risk. However the question whether managerial decisions bearing excessive risk to the company are and should be criminalised has not been thoroughly treated.

There has been so far no comparative research on existing criminalisation of excessively risky decisions by managers.[20] In the three countries selected for comparison the attention given to the topic varies. There is no analysis particularly dedicated to the topic in the English and the French literature, which only mentions exposing to excessive risk as one of the possibilities of committing the respective offences, without however providing for complex investigations of the problems linked with it. In this sense the chapters providing the analysis of these two national systems constitute a completely new input to the discussion on the application of the Fraud Act 2006 in England and the offence of abuse of company assets in France.

In contrast, the literature on the topic is abundant as regards Germany. However, even in this language, there has been no comparison with other legal

[19] See for example: Herfried Münkler, Matthias Bohlender, Sabine Meurer (eds.), *Sicherheit und Risiko: über den Umgang mit Gefahr im 21. Jahrhundert*, (Bielefeld: transcript Verlag, 2010); Thomas Sutter-Somm, Felix Hafner, Gerhard Schmid, Kurt Seelmann, *Risiko und Recht. Festgabe zum Schweizerischer Juristentag 2004* (Basel, Genf, München: Helbing & Lichtenhahn, 2004); Richard V. Ericson, Kevin D. Haggerty, *Policing the Risk Society* (Oxford University Press, 1997); Jenny Steele, *Risks and Legal Theory* (Oxford and Portland, Oregon: Hart Publishing, 2014); Alexandre Kiss, 'Droit et risque', *Archives de Philosophie du Droit*, 36 (1991), pp. 49-53; Stephen R. Perry, 'Responsibility for Outcomes, Risk, and the Law of Torts', in: Gerald J. Postema (ed.), *Philosophy and the Law of Torts* (Cambridge: CUP, 2001); Jules Coleman, *Risks and Wrongs* (Oxford: Oxford University Press, 1992); W. Kip Viscusi, 'Corporate Risk Analysis: A Reckless Act?', *Stanford Law Review*, 52 (1999-2000) pp. 547-597; Sara Porro, *Risk and mental element: an analysis of national and international law on core crimes* (Baden-Baden: Nomos, 2014); Pat O'Malley (ed.), *Crime and the Risk Society*, (Aldershot: Ashgate/Dartmouth, 1998); Liv Jaeckel, *Gefahrenabwehrrecht und Risikodogmatik: moderne Technologien im Spiegel des Verwaltungsrechts* (Tübingen: Mohr Siebeck, 2010); Marion Albers (ed.), *Risikoregulierung im Bio-, Gesundheits- und Medizinrecht* (Baden-Baden: Nomos, 2011); Mike Feintuck, 'Precautionary Maybe, but What's the Principle? The Precautionary Principle, the Regulation of Risk, and the Public Domain', *Journal of Law and Society*, 32 (2005), Number 3, pp. 371-398; Aaron Doyle, Richard V. Ericson, *Uncertain Business: Risk, Insurance, and the Limits of Knowledge*, (Toronto: University of Toronto Press, 2004).

[20] For preliminary reflections on the topic see: Stanislaw Tosza, 'La responsabilidad por los actos riesgosos de gestión en las sociedades de capital: Un estudio de derecho comparado', *La Revista Penal* (2010), nr 26, pp. 177-186.

systems as to the problems of excessive risk-taking, nor has the German liability for excessive risk-taking been presented in English.[21]

The innvovative character of this study results from the fact that it provides for the first comprehensive blueprint of criminalisation of managerial decisions, which expose companies to excessive risk. It is based on an in-depth analysis of the reasons in favour of and against criminalisation of such decisions.

The following sections of this chapter will present the scope of this study together with the related research questions and clarify the terminology (2. Design of the research) as well as explain the methodology used in this research (3. Methodology). The last section will present the outline of the analysis (4. Outline of the analysis).

2. Design of the research

2.1. Objectives of the research and research questions

The objective of this research is to study the problem of excessive risk-taking by managers in the existing law in three jurisdictions and to examine if it is legitimate and justified to criminalise such acts and, if so, under which conditions. This analysis should show whether the three legal orders provide for criminalisation in a form which is legitimate and proportionate and, if it is at all justified and proportionate to punish managers for excessive risk-taking, how to design criminalisation of such acts. This proposal may serve the national legislator as well as potentially the European one.[22]

These objectives are summarised in the following research questions:

1. What are the models of criminalising excessive risk-taking by managers?

[21] See for example the volume of ZStW devoted to the offence of *Untreue*, which however does not concentrate on risk, Zeitschrift für die gesamte Strafrechtswissenschaft, Volume 122, Issue 2 (Aug 2010).

[22] For instance, by virtue of Article 83 (2) TFEU, if criminalisation of excessive risk-taking or more broadly managerial misconduct becomes "essential to ensure the effective implementation of a Union policy". It is important to stress that this study does not examine the question whether criminalisation of excessive risk-taking should be made at the EU level or what role EU should play in tackling this problem. In order to ask this question, it would be necessary to perform a complex analysis including issues related to the EU legal system, which would go beyond the scope of this study.

2. Is it legitimate and proportionate to criminalise excessive risk-taking by managers?

3. If it proves legitimate and proportionate to criminalise excessive risk-taking by managers, what should be the conditions and boundaries of such a criminalisation? Do the prohibitions in the examined models fulfil these criteria?

2.2. Terminological clarifications

Three terms used to formulate the topic of this study require explanation: risk, excessive and manager.

The word 'risk' is used in many different contexts and with different meanings.[23] "The concept of risk seems to be uncertain even to scholars of etymology".[24] Some scholars find its origin in the Spanish noun '*risco'*, which means "a pointed, sharp rock" or "dangerous for navigation" or the Latin verb '*rescare'* meaning 'to cut', but also to navigate against the stream.[25]

The Stanford Encyclopedia of Philosophy provides five understandings of the notion:

"1. risk = an unwanted event which may or may not occur. […]

2. risk = the cause of an unwanted event which may or may not occur. […]

3. risk = the probability of an unwanted event which may or may not occur. […]

4. risk = the statistical expectation value of an unwanted event which may or may not occur. […]

[23] Les Coleman, *Why Managers and Companies Take Risks* (Heidelberg: Physica-Verlag, 2006) p. 21.
[24] Oliviero Roggi, Omar Ottonelli, 'An Evolutionary Perspective on the Concept of Risk, Uncertainty and Risk Management', in: Oliviero Roggi, Edward Altman (eds.), *Managing and Measuring Risk. Emerging Global Standards and Regulation After the Financial Crisis*, (Singapore: World Scientific Publishing, 2013) p. 4.
[25] The information about etymology and translations come from: Roggi, Ottonelli, 'An Evolutionary Perspective on the Concept of Risk…' (note 24) p. 4. See also Walter W. Skeat, An etymological dictionary of the English language (New York: Macmillan, 1882) p. 512.

5. risk = the fact that a decision is made under conditions of known probabilities ('decision under risk' as opposed to 'decision under uncertainty')"[26]

According to the Institute of Risk Management's definition, risk is: "the combination of the probability of an event and its consequence. Consequences can range from positive to negative."[27]

Risk is painstakingly categorised in particular in the literature on risk management. It can be differentiated as downside risk (pure risk), which includes only the possibility of a negative outcome, or two-way risk (speculative risk) which implies that the outcome may be better or worse in comparison to what is expected.[28] It can be classified as to its type: business risk, non-business risk, financial risk, operational risk, and event risk. It can also be classified as to its source as coming from: the physical, social, political, legal, general economic or operational environment(s).[29]

This study focuses on criminal liability for mismanagement consisting in exposing the company to excessive risk. It does not differentiate between different types or sources of risk as the question of relevance or irrelevance of certain risks is not inherent to criminal liability, but belongs to the rules governing the domain in question. Moreover, as the question of liability makes sense only in the case of (at least potentially) negative consequences, risk will be understood here only as downside risk.

Hence, the notion of risk in this study will be understood as the probability of a negative consequence.

The second important question is what it means for risk to be excessive. Risk is a different notion from danger or hazard. The notion of risk implies an ambition to control the future.[30] This implies a possibility to either control or at least predict the risk. While there is abundant literature on risk in finance, it implies that risks are

[26] 'Risk' in: Stanford Encyclopedia of Philosophy, First published Tue Mar 13, 2007; substantive revision Thu Aug 11, 2011, http://plato.stanford.edu/entries/risk/ (retrieved on 9.07.2015).
[27] The Institute of Risk Management: https://www.theirm.org/about/risk-management/ (retrieved on 9.07.2015). "This is a widely applicable and practical definition that can be easily applied" – Paul Hopkin, *Fundamentals of Risk Management*, Institute of Risk Management (London, Philadelphia, New Delhi: Kogan Page Limited, 2010), p. 11.
[28] Brian Coyle, *Risk Awareness and Corporate Governance* (Financial World Publishing, 2002) p. 2.
[29] Both classification after: Coyle, *Risk Awareness and Corporate Governance* (note 28) p. 5-8.
[30] Anthony Giddens, 'Risk and Responsibility', *The Modern Law Review*, 62 (1999), No 1, pp. 1-10, 3.

diversifiable. One can also speak about non-diversifiable decisions that managers take making a more or less sophisticated risk-assessment, which is a domain of management.[31]

The answer to the question whether the risk taken by the manager was excessive is crucial for criminal liability for offences, which punish this kind of decision. It is however impossible to provide it *in abstracto*. This answer will depend on a plethora of factors and standards applicable to particular commercial activities, concrete businesses or deals and contexts. An abstract definition for excessiveness of risk cannot take all these particularities into account. Therefore it is submitted here that criminal law cannot provide for such a definition. This is also linked with the function criminal law should play among other branches of law in the protection of legal interests. While these other branches (civil or administrative) are tasked with the overall protection of such interests, criminal law should only intervene as regards select, particularly serious infringements and thus may rely on the regulation of a particular domain provided for by other branches of law or non-legal tools. Criminal liability examined here enters the scene on the condition that a risk was excessive according to the applicable standards.[32] Consequently this study avoids answering the question what is excessive and adopts a formal approach: the risk is excessive when it is considered excessive within the relevant context (i.e. the relevant domain of law, the relevant type of business or deal, etc.).[33]

This approach is similar to the one a criminal judge would need to take in many cases, where it would be necessary to call an expert witness in order to analyse whether the risk was excessive or a normal risk that the manager was allowed to take.[34] At the same time such assessments are no stranger to the everyday business of companies.[35] Where it is impossible to determine whether the risk was excessive or

[31] Coleman, Why Managers and Companies Take Risks (note 23) p. 21.
[32] Of course this will need to be proved in the criminal process, depending on concrete requirements of the offence in question.
[33] In view of this definition, the study will omit the problems which result from acts committed against the interests of one of the companies being part of a corporate group (and being in particular in the interests of the group). If the level of risk to which a company may be exposed is different than when it is contituted outside such a structure, then the concrete level of excessivness changes.
[34] See also an interesting study on biases as regards risk among judges: W. Kip Viscusi, 'How Do Judges Think about Risk?', *American Law and Economics Review*, 1 (1999), issue 1, pp. 26-62.
[35] See for instance the reflection of the German Constitutional Court (*Bundesverfassungsgericht*) in the judgement assessing the conformity of the offence of *Untreue* with the German Constitution: BVerfG (23.06.2010) NJW 2010, 3209-3221, 3220 at [146].

not, ultimately the *in dubio pro reo* rule will have to be applied.[36] Another relevant question is related to the perception of risk as excessive or normal in the given circumstances.[37] While it is necessary to establish that the transaction was objectively abnormal, its perception as such will be the question of the manager's *mens rea*.

The third notion which requires explanation is what is meant by the notion of "manager". One of the famous quotes from Peter Drucker, considered the "founder of modern management",[38] says that "[e]xecutives do many things in addition to making decisions. But only executives make decisions. The first managerial skill is, therefore, the making of effective decisions."[39] Companies vary as to the level of complication of their managerial structure, from very simple structures in small companies, flat structures, to typical hierarchical structures including senior, middle- and lower-level managers. While the rules for managers may vary, in particular as regards the senior management, whose duties are often prescribed by *inter alia* company law statutes, this analysis is not limited to a particular group, but includes all types of managers. Therefore this term will encompass all persons allowed to decide upon the company's assets, who may take decisions, which expose the company to a risk of loss.

The approach to the term "manager" in this study is functional. It will mean a company official at any level, who is empowered to take decisions (alone or with other persons) affecting the assets of the company and who, while taking these decisions, enjoys a certain level of discretion. The latter condition is necessary to exclude persons who perform only mechanical tasks within the company. The approach adopted does not automatically imply that there is or there should be no difference between different categories of managers.

The analysis will be limited to managers of companies, which have legal personality and their own assets. While the legal framework of company law may differ significantly between national systems, the typical models for such companies are the limited liability company (*société à responsabilité limitée*, *Gesellschaft mit*

[36] BVerfG (23.06.2010) NJW 2010, 3209-3221, 3220 at [151].
[37] As to differences in attitude towards risk among managers see: Coleman, Why Managers and Companies Take Risks (note 23) in particular: Chapter 7. Why Managers Take Risks.
[38] Steve Denning, The Best Of Peter Drucker, Forbes 29.7.2014, http://www.forbes.com/sites/stevedenning/2014/07/29/the-best-of-peter-drucker/ (retrieved on 9.07.2015).
[39] Peter F. Drucker, *Management: Tasks, Responsibilities, Practices* (Oxford et al., Butterworth-Heinemann, 1974 reprint of 1999) p. 374 (Chapter 29: The effective decision).

beschränkter Haftung) and the public limited company (*société anonyme*, *Aktiengesellschaft*).[40] The analysis will mainly focus on these types of companies.

The managers are not necessary solely responsible for decisions, which expose the company to excessive risk. They might have collaborated with other managers. It is also possible that they received help from assistants or information from external experts. There may exist cases where such persons have important influence on the decision taken and bear responsibility (in general terms) for its potentially detrimental effects. Usually the liability of such persons will be linked with rules on liability for cooperation in the commission of the offence. While it is impossible for this study to provide for a comprehensive comparative analysis of these rules, the study would be incomplete without verifying whether these persons might also be subject to criminal liability and under which conditions.

One more notion, which has been used to define the scope of this study deserves to be explained, namely "legitimacy". The study in Chapters VI-VII analyses whether criminalisation of excessive risk-taking is legitimate and, if so, how a legitimate provision could be formulated. There exist vast literature about the concept of legitimacy and a summary of the discussions related to this term would go beyond the objectives of this study.[41] The term "legitimate" will be understood here as justified in a rational way. The existence of a legal order respecting the rule of law as well as liberal approach to criminal law are presumed. However, the analysis in these chapters will transcend the remits of a concrete legal order. In this sense it will be contrary to an analysis of legality (whether the legislator is allowed by law, e.g. by the constitution, to issue criminal law provisions of certain kind), which would necessary be limited to concrete legal orders, i.e. be system-immanent. The system-transcendent approach requires the use of commonly respected justification theories and principles, such as Harm Principle, *Rechtsgut* theory, *ultima ratio* and Principle of Legality (as will be explained more in details below). While these theories and principles cannot

[40] For a comparative analysis of these types of companies in the English, French and German legal systems, *inter alia*, see: Mads Andenas, Frank Wooldridge, *European Comparative Company Law* (Cambridge: Cambridge University Press, 2009); Andreas Cahn, David C. Donald, *Comparative Company Law*, (Cambridge University Press, 2010) – the latter only as regards Germany, the UK and the USA.

[41] A compact summary is provided at: 'Political Legitimacy' in: Stanford Encyclopedia of Philosophy, First published Thu Apr 29, 2010; http://plato.stanford.edu/entries/legitimacy/ (retrieved on 13.01.2016); see also Ferry de Jong, 'A Reciprocal Turn in Criminal Justice? Shifting Conceptions of Legitimate Authority', *Utrecht Law Review*, 9 (January 2013) issue 1, pp. 1-23.

give a one-directional or decisive guidance as to whether and how to criminalise the analysed behaviour, they offer a narrative within which a rational argumentation can be build in favour or against considering a solution to be legitimate. Only against the backdrop of the outcome of this system-trascendent analysis, the three legal orders can be evaluated.

2.3. Scope of the research

This study will examine criminalisation of acts and omissions committed by managers, which expose their companies to excessive risk of loss. An exemplification of situations which are meant here is given by the five cases presented in the next section (see: 3.3. Sample cases). This study intends to be a contribution to legal scholarship on various levels: by providing an analysis of national rules of criminal liability for excessive risk-taking; by furnishing comparative analysis and evaluation of these provisions; by examining the conditions determining whether excessive risk-taking should or should not be criminalised; by proposing a model for criminalisation based on this analysis.

In order to fulfil these objectives an appropriate methodology has been chosen which will be explained in the following section. This section will present the scope of the research, which aspects have been selected for analysis and which have been left out, along with the reasons for this.

The questions formulated in this study concentrate on the problem of criminalisation and thus are an issue of substantive criminal law. Punishing managers for excessively risky decisions may also evoke procedural law questions, such as, as already mentioned above, how to establish proof that risk was excessive. However, answering procedural law questions would require another body of research taking into account a plethora of aspects concerning this domain of criminal law. The question of how to procedurally deal with cases of excessive risk-taking is very different from the question of whether such acts should be criminal. The latter issue naturally should be treated first, but has not been extensively examined in legal scholarship. Hence, problems of procedural law will not be dealt with here.

The research will also omit the problems of the choice of sanction. While the question as to which type of punishment is best suitable for managers is no doubt of high importance, it would require broader research involving an in-depth analysis of different types of justification for punishment and the effectiveness of the application of various types of penalties to managers. However, this issue is not particularly linked to the question of excessive risk-taking, but concerns rather the punishment of managers in general.

The problem of exposing to risk by managers can have different aspects, if analysed from the perspective of protected legal interests. Decisions of managers might result in endangering the assets of the company and its general well-being. They may also put in danger the stability of the financial system, the economy and potentially society as a whole, if the endangerment of the company in question may have such systemic impact ("too big to fail"). These decisions concern the question of the management of the company as such, thus the relationship between the manager (agent) and the company (principal). The well-being of the company is also linked to the interests of the shareholders, and also stakeholders (such as creditors or employees) who benefit from the correct functioning of the company. The offences protecting these interests will be analysed in this study.

There exist, however, many other categories of interests that may be endangered by the acts of managers. Decisions of managers may have an impact on the safety of the employees, may lead to introducing excessively dangerous products to the market or creating risks of an ecological catastrophe. Criminal liability for these acts presents its own particularities linked to the protected legal interests and the modalities of infringing them. Including them into the scope of this research would require an analysis taking into account all of these aspects, distant from the problem of criminalisation of wrongful management of companies as such. Therefore these problems will be left out of this study.

The study also excludes from its scope the question whether acts which expose the company to a risk but do not entail the management of company assets are or should be criminalised. An example of such acts would be prohibitions, such as non-compete clauses, breaches of which might expose the company to a risk of loss. Any analysis of these types of acts would need to address particular problems and

rationales linked to these types of acts, which would divert this study from its main objective.

This study focuses on the correctness of the management of company assets. The principal victim of the misdealing analysed in the following chapters is the company, whose assets were managed in an excessively risky manner. Hence, the criminal liability of the company itself is necessary excluded for such acts and will not be analysed in this study.

Without foretelling the conclusions of this study, two theoretically possible approaches to the criminalisation of excessive risk-taking might be distinguished. The first, which will be referred to here as the general approach, provides for an offence which defines an act of mismanagement in an abstract way and leaves it to the judge to verify whether mismanagement occurred, be it according to the criteria of the offence or by reference to criteria given in other branches of law. Such a general offence relies on a more or less precisely defined, open-ended catalogue of forms through which mismanagement may be committed.

The second approach would consist of providing concrete rules of conduct, duties of diligence (the aim of which is to avoid exposing the company to excessive risk) and of providing for offences criminalising breaches of such rules. Such special offences either contain in the definition the description of a concrete act that should be avoided, or refer to such a definition. They refer to a concrete duty and not to a general standard or a set of duties that define the position of the manager in general.

Furthermore, these two approaches do not predetermine the *mens rea* requirement and can, theoretically, appear as intentional or negligent offences.

The two approaches are not mutually exclusive. Moreover, as will be explained below, intermediary solutions comprising aspects of these two approaches are possible.

This study will focus only on general offences, excluding special offences from its scope. There are two main reasons for such exclusions: one theoretical and one practical. The theoretical reason is that in order to justify why certain concrete acts should or should not be performed it is mainly necessary to rely on the reasoning embedded in the domain of law regulating the type of business in question. For

example if certain rules concerning banks were to prevent these companies from being exposed to excessive risk of loss they are embedded in the set of banking law provisions and depend on policy choices relative to that branch of law. Criminal law could potentially be used to enforce them and such a criminalisation would have to respect basic principles of criminal law, such as *nullum crimen sine lege*. However criminal law analysis would have very little to add to the reasoning on why they should be enforced through criminal punishment, as the reasoning would belong to the domain of banks and depend on other rules of banking laws, the way they are enforced and the priorities of the legislator in this regard. Whilst this may be considered a normal aspect of the subsidiarity of criminal law, the reasoning within the latter domain can be much more informative as regards general offences. Since they do not refer to a concrete, extra-penal, rule, they require a justification *in abstracto*, which is much more embedded in criminal law reasoning, without of course being completely disconnected from the branches of law, which also regulate the domain(s) in question.

The practical reason for excluding special offences is that it would necessarily transform the analysis into a superficial encyclopaedia of different provisions of various domains of law, leaving little or no space for an in-depth study capable of providing the reader with insights into what problems are created when criminally assessing excessively risky management as well as why and how such acts should be criminalised.

While this study will solely focus on general offences, this does not mean that the possibility of using the special offences to contain managerial excessive risk-taking will be ignored in its normative part. It will, indeed, be especially relevant for the conceptual part in Chapters VI and VII where the reasons for criminalising such acts are examined and a proposal for model regulation is formulated.

As mentioned above, the two categories are not absolute and mixed models are possible. For example the application of a general provision may be restricted to a limited number of domains. It is also possible that while describing the provisions the legislator refers to a long but limited catalogue of rules. The classification proposed above should enable delimitating the scope of the analysis in a way, which would exclude aspects that cannot make a valuable contribution. There is however no reason

to exclude offences, which present such hybrid qualities, if they might be important for understanding models of criminalisation of managerial excessive risk-taking. Such a hybrid offence is provided for in the German legal system (Section 54a of the Banking Act). While it requires a breach of the rule of risk-management, the list of these rules is provided by the statute. At the same time, the offence provides requirements, which typically belong to criminal law analysis, such as the requirement of result and its ascription to the conduct. Therefore this offence cannot be considered as mere criminal law enforcement of rules provided by a banking law statute, and will be analysed in this study.

3. Methodology

3.1. Comparative approach

The methodological approach chosen for this study is composed of an in-depth study of the three selected legal systems, functional comparison of identified solutions as well of a normative study aiming at proposing recommendations for a use of criminal law to counter excessive risk-taking. The results of the latter analysis inspired by the findings of functional comparison will be used to evaluate the approaches in the three selected legal orders.

Comparative law is both a purpose, i.e. a discipline in itself, and a method.[42] In the former sense, it is a body of knowledge about different national systems, "consisting of factual information, recognition of structures, and understanding of fundamental issues".[43] Comparison of legal solutions is also a method used with different purposes and different methodological approaches have been developed (e.g. functional or cultural comparison,[44] postmodern comparative law, socio-legal comparative law and numerical comparative law[45]). In both contexts comparative law

[42] Esin Örücü, 'Developing Comparative Law", in: Esin Örücü, David Nelken, *Comparative Law. A Handbook*, (Oxford, Portland: Hart Publishing, 2007) p. 48; Mathias Reimann, 'The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century', *American Journal of Comparative Law*, 50 (2002), pp. 671-700, 683.
[43] Reimann, 'The Progress and Failure of Comparative Law…' (note 42) p. 684.
[44] Ralf Michaels, 'Rechtsvergleichung', in: Jürgen Basedow, Klaus J. Hopt, Reinhard Zimmermann, *Handwörterbuch des Europäischen Privatrechts*, (Tübingen: Mohr Siebeck, 2009), p. 1266.
[45] Mathias Siems, *Comparative Law*, Cambridge 2014, pp. 97-187.

is subject to extensive theoretical discussions,[46] spreading from absolute despair about the possibility to make sensible comparison to criticism that comparison is done without any methodological reflection and looking for middle solutions.[47]

One of the methodological problems is the extent to which a sensible study of such a phenomenon as the criminalisation of excessive risk-taking must involve cultural aspects of the analysed systems, in particular as regards business and legal culture, which is one of the points of discussion in theoretical reflections on comparative law.[48] A radical approach requiring a full understanding of all elements influencing the state of the law as well as its practice leads to an epistemological impossibility to encompass all the relevant phenomena and complexities of culture.[49] A radical consequence of such an approach would lead to abolishing the whole discipline of comparative law, which seems farfetched.[50] The influence of culture, in particular legal culture, on legislation should not be overestimated, as various plausible arguments have been formulated against it. One of them is based on attacking the underlying assumption of a radical approach, which presumes consistency of a legal culture while overrating differences with other cultures.[51] The second one reminds us that not only does culture influence the law, but also the law influences the culture of any given society.[52] Furthermore, it is fair to consider that the law already reflects different aspects of culture and its study allows the researcher to

[46] See for example: Konrad Zweigert, Hein Kötz, *An introduction to comparative law*, 3rd edition (Oxford: Clarendon Press, 1998); Örücü, Nelken, *Comparative Law…* (note 42); Mathias Reimann, Reinhard Zimmermann (eds.), *The Oxford Handbook of Comparative Law*, (Oxford University Press 2006/2008); Maurice Adams, Jacco Bomhoff (eds.), *Practice and Theory in Comparative Law*, (Cambridge University Press, 2012); Siems, *Comparative Law* (note 45); Pierre Legrand, 'How to compare now', *Legal Studies*, 16 (1996), pp. 232-242. For an interesting polemic with the postmodernist critique of comparative law see: Anne Peters, Heiner Schwenke, 'Comparative Law beyond Post-Modern', *International and Comparative Law Quarterly*, 49 (2000), pp. 800-834, in particular 811ff.

[47] Reimann, 'The Progress and Failure of Comparative Law…' (note 42) p. 689; Maurice Adams, Jacco Bomhoff, 'Comparing law: practice and theory', in: Adams, Bomhoff, Practice and Theory in Comparative Law (note 46) p. 1.

[48] David Nelken, 'Defining and Using the Concept of Legal Culture', in: Örücü, Nelken, *Comparative Law…* (note 42), pp. 116ff.

[49] Legrand, 'How to compare now' (note 46) p. 236. Nils Jansen, 'Comparative Law and Comparative Knowledge', in: Reimann, Zimmermann, *The Oxford Handbook of Comparative Law* (note 46) p. 306.

[50] See the analysis of different positions in Mathias Siems, 'The End of Comparative Law', *The Journal of Comparative Law*, 2 (2007), pp. 133-150 (read in the version available on www.ssrn.com, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1066563 – the referenced fragment is on pp. 8-9 of that version).

[51] Ralf Michaels, 'Rechtskultur', in: Basedow, Hopt, Zimmermann, *Handwörterbuch des Europäischen Privatrechts* (note 44) p. 1258.

[52] Ralf Michaels, 'Rechtskultur', in: Basedow, Hopt, Zimmermann, *Handwörterbuch des Europäischen Privatrechts*, p. 1256.

reveal what is necessary. An all-encompassing analysis of factors that influence economic policy and its particular aspects would require a separate and quite broad study.

However this study, applying the functionalist approach, as will be explained below, does not concentrate on the interaction between law and culture or society, but attempts to understand criminal law solutions with regard to the phenomenon of managerial excessive risk-taking. It will be assumed therefore that the relevant aspects can be detected from the legal scholarship in each of the legal systems analysed. The study will, however, concentrate more on the consequences of the chosen solutions, as they will shape the economic climate.

3.2. Functional comparison

The functionalist approach requires that legal rules must be 'seen purely in the light of their function, as an attempt to satisfy a particular legal need'.[53] This means that the comparison should begin with a concrete problem and look for solutions to this problem in the selected legal orders. This will be the approach taken in this study. Since its aim is to examine the criminal law reaction to excessive risk-taking, the comparison will be limited to criminal law solutions and will not venture into the domains of administrative or civil legal tools or self-regulation. The objective is to examine what role criminal law plays and should play in regulating an aspect of economic life, which is so close to the core of the activity in question, taking into account the particular characteristics of this branch of law. In other words, while the taking of risks is inherent to business activity, the question is when criminal law does or should intervene, in relation to which legal interests and under which conditions.

The structure of this study is what Mathias Simms calls: "the typical structure of a comparative paper", consisting in: preliminary considerations, description of the laws of the chosen countries, comparing those laws and finally critically evaluating them while also proposing policy recommendations.[54] The novelty of this work does

[53] Zweigert, Kötz, *An introduction to comparative law* (note 46) p. 44. See also the critique of this view in: Maurice Adams and John Griffiths, Against 'Comparative Method' in: Adams, Bomhoff, Practice and Theory in Comparative Law (note 46) pp. 283ff.
[54] Siems, *Comparative Law* (note 45) p. 13.

not come from the method, but from its subject, which has not been studied in depth in a comparative context. In two out of the three national systems selected for comparison the question of criminalisation of excessive risk-taking by managers has not been extensively studied. German literature, providing extensive material on German law, seems to be an exception, not only among the chosen systems.

"[M]ere study of foreign law falls short of being comparative law".[55] However "[k]nowledge of foreign law is an indispensable prerequisite to explicit comparison, information about other legal regimes is the discipline's most valuable contribution to legal practice, and its production is what most comparatists do in fact most of the time."[56] Therefore the first part of this study (chapters II-IV) will be dedicated to the analysis of national systems. As described above, the need for such chapters comes not only from the necessity to create a common platform for further comparison, but also in order to analyse the French and in particular the English legal systems, where the scholarship has not yet shed enough light on the problems of excessive risk-taking in the context of available offences.

The approach adopted in these three national chapters is doctrinal and focuses mainly on the legislation in the three chosen national systems. It analyses the provisions in these systems taking into account each system's language, available jurisprudence and doctrine. It is an obvious statement that it is necessary not to limit the analysis to the law on paper but also to take notice of the law in action.[57] The question is not only to read the law and its interpretation but also to verify how it really works in the cases in question here. Moreover it is essential to examine how the law and its components work in context as it may be influenced by different factors which are particular to the system in question.[58] The final meaning of these components may be very different to that suggested by a *prima facie* reading of relevant provisions. The jurisprudence of France and Germany together with their doctrinal analysis generally suffice for a good understanding of the state of the art. As to England, where the jurisprudence is very limited, an inquiry into practice in the Serious Fraud Office was conducted.

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[55] Zweigert, Kötz, *An introduction to comparative law* (note 46) p. 6.
[56] Reimann, 'The Progress and Failure of Comparative Law…' (note 42) p. 675.
[57] Reimann, 'The Progress and Failure of Comparative Law…' (note 42) p. 679.
[58] Koen Lemmens, 'Comparative Law as an Act of Modesty', in: Adams, Bomhoff, *Practice and Theory in Comparative Law* (note 46) p. 315.

The study of the three national systems has been conducted mainly as desk research by means of available literature and jurisprudence. Moreover research stays in all three analysed countries have been conducted. Furthermore interviews with national experts have been conducted and the findings as regards the three systems have been verified by national experts.[59] As regards the English legal system the said interviews in the Serious Fraud Office has been conducted. Due to lack of available statistical data, no analysis of the latter has been included. The study has also not examine the practice of lower level courts.

The three national systems will be compared in Chapter V. Whereas comparatists are often accused of an exaggerated tendency to look for similarities,[60] this study will focus on both similarities and differences. However the choice of the legal systems, which will be explained below, was made with the differences in mind. The methodology of this comparison is to look for functional equivalents and draw conclusions as to similarities and differences of the solutions, which should on the one hand give an in-depth insight into each of the systems and on the other hand lead to detecting relevant issues for the normative part of the study. The comparison in Chapter V will not evaluate the national systems, as this will be done in the concluding chapter, after developing the normative framework and the proposed model.

3.2.1. Choice of national systems

Three national systems have been chosen for this comparison: England and Wales, France and Germany. There are three main reasons for this choice. First and foremost, these systems offer very different approaches to the criminalisation of excessive risk-taking. Secondly, they represent fairly different systems of criminal law, and have a tradition of inspiring other legislators. Thirdly, Germany, the United

[59] The author expresses his particular gratitude to Professor John Spencer (Cambridge University), Professor Juliette Tricot and Professor Yvonne Muller-Lagarde (Université Paris Ouest Nanterre La Défense) and Professor Thomas Weigend (University of Cologne) for their guidance in completing the respective national chapters. All remaining mistakes are my own.

[60] Legrand, 'How to compare now' (note 46) p. 240; According to Legrand: "[T]he comparatist must learn to detect, to understand, to value, indeed, to cherish difference", *ibidem*.

Kingdom and France are the three biggest economies in Europe, and the biggest globally after the United States, China and Japan.[61]

Criminalisation of the behaviour in question in the English system goes through the offence of fraud, which is understood much more broadly than in the continental criminal laws. Besides fraud by false representation, which resembles the classic form of fraud from the continental point of view, it comprises offences of fraud by failing to disclose information and fraud by abuse of position. It is particularly the latter provision, which will be the most interesting for the purpose of this study. The distinguishing element of the English construction is the focus on the requirement of dishonesty, which presents both *actus reus* and *mens rea* characteristics. Otherwise, the *actus reus* of the offence is very limited requiring only that the perpetrator hold a position of trust and abuse this position. The *mens rea* is mainly composed of a broadly designed intention to expose to a risk of loss. The appreciation of dishonesty, with its theoretical and practical particularities will be decisive for the defendant's liability. It is thus unnecessary to prove result or causation, which creates much larger possibilities of conviction and facilitates the task of the prosecution. Additionally the common law offence of conspiracy to defraud, although criticised for its extremely broad scope, has not yet been abolished despite proposals to do so, and was also used to punish taking excessive risk with entrusted assets. Finally, the newly-introduced offence of reckless banking may allow the judges to punish overly risky senior managers of large banks. While the theoretical framework of this approach will be very different from the two other systems, it is highly relevant to verify how this plethora of very broadly designed offences works in practice, also in view of the particularities of the common law system.

The French legislator took a very different approach to the criminalisation of misuse of entrusted assets by introducing the offence of *abus de biens sociaux* (abuse of company assets). Contrary to the German and English approaches, it precisely names possible perpetrators, providing for a variation of the offence for different types of companies. Similarly to the English system it does not require result, but punishes only acting against the interests of the company whilst pursuing one's own interests. Exposing the company to (excessive) risk of loss can be understood as

[61] According to the Gross domestic product 2014 as provided by the World Bank: http://data.worldbank.org/data-catalog/GDP-ranking-table (retrieved on: 8.07.2015)

acting against its interests. The scope of possible understanding of the *mens rea* element of "own interest" will be the key element to define the scope of criminal liability.

The German *Untreue* model is interesting for various reasons. Firstly, it concentrates on an offence, which expressly requires proof of damage. While this requirement should exclude its application to excessive risk-taking, the jurisprudential interpretation extended this concept including risk under certain conditions. Contrary to the two other systems, there is still a need to prove a concrete result (consisting in endangerment) and causation. This will have significant consequences also as regards the *mens rea* requirement of the offence. Secondly, also contrary to the other offences, the German jurisprudence regarding excessive risk-taking is abundant and has evolved over time, which bears witness to difficulties linked to the criminalisation of excessively risky decisions. Thirdly, the German criminal law has proved to be an inspiration for many other legal systems. It is a good example of the approach to protecting property concentrated around the requirement of result. Therefore it is highly interesting to examine how such a tradition is confronted with the need to tackle the problem of risk, i.e. only a probability of damage. Finally, the German system provides for an offence punishing failures in risk-management, which results in a situation of concrete endangerment to the existence of a financial or insurance institution.

It is too early at this stage to draw any comparative conclusions. It does seem, however, that this set of countries should allow the reader to survey a panorama of existing legal solutions and to make a meaningful comparative analysis. The set comprises two different continental models and a common law one. Although the provisions were designed very differently, they tend to criminalise conduct which could be summarised as dishonest handling of entrusted assets by exposing them to excessive risk of loss. One piece of legislation makes express reference to the risk of loss, whilst two others allow for a reading of their provisions to comprise risk of loss under the chosen terminology. None of the legislation criminalises the taking of (excessive) risk as such, but all texts provide for different additional criteria that make exposing the assets to risk particularly blameworthy. At the same time, all three provisions struggle with similar problems as regards the principles and rules of criminal law, such as legal certainty in describing the offence and the problem of how

to limit criminal law intervention in the domain of business decisions. Finally, two of the chosen systems include provisions punishing senior managers for failures in the decision-making process or risk management. Although they must result in concrete endangerment of the institution or its collapse, this result does not have to be intentional placing the blameworthiness on the side of excessively risky management.

3.2.2. Structure of national chapters

In order to achieve a common platform and facilitate the comparison, the three national chapters are built up according to the same structure, complemented only by necessary adaptations to the particularities of each of the systems. After identifying the relevant offences in the analysed system, the first two subchapters analyse the historical aspects of the introduction of relevant provisions and their subsequent modifications in the context of their application to excessive risk-taking. The third subchapter is devoted to the analysis of the identified offences. It is composed of sections on relevant aspects of the *actus reus* and the *mens rea*.

The two following subchapters present the possibilities to extend criminal liability through the criminalisation of inchoate offences, such as attempts, conspiracy or possession of materials to be used in the course of the commission of the offences or through possibilities to punish persons involved in the commission of the offence through different forms of perpetration, aiding or abetting. The sixth subchapter is dedicated to selected factors that may exclude criminal liability. These are: consent of the victim, orders of a superior and expert opinions. A thorough examination of other such factors would go beyond the scope of this study and it can be assumed that they would not present sufficiently interesting particularities in the context (e.g. self-defence of insanity) to justify such an analysis. As to the theoretical classification of these factors within the structure of the offence, they might be considered defences, but also they might be included in the analysis of different limbs of the offence.

The analysis of the legal systems providing the above-mentioned offences for head management of banking and insurance industries will include an examination of these provisions in the seventh subchapter. The analysis of criminal liability for all of the selected offences will be complemented in the following subchapter by a brief

presentation of the punishment provided for these offences. Before each of the national chapters is closed with concluding remarks, the penultimate subchapter will examine the relevant offences in the context of the five sample cases discussing whether it is possible to punish the acts described in these cases and which factors will determinate criminal liability.

3.2.3. Normative part and outcome

A comparative analysis can have various purposes.[62] While understanding possible solutions is the first goal of this study, their evaluation and a quest for a better/best solution is its ultimate aim, to which the second part of the study will be dedicated (chapters VI and VII).

For this purpose a legal framework will be built consisting of an analysis of reasons that trigger the introduction of criminal liability (such as protection against harm or protection of legal interests) together with an analysis of ethical aspects of excessive risk-taking, which will be completed by examining principles limiting the use of criminal law such as the principle of proportionality and the legality principle (the fair warning principle).[63] This framework will first be analysed theoretically and then in the context of excessive risk-taking by company managers. The outcome of this analysis should prepare the ground for answering the question whether and to what extent it is legitimate and justified to criminalise excessive risk-taking by managers (see also the explanation of the term "legitimate" in the section 2.2. Terminological clarifications).

This result will then be used to elaborate model criminalisation of excessive risk-taking as well as to evaluate the approach taken in each of the three examined legal orders.

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[62] Siems, *Comparative Law* (note 45) p. 2-5; Gerhard Danneman, 'Comparative Law: Study of Similarities of Differences?' in: Reimann, Zimmermann, *The Oxford Handbook of Comparative Law* (note 46) pp. 401-406 as well as Ralf Michaels, 'The Functional Method of Comparative Law', in: Reimann, Zimmermann, *The Oxford Handbook of Comparative Law* (note 46) pp. 372-380; Esin Örücü, 'Developing Comparative Law', in: Örücü, Nelken, *Comparative Law…* (note 42) pp. 53-56.

[63] A more detailed explanation of this framework is provided in the introduction to Chapter VI.

3.3. Sample cases

An additional methodological tool used throughout the whole study is a set of five sample cases illustrating typical situations of excessive risk-taking. These cases have two purposes. On the one hand they should give more flesh to the theoretical analysis, bringing the abstract comparison more to life. On the other hand, and more importantly, the sample cases will be used as an implement in order to examine at each stage of the study how they would be solved in a given situation. In this sense these cases serve to test the criminal law solutions evoking their crucial characteristics, which determines liability. In view of this function, each of the national systems will contain at its end a section where the five cases are solved according to the law of this system. The solutions given in the three examined legal systems will be compared in Chapter V. Furthermore, the model criminalisation proposed in the concluding chapter will be also tested in view of these cases.

While the sample cases demonstrate some typical occurrences of excessive risk-taking, they should not be taken as real-life cases. Most of them are based on real-life examples inspired by existing jurisprudence, but the situations were simplified so that the reader is not distracted by issues that would have limited relevance for the analysed problems (e.g. the problems of proof). Moreover, more detailed situations might implicate the need for a much more detailed analysis of a national system in question, including non-criminal law issues. While such an in-depth complex analysis might be an interesting and relevant exercise, its purposes would be different. The role of these cases is to serve as sort of a tincture or litmus paper that while applied to a concrete criminal law solution should reveal its actual characteristics.

The five cases have in common that the perpetrator is a manager responsible for safeguarding the company's financial interests, but manages the entrusted assets in a way that exposes the company to an important risk of loss. Although the manager knows of the risk and accepts to take it, he does not want the company to suffer the loss, or hopes that this will not occur, or even on the contrary, he may wish for the company to profit. For two reasons the cases leave it open whether the risk materialised or not. Firstly, the solutions will focus on the possibility to punish the manager for exposing the company to excessive risk regardless of whether the loss

actually occurs. Secondly, this approach is meant also to leave a certain flexibility making it possible to point out which variables determine criminal liability. The cases are as follows:

I. A bank manager grants a credit to a client knowing that the guarantee offered by the client (e.g. mortgage) for securing the credit would be insufficient in the case of non-payment by the client. The manager nevertheless hopes that the client will be able to repay the credit.

II. A top manager of the bank instructs lower-level managers to grant credits which are not fully secured (see above) in order to increase the bank's turnover. The top manager conceives of the possibility that some of these credits may not be repaid; however, he hopes that the overall beneficial economic situation will allow enough of these problematic clients to repay their loans so that the bank will profit. Simultaneously, he is convinced of his successful business strategy and hopes to be rewarded with a bonus and to leave the bank before any trouble might begin to occur.

III. A director of a construction company realises that he has an important surplus of money due to a very successful sale of apartments. The company needs to pay for materials and work to subcontractors, but the first creditors have to be paid only in three months. Instead of keeping the money on the bank account, he decides to gamble with it on the stock exchange (i.e. invest it in fairly aggressive way).

IV. The perpetrator is a director of a department responsible for new projects within a car manufacturing company. For the past three years the department has been working mainly on a new luxury SUV model. The model is ready, but the director is aware of a problem with the sound system integrated into the car, which is supposed to be a great asset of the car. For some reason it is not possible to eliminate interference with the on-board computer which might cause unpleasant sound. This does not put the passengers in danger, but if many models have this problem, the company might need to recall sold cars in order to repair the system. In order to resolve the problem a full reprogramming is necessary. At the same time the executives of the company are pressing to finalise the work, since the set deadline for presenting the new

model is approaching. The director decides not to disclose the problem to the executives.[64]

V. A manager becomes aware of a possibility to obtain a lucrative contract for his company from the Ministry of Infrastructure. The contract is worth several million Euros. Knowing that his company is not the most competitive on the market, he decides to increase its chances by arranging a meeting with the public official responsible for this issue and offers him an envelope with 50 000 Euros, which were assigned from the company's budget. The public official accepts the money. Eventually the company gets the contract. The manager is aware that if this becomes known to the competent authorities, the company may be stripped of the contract, banned from participating in public bidding and fined, but he hopes that these consequences will not materialise.

While the first three sample cases represent an evident use of company assets (in I and II the use is in the scope of the company activities, whereas in III the use is rather outside this scope), case IV presents a situation where the fact that the manager is using the assets is less obvious. However he takes a decicion which affects the financial prospect of the company and the act of not disclosing the information is an omission. Furthermore, the issues of security are eliminated in order to concentrate on the aspect of the risk to the company (and other interested parties).

As to the last case, although it is about corruption, which most probably could be punished as such, this study does not deal with the criminalisation of bribery. This case illustrates the questions which may arise if the illegal act of the manager risks to expose the company to sanctions (and consequences linked to them) even if the manager acted (at least in part) in the interest of the company. Here we see an example where the same act infringes different types of legal interests both public – as regards corruption - and private - as regards the company's exposure to risk. Different legal orders have different rules as to how to treat acts, which fulfil the definitions of

[64] Just before submitting this study, it has been revealed that Volkswagen manipulated tests as regards the emission of polluting substances in various models of its cars. While at this early stage it is impossible to perform a legal analysis of this affaire as a lot is still unknown, it might present similar aspects to case 4 of this study in the following sense. The managers of Volkswagen, apparently, took a decision to install the software altering the results of the tests and permitting the company to sell concerned models presenting them as less polluting and more powerful. However this decision exposed the company to rather excessive risk of costs of changes, various costly sanctions and important damage to reputation once the scheme is discovered.

two (or more) offences and it is beyond the scope of this study to examine these rules.[65]

These scenarios can also be modified so that the perpetrator acts negligently (and not intentionally). As to the first case, the manager might not know that the guarantee is insufficient, but he should have and could have known that, had he verified correctly the details of the guarantee offered. In case II, the manager did not order the employees to grant not fully secured credits, but they were doing so on their own initiative because of their concerns for the bank's turnover and in view of the bonuses linked to their success. However, the manager failed at his supervision duties and did not prevent his employees from allowing the loans under such conditions. Finally, in case IV, the manager was not aware of the failure of the sound system, but it was his duty to verify it, which he failed to fulfil. When discussing the cases in the following chapters, the possibility of convicting managers in these negligent scenarios will also be verified.

4. Outline of the analysis

The structure of this study is composed in the following way.

The first three chapters will analyse the criminalisation of excessive risk-taking in the three national legal systems (Chapter II. England and Wales, Chapter III. France and Chapter IV. Germany). The function of these chapters is twofold: on the one hand they should analyse the existing law in view of excessive risk-taking, which is in particular important as regards the English and the French legal systems, where such analysis is scarce. On the other hand they should set the scene for the comparative analysis. The chapters will follow the same structure, as described in the previous section.

Having analysed the possibilities to criminalise excessive risk-taking and setting the common ground for comparison, Chapter V will then provide the comparative analysis of the three national systems. The aim of this chapter is to

[65] The practical relevance of this sample case has been also linked with the rules on the limitation period which may result in a shorter period for corruption than for the offence protecting the company intersts as it is the case in the French legal system (see: III. France 3.1.3.2.2. Being contrary to the interests of the company).

establish what are the models of criminalisation of excessive risk-taking by managers and what are the crucial factors determining criminal liability in each of the systems and providing distinguishing characteristics for these systems. In will thus answer the first research question. The result of this analysis will provide inspiration for the normative part of the analysis and for critical evaluation at the end of chapter VII.

Chapter VI will be devoted to the normative analysis of the problem of criminalisation of excessive risk-taking. Its aim is to discuss whether it is justified and proportionate to criminalise excessive risk-taking and if yes, under which conditions and to which extent. The chapter will provide a normative framework including the theories on reasons for criminalisation (such as the harm theory and the theory of legal goods) as well as principles limiting the use of criminal law, and will further analyse the problem of excessive risk-taking by mangers against its backdrop, thus answering the second research question, i.e. whether it is legitimate and proportionate to criminalise excessive risk-taking by managers.

The outcome of this analysis will be the basis for Chapter VII, which aim is to answer the third research question. It will examine what should be the conditions and boundaries of (a) provision(s) criminalising excessive risk-taking by company managers, provided that it turns out to be possible (legitimate and proportionate) on the basis of the results of the previous chapter. Finally, the three national legal systems will be evaluated against the backdrop of this model proposal.

Chapter II. ENGLAND AND WALES[1]

1. Introduction and history

The English law offers various possibilities of incriminating excessive risk-taking by managers. Although not an object of expressed criminalisation, it has been subject to criminal punishment by way of the common law offence of conspiracy to defraud which was confirmed by three major judgments (*Sinclair*, *Allsop* and *Wai Yu-Tsang*). The recent Fraud Act of 2006 expressly included exposing to risk into the provision. While the English law provides these and many other offences, which could be applied to situations of interest for this study, its use may be countered by the requirement of dishonesty and the particularities of its understanding.

Before the Fraud Act entered into force, actions and omissions, which this act incriminates were covered, although to a limited extent, mainly by two Theft Acts dating from 1968 and from 1978. Besides the definition of theft they contained eight so-called "offences of deception"[2]. These eight offences were committed by a person who dishonestly and by deception would:

(a) obtain property belonging to another, with the intention of permanently depriving the other of it[3],

(b) obtain a money transfer[4],

(c) obtain services[5],

(d) secure the remission of an existing liability to make a payment[6],

(e) induce a creditor to wait for payment or to forgo payment with intent to permanently default on the debt[7],

[1] The law described in this chapter extends its application to England and Wales. For the sake of brevity the author uses such expressions as "English law" or "law in England" when referring to England and Wales.
[2] FRAUD Report on a reference under section 3(1)(e) of the Law Commissions Act 1965, The Law Commission (LAW COM No 276), p 7.
[3] Theft Act 1968, s 15.
[4] Theft Act 1968, s 15A.
[5] Theft Act 1978, s 1.
[6] Theft Act 1978, s 2 (1) (a).

(f) obtain an exemption from or abatement of liability to make a payment[8],

(g) obtain a pecuniary advantage[9], or

(h) procure the execution of a valuable security[10].[11]

These offences were not useful in cases of excessive risk-taking since they required a transfer of property to the perpetrator or a gain on his side in another way (e.g. obtaining of services).

In order to address these issues, English law made use of the common law offence of conspiracy to defraud, which consisted of being "party to an agreement with the common intention to defraud one or more of the persons".[12] The particularity of this conspiracy is that the act, to which the defendants conspire, need not constitute an offence.[13] Its application to excessive risk-taking by managers was confirmed by three major judgments (*Sinclair*, *Allsop* and *Wai Yu-Tsang*).

The Criminal Law Act 1977 introduced a statutory form of conspiracy (Section 1), which, in contrast, required that the perpetrator foresee the commission of an offence. The 1977 Act abolished many types of conspiracies existing at the time at common law, but spared conspiracy to defraud.[14]

Not only in the context of the punishment for excessive risk-taking, which has a marginal place in the English debate, but also with regard to the general solution to the problem of the offences related to deception and fraud, there was a consensus that the state of the law was unsatisfactory,[15] which prompted the Government to refer the issue to the Law Commission. The latter issued a report criticising both the common law offence of conspiracy to defraud for the extreme width of its scope, and the statutory offences, for being too narrow.[16] Particularly as regards the offence of

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[7] Theft Act 1978, s 2 (1) (b).
[8] Theft Act 1978, s 2 (1) (c).
[9] Theft Act 1968, s 16.
[10] Theft Act 1968, s 20 (2).
[11] The list cited after: Law Com No 276 (note 2) p. 7.
[12] *Wai Yu-Tsang Appelant v R* [1992] 1 AC 269, 269.
[13] Kenneth Cambell, 'The Fraud Act 2006', *King's Law Journal,* 18 (2007), pp. 337-347, 346.
[14] A. P. Simester, J. R. Spencer, G. R. Sullivan, G. J. Virgo, *Simester and Sullivan's Criminal Law. Theory and Doctrine*, 5th edition (Oxford and Portland: Hart Publishing, 2013) p. 310.
[15] *Simester and Sullivan's Criminal Law* (note 14) p. 609.
[16] Law Com No 276 (note 2) p. 13. The Law Commission referred mainly to the two Theft Acts (1968 and 1978), but gave examples of other acts providing for provisions punishing fraudulent acts, e.g.

conspiracy to defraud, the Commission recommended its abolition,[17] which can be seen also in the context of a general trend to abandon common law offences. It has been also pointed out in the literature that conspiracy to defraud raises questions as to its compatibility with the principle of legality, in particular the fulfilment of the requirement of legal certainty (Article 7 of the ECHR).[18]

The conclusions of the report of the Law Commission formed the basis for the Fraud Act, which was eventually enacted in 2006. The Act abolished most of the offences of deception[19] and provided for a new general offence of fraud[20] including three ways of committing it:

(a) by false representation (Section 2)

(b) by failing to disclose information (Section 3), and

(c) by abuse of position (Section 4).

Fraud by false representation (Section 2) consists of dishonestly making a false representation with an intention to make a gain for oneself or another or to cause loss to another or expose him to a risk of loss. The term false representation is understood very broadly: such a representation need not be untrue, but also qualifies as false when it is misleading.[21] A false representation may be express or implied,[22] and may concern law or facts, including a representation as to the state of mind[23].

Fraud by failing to disclose information consists of (dishonestly) failing to disclose to another person information which the perpetrator is under a legal

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fraudulent trading (Companies Act 1985, section 458), insider dealing (Criminal Justice Act 1993, section 52) and misleading statements and practices in the context of the financial markets (Financial Services Act 1986, section 47) – Law Com No 276 (note 2) p. 15.

[17] Law Com No 276 (note 2) Recommendation 5.

[18] David Ormerod, David Huw Williams, *Smith's Law of Theft*, 9th edition (Oxford University Press, 2007) p. 132.

[19] *Simester and Sullivan's Criminal Law* (note 14) p. 609, fn. 19 - Obtaining property by deception (Theft Act 1968, Seciton 15); obtaining a money transfer by deception (Theft Act 1968, Section 15A); obtaining a pecuniary advantage by deception (Theft Act 1968, Section 16); procuring the execution of a valuable security by deception (Theft Act 1968, Section 20); obtaining services by deception (Theft Act 1978, Section 1); evading liability by deception (Theft Act 1978, Section 2).

[20] The Fraud Act 2006 also provides for offence of dishonestly obtaining services (Section 11) and broadens the scope of the offence of fraudulent trading. Both offences will be irrelevant to the topic of this study.

[21] Section 2 (2) (a).

[22] Section 2 (4).

[23] Section 2 (3).

obligation to disclose with the same intention as above: to make a gain for himself or another or to cause loss to another or expose him to a risk of loss.[24]

For the commission of fraud by abuse of position the Fraud Act 2006 requires that the perpetrator occupy a position in which he is expected to safeguard, or to not act against, the financial interests of another person and he (dishonestly) abuses that position with the same intention as in the two previous modalities.[25] The abuse might be committed also by omission.[26]

One of the major differences between the new offence of fraud and the old offences of deception provided by the Theft Acts lies in the fact that fraud is a conduct crime, whereas the old offences required proof of result consisting in the defendant obtaining something from the victim (by deception).[27] According to the new design, fraud, on the contrary, does not require the proof of result.[28] The removal of this element was compensated by the *mens rea* element of intention to make a gain, cause a loss or expose to a risk of loss. It is therefore not the actual result but the result foreseen by the perpetrator which will be important for the offence. Similarly the proof of causation lost its importance, but also reappeared in the *mens rea*, since the perpetrator must have the intention that through his action the foreseen result occurs.

This change is of extreme importance since it broadens the scope of this provision significantly. This brought one author to talk about the "inchoate mode" in which fraud has been defined,[29] since there is no need to prove any actual harm to the victim. Inchoate offences criminalise courses of conduct coming close to the commission of an offence, but without requiring that the actual offence is committed.[30] To say that fraud was drafted in the "inchoate mode" suggests that the offence is able to catch the perpetrator even before he manages to actually harm the victim.[31] Not only is the offence described by use of an action-oriented formulation,

[24] Section 3.
[25] Section 4 (1).
[26] Section 4 (2).
[27] *Simester and Sullivan's Criminal Law* (note 14) p. 609.
[28] Attorney General: "The Bill has been drafted on the basis that it focuses on the conduct of the defendant rather than on the consequences of the defendant's acts." Hansard, HL July 19, 2005 col. 1414.
[29] *Simester and Sullivan's Criminal Law* (note 14) p. 610.
[30] *Simester and Sullivan's Criminal Law* (note 14) p. 291.
[31] Cambell, 'The Fraud Act 2006' (note 13) p. 341.

without requiring any result, but also the *actus reus* is described in a minimal way, which moves the weights of the analysis to the *mens rea*. The scope of the offence extends thus already to grounds which are normally occupied by preparation and attempt, without excluding the application of the two latter offences as well. Fraud is not the only offence which has been widened in this way (the scope of the offences created by the Terrorism Act 2006 could make another example) thus giving larger room for manoeuvre for the prosecutor and raising doubts in relation to the harm principle.[32] The Fraud Act 2006 was praised for its legislative technique because of its clearness. The new law is simpler and more accessible than the previous legislation, which left much uncertainty as to its scope. The "inchoate mode" of approaching fraud has however been criticised for allowing very broad criminalisation.[33]

The difference between the old and the new approaches can be shown with reference to the recent case of *Jeevarajah*, in which two defendants, who ran a shop where lottery tickets were sold, falsely informed their client that his ticket had lost whereas in reality it was a winning one. The defendants later tried to claim the money, but were unsuccessful.[34] Although their conduct would have constituted an attempt under the Theft Act, they were convicted for accomplished fraud under the new law.[35]

Another important difference compared to the old law is that fraud is currently one offence – created by Section 1 – with three different ways of committing it. This implies important procedural consequences. If the prosecutor bases his accusation on section 4, but fails to prove its *actus reus*, it is still possible, from the perspective of substantive criminal law, to convict the accused on the basis of sections 2 or 3 in the same trial, if it is possible to prove the *actus reus* of one of these modalities. This rule will be however limited by the guarantee of fair trial as enshrined in Article 6 of the ECHR. Therefore it will not be possible to convict a defendant for a different modality of fraud, if he had no chance to contest the allegation based on this modality.[36]

[32] *Simester and Sullivan's Criminal Law* (note 14) p. 610.
[33] *Simester and Sullivan's Criminal Law* (note 14) p. 610.
[34] Regina v Alfred Jeevarajah [2012] EWCA Crim 1299.
[35] *Simester and Sullivan's Criminal Law* (note 14) p. 610.
[36] *Simester and Sullivan's Criminal Law* (note 14) p. 609, who cites as an example of the application of this rule the following case: R. v Joan Olive Falconer-Atlee (1974) 58 Cr App R 348.

Despite the recommendation of the Law Commission report,[37] the Government refrained from abolishing the common law offence of conspiracy to defraud, for fear that there may be situations in which it might still be useful to prosecute for this offence, instead of fraud or other offences, for instance in situations of "multiple offences or large serious fraud offences".[38] Therefore, it remains possible for the prosecutor to file charges in relation to this offence. However, in order to avoid excessive use of the common law conspiracy, the Attorney General has issued "guidelines for prosecutors on the use of the common law offence of conspiracy to defraud", limiting situations, in which it may be used.[39]

In addition, the Financial Services (Banking Reform) Act 2013 introduced the offence of reckless misconduct in the management of a financial institution, which application is however limited to senior managers in the financial sector.[40]

The analysis of English law in this chapter will proceed as follows. The study will begin with an analysis of legal interests deserving criminal law protection (subchapter 2). Subchapter 3 will be devoted to the analysis of whether and under which conditions the new offence of fraud allows for the punishment of managers for excessive risk-taking. All three relevant sections of the Fraud Act 2006 contain certain, mostly *mens rea*, requirements (acting dishonestly and with an intention to make a gain for oneself or another, or to cause loss to another or to expose another to a risk of loss), but differ as to the *actus reus*. Although contrary to the usual practice of analysing the *actus reus* in the first place, it is much more suitable to analyse the common requirements first before entering into the discussion on the three modalities of *actus reus*. This order was also adopted by many other authors.[41] Further, all three

[37] Law Com No 276 (note 2) Recommendation 5.
[38] Clare Montgomery, David Ormerod (eds.), *Montgomery and Ormerod on Fraud. Criminal Law and Procedure*, Release 9, December 2012 (Oxford University Press, 2012) pp. D-7008f.
[39] Attorney General's guidelines for prosecutors on the use of the common law offence of conspiracy to defraud. First published 2007. Updated version 29 November 2012.
[40] As explained in I. Introduction (2.3. Scope of the research), only offences which are considered general according to the differentiation explained there are subject to the analysis in this study. The offence of reckless misconduct in the management of a financial institution belongs also to this category, despite the fact that its application is limited to finanacial institutions, since it defines an act of mismanagement in an abstract way (in particular by using the following expression in the definition of the offence: "S's conduct in relation to the taking of the decision falls far below what could reasonably be expected of a person in S's position") and it must be the judge who verifies whether so defined mismanagement occurred.
[41] E.g. *Simester and Sullivan's Criminal Law* (note 14) pp. 611ff.; Jacques Parry, Anthony Arlidge, Joanne Hacking, Josepha Jacobson, *Arlidge and Parry on Fraud*, 3rd edition (London: Sweet & Maxwell, 2007) pp. 5ff; *Montgomery and Ormerod on Fraud* (note 38) pp. D-1001ff.

sections will be examined. In this analysis the order of the Fraud Act will also be reversed, since it is section 4 (fraud by abuse of position), which addresses the types of conduct, which mainly form the subject of this work. However, since the two other sections might also find application to cases of excessive risk-taking, those provisions will also be analysed accordingly. Moreover the broad interpretation given to the basic offence of theft (Section 1 of the Theft Act 1968) might allow also using it for incriminating excessive risk-taking. Since it will encounter the same limitation as the offence of fraud – namely the requirement of dishonesty – the last section of Subchapter 3 will only sketch the crucial features, which would allow its application to cases of excessive risk-taking.

In order to show the full scope of possible criminal liability provided by English law, it is also necessary to analyse other ways through which criminal liability may be incurred by managers exposing their companies to excessive risk. Therefore the study will proceed to analyse possible inchoate offences that might be of use in the context of the topic: encouraging and assisting crime, conspiracy (statutory and at common law) and attempt (subchapter 4). Particular attention will be paid to the common law offence of conspiracy to defraud, under the regime of which two significant judgments were issued in cases of excessive risk-taking. Subsequently the study will examine: the possibility to convict in cases of cooperation in the commission of the offence (subchapter 5), Reasons for excluding criminal liability (subchapter 6). The analysis will be completed by the presentation of the new offence of reckless misconduct in the management of a financial institution (subchapter 7) and the penalties applicable for all these offences (subchapter 8). The chapter will finish with the solution to the five model cases presented in the introduction (subchapter 9) and some concluding remarks (subchapter 10).

The debate on the criminalisation of excessive risk-taking in English law is rather limited and focuses mainly on two cases of conspiracy to defraud (*R. v Allsop*[42] and *Wai Yu-Tsang*[43]). Therefore in addition to the analysis of these cases,[44] the author was compelled to analyse the existing law – the Fraud Act 2006 and the common law rules on conspiracy to defraud, but also laws extending criminal liability concerning

[42] *R. v Allsop* [1977] 64 Cr App R 29.
[43] *Wai Yu-Tsang Appelant v R* [1992] 1 AC 269.
[44] See Subchapter 4.4.2.2. (Conspiracy to defraud. Cases).

e.g. attempt, conspiracy or complicity – in view of the possibility to punish excessive risk-taking by means of its provisions and in view of the current jurisprudence concerning the respective offences. Despite certain clarifications given by the Fraud Act 2006, many questions of interpretation of fraud in the context of risk-taking remain open, in particular in view of the scarce jurisprudence so far produced. In particular it remains to be seen if the directions given in the judgments mentioned above, which were issued in cases of conspiracy to defraud, remain a valid guidance under the new law. Whilst some aspects of these judgments are taken as inspiration, the analysis is not based solely thereupon; they are subject to detailed analysis under the subchapter on common law conspiracy to defraud (4.4.2).

2. Legal interest deserving criminal law protection

Fraud is considered to be one of the property offences and it certainly focuses on protecting private property.[45] The law protects naturally the owner of the assets in question, but is not limited to that. In the case of companies, it is not only the company which can be the victim of the abuse of position, but it is considered that other persons can become victims, for instance "existing and potential shareholders, creditors and depositors".[46] Since the offence does not require any result, it may be considered a victimless crime and it is theoretically possible to convict a person without the victim giving evidence.[47]

It is important to note that the English criminal procedure does not grant the victim any special status within criminal procedure (like e.g. the French *partie civile*).[48] The judge may grant compensation to any person who suffered from the offence.[49] This category is very broad and it is for the judge to decide whom he considered prejudiced by the crime.[50] On the other hand any person, including the

[45] *Simester and Sullivan's Criminal Law* (note 14) p. 608.
[46] *Wai Yu-Tsang Appelant v R* [1992] 1 AC 269, 269.
[47] *Montgomery and Ormerod on Fraud* (note 38) p. D-2024/D.2.114-D.2.115.
[48] John Spencer, 'The victim and the prosecutor', in: Anthony Bottoms, Julian V. Roberts (eds.), *Hearing the Victim. Adversarial justice, crime victims and the State* (Cullompton: Willan Publishing, 2010), p. 143. For the historical evaluation of the position of the victim in English criminal law, see pp. 141ff.
[49] Section 130 of the Powers of Criminal Courts (Sentencing) Act 2000.
[50] *Chappell* [1985] 80 Cr. App. R 31. According to this judgement the judge may grant compensation regardless if the victim would have an independent civil claim against the offender. See also David

victim may start a private prosecution for the offence. The practical implications make the possibilities to make use of this right rather limited.[51]

Professor J. Spencer et al. point out that the reason for criminalisation extends also to considerable psychological distress associated with victimisation in cases of property offences. "In each case, the conduct prohibited can be seen as an attack upon the victim's entitlement to dispose of his property by his own full and informed choice".[52] In his view fraud by abuse of position, which is the most relevant modality of fraud from the perspective of this study, "is a crime partly because it entails the manipulation or exploitation of another".[53] In this sense fraud protects the victim's free will and autonomy as well as the freedom to control his own material situation. Furthermore this modality of fraud protects the important value of trust, thanks to which the perpetrator is allowed to have access to assets and customers and he should use it to the benefit of the person who entrusted them to him.[54] The mere dishonest abuse of such a position - without causing any harm but exposing a person to risk of loss - can victimise a person whose trust is abused (e.g. the shareholders). Moreover one can claim that exposing assets to a risk of loss create a harm to their owner, which is further corroborated, if it is admitted, as the Court of Appeal did in *Allsop*, that assets exposed to risk are worth less than they would be worth in the absence of any of such exposure.[55]

Since there are different ways of committing fraud one could ask what is the core moral wrong that the offence of fraud is aiming at addressing. The element, which is repeated in all three modalities of fraud (and also in conspiracy to defraud), is dishonesty, i.e. acting dishonestly. In this interpretation fraud would amount to being dishonest in one of the specific contexts described by sections 2-4 of the Fraud Act or of the conspiracy to defraud, which add an element (conduct) making dishonesty worthy of criminal punishment. In view of the broad terminology used to describe the *actus reus*, its role ought not to be overestimated, leaving the focus on the

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Ormerod, Anthony Hooper (gen. eds.), *Blackstone's Criminal Practice 2013* (Oxford University Press, 2012) E16.1-E16.4/pp. 2278-79.

[51] For a thorough analysis of this right see: John Spencer, 'The victim and the prosecutor' (note 48) pp. 145ff.

[52] *Simester and Sullivan's Criminal Law* (note 14) p. 608.

[53] *Simester and Sullivan's Criminal Law* (note 14) p. 608.

[54] Simon Farrell, Nicholas Yeo, Guy Ladenburg, *Blackstone's Guide to The Fraud Act 2006* (Oxford University Press, 2007) pp. 31f.

[55] *R. v Allsop* [1977] 64 Cr App R 29, 32.

question of dishonesty. As Ormerod and Williams put it: "the morally dubious conduct additional to dishonesty seems hard to identify, it could be something as innocuous as failing to work for an employer as hard as one might".[56]

While the English doctrine does not use the concept of protected interests as it is done for instance in the German scholarship, it seems fair to conclude that the offence focuses mainly on protecting property and reprimanding dishonesty in situations described by the offence.

3. Definition of the main offences

3.1. Common elements

All three sections describing the modalities of fraud contain two common requirements, which need to be proved for each of them, namely dishonesty and special intention. As to the latter, Sections 2-4 of the Fraud Act provide that the perpetrator should act with intention to:

(i) make a gain for himself or another, or

(ii) cause loss to another or to expose another to a risk of loss.

Dishonesty is composed of two aspects: one which describes the conduct and one referring to the perpetrator's mental state, therefore influencing both the *actus reus* and the *mens rea* of all types of fraud. The special intention complements the *mens rea* requirements, in addition to the *mens rea* required for each of the three modalities. Since the design of the special intention requirement is very broad it will not play an important role in shaping the scope of application of the offence. To the contrary, dishonesty will play a much more important role, and will make the conduct described in the *actus reus*, which is not blameworthy *per se*, worthy of criminal punishment.

[56] Ormerod, Williams, *Smith's Law of Theft* (note 18) p. 133.

3.1.1. Dishonesty

The Fraud Act 2006 does not provide any definition of or guidance as to how to understand the element of dishonesty. The problem how to understand dishonesty existed already under the previous law and was subject to extensive debates and jurisprudence.[57] According to the judgment in *Feely*[58] dishonesty should be taken as an ordinary word and the jury should be asked whether they found the conduct of the defendant to be dishonest. In a subsequent judgment in *Ghosh*[59] the Court of Appeal decided to introduce a test for dishonesty that, despite certain criticisms, is widely accepted.[60] According to this judgment, in order to establish that the defendant acted dishonestly the jurors need to answer positively the following two questions:

- Was what was done dishonest according to the ordinary standards of reasonable and honest people?
- Must the defendant himself have realised that what he was doing would be regarded as dishonest by the standards of reasonable and honest people?[61]

This is a mixed – objective and subjective – approach to dishonesty. The objective part, which will belong to the *actus reus* of the offence requires that the tribunal of facts (e.g. the jury, see below) evaluates whether the conduct was dishonest according to the standard of reasonable and honest people.[62] The subjective part, belonging to the *mens rea*, requires that the jury establish that defendant was aware that his act was dishonest according to this standard.[63] The question whether he considered his act dishonest is irrelevant. As will be seen below, the division between the *actus reus* and *mens rea* aspect of dishonesty is not very strict, since the objective part of the test can also take into account the cognitive aspects of the manager's mental state.

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[57] For the evolution of the understanding of dishonesty see e.g. *Alridge and Parry on Fraud* (note 41) pp. 6ff.
The requirement of dishonesty is present in various offences in the English law, e.g. in theft. Most recently (by the Enterprise and Regulatory Reform Act 2013) the legislator decided to exclude it from the definition of the cartel offence (Section 188 of the Enterprise Act 2002).
[58] *Regina v Feely*, [1973] 2 WLR 201 QB 530, 537-538.
[59] *R v Ghosh*, [1982] QB 1053.
[60] Law Com No 276 (note 2) p. 43/5.18. See e.g. *Regina v Benjamin Jason Cornelius* [2012] EWCA Crim 500, where the Court of Appeal said: "We wish therefore to make clear that the decision in Ghosh remains good law".
[61] *R v Ghosh*, [1982] QB 1053, 1064.
[62] *Blackstone's Criminal Practice 2013* (note 50) B4.54/p. 408.
[63] *Blackstone's Guide to The Fraud Act 2006* (note 54) pp. 15/2.05-2.07; *Alridge and Parry on Fraud* (note 41) pp. 9/2-013.

The test has been criticised for its various shortcomings.[64] As to the objective part of the test, it assumes that the members of the jury, who will evaluate the occurrence of this element, have consistent values, whereas in practice they rather vary to important extent both in cultural and socio-economic aspects.[65] This leads to the danger of differing convictions as to the standard of dishonesty and an impossibility for a reasonable person to predict, if his conduct should be regarded as dishonest or not. In view of the defendant's inability to foresee whether his conduct constitutes an offence, questions as to the contravention of Art 7 ECHR can be raised.[66] It is important to point out that the jury should not take into account whether people usually do something or not (e.g. commit small tax evasions or abuse the system of compensation of costs), but whether they regard it as dishonest.[67]

The second part of the test was criticised for granting too much importance to the subjective element of the defendant's vision as to people's morality. He could thus theoretically evoke in his defence that "everybody does that".[68] It was this kind of reasoning that was used, although unsuccessfully, when in the course of the trials of members of the House of Lords for false accounting regarding the use of their official expenses, the defendants tried to get away with the claim that their behaviour was part of the "office culture".[69] However such excuse does not seem to work for this test, since it is not the personal conviction of the defendant that is the basis of the subjective part, but his awareness of the fact that a reasonable and honest person would consider such behaviour to be dishonest. It is not a question of the common practice but of the understanding of a standard. Therefore, even if "everybody does that", when one knows that the behaviour cannot be considered honest, the condition is fulfilled. Defendants might find it hard to claim that although colleagues were

[64] *Simester and Sullivan's Criminal Law* (note 14) p. 549. For analysis of the deficiencies of Ghosh, see e.g. *Montgomery and Ormerod on Fraud* (note 38) pp. D-1006ff; David Ormerod, 'The Fraud Act 2006–Criminalising Lying?', *Criminal Law Review*, (2007), pp.193-219, pp. 200ff.
[65] *Simester and Sullivan's Criminal Law* (note 14) p. 548. Similarly the members of the jury may have also a discrepant code of values in comparison to the defendant due to various factors (sex, age, background etc.); this problem is not limited to the offence of fraud, but concerns all offences, where a test of reasonable person is applied; for its detailed analysis see: Mayo Moran, *Rethinking the Reasonable Person. An Egalitarian Reconstruction of the Objective Standard*, (Oxford University Press, 2003).
[66] *Simester and Sullivan's Criminal Law* (note 14) p. 549; Law Commission, Consultation Paper No 155, Legislating the Criminal Code. Fraud and Deception, 1999 elaborates on this problem (5.33ff).
[67] *Alridge and Parry on Fraud* (note 41) pp. 12/2-020.
[68] *Simester and Sullivan's Criminal Law* (note 14) p. 549.
[69] *Simester and Sullivan's Criminal Law* (note 14) p. 550.

doing the same, they did not know that the way they dealt with their expenses was not right.

The requirement of dishonesty became the central point of the description of the offence of fraud as enacted in the Fraud Act 2006 and the intention that the test of *Ghosh* applies was reiterated in parliamentary debates[70] and in the Explanatory Notes to the Act.[71] Despite various criticisms and proposals for reform, *Ghosh* remains, not a definition, but rather "a way of coping with the absence of a definition".[72]

Although this issue belongs to procedural law, which is generally not addressed in this study, it is impossible to detach the problem of dishonesty from the practical aspects of its application. Fraud is an offence which is 'triable either way', meaning that it can be tried either in a magistrates' court or in the Crown Court, depending mainly on the defendant's decision to plead guilty or not guilty and on the seriousness of the offence. In any case, if the defendant pleads not guilty, he has the right to elect trial by jury.[73] It was argued that the vagueness of the test for dishonesty may encourage a larger number of defendants to "try their luck" in front of the jury, where they risk much higher punishment, if convicted.[74] In any case the prosecution must be prepared to be able to demonstrate dishonesty before a jury.[75]

While it is not the purpose of this study to analyse the pros and cons of the jury system,[76] its dynamics must be born in mind, since it will shape to a large extend the practice of application of the offence of fraud. The involvement of the juries in fraud trials was subject to criticism in two major reports[77] and a bill allowing

[70] Hansard, HL Debates, 19 July 2005, col. 1424 Attorney General; the House of Commons Research Paper 31/06, p 14; Standing Committee B, 20 June 2006, col. 8 (Solicitor-General).
[71] Home Office, Explanatory Notes Fraud Act 2006, 8 November 2006, Recital 10.
[72] Law Com No 155 (note 66) p. 50; *Montgomery and Ormerod on Fraud* (note 38) pp. D-1014.
[73] Andrew Ashworth, *Principles of Criminal Law*, 6th edition (Oxford University Press, 2009) p. 7.
[74] *Montgomery and Ormerod on Fraud* (note 38) p. D-1009.
[75] For two reasons this chapter (as well as the rest of the study when discussing the English legal system) will refer to the jury instead of using a more neutral expression "the tribunal of fact". Firstly, the English model of criminalisation of excessive risk-taking will be particularly shaped by the involvement of the juries and result in distinct characteristics in comparison to the two other legal systems. The reference to the jury should point out this particularity. Secondly, cases of fraud tried in the magistrates' courts are of lesser gravity than those tried in the Crown Court. It is however important to bear in mind that cases where the jury will not be involved are not excluded.
[76] See for instance: Andrew Ashworth, Mike Redmayne, *The Criminal Process*, 4th edition (Oxford University Press, 2010) pp. 323ff.
[77] Fraud Trials Committee Report, (Roskill Committee), Fraud Trials Committee Report, Her Majesty's Stationery Office, London 1986; see also Lord Devlin, 'Trial by Jury for Fraud', *Oxford Journal of Legal Studies*, (1986), pp. 311-21; Lord Justice Auld, Review of the criminal courts of England and Wales: report, London : Stationery Office, 2001, in particular chapter 5 para 173ff. See also Ormerod,

excluding them from these trials.[78] However the bill failed and so far there has been no new proposal in this regard.[79]

Although the fact that the trial involves the jury will influence all the aspects of the process, as regards the offence of fraud, it will have particular impact on the test of dishonesty. Namely, it will be applied by twelve laymen with different background and most probably without experience in business.[80] Moreover the verdict of the jury is limited to pronouncing the defendant 'guilty' or 'not guilty' and no reasons are given for the decision. The jury deliberates in private and it is a criminal offence 'to obtain, disclose or solicit any particulars of statements made, opinions expressed, arguments advance or votes cast by members of a jury in the course of their deliberations.'[81] Therefore there is no possibility to establish the reasons, which convinced the jury in a concrete case that the defendant was or was not dishonest. In view of that there is no systematised doctrine, which would allow to precisely foreseeing which conduct is dishonest and which is not, as it will be assessed on the case-by-case basis.

From the point of view of this research it is essential to establish when excessive risk-taking by managers can be considered dishonest. The *Ghosh* test will apply in its two aspects. The jury will in the first place analyse the objective part of the test, i.e. whether an honest and reasonable person would consider what the manager in question did as dishonest. One can ask whether the standard should be the one of an honest and reasonable (ordinary) person or of a manager of such qualities. *Ghosh* does not introduce any differentiation in this regard suggesting that an ordinary person should be taken as a model.[82] It seems plausible to claim that the assessment

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Williams, *Smith's Law of Theft* (note 18) pp. 398ff.; Michael Levi, 'The Roskill Fraud Commission revisited: An assessment', *Journal of Financial Crime,* 11.1 (July 2003), pp. 38-44.

[78] Section 43 of the Criminal Justice Act 2003 allows applications for the trial in the Crown Court to be conducted without a jury. However in order to be applied for fraud it requires further legislation. The Fraud (Trials Without a Jury) Bill, introduced in 2007, was meant to provide such legislation for serious fraud, but was blocked by the House of Lords. Andrew Ashworth, Mike Redmayne, *The Criminal Process*, (note 76) p. 330. In the meantime Section 43 of the Criminal Justice Act 2003 was repealed by the Protection of Freedoms Act 2012 (Schedule 10 Part 10), which however at the moment of writing has not yet entered into force, neither the date for it has been given.

[79] Andrew Ashworth, Mike Redmayne, *The Criminal Process* (note 76) p. 330; see also: Miriam Peck, *The Fraud (Trials Without a Jury) Bill 2006-07*, House of Commons Research Paper 06/57, 23 November 2006.

[80] Andrew Sanders, Richard Young, Mandy Burton, *Criminal Justice*, 4th edition (Oxford University Press, 2010) p. 559.

[81] Section 8 of the Contempt of Court Act 1981.

[82] *Alridge and Parry on Fraud* (note 41) p. 16.

will be made for a reasonable and honest person in such a position, meaning the manager.[83]

The judgment in the case of *Sinclair* addressed the problem of what is the importance of the quality of the decision for the assessment of dishonest, in particular whether the risk taken by a company director was dishonest.[84] The Court of Appeal in its nuanced opinion stated that the defendant's counsel was wrong in asserting that "the test to distinguish between conduct which is fraudulent, and conduct which is not, is whether the transaction is a normal transaction".[85] The question of honesty cannot be replaced by the test of the normality of the transaction. The Court of Appeal aligned itself with the following formulation: "For the Crown it is contended that it is fraudulent to take a risk to the prejudice of another's rights, which risk is known to be one which there is no right to take, and that if such a risk is taken it is no defence to say that the person taking the risk had an honest belief that no prejudice but only benefit would result."[86]

From this judgment results that the fact that the transaction was as such abnormal does not in itself imply that the defendant acted dishonestly. A more troublesome question is how the jury will evaluate the (dis)honesty of a defendant. In view of this judgment in *Ghosh*, the jury will be confronted with the question whether an honest and reasonable person in such situation would not take the risk the manager took. The fact that the defendant honestly believed that "no prejudice but only benefit would result"[87] as such does not render his act honest. According to Parry "a defendant who takes even a slight risk with another's property, knowing that the other would not allow that risk to be taken if he knew the true position, will almost inevitably be found to have acted dishonestly. His belief that the risk would not materialise ought not to be a defence."[88]

While the above interpretation would generally allow incriminating the managers who knowingly take excessive risk, it seems that it might be far-fetched. Since the jury needs to infer dishonesty from the evidence, the sole fact that the

[83] The judgment in *Sinclair* seems to suggest it: [1968] 1 WLR 1246, 1251.
[84] *Sinclair* [1968] 1 WLR 1246.
[85] *Sinclair* [1968] 1 WLR 1246, 1249 and 1251.
[86] *Sinclair* [1968] 1 WLR 1246, 1251.
[87] *Sinclair* [1968] 1 WLR 1246, 1251.
[88] *Alridge and Parry on Fraud* (note 41) pp. 13/2-024.

manager took excessive risk, in particular, if he wanted the company to eventually benefit from it, may be insufficient for the prosecution to decide to proceed with the case. It can be assumed that some additional circumstances should render the manager's act more reproachable. In particular two factors may contribute to his dishonesty. Firstly, it may be the fact the he acted mainly for his personal interest, e.g. in view of increased commission for the transaction, provided that there is some direct tangible gain.[89] Secondly, some additional factors demonstrate lack of integrity, e.g. he is colluding with the client who provides incorrect information in the process of obtaining a loan, or knowingly and intentionally breaching one of the rules regulating the execution of his duties.[90] The sole fact that he breached one of these rules does not render him dishonest yet, as he may plausibly claim that he did so by mistake. Additional difficulty will be linked with the fact that business decision may be taken in within a complex structure and after a decision making process, within which it is difficult to precisely attribute one's influence. The motivation only to prove to be a successful manager (by increasing the company's turnover) or to please higher management may not be sufficient to convince the jury that he was dishonest. Eventually the particularities of the case will decide whether the prosecution decides that the prospect of conviction is sufficient to proceed with the case or not.[91]

The second limb of the test of *Ghosh* requires that the defendant was aware of the fact that taking excessive risk would be considered by reasonable and honest people as dishonest. This issue will be particularly relevant in business circles, e.g. in the financial sector, where the members of such circles might find themselves disconnected from ordinary people and their views and operating according to the rules established in such circles. If a defendant would be absolutely convinced that honest and reasonable people would consider his behaviour as honest, he cannot be held guilty of fraud. As was said in *Ghosh*: "[e]ven if he [the defendant] asserts or genuinely believes that he is morally justified in acting as he did" he is still acting dishonestly, if he is aware of the fact that ordinary people would consider his conduct to be dishonest.[92] It is thus irrelevant whether the defendant considered his action as

[89] *R. v Allsop* [1977] 64 Cr App R 30.
[90] *Wai Yu-Tsang Appelant v R* [1992] 1 AC 269, 269-272.
[91] This section is mainly based on the interview conducted at the Serious Fraud Office with Mr. Stuart Alford.
[92] *R v Ghosh*, [1982] QB 1053, 1064.

dishonest. It will be enough to say that he was aware that others would regard it as such.[93]

The issue, which is generally associated with dishonesty, is the question of the applicability and scope of the following rules established under the Theft Act 1968 (Section 2):

- the defendant is not dishonest if he appropriates the property in the belief that he has in law the right to deprive the other of it, on behalf of himself or of a third person (claim of right); or

- the defendant is not dishonest if he appropriates the property in the belief that he would have the other's consent if the other knew of the appropriation and the circumstances of it; or

- the defendant is not dishonest if he appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps, except where the property came to him as trustee or personal representative.

- A person's appropriation of property belonging to another may be dishonest notwithstanding that he is willing to pay for the property.[94]

Since fraud emancipated itself from the Theft Act and the new act does not make reference to Section 2 of the latter, it remains unclear, whether these rules can be used in establishing dishonesty in fraud.[95] Since Section 2 of the Theft Act 1968 applies only to the offence of theft,[96] the court could only apply the rules it contains by analogy. Although the Law Commission recommended that a "claim of right" or "belief in the claim of right" should not always constitute a defence,[97] it is probably right to consider that in the majority of cases the defendant's action will not be considered dishonest.[98]

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[93] *Blackstone's Guide to The Fraud Act 2006* (note 54) p. 15/2.06
[94] Theft Act 1968, Section 2.
[95] Against: *Blackstone's Guide to The Fraud Act 2006* (note 54) p. 16/2.12; Ormerod, Williams, *Smith's Law of Theft* (note 18) p. 133/3.23. In favour: *Alridge and Parry on Fraud* (note 41) pp. 38ff/2-090ff.
[96] Section 1 (3) of the Theft Act 1968.
[97] Law Com No 276 (note 2) marginal number 7.66.
[98] Ormerod, Williams, *Smith's Law of Theft* (note 18) p. 133/3.23

A further analysis of these rules seem unnecessary, since situations described there will rarely match scenarios analysed in this study, with the exception of the second one, which will be analysed further below (6.1. Consent of the victim).

3.1.2. Intent

The second element of *mens rea*, which is also present in all of the three sections describing fraud, is intent, which is in fact a requirement of special intention, since it refers to the conduct described by the *actus reus*, but adds an additional element of the perpetrator's guilty mind. It can be directed at three different, not mutually exclusive, objectives:

- to make a gain (for oneself or another)
- to cause loss to another or
- to expose another to a risk of loss.

The previous offences of deception required that the perpetrator obtain something as the result of his conduct. The new offence does not require result, but moves the objective steering the defendant's action to the *mens rea* part.[99] Such a broad description of *mens rea* gives the prosecution various possibilities to charge the defendant for fraud and e.g. proving only the intention to cause loss or expose to a risk of loss, where it is impossible to prove both his gain and the intention to achieve any such gain.[100]

With respect to intent as required for fraud, managers can be held liable for exposing their companies to a risk of loss in two different configurations. Within the first one, exposing the company to a risk of loss is the manager's true intention. In these cases the manager will most often not wish to cause any damage; on the contrary, he hopes that the company will benefit in the end or that he will save the company in case of troubles.[101] The manager can have additional motivation to act this way, which might be seeking his own benefit, e.g. development of his career as a

[99] *Blackstone's Guide to The Fraud Act 2006* (note 54) p. 17.
[100] *Blackstone's Guide to The Fraud Act 2006* (note 54) p. 19.
[101] Two cases described further in this chapter can exemplify such situations: *Allsop* as to the first one (4.4.2.2.1. *R. v Allsop*) and *Wai Yu-Tsang* (4.4.2.2.2. *Wai Yu-Tsang*).

successful manager or else in the form of financial gratification (bonus or raise of the company's value of which he owns shares).

As to the second configuration, it will be possible to convict a manager for effectively exposing his company to the risk of loss, while his intention was directed at other objectives. It will be obvious that, if the defendant acted with intention to cause prejudice his state of mind comprised also the intention to expose to a risk of loss. The flexibility of the formulation shows itself fully in cases where it is impossible to prove that the defendant wanted to expose the company to a risk of loss (or to cause loss), if the prosecution can prove that he effectively did expose it to this, while seeking personal or another's gain.

Further analysis of this limb will be divided into three parts:

- What does the word intention mean?
- What does the perpetrator want?
- Causation.

3.1.2.1. What does the word intention mean?

The perpetrator's state of mind is described in sections 2-4 by the verb "intends". It certainly covers situations in which the defendant wants something to happen.[102] Therefore all the situations, according to the configurations described above, where managers willingly expose their companies to a risk of loss or have this intention without achieving it, are covered by this limb.

The question is whether it is possible to extend the liability for situations where there is no intention in the sense described above, but, while acting, the perpetrator was nevertheless aware of the fact that his decision may put the company at risk of loss.

The question of the extension of intent was discussed in *Woollin*, where the House of Lords defined it in the following way:

"(1) The result is intended when it is the actor's purpose to cause it.

[102] *Alridge and Parry on Fraud* (note 41) p. 19.

(2) A court or jury may also find that a result is intended, though it is not the actor's purpose to cause it, when–

a) the result is a virtually certain consequence of that act, and

b) the actor knows that it is a virtually certain consequence."[103]

Different authors seem to agree that this definition extends also to fraud,[104] although it was not formulated in a fraud case.[105] This means that where a manager who does not want to cause loss or expose the company to the risk of loss, but it is virtually certain that the company will be exposed to the risk of loss and he is aware of it, the jury may still find him guilty of fraud, if other elements are fulfilled. If the defendant's state of mind does not amount to one of those described in *Woollin*, he must be acquitted (e.g. if it would be possible to prove that he acted recklessly, but not intentionally).

As to the expression "virtually", one could argue that it is very often not possible to say with full certainty that one act will be followed by another, it is thus safer to speak about a "virtually" certain result. What is meant here is that the defendant is aware that his action in a "normal course of events"[106] will cause the risk of loss and he decides to pursue it anyway.[107] It cannot exempt the defendant from liability that he is not sure, if he will be successful with his plan or not.[108] The use of the expression "may" in the *Woollin* definition of the second type of intention suggests that juries, while deciding upon the defendant's liability, are free to attribute it to him considering his blameworthiness with respect to all the circumstances.[109]

The extension of the understanding of intention granted some degree of flexibility to juries, which might contribute to providing justice in particular cases.[110] However, this solution has been criticised for providing space for uncertainty and

[103] *Woollin*, [1998] AC 82 (83) – the formulation here after *Blackstone's Guide to The Fraud Act 2006* (note 54) p. 19.
[104] *Blackstone's Guide to The Fraud Act 2006* (note 54) p. 19; Ormerod, Williams, *Smith's Law of Theft* (note 18) p. 136; *Alridge and Parry on Fraud* (note 41) p. 54.
[105] *Montgomery and Ormerod on Fraud* (note 38) p. D-1025.
[106] As the Attorney-General formulated in the course of discussions preceding the enacting of the Fraud Act: Hansard, HL July 19, 2005 col. 1414.
[107] *Montgomery and Ormerod on Fraud* (note 38) pp. D-1025f.
[108] *Alridge and Parry on Fraud* (note 41) p. 55.
[109] Alan W. Norre, 'After Woollin', *Criminal Law Review,* (1999), pp. 532-544, p. 537.
[110] *Montgomery and Ormerod on Fraud* (note 38) p. D-1026.

inconsistency in application of the law. This solution has been also blamed for confusing the boundaries of substantive law and the law of evidence and rendering the scope of liability undefined.[111]

An interesting question for this study is whether the intention to make a gain for another is fulfilled if this other person is at the same time the victim of the offence through being exposed to risk of loss. This question will touch upon situations, already mentioned above, when the defendant exposes another to the risk of loss while willing that the victim benefits or at least avoids loss (which, as will be seen below, can also include "keeping what one has"[112]). In two cases of conspiracy to defraud that will be subject to more detailed analysis below (*Allsop* and *Wai Yu-Tsang*)[113] the Court of Appeal and the Privy Council confirmed that although the ultimate motive of the defendant was beneficial for the victim, he did in fact intend to (at least) expose the victim to the risk of loss. In view of the phrasing of intent, even if the defendant does not seek his own gain, but the victim's gain, and even if he does not intend to cause loss to the victim or expose him/her to the risk of loss, he will possibly still be held liable. Hence, liability for fraud is possible when the defendant exposes the company to the risk of loss recklessly while his intention refers to the gain of the latter. The only possible way to correct this far-reaching result leads through dishonesty and it is not certain that the jury would not find a reckless director of a bank to be dishonest.

3.1.2.2. What does the perpetrator want?

The second issue to be analysed with regard to this element of *mens rea* is the object of intention. As to this issue, the Fraud Act provides for some clarification in Section 5:

"(2) "Gain" and "loss"—

(a) extend only to gain or loss in money or other property;

[111] *Montgomery and Ormerod on Fraud* (note 38) p. D-1026.
[112] Section 5 (3)
[113] See 4.4.2.2. (Conspiracy to defraud/Cases)

(b) include any such gain or loss whether temporary or permanent; and "property" means any property whether real or personal (including things in action and other intangible property).

(3)"Gain" includes a gain by keeping what one has, as well as a gain by getting what one does not have.

(4)"Loss" includes a loss by not getting what one might get, as well as a loss by parting with what one has."

The key element of these definitions is the word "property", which is understood very broadly. According to section 5 (2) (b), it can be any property, also real, including things in action (also called choses, which corresponds to legal right to sue, e.g. debts)[114] and intangible property (property which has no physical substance, e.g. copyrights, patents or trademarks).[115] The definition comprises thus intellectual property, although the Explanatory Notes point out that it is "rarely 'gained' or 'lost'".[116] This remark might be true in the context of typical fraudulent situations, however intellectual property rights might be lost, if they are not safeguarded properly. It would be possible for instance to envisage liability of a manager responsible for taking care of patent applications who fails to file such an application in time, because he has interests in a rival company who will benefit from a failure.

According to the judgment in *Oxford v. Moss*[117] confidential information is not covered by the definition of property. Although discussed in the parliamentary debates, the extension of the definition of property was rejected,[118] which means that trade secrets cannot be the object of fraud. However, it could be argued that even if the perpetrator's objective is that the company risks losing some confidential information (where losing would necessarily mean that this information is made public), it is virtually certain that this at least exposes the company to a risk of loss in pecuniary terms. Hence, such a situation could also be covered by this provision.

The terms "Gain" and "Loss" are also understood broadly, by including also keeping what one has in case of the former and not getting what one might get as to

[114] *Oxford Dictionary of Law*, 3rd edition (Oxford University Press, 1996).
[115] *Oxford Dictionary of Law* (note 114).
[116] Home Office, Explanatory Notes Fraud Act 2006, 8 November 2006, Recital 24.
[117] *Oxford v Moss*, [1979] 68 Cr App R 183.
[118] Hansard, HL 19 July 2005 col. 1435-1436.

the latter. As to the risk of loss, there exists no definition of the word risk and it should probably be taken as an ordinary English word referring to "loss", which is defined in section 5. Even before the enactment of the Fraud Act, the Court of Appeal held in *Allsop* that "Interests which are imperilled are less valuable in terms of money than those same interests when they are secure and protected".[119] If understood this way, it could be claimed that the fact of being exposed to risk of loss is enough to declare that an actual loss has taken place. As Parry points out, the phrase "or to expose another to a risk of loss" might not in fact extend the scope of criminalisation, but simplify the explanations with which the jury should be provided.[120]

3.1.2.3. The problem of causation

All three forms of fraud require intended causation between the *actus reus* and the intent to make gain, cause loss or expose to a risk of loss. According to all the three sections, the defendant must intend to achieve his objective "by means of" making false representation, by failing to disclose information or by abusing his position.[121] It is important to point out that this problem of causation belongs to the *mens rea* and not to the *actus reus*, since fraud does not require a result. It will be necessary for the jury to establish whether it was part of the perpetrator's intention that a gain, a loss or a risk of loss is caused by his act.[122]

Under the previous law (Theft Acts 1968 and 1978), the courts faced the problem of causation (and remoteness) within the analysis of the *actus reus*, since the law required a proof of result.[123] It was necessary to establish whether the action of the defendant had resulted in the latter obtaining something from the victim and whether the chain of events was not too remote. The courts tended to deny causality, if the act in question was not a "direct and immediate cause of the obtaining".[124] In a case for obtaining winnings by false pretences a man managed to bet on a horse by

[119] *Allsop* [1976] 64 Cr.App.R. 29, 32.
[120] *Alridge and Parry on Fraud* (note 41) p. 53.
[121] Sections 2-4 Fraud Act 2006.
[122] *Gilbert*, [2012] EWCA Crim 2392, 29; *Simester and Sullivan's Criminal Law* (note 14) p. 614.
[123] *Simester and Sullivan's Criminal Law* (note 14) p. 613.
[124] *Simester and Sullivan's Criminal Law* (note 14) p. 613.

telling lies. The horse eventually won. The court held that the gain's immediate cause was the horse's win and not the false pretences, thus dismissing the case.[125]

3.2. Fraud by abuse of position

The way of committing fraud that is most relevant from the perspective of this study is described in Section 4 (fraud by abuse of position):

(1) A person is in breach of this section if he—

> (a) occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person,
>
> (b) dishonestly abuses that position, and
>
> (c) intends, by means of the abuse of that position—
>
> > (i) to make a gain for himself or another, or
> >
> > (ii) to cause loss to another or to expose another to a risk of loss.

The offence has been already in Parliament criticised as a "catch all provision that will be a nightmare of judicial interpretation … and help to bring the law into disrepute",[126] and the definition of position, seen as the most problematic element, was described as "woolly".[127]

It contains the same two elements of *mens rea* as other types of fraud – dishonesty and intention – and the *actus reus* is described in a rather "minimalist" way.[128] It comprises only two elements: the description of the perpetrator by means of a position of trust and the description of his action, which consists in abusing this position. As will be shown below, the way the provision is drafted allows including a plethora of relationships into its scope (3.2.1. The perpetrator). The question of whether the defendant abused his position will often be intertwined with the question of dishonesty, and thus helps little to shape the contours of the offence (3.2.2.

[125] *Rex v Clucas* [1949] 2 KB 226.
[126] Standing Committee B, 20 June 2006, col. 25.
[127] Hansard, HC, 12 June 2006, col. 549.
[128] *Simester and Sullivan's Criminal Law* (note 14) p. 609.

Conduct – Abuse). The question whether it is possible to require an additional element of *mens rea* will be discussed at the end of this subchapter (3.2.3. *Mens rea*).

3.2.1. The perpetrator

The offence described in Section 4 can be committed only by a person who "occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person". Two main problems of interpretation arise here:

- What is the scope of the position described in this section?
- What does it mean to occupy such a position?

3.2.1.1. Position

The key element of fraud by abuse of position is the element defining the suitable perpetrator, which is described as "the position in which he is expected to safeguard, or not to act against, the financial interests of another person". The act does not specify any further how to understand this expression, which has given rise to intensive doctrinal debates.[129] During the parliamentary discussions it was suggested that this position could be interpreted as synonymous to the civil law concept of fiduciary duty, a solution which would provide more legal certainty and guarantee coherence between civil and criminal law.[130] The government, however, rejected this interpretation for fear that the definition of 'fiduciary duty' would bring extensive civil law debates into criminal courts and that it would unjustifiably narrow down the scope of the offence.[131] The government seemed to consider that it will be a question of fact for the jury and in general an issue of lesser importance:

"We see no problem in a jury determining when one person is in a position to safeguard the interests of another. Furthermore, in most cases the crucial issue will not

[129] See e.g. *Montgomery and Ormerod on Fraud* (note 38) p. 2103, *Alridge and Parry on Fraud* (note 41) pp. 143ff.
[130] *Montgomery and Ormerod on Fraud* (note 38) p. D-2103.
[131] Standing committee B, 20 June 2006, col. 18ff.

be the relationship between the defendant and the victim, but whether the defendant's actions were, in its sum, dishonest".[132]

Notwithstanding this statement and in view of the Explanatory Notes (7.38, see below), the government supported the idea that the question will be a mixture of fact and law, where "[t]he judge would determine whether or not the particular relationship is capable of falling within the definitions, before the jury determine that this is as a matter of fact within the definition".[133] This corresponds to the problem of interpretation of the expression "expected". The question here is whether the victim's subjective expectations should be taken into account or whether the judge ought to direct the jury in view of more objective expectations.[134] The Explanatory Notes seem to opt for the second solution.[135] The position of the CPS is similar.[136]

In fact, the Explanatory Notes to the Act do not provide any additional explanation, but repeat instead the clarifications provided in the report of the Law Commission[137]:

"The necessary relationship will be present between trustee and beneficiary, director and company, professional person and client, agent and principal, employee and employer, or between partners. It may arise otherwise, for example within a family, or in the context of voluntary work, or in any context where the parties are not at arm's length. In nearly all cases where it arises, it will be recognised by the civil law as importing fiduciary duties, and any relationship that is so recognised will suffice. We see no reason, however, why the existence of such duties should be essential. This does not of course mean that it would be entirely a matter for the fact-finders whether the necessary relationship exists. The question whether the particular facts alleged can properly be described as giving rise to that relationship will be an issue capable of

[132] Hansard, HC Standing Committee B 20 June 2006 col. 21.
[133] *Blackstone's Guide to The Fraud Act 2006* (note 54) p. 32.
[134] *Fraud: Law Practice & Procedure* (Butterworths LexisNexis, Issue 22) (available online, consulted on: 30 March 2015), para 2.33.
[135] *Montgomery and Ormerod on Fraud* (note 38) p. D-2105; *Blackstone's Guide to The Fraud Act 2006* (note 54) p. 32; Home Office, Explanatory Notes Fraud Act 2006, 8 November 2006, Recital 20.
[136] "Whether the facts as alleged are capable of giving rise to a legal duty will be a matter for the judge; whether on the facts alleged, the relationship giving rise to that duty existed will be a matter for the jury." Crown Prosecution Service, The Fraud Act 2006: Legal Guidance.
[137] Home Office, Explanatory Notes Fraud Act 2006, 8 November 2006, Recital 20.

being ruled upon by the judge and, if the case goes to the jury, of being the subject of directions."[138]

In its report, the Law Commission described the relationship in Section 4 in the following way:

"The essence of the kind of relationship which in our view should be a prerequisite of this form of the offence is that the victim has voluntarily put the defendant in a privileged position, by virtue of which the defendant is expected to safeguard the victim's financial interests or given power to damage those interests. Such an expectation to safeguard or power to damage may arise, for example, because the defendant is given authority to exercise a discretion on the victim's behalf, or is given access to the victim's assets, premises, equipment or customers. In these cases the defendant need not enlist the victim's *further* co-operation in order to secure the desired result, because the necessary co-operation has been given in advance."[139]

According to these explanations, in cases of a fiduciary relationship between the defendant and the victim, this limb will always be fulfilled.[140] However the definition is not limited to fiduciary relationships and will include any kind of relationship that the judge or jury deem to meet the description from Section 4. Most often this relationship will be of a civil law nature, but its scope can be even interpreted more broadly.[141] Such a broad scope of possible perpetrators was criticised for allowing "all sorts of trivial civil law contractual disputes [to] become the subject of prosecutions".[142] The CPS expressed a moderate view by saying:

"Prosecutors should guard against the criminal law being used as a debt collection agency or to protect the commercial interests of companies and organisations. However, prosecutors should also remain alert to the fact that such organisations can become the focus of serious and organised criminal offending."

In view of the broad interpretation of the position in Section 4, managers will undoubtedly fall into the scope of this provision. The relationships between director

[138] Law Com No 276 (note 2) marginal number 7.38.
[139] Law Com No 276 (note 2) marginal number 7.37.
[140] *Simester and Sullivan's Criminal Law* (note 14) p. 624, *Blackstone's Guide to The Fraud Act 2006* (note 54) p. 32.
[141] *Blackstone's Guide to The Fraud Act 2006* (note 54) p. 33.
[142] *Montgomery and Ormerod on Fraud* (note 38) p. D-2106.

and company and between employer and employee are expressly mentioned in the Explanatory Notes. Directors' duties to the company are described in the Companies Act 2006,[143] and they are in a fiduciary relationship with the company.[144] Employees are also in such a relationship under certain conditions.[145] But even without entering the murky waters of fiduciary duties,[146] it is clear that managers fulfil this limb of Section 4. The Law Commission explained that the "expectation to safeguard or power to damage may arise, for example, because the defendant is given authority to exercise a discretion on the victim's behalf, or is given access to the victim's assets, premises, equipment or customers."[147] Managers effectively exercise discretion on behalf of the company and are given access to the property of the company that they are supposed to use for its benefit. Even employees that are given some managerial power, but with very limited discretion, will most likely be expected not to act against the financial interests of the company. If they were ordered to pursue the policy which encourages them to take excessively risky decisions, their acquittal will depend on the success of the defence that they acted under the orders of superiors.[148]

3.2.1.2. Occupies

The definition of Section 4 (1) (a) uses the term "occupies" which implies that abuse of position should be committed while the perpetrator is occupying this position. This issue arises in cases of duties that go beyond the timeframe of the manager's contract. In this sense he can still abuse his position after he ceases to perform his functions.[149] Moreover the CPS instructed in the guidelines that if the offence was planned while in office, and the perpetrator undertook some action at that time (e.g. he collected some information that he used after leaving office) the offence was committed while he was still in office and thus he can be prosecuted.[150]

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[143] Sections 170-177, in particular Section 172 (Duty to promote the success of the company) and 174 (Duty to exercise reasonable care, skill and diligence).
[144] For discussion of fiduciary duties of directors and employees see: Andrew Stafford, Stuart Ritchie, *Fiduciary Duties: Directors and Employees* (Bristol: Jordans, 2008) pp. 5ff.
[145] Stafford, Ritchie, *Fiduciary Duties…* (note 144) pp. 83ff.
[146] Stafford, Ritchie, *Fiduciary Duties…* (note 144) p. 8.
[147] Law Com No 276 (note 2) marginal number 7.37.
[148] See 6.2 (Reasons for excluding criminal liability /Orders of a superior)
[149] *Montgomery and Ormerod on Fraud* (note 38) p. D-2108.
[150] Crown Prosecution Service, The Fraud Act 2006: Legal Guidance.

The above problem will have limited impact on the liability of managers covered by this study. The situations where time-delay will play a role in this study are when managers take decisions which expose the company to a risk of loss, although this risk will foreseeably materialise, if at all, after they leave office. Often risky decisions boost the company's performance in the short term and managers get higher bonuses. The consequences might only arrive after they have left their positions. However in English law it would not be a problem to consider such conduct as fraud. If the decision exposing the company to the risk of loss can be considered as abusive and taken dishonestly, and if the intention to gain is clear, the problem of the late occurrence of the result (or lack of its materialisation) does not preclude the manager's criminal liability.

3.2.2. Conduct - Abuse

A person occupying a position described in the previous paragraph commits fraud described in Section 4 if he "abuses that position". Similarly to "position", the term "abuse" was not defined by the Act. According to the Explanatory Notes: "[t]he term "abuse" is not limited by a definition, because it is intended to cover a wide range of conduct."[151] Among the examples given by the Home Office, the following is the most relevant:

"Another example covered by this section is where a person who is employed to care for an elderly or disabled person has access to that person's bank account and abuses his position by transferring funds to invest in a high-risk business venture of his own."[152]

The term "abuse" should be taken as an ordinary English word and it will be for the jury to decide on a case-by-case basis whether it took place or not.[153] Certainly it should not be limited to breaches of fiduciary duties. Abuse does not have to be a legal act and need not have an impact on the company's obligations vis-à-vis third

[151] Home Office, Explanatory Notes Fraud Act 2006, 8 November 2006, Recital 21.
[152] Home Office, Explanatory Notes Fraud Act 2006, 8 November 2006, Recital 23.
[153] *Montgomery and Ormerod on Fraud* (note 38) p. D-2109. Also this way Crown Prosecution Service in the Legal Guidance

parties.[154] According to Section 4 (2) an abuse of position may be performed by omission.

A fictitious case proposed by one author shows possible excessive criminalisation provided by Section 4. A compliance officer, instead of monitoring the bank's risk, plays card games on his computer. "He is in a position of trust and by his omission he is abusing his position and exposing the bank to the risk of financial loss. Provided the jury find that he is dishonest, he is in breach of the section and guilty of fraud."[155] One might add that playing cards during work time can hardly be considered honest. This case suggests that breaching professional duties could be punished under certain conditions as fraud. A situation of pure carelessness would probably encounter problems to meet the *mens rea* requirement, since it is an intentional offence. But if the defendant has intentionally breached his professional duty, it will not be too difficult to qualify his act as dishonest.

The initial idea of the Law Commission that in order to be criminal the abuse should be performed secretly, intended to add an element of blameworthiness, was abandoned.[156] It is indeed difficult to imagine why a secretly performed abuse of position should be criminal while abuse about which the victim is informed, but that he cannot prevent, should escape criminal sanction.[157]

The CPS gave the following examples of abuse of position:

- "an employee who fails to take up the chance of a crucial contract in order that an associate or rival company can take it up instead;
- a director of a company who dishonestly makes use of knowledge gained as a director to make a personal gain;
- an employee who abuses his position in order to grant contracts or discounts to friends, relatives and associates; a waiter who sells his own bottles of wine

[154] Antje du Bois-Pedain, 'Die Strafbarkeit untreueartigen Verhaltens im englischen Recht: „Fraud by abuse of position" und andere einschlägige Strafvorschriften', *Zeitschrift für die gesamte Strafrechtswissenschaft,* 122, (2010), Heft 2, pp. 325-353, 344.
[155] *Blackstone's Guide to The Fraud Act 2006* (note 54) p. 34.
[156] Law Com No 276 (note 2) marginal number 7.40
[157] *Alridge and Parry on Fraud* (note 41) p. 143.

passing them off as belonging to the restaurant *R v Doukas* [1978] 1 All E.R. 1071."[158]

The remark that criminal law should not be used as a debt collection agency, but it ought to fight serious criminal activity can be repeated also in this context.[159]

One can simply argue, in view of the description of the perpetrator, that an abuse of position consists in not safeguarding or in acting against the financial interests of another person. However the fact that the Act did not use this expression might not only be considered a stylistic choice, but also a deliberate differentiation suggesting that an abuse is something more. The dictionary meaning of the word "to abuse" is "to use wrongly or improperly".[160] If a person is not safeguarding the financial interests of a person he is supposed to safeguard or is acting against these interests and is doing it dishonestly, it will be hard to say that he is not abusing his position.[161] This reasoning shows that eventually it will be dishonesty that will be the crucial element deciding on the defendant's liability, despite the intention of the Law Commission not to let dishonesty "do all the work".[162]

In their daily work managers take decisions that can expose their company to a risk of loss. That is natural, otherwise they could not take any decision, since each of them can potentially result in a loss. This corresponds to the correct or the right use of entrusted assets. The level of risk that a manager is allowed to take can be prescribed or can depend on practices in certain types of business. By not respecting these rules the manager might be in breach of his duties and thus abusing his position. This would be the case when the defendant is in breach of a rule governing his management duties.[163] But it can be argued that even if these duties are not formulated concretely, as it is the case for directors in articles 171-177 of the Companies Act 2006 or any other rules, a manager is anyway supposed to make proper use of the assets of the company. If the manager takes a risk, which is excessive to the type of

[158] Crown Prosecution Service, The Fraud Act 2006: Legal Guidance
[159] Crown Prosecution Service, The Fraud Act 2006: Legal Guidance.
[160] *Webster's College Dictionary*, 2010. According to Lesley Brown (ed.), *The New Shorter Oxford English Dictionary on Historical Principles*, Vol. 1 A-M (Clarendon Press Oxford, 1993) the noun 'abuse' means 'an improper usage', while the verb 'abuse' means 'misuse; make a bad use of'.
[161] *Alridge and Parry on Fraud* (note 41) p. 161.
[162] Law Com No 276 (note 2) marginal number 7.3.
[163] Arguably the behaviour of Wai Yu-Tsang of concealing information about dishonoured cheques which he was supposed to report could be considered an abuse in the sense of Section 4: *Wai Yu-Tsang*, 273. For details on this case see below: 4.4.2.2.2. *Wai Yu-Tsang.*

business he is pursuing or to the type of transaction in question, he is improperly using his position, hence he is abusing his position. A decision can expose the company to excessive risk, but also passiveness of the manager can have such results. In view of Section 4 (2) the position can be also abused by omission.

It was said in *Sinclair* in the context of conspiracy to defraud that "[f]or the Crown it is contended that it is fraudulent to take a risk to the prejudice of another's rights, which risk is known to be one which there is no right to take."[164] If the defendant took risk there was no right to take, he arguably abused his position. As already mentioned, the decision to consider the manager's behaviour to be an abuse will be most probably intertwined with the verdict on his honesty. A risk which can be considered honest according to the standard of honest and reasonable people will probably not be abusive and if it is considered to be dishonest, it will tend to be also considered abusive. This reasoning might appear to be fallacy of *petitio principi*,[165] although it is in fact not the case. A use becomes an abuse when it is incorrect according to certain rules, which apply in the context in question (e.g. allowing the manager to expose the assets to a certain level of risk). The reasoning on dishonesty will evaluate if an honest and reasonable person would consider this act dishonest and whether the perpetrator knew it. It is not necessary that answering positively to the first question automatically result in admitting dishonesty. However in practice, it is likely that, if it is considered that the manager knowingly used the assets in an incorrect way (committing an abuse), the jury would find that reasonable and honest people would consider it dishonest. And *vice versa*, if the conduct of the manager appears dishonest, it is more likely that they will consider it an abuse, not forgetting that it is to be understood as an ordinary English word and not a technical term.[166] Hence it is not so much a case of circular reasoning, but rather evidence of broad terms used in its design.

[164] Sinclair [1968] 1 WLR 1246, 1251.
[165] A dishonest use of assets is an abuse, while an abuse is defined to be use, which is not honest.
[166] *Montgomery and Ormerod on Fraud* (note 38) p. D-2109/D.2.338.

Interestingly, the phrasing of Section 4 allows also charging a person for intending to cause loss to or expose to a risk of loss a different person than the one whose interests the defendant was supposed to safeguard.[167]

3.2.3. Mens rea

Apart from dishonesty and intention, Section 4 does not provide for any other *mens rea* requirement. In particular there is no requirement that the perpetrator be aware of the fact that he is expected to safeguard, or not to act against, the financial interests of another person. In two landmark decisions the House of Lords held that even in lack of an explicit formulation of the *mens rea* requirement, the existence of such requirement is presumed in English criminal law.[168] It is hard to say how this rule will apply to Section 4 or whether the courts will opt for strict liability in respect of this element. In any case the defendant may claim that he did not act dishonestly, if he was not aware of his duties.[169]

3.3. Other offences

This section examines whether it is possible to charge managers who expose their companies to excessive risk for the two other types of fraud, namely fraud by false representation (3.3.1) and fraud by failing to disclose information (3.3.2.). The common requirements of dishonesty in its both *actus reus* and *mens rea* aspects as well as special intention apply to these modalities as well.

[167] *Blackstone's Guide to The Fraud Act 2006* (note 54) p. 34, *Montgomery and Ormerod on Fraud* (note 38) p. D-2109.
[168] *B v Dpp* [2000] 2 A.C. 428; *R v K* (Crown Prosecution Service v K) [2002] 1 AC 462.
[169] *Montgomery and Ormerod on Fraud* (note 38) p. D-2101.

3.3.1. Fraud by false representation

Fraud by false representation (Section 2) is the most classical form of fraud, which can be associated with what the continental criminal law would understand under this term.[170] According to Section 2:

(1)A person is in breach of this section if he—

(a) dishonestly makes a false representation, and

(b) intends, by making the representation—

(i) to make a gain for himself or another, or

(ii) to cause loss to another or to expose another to a risk of loss.

Fraud described in this section might be applied in particular to managers who looked for approval of their decision, e.g. by shareholders or more senior managers, or who made these persons take the decisions based on their recommendations. It is possible that such conduct would be considered as an abuse of position and could be charged under Section 4. However, this section does not require proof of the position in which the defendant is expected to safeguard the financial interests of his company. Moreover in particular cases it might better reflect the wrongdoing of the perpetrator.

This section will examine the elements constituting the *actus reus*, i.e. the meaning of representation and the questions as to under which conditions it is considered to be false as well as when a representation is actually made. As to the *mens rea* requirements, in addition to dishonesty and intention, fraud by false representation contains an additional limb, which will be discussed at the end of the section.

3.3.1.1. Representation

In contrast to Section 4, the law is much more explicit in explaining the terminology of Section 2. According to this section:

[170] Similar to e.g. *Escroquerie* (Art. 313-1 of the French Penal Code) or *Betrug* (§ 263 StGB).

(3) "Representation" means any representation as to fact or law, including a representation as to the state of mind of—

(a) the person making the representation, or

(b) any other person.

In most cases the representation will concern facts. The law is explicit about the inclusion of states of mind in this category, which was necessary in view of the decision in *Dent*, which excluded such an interpretation under the previous law.[171] This category allows also incorporating statements concerning future events in the sense that it includes statements as to what the perpetrator or another person (in the view of the perpetrator) is intending to do.[172] As to the statements of opinions, they can be also considered as representations as to the state of mind. The fact that they are wrong does not make them false in terms of Section 2, but if the perpetrator presents an opinion as his own while in fact thinking something else or presenting somebody else's opinion knowing that it is not true, it can count as false representation, if the prosecution is able to prove it.[173] This category will comprise all types of statements made by managers, including their own opinions on the prospective results of this decision as well as quoted opinions of others (e.g. experts).

False representation can be relative to law as well. This category will comprise for instance situations when a manager deliberately presented wrongly the legal effects of a legal act. However, if the law is unclear, an interpretation, which stays within the reasonable boundaries of the law, cannot count as false even if it is not commonly accepted, unless it is presented as such.[174]

According to Section 2 (4) "A representation may be express or implied". There is abundant jurisprudence giving examples of implied representation. For instance, a person entering a restaurant and ordering a meal implies that he is willing to pay.[175] The Court of Appeal admitted implied representation in case of vulnerable victims who trusted the defendants that the price they charged was fair.[176] With a

[171] *Regina v Dent* [1955] 2 QB 590.
[172] *Montgomery and Ormerod on Fraud* (note 38) p. D-2038/1.
[173] *Montgomery and Ormerod on Fraud* (note 38) pp. D-2039f.
[174] *Montgomery and Ormerod on Fraud* (note 38) pp. D-2038/1f.
[175] *DPP v Ray* [1974] AC 370.
[176] *R v Greig* [2010] EWCA Crim 1183.

similar reasoning this category could be applied in case of a manager seeking approval for a decision bearing a higher risk than usually taken by the company and presenting it as normal or routine business activity.

The Law Commission explained that representation is an assertion, which may be "express, implicit in written or spoken words, or implicit in non-verbal conduct."[177]

3.3.1.2. Falsity

According to Section 2 (2) "A representation is false if—

(a) it is untrue or misleading, and

(b) the person making it knows that it is, or might be, untrue or misleading."

In fact this subsection clarifies two aspects of the definition of fraud by false representation. One is the scope of understanding of the term false (a); the second provides for an additional element of the *mens rea* (b).[178] Here only the first element will be analysed. The second will be treated below in the part dedicated to *mens rea*.

The term untrue should be understood in its ordinary meaning and the juries should be instructed to use it in this sense.[179] The representation need not be entirely false. It is enough that some statements are false, provided that it is through these statements that the defendant intended to make gain, cause loss or expose to the risk of loss.[180] Since the prosecution has to prove a negative fact (falsity), the defendant, although not obliged to prove his own innocence, may find himself in the position where it is in his interest to prove the truthfulness of his statement.[181]

In order to be false, it is enough that the representation is misleading. According to the Home Office a representation is misleading when it is 'less than wholly true and capable of an interpretation to the detriment of the victim'.[182] The

[177] Law Com No 276 (note 2) p. 61.
[178] *Alridge and Parry on Fraud* (note 41) p. 90.
[179] *Montgomery and Ormerod on Fraud* (note 38) p. D-2041.
[180] *Montgomery and Ormerod on Fraud* (note 38) p. D-2041.
[181] *Alridge and Parry on Fraud* (note 41) p. 91. In *Mandry and Wooster* [1973] 3 All ER 996.
[182] Fraud Law Reform, Government response to consultation, The Consultation Exercise para 19, available at:

classic example of misleading representation is when the perpetrator discloses true information to the victim in a credible way, while not giving information, which, if provided, would significantly alter the interpretation of this information.[183] Similarly the perpetrator might be using ambiguous language.[184] By extending the understanding of false to misleading, the scope of criminalisation has become very broad. It is noteworthy that while civil law limits its applicability by introducing the *caveat emptor* rule, the Fraud Act makes no such distinction.[185] However, the CPS instructed that the prosecutor should bear in mind the existence of this rule. Moreover, also for the sake of consistency and in order to limit the already broad scope of the provision, the prosecution should be guided by the *caveat emptor* rule.[186] In any case, this rule will not exclude the liability of a director who deliberately presents information in ambiguous terms or hides important information.

3.3.1.3. Making the representation

A further problem in the interpretation of Section 2 is the question when one can say that the representation is actually made, in other words, at what moment the offence is committed. It is suggested that the representation is made in the moment when it is pronounced in the case of oral representation, posted in the case of mail and sent in the case of email.[187] There is no need for the representation to be made directly to the person to whom it is intended to arrive or to any concrete addressee.[188]

There exists doubt as to whether the representation can be made by omission. First of all particular caution ought to be taken while broadening the provision in this direction in view of the two other sections. Section 3 provides for liability for omission to disclose information and requires a special duty on the part of the

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http://webarchive.nationalarchives.gov.uk/20130128103514/http://www.homeoffice.gov.uk/documents/cons-fraud-law-reform/Government_response.pdf?view=Binary (retrieved on 23.07.2015).

[183] *Simester and Sullivan's Criminal Law* (note 14) p. 618.

[184] *Montgomery and Ormerod on Fraud* (note 38) p. D-2042.

[185] *Simester and Sullivan's Criminal Law* (note 14) p. 618, *Montgomery and Ormerod on Fraud* (note 38) p. D-2042. *Caveat emptor*, from Latin buyer beware, is a "common-law maxim warning a purchaser that he could not claim that his purchases were defective unless he protected himself by obtaining express guarantees from the vendor" (*Oxford Dictionary of Law* (note 114)).

[186] *Montgomery and Ormerod on Fraud* (note 38) p. D-2035

[187] *Simester and Sullivan's Criminal Law* (note 14) p. 619, *Montgomery and Ormerod on Fraud* (note 38) p. D-2026.

[188] *Montgomery and Ormerod on Fraud* (note 38) pp. D-2025f.

perpetrator obliging him to disclose the information. It is possible to argue that if section 2 is to be understood as allowing for the possibility of being committed through omission, it would subsume section 3.[189] As to section 4, it expressly states that omission can be regarded as abuse (2). Section 2 lacks such a statement. It is argued that this section does not apply in cases where a person did nothing other than fail to correct the erroneous conviction of another victim, while having no duty to do so.[190]

But under certain conditions a representation can be made by omission. If the perpetrator is asked to provide certain information and omits an important element, he might be liable for fraud.[191] Furthermore, under the previous law the concept of "continuing representation" was developed in *DPP v Ray*.[192] It applies to situations where the perpetrator by his action constantly makes a representation as to the existence of a certain situation. In the cited case it was established that if one enters a restaurant and orders a meal, one continuously, by the act of remaining in the restaurant and having the meal, makes the representation as to one's intention to pay the bill at the end of the meal. Hence, the lack of action is in fact considered to be a positive representation.[193] A different variation of this case would relate to a situation where the perpetrator makes a true statement but he becomes aware of facts that make it false or the change of circumstances makes them so, but his behaviour suggests that such a change did not take place. Even if it would be considered as representation, it is necessary to prove dishonesty at this later stage as well.[194]

These rules might find application in cases where managers sought approval of their decision and omitted to present information they had, e.g. in case the level of risk of an investment raised because of new events or new information and by omitting to mention it, they implied that the conditions remain as before. It is however difficult to predict whether the mere fact of non-communication of these new information or facts and proceeding with the investment would be considered as false representation. The situation might be different, if the manager during this process communicated with those giving the agreement in a way that suggested that no change

[189] *Montgomery and Ormerod on Fraud* (note 38) p. D-2032.
[190] *Montgomery and Ormerod on Fraud* (note 38) p. D-2033.
[191] *Montgomery and Ormerod on Fraud* (note 38) p. D-2032
[192] DPP v Ray [1974] AC 370.
[193] *Montgomery and Ormerod on Fraud* (note 38) p. D-2034.
[194] *Montgomery and Ormerod on Fraud* (note 38) p. D-2034.

occurred. This could in fact constitute a new representation, without the necessity to use the concept of "continuing representation".[195] If this would be the case, dishonesty must be proved at the moment of the new representation.

3.3.1.4. *Mens rea*

Besides the common *mens rea* elements of dishonesty and intention, Section 2 provides for an additional element of *mens rea*. A representation is false, according to Section 2 (2) when it is not only untrue or misleading, but the person making it also knows that it is, or might be, untrue or misleading.[196] It might be considered unfortunate that this requirement was added to the definition of falsity. The representation does not become false due to the fact that the perpetrator is aware of its falsity.[197]

In spite of the legislative technique, adding this passage guarantees that the *mens rea* requirement extends to situations in which the defendant knew that the representation was false, but also to situations when he knew that it might be so.[198] While the requirement that the defendant knows about the statement being untrue or misleading seems natural, the application of the offence to situations, in which the defendant knew only that it might be so, grants the offence limits which are difficult to precisely define. It is particularly so, since absolute certainty about facts or their interpretation is rare and thus a slight doubt should stop a person from using the representation. The extension would go even further, if the juries decided to admit wilful blindness as fulfilling this element, which remains however uncertain at this point.[199] It thus appears that the crucial and only limit to extensive criminalisation will be dishonesty, which will prevent liability for false statements made with good intentions.[200]

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[195] *Montgomery and Ormerod on Fraud* (note 38) p. D-2034.
[196] *Simester and Sullivan's Criminal Law* (note 14) p. 620.
[197] *Montgomery and Ormerod on Fraud* (note 38) p. D-2041.
[198] Before the enactment of the Fraud Act 2006, the definition of deception used the term "recklessness" (Section 15 (4) of the Theft Act 1968), which was considered confusing by the Law Commission (Law Com No 276 (note 2) marginal number 7.17, fn. 9) and avoided in the Fraud Act.
[199] *Montgomery and Ormerod on Fraud* (note 38) p. D-2045
[200] This position was held also by the Attorney General (Hansard, HL 19 July 2005 col. 1415-1416). Similarly *Alridge and Parry on Fraud* (note 41) pp. 92f.; *Blackstone's Guide to The Fraud Act 2006* (note 54) p. 26; *Montgomery and Ormerod on Fraud* (note 38) p. D-2045.

It is important to stress that this provision excludes liability for recklessness in the sense of situations where the perpetrator might and should have known that the representation is or might be untrue or misleading. On the other hand, if the statement is true, but the perpetrator was convinced that it was not and he made it dishonestly and with the relevant intention, he could be held liable for attempted fraud,[201] which is the result of excluding the impossibility defence in cases of attempts (Section 1 (2) of Criminal Attempts Act 1981).

3.3.2. Fraud by failing to disclose information

Fraud by failing to disclose information described in Section 3 of the Fraud Act criminalises situations where a person dishonestly fails to disclose to another person information, which he is obliged by a legal duty to disclose to that person, and he does so with the same intention as in other types of fraud.[202]

This provision could be of application in situations in which the manager dishonestly conceals information when he is obliged to disclose it and he does so with the intention of making a gain or causing loss to the company or exposing it to a risk of loss. Such situation might occur in various contexts. For instance, a manager conceals information that he is obliged to disclose while seeking approval of his decision by a competent person or body while the information concerns the exposure of the company to risk of loss or on the higher level of such risk. Secondly, a manager could have information about a possible risk, which concerns the activity of the company or its product and does not disclose it, which might result, if the risk materialises, in loss. In the third scenario a manager has the duty to disclose certain information and by the fact of not doing so he exposes the company to the risk of loss.

[201] *Montgomery and Ormerod on Fraud* (note 38) p. D-2030.
[202] (3) Fraud by failing to disclose information
A person is in breach of this section if he—
(a) dishonestly fails to disclose to another person information which he is under a legal duty to disclose, and
(b) intends, by failing to disclose the information—
(i) to make a gain for himself or another, or
(ii) to cause loss to another or to expose another to a risk of loss.

It is not excluded that criminalisation under this section will overlap with Section 2 or 4. [203] As to the overlap with section 2 the use of Section 3 would have the advantage of circumventing the problem of making a representation by omission. Concerning the overlap with fraud by abuse of position, if the fraud was committed by non-disclosure of information, the use of Section 3 will have the advantage of omitting the problem of qualifying it as abuse. Despite the overlap, if the case consists mainly of the non-disclosure of information, bringing charges under Section 3 will have the advantage of better labelling the defendant's wrongdoing and it will be more sensible to explain it to the jury.[204]

In order to verify the manager's liability for Section 3, it is necessary to verify whether he had the legal duty to disclose information and whether he failed to disclose it. In addition to dishonesty and intention, it is a matter of debate whether it is necessary to prove an additional *mens rea* element of knowledge or awareness of circumstances giving rise to the duty to disclose information.

3.3.2.1. Legal duty

Section 3 requires that the perpetrator be under the legal duty to disclose information. The section does not provide any further information as to this duty. Often infringements of duties to disclose are criminalised by acts imposing these duties and can be prosecuted under the terms of such acts.[205]

This section was proposed in a much broader version by the Law Commission. According to their understanding the scope of the perpetrators was not limited to those who have legal duties, but extended also to situations where a moral duty could be deduced from the relationship between the victim and the perpetrator.[206] Such criminalisation would be extremely vast and would lack legal certainty. Moreover it would run counter to the civil law rule of caveat emptor.[207] A narrower view was chosen limiting the scope to legal duties.

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[203] *Montgomery and Ormerod on Fraud* (note 38) p. D-2048.
[204] *Montgomery and Ormerod on Fraud* (note 38) p. D-2048.
[205] *Simester and Sullivan's Criminal Law* (note 14) p. 622.
[206] Law Com No 276 (note 2) marginal number 7.31ff., pp. 64f.
[207] *Simester and Sullivan's Criminal Law* (note 14) p. 621.

Besides this adjective, the act does not explain any further what is meant by this duty or what is its source. The Home Office Explanatory notes are restrained in their elucidations, by saying that these duties "may include duties under oral contracts as well as written contracts"[208] and quoting the explanations of the Law Commission, which are the following:

"7.28 […] Such a duty may derive from statute (such as the provisions governing company prospectuses), from the fact that the transaction in question is one of the utmost good faith (such as a contract of insurance), from the express or implied terms of a contract, from the custom of a particular trade or market, or from the existence of a fiduciary relationship between the parties (such as that of agent and principal).

7. 29 For this purpose there is a legal duty to disclose information not only if the defendant's failure to disclose it gives the victim a cause of action for damages, but also if the law gives the victim a right to set aside any change in his or her legal position to which he or she may consent as a result of the non-disclosure."

There is no doubt that the criminal liability for non-disclosure of information does not go further than the duties established under civil law. The Attorney General made this clear by stating: "[t]he Government believe that it would be undesirable to create this disparity between the criminal and the civil law; it should not be criminal to withhold information which you are entitled to withhold under civil law".[209]

The question whether the defendant has the legal duty to disclose will be a mixed question of fact and law. The juries will be directed by the judge that if they consider certain facts to have occurred, then the defendant had a legal duty to disclose.[210]

Managers may fall into the scope of criminalisation of this provision, if they are under a legal duty to disclose information. Such an obligation might be statutory, contractual, be deduced from the fiduciary relationship or be part of general practices or customary rules.[211]

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[208] Home Office, Explanatory Notes Fraud Act 2006, 8 November 2006, Recital 18.
[209] Hansard, HL, 19 July 2005, col. 1426.
[210] *Blackstone's Guide to The Fraud Act 2006* (note 54) p. 29.
[211] Home Office, Explanatory Notes Fraud Act 2006, 8 November 2006, Recital 18.

3.3.2.2. Failure to disclose information

The offence described in this section is committed by omission consisting in the non-disclosure of the information as required under the duty described above. It can consist of the non-disclosure of any type of information and need not concern all the information in question in a certain context. It is enough that the defendant is partially silent or omits one detail of an issue.[212] Possibly absurd results of such a broad scope will be corrected by the fact that the problem of how much information was concealed will be reflected in the assessment of dishonesty.[213]

It is obviously necessary that the perpetrator fail to disclose the information to the person towards whom he is bound by the duty.[214] But the wording of Section 3 does not express the need that the person to whom the information is not disclosed is the same as the one who can be exposed to the risk of loss. It is thus possible to envisage liability of a company director for breaching information duty towards the company while the shareholders are exposed to the risk of loss.[215]

3.3.2.3. *Mens rea*

With the exception of the requirements of dishonesty and intention, common to all Sections, Section 3 contains no express provision on the *mens rea* requirement as to the knowledge of the defendant about his duty or the circumstances concerning it. Arguably this element of *mens rea* might be presumed, in particular in view of the judgments in DPP v B and R v K.[216] The CPS in its guidelines considers Section 3 to be a strict liability offence in this respect.[217] Even if the position of the CPS is accepted, the lack of knowledge concerning the duty will most probably exclude

[212] *Alridge and Parry on Fraud* (note 41) p. 138.
[213] *Montgomery and Ormerod on Fraud* (note 38) pp. D-2050-2100. As the CPS points out in its guidelines: "If a Defendant disclosed 90% of what he was under a legal duty to disclose but failed to disclose the (possibly unimportant) remaining 10%, the *actus reus* of the offence could be complete. Under such circumstances the Defendant would have to rely on the absence of dishonesty. Such cases can be prosecuted under the Act if the public interest requires it, though such cases will be unusual." Crown Prosecution Service, The Fraud Act 2006: Legal Guidance; (available at: http://www.cps.gov.uk/legal/d_to_g/fraud_act/ consulted on: 10.10.2015).
[214] *Alridge and Parry on Fraud* (note 41) p. 138.
[215] *Montgomery and Ormerod on Fraud* (note 38) p. D-2101.
[216] *Simester and Sullivan's Criminal Law* (note 14) p. 623; *Montgomery and Ormerod on Fraud* (note 38) p. D-2101.
[217] Crown Prosecution Service, The Fraud Act 2006: Legal Guidance, heading: Failure to disclose information (available at: http://www.cps.gov.uk/legal/d_to_g/fraud_act/ consulted on: 10.10.2015).

criminal liability for lack of dishonesty.[218] This will be of particular importance depending on the source of the duty. It is submitted that the question will be treated differently, if the duty was enshrined in statutory law and thus had to be known by everybody or if it was a question of some customary rules or general practices, the knowledge of which might not be full in case of newly appointed managers.

3.3.2.4. Summary

In view of the above, in order to decide upon the liability of managers in the three scenarios described at the beginning of this section, it is necessary to establish whether the perpetrator was under a duty to disclose the information and whether he dishonestly failed and whether he intended this way to make a gain or cause loss or expose to a risk of loss.

In all three scenarios, the perpetrator fails to disclose information. As to his intention, he will most probably be driven by the intention to gain – at least understood as keeping what one has according to Section 5 (3) – while the perpetrator will seek to keep his position. He might also seek benefit in the hope that things will go well. Moreover, he will fulfil this element in most cases since he will be aware that he is exposing the company to the risk of loss and will continue with his plan anyway. Similarly to other modalities of fraud, the most important threshold will be related to dishonesty.

3.3.3. Theft

Without entering into the details of the offence of theft, it should be mentioned for sake of completeness that this offence could also be contemplated as the legal basis for prosecuting excessive risk taking committed by managers against the interests of their companies. It has been used against directors who misapply the assets of their companies, as it was notably done in the Guinness case.[219] The

[218] Ormerod, 'The Fraud Act 2006–Criminalising Lying?' (note 64) p. 206. The guidelines of the CPS also evoke the role of dishonesty in this context.
[219] R. v Ernest Walter Saunders [1996] 1 Cr App R 463. The CEO of Guinness at the time of the offence Ernest Saunders was the main defendant in the case where various defendants "were convicted

definition of this offence is provided for in Section 1 (1) of the Theft Act 1968, according to which: "A person is guilty of theft if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it".

The *actus reus* of the offence consist of the appropriation of property belonging to another.[220] The *mens rea* is composed of intention permanently to deprive the other person of the property and dishonesty, although the *actus reus* aspect of the first part of the *Ghosh* test applicable also for theft, should be born in mind.[221]

The property of the company is to be considered property belonging to another, even if the manager is acting with the consent of the owner, provided that he was dishonest.[222]According to Section 3 of the Theft Act 1968 "[a]ny assumption by a person of the rights of an owner amounts to an appropriation". The very broad understanding of appropriation, which the jurisprudence has given to the requirement of appropriation allows including any usurpation of the rights of the owner to be considered theft.[223] In this sense a wrongful use of the property, i.e. exposing it to non-permitted risk, can also be considered an assumption of the rights of the owner.

Similarly, the *mens rea* requirement of intention to deprive has been very broadly construed by the jurisprudence. In particular it is considered that, if the defendant took an amount of money with intention to return the same amount, he is still guilty of theft, because he cannot hand back the same coins and notes.[224] Moreover Section 6 (1) of the Theft Act 1968 provides that: "A person appropriating property belonging to another without meaning the other permanently to lose the thing itself is nevertheless to be regarded as having the intention of permanently depriving the other of it if his intention is to treat the thing as his own to dispose of regardless of

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on a number of counts in relation to their dishonest conduct in a share support operation during Guinness Plc's takeover bid for the Distillers Company Plc" (at 463). The defendants made use of funds belonging to Guinness consisting in making payments to purchasers of Guinness shares, which was supposed to boost their value and enable the takeover. One of the offence for which Saunders was convicted (as well as other defendants) was theft, since the payments were not authorised by the Guinness board.

[220] David Ormerod, *Smith and Hogan's Criminal Law*, 13th edition (Oxford University Press, 2011) p. 780.

[221] *Simester and Sullivan's Criminal Law* (note 14) p. 494.

[222] Ormerod, *Smith and Hogan's Criminal Law* (note 220) pp. 819f.

[223] *Simester and Sullivan's Criminal Law* (note 14) pp. 523ff; Ormerod, *Smith and Hogan's Criminal Law* (note 220) pp. 780ff.

[224] *Simester and Sullivan's Criminal Law* (note 14) p. 539; *Montgomery and Ormerod on Fraud* (note 38) p. D-3020/D.3.137.

the other's rights". Despite the use of the expression "dispose of", which would suggest parting with it, there is jurisprudence, which extends its meaning to situations, where the defendant wanted to treat the thing as his own in the sense of dealing with it and not disposing of it in the strict sense, thus not really meaning that the owner loses his property.[225] In particular in *Fernandes* the court held that "section 6 may apply to a person in possession or control of another's property who, dishonestly and for his own purpose, deals with that property in such a manner that he knows he is risking its loss".[226]

Finally, the offence of theft requires proof of dishonesty. In view of the broad design of the other elements of this offence, this element will be decisive for determining criminal liability of the defendant.[227] The understanding of dishonesty will be the same as described for fraud and the test of *Ghosh* applies.[228] The same restrictions and reservations as described above will be also applicable to theft.

It can be concluded that if the threshold of dishonesty is passed, the English law offers various offences, which may be used to incriminate the conduct of the manager who exposes his company to excessive risk of loss.

4. Inchoate offences

In order to understand the full scope of criminalisation of excessive risk-taking in the English criminal law, it is necessary to analyse liability for inchoate offences. The important characteristic of these offences is that "liability for these crimes may arise before, or even without, the commission of any substantive offence".[229] The offences to be considered in this subchapter are: certain preparatory acts (possession etc. of articles for use in fraud; making or supplying articles for use in fraud), encouraging and assisting an offence, attempt and conspiracy (statutory conspiracy and common law conspiracy to defraud).

[225] *Simester and Sullivan's Criminal Law* (note 14) p. 543.
[226] Fernandes [1996] 1 Cr App R 175.
[227] See also: Consultation Paper No 155, para 3.24.
[228] *Simester and Sullivan's Criminal Law* (note 14) p. 547.
[229] *Simester and Sullivan's Criminal Law* (note 14) p. 291.

4.1. Preparatory acts

There exists no general law criminalising preparatory acts in England and Wales, as exists for attempt. However the Fraud Act contains two provisions making punishable certain acts committed in preparation for fraud:

- Possession etc. of articles for use in frauds (Section 6)

- Making or supplying articles for use in frauds (Section 7).

It is important to point out that they constitute offences sui generis and do not require that the main offence of fraud be even attempted.

4.1.1. Possession etc. of articles for use in frauds

According to Section 6: "A person is guilty of an offence if he has in his possession or under his control any article for use in the course of or in connection with any fraud". Similarly to the main offences of fraud this section was criticised for its own very broad scope of application and also for generally broadening the scope of criminal liability of the already widely designed fraud offence.[230]

The term "article" used in this section covers any article without providing a definition of this term. Section 8 provides only the clarification that "'article' includes any program or data held in electronic form". Thus the term can cover practically any item, including computers, printers, theoretically even pens or paper.[231]

This term will cover any article which is as such destined to commit fraud, but also articles that can be used for perfectly legal purposes but in the particular context is used to commit fraud (e.g. the computer used for disseminating information that is considered to be false representation).[232] Hence, the section can without any problem apply in cases where the item used was a document, a computer file or a computer programme.

[230] Ormerod, Williams, *Smith's Law of Theft* (note 18) p. 284.
[231] *Montgomery and Ormerod on Fraud* (note 38) p. D-2116.
[232] *Blackstone's Guide to The Fraud Act 2006* (note 54) p. 66.

The article need not be for use in the course of fraud, but it can also be for use in connection with fraud. This phrasing allows including those articles that can be used e.g. in the course of preparatory acts or in order to cover the fraud.[233]

It is unclear how to interpret the expression "any fraud" in the context of the plethora of offences incriminating fraudulent activities. This expression certainly includes fraud described in Sections 2-4 of the Fraud Act. The question remains open in particular in relation to the common law offence of conspiracy to defraud.[234]

Section 6 describes the relationship between the perpetrator and the article as an alternative of two possibilities. A person must either have the article in his possession or under his control, which allows a very broad interpretation, including e.g. computer programs stored on computers located outside the UK.[235] The combination of these two terms allows comprising a variety of situations and has led to doubts as to whether a person can be liable even where he is not aware of possession or control or of the nature of the article. In light of this uncertainty, it was suggested that the courts include one or both of the additional elements of *mens rea*:

- "that the accused 'knows' that he is in possession or control of the article

- that the accused 'knows' of the nature of the article in his possession or control."[236]

It is unclear so far whether the courts will be willing to include these elements.[237] The provision does not explicitly mention the *mens rea* requirement. However, the lack of such an interpretation would lead to the immediate liability of the whole adult population in England and Wales for this offence.[238] Despite initial reluctance on the side of the Home Office, it was made clear in the Explanatory Notes (Recital 25) that the proof of this element will be necessary,[239] which was also repeated in the Guidance of the CPS.[240] Both documents refer to the jurisprudence

[233] *Montgomery and Ormerod on Fraud* (note 38) p. D-2122/1
[234] For an analysis of the term "any fraud" see: *Montgomery and Ormerod on Fraud* (note 38) pp. D-2122/1ff.
[235] *Montgomery and Ormerod on Fraud* (note 38) p. D-2121/D.2440.
[236] *Montgomery and Ormerod on Fraud* (note 38) p. D-2125.
[237] Ormerod, Williams, *Smith's Law of Theft* (note 18) pp. 287ff.
[238] Ormerod, Williams, *Smith's Law of Theft* (note 18) p. 293.
[239] *Alridge and Parry on Fraud* (note 41) p. 490.
[240] Crown Prosecution Service, The Fraud Act 2006: Legal Guidance, heading : Possession of articles for use in fraud (Section 6) (available at: http://www.cps.gov.uk/legal/d_to_g/fraud_act/ consulted on: 10.10.2015)

under the Theft Act 1968, according to which "the prosecution must prove that the defendant … intended the article to be used in the course of or in connection with some future burglary, theft of cheat."[241] This requirement should now apply also for fraud. It is enough to prove general intention to commit fraud, in view of the use of the word "any" by the provision.[242] It is important to stress that no proof of dishonesty is necessary.[243]

Although it might appear excessive, there is no legal obstacle that would exclude liability for the attempt or (statutory) conspiracy to commit a Section 6 offence. Interestingly, there is no need to rely on attempt in case of impossibility. Even if the perpetrator has in his possession an article that cannot be useful to commit fraud but he intends to use it this way, he commits the offence of Section 6.[244]

4.1.2. Making or supplying articles for use in frauds

In addition to Section 6, Section 7 widens the scope of fraud even further and does so using a fairly complicated legislative technique. This section practically provides for two different offences, depending on the modality of *mens rea* and both can be committed in four different ways.[245] However, the scope of the offence(s) is not as worryingly wide as under Section 6, since it requires some positive action on the side of the defendant and contains a strong *mens rea* requirement.[246] This section has been designed in order to incriminate mainly those who produce items that can be used to commit fraud, in particular fraud by false representation, as in the example given by the Explanatory Notes – a device, which can cause the electricity meter to show lowered consumption.[247] In fact it was designed much more widely and can comprise situations referring to completely innocuous items.

Section 7 presents certain advantages when formulating charges for inchoate forms of fraud. Compared to conspiracy, it has the advantage of not requiring the

[241] *R v Ellames* (1974) 60 Cr App R 7.
[242] *R v Ellames* (1974) 60 Cr App R 7.
[243] Ormerod, Williams, *Smith's Law of Theft* (note 18) p. 294.
[244] *Montgomery and Ormerod on Fraud* (note 38) p. D-2126.
[245] Ormerod, Williams, *Smith's Law of Theft* (note 18) p. 296.
[246] *Simester and Sullivan's Criminal Law* (note 14) p. 627
[247] Home Office, Explanatory Notes Fraud Act 2006, 8 November 2006, Recital 27.

interaction of two persons and compared to aiding and abetting that it is not necessary that the actual fraud take place.[248]

According to Section 7 "A person is guilty of an offence if he makes, adapts, supplies or offers to supply any article—

(a) knowing that it is designed or adapted for use in the course of or in connection with fraud, or

(b) intending it to be used to commit, or assist in the commission of, fraud."

The *actus reus* of this offence is described alternatively by four verbs (making, adapting, supplying or offering to supply) referring to any article. The latter term should be understood similarly as in Section 6 described above. However its meaning is additionally shaped by the description of *mens rea*. If the prosecution chooses the first modality (a), the article should be designed or adapted for use in the course of or in connection with fraud.[249] This will significantly limit the meaning of the term to items designed to commit fraud. Such a limitation will not be applicable in case of the second modality (b) and any article could be subsumed under this term, e.g. a mobile phone.[250] According to Section 8 "article" includes any program or data held in electronic form. As to the understanding of the word "fraud" in this context, it is still not entirely clear, similarly as for Section 6. It comprises obviously fraud described in Sections 2-4 and in view of the Home Office includes also conspiracy to defraud.[251]

As to the word "makes", it should be understood according to its ordinary meaning. However, it may be extended in the context of electronic data if the courts accept the interpretation already applied in case of a different provision, where the court considered that downloading from internet to the computer cache can be considered as "making".[252]

Similarly the word "adapts" should also be understood in its natural meaning. In view of the topic of this study, it will mostly apply to software or other electronic

[248] Ormerod, Williams, *Smith's Law of Theft* (note 18) p. 297.
[249] *Montgomery and Ormerod on Fraud* (note 38) p. D-2133.
[250] Ormerod, Williams, *Smith's Law of Theft* (note 18) p. 297.
[251] *Montgomery and Ormerod on Fraud* (note 38) p. D-2132/D.2.535.
[252] *Atkins v DPP* [2000] 1 WLR 1427.

data when it is impossible to claim that the defendant "made" it, in particular if the courts are reluctant to use the broad interpretation made in *Atkins*.[253]

Also the word "supplies" should be understood in its ordinary meaning.[254] The difficulties, which this expression together with the phrase "offers to supply" cause will most likely not affect cases relevant to this study.[255]

The *mens rea* requirement creates a substantive difference within Section 7 creating in practice two offences. According to Section 7 (1) (a) the defendant must know that the article is designed or adapted for use in the course of or in connection with fraud, which will limit its scope to situations where the perpetrator knows that the article is designed for such use and it is truly so. Section 7 (1) (b) opens much broader possibilities of incrimination requiring intention that the article is to be used to commit, or assist in the commission of, fraud. It will be even more so, since intention can include also oblique intention when the defendant knows that it is virtually certain that the article will be used for fraud.[256] Similarly to Section 6, it is unclear whether fraud would mean also conspiracy to defraud. A broader interpretation could be supported by the fact that the Home Office used an example based on such a case when explaining the scope of this section.[257]

4.1.3. Application

Since cases that are considered by this study do not resemble classic fraud, Sections 6 and 7 may find only limited but still significant application. In this context it is first necessary to verify whether an item in question can be considered an "article" under these sections and whether there is the necessary connection with excessive risk taking constituting fraud by abuse of position or any other type of fraud, as was analysed in the previous subchapter, or conspiracy to defraud, if this possibility is accepted. In view of the broad interpretation of "article", practically any item can fall into the scope of this term and it will depend on the modality whether it

[253] *Montgomery and Ormerod on Fraud* (note 38) p. D-2130.
[254] *Montgomery and Ormerod on Fraud* (note 38) p. D-2130.
[255] More about interpretation of these terms: *Montgomery and Ormerod on Fraud* (note 38) pp. D-2130ff.
[256] *Montgomery and Ormerod on Fraud* (note 38) p. D-2133.
[257] Home Office, Explanatory Notes Fraud Act 2006, 8 November 2006, Recital 27, *Montgomery and Ormerod on Fraud* (note 38) pp. D-2132f.

must effectively be designed or adapted for use in the course of or in connection with fraud or whether it will be enough that the perpetrator's intention is so, although the item is not apt for such use. In the former case, the required *mens rea* will be limited to the knowledge of the article's character, while in the latter, the intention will compensate for more limited *actus reus*.

As to articles that could be considered in the context relevant for this study, these will be mainly documents or electronic data. However other items cannot be excluded. Case 4 described in Chapter I (3.3. Sample cases) concerning the new car model can be alternate in such a way that the manager prepares the model car in such a way that the problem with the sound system does not appear. If the situation from that case can be considered fraud by abuse of position, the car could be considered as article to be used for fraud and the perpetrator's conduct would be to adapt it for use in fraud.

The courses of conduct foreseen by Section 6 and 7 comprise possessing or having under control, making, adapting, supplying or offering to supply, thus covering virtually any kind of possible preparatory activity. Hence, the extensiveness of these two sections results in the fact that once the foreseen conduct can amount to fraud, then any kind of activity with any item, which could be used in connection with this offence or even possession of it, can become criminal, if the perpetrator has the required knowledge or intention.

The article in question may be prepared or designed *per se* only for the use in fraud. This will be the case of documents that were prepared in order to use them in the process of taking a decision, which would expose the company to excessive risk, e.g. an expert opinion wrongly assessing such risk, if the perpetrator is aware of its inaccuracy. However also documents which contain correct information could be considered as articles according to these sections, if the person who has them in his possession or under his control, or the person producing, adapting or supplying them, intends that they are used in the course or in connection with fraud. Since the person who makes, adapts or supplies necessarily has the articles in his possession for a certain time, the scope of liability can be stretched to cases where the articles served to prepare or to cover up the offence. Not only documents can fall into the scope of

these sections, but also software, e.g. a programme used while preparing risk analysis, alternated in a way that it gives more optimistic results.

Both sections may be of application for two categories of perpetrators. Firstly, they can be used to punish managers who were caught while preparing a decision exposing the company to excessive risk, which would constitute an abuse of position or other modality of fraud. They could also be held liable if such articles are used to cover up deficiencies in the process of taking such a decision (e.g. providing inaccurate economic justification).

Secondly, other persons who cooperate with managers could be held liable for possessing or preparing such documents or software provided that they have the required *mens rea*. An assistant who prepares (makes, adapts or supplies) documents or software for a manager knowing for which purpose the manager will use it can be held liable, even if he does not intend that the offence is committed. These provisions can be used to charge those who participate in a process of excessive risk-taking but with regard to whom there exist difficulties to prove that they have the position described in Section 4. Notably, these offences do not require a proof of dishonesty of their perpetrator, but only certain knowledge or intention as to the possible or foreseen use of the articles in a context, where the eventual perpetrator of fraud need to be dishonest.

4.2. Encouraging and assisting crime

Shortly after the Fraud Act was enacted another piece of legislation – the Serious Crime Act 2007 – introduced criminal liability for an inchoate offence of encouraging and assisting crime. There is no need to evaluate this type of liability in its entirety. This subsection will only examine which kind of encouragement and which kind of assistance to managers in the context of their decisions exposing their company to excessive risk can be punished in view of Sections 44-46 of the Serious Crime Act 2007.[258]

[258] For further analysis of this type of liability see: *Simester and Sullivan's Criminal Law* (note 14) pp. 293ff, Ashworth, *Principles...* (note 76) pp. 458ff.

These sections provide for liability for two different types of conduct: encouraging and assisting. As far as the former is concerned, it could possibly cover those who inspire or embolden managers to take excessive risk, whereas the latter would potentially cover those who help managers in these acts. The important advantage of charging the offence under one of either type of conduct in this section is that there is no need to prove any connection with the main offence, which might be found by prosecutors as a convenient alternative to complicity (see below 5.1). These offences have been widely criticised for their extremely broad scope and lack of precision, while at the same time not being used too often.[259]

In order to establish if persons described above could be held criminally liable in these cases, it is necessary to verify if their conduct coincides with the understandings of "encouraging" and "assisting" provided in the Serious Crime Act and whether they could have the required *mens rea*.

Both terms of the *actus reus* – encouraging and assisting – are not defined in the act. According to Simester and Sullivan's Criminal Law encouraging is "some communication or gesture on the part of [the inchoate offender] that might persuade, induce, or influence [the main offender] to commit a crime".[260] There is no need to prove that the action of the former had any influence on the latter. As far as the encouragement is concerned, it can also be done to a variety of addressees, e.g. in a journal article.[261]

Assisting can be understood as helping or making it easier to commit an offence and probably, due to similarity in meaning will be interpreted in line with aiding (form of secondary liability).[262]

The act must be capable of encouraging or assisting the offence, but need not effectively encourage or assist. There is not even a need to prove that for instance a letter encouraging the commission of an offence actually reached the addressee, although it is probably necessary that it was at least posted. Moreover liability for attempted encouraging or assisting is possible, but it is necessary that the act of the perpetrator amount to more than mere preparation to encourage or to assist (Section 1

[259] *Simester and Sullivan's Criminal Law* (note 14) pp. 293f.
[260] *Simester and Sullivan's Criminal Law* (note 14) p. 295.
[261] *Simester and Sullivan's Criminal Law* (note 14) p. 295, Jones [2007] EWCA Crim 1118.
[262] *Simester and Sullivan's Criminal Law* (note 14) pp. 296f.

(1) Criminal Attempts Act 1981).[263] It is argued that the courts will apply some remoteness limitation (in the sense of unwillingness to convict if what the defendant did was quite remote from the actual harm of the main offence) in order to avoid excessive criminalisation.[264] Except this latter caveat nothing precludes liability for encouraging or assisting an inchoate offence or commission in the form of secondary participation.[265]

Mens rea is the most complicated requirement in the design of the offence of assistance and encouragement. It is provided in three variations and further complicated by additional rules in Section 47.[266] The defendant has the required *mens rea*, if he:

- intends to encourage or assist commission of an offence (Section 44), or

- believes that the offence will be committed; and that his act will encourage or assist its commission (Section 45), or

- believes that one or more of those offences will be committed (but has no belief as to which); and that his act will encourage or assist the commission of one or more of them (Section 46).

Initially it is necessary to envisage to which offence a person might assist or which offence he might encourage. Fraud is not mentioned among the offences excluded from the scope of application of these provisions. Thus a person might be assisted in committing or encouraged to commit fraud in any of the three forms resulting in the excessive exposure of the company to a risk of loss. To the contrary, the offence of encouraging and assisting does not apply to conspiracy to defraud, which is expressly excluded by the Act (Serious Crime Act 2007, Schedule 3, point 39).

Two types of conduct may be considered here. Firstly, those that would help a manager commit the above offence. This could be done by any kind of positive action and nothing seems to preclude assisting by omission. A person can provide the main

[263] *Simester and Sullivan's Criminal Law* (note 14) p. 297.
[264] *Simester and Sullivan's Criminal Law* (note 14) p. 297.
[265] *Simester and Sullivan's Criminal Law* (note 14) p. 298.
[266] An extensive analysis of the problems of *mens rea* of assistance and encouragement would go beyond the scope of this study. For a detailed analysis, see *Simester and Sullivan's Criminal Law* (note 14) pp. 300ff; Ashworth, *Principles...* (note 76) pp. 458ff.

perpetrator with documents, organise an expert analysis (not necessarily accurate, e.g. blurring the perspective of risk) or draft it by himself etc. By omission the main perpetrator may be assisted by higher management who voluntarily disregards the fact that the former is taking excessively risky decisions. Other persons in the company may provide such help by e.g. not executing their control functions. Furthermore a manager may be assisted also by a person external to the company, e.g. an expert who will incorrectly (and knowingly) assess the risk of a transaction.

Secondly encouraging might be done also by senior management who may effectively inspire, embolden or even pressurise managers to take decisions that by normal standards in the business would be considered too risky. They could also do it by omission in not reacting to such behaviour, if it could be clearly proved that they knew it and that their silence was sending a clear signal of acceptance. Also other employees could be held liable for encouraging as well as persons outside the company. Since encouragement need not have a precise addressee, an author of an article in a journal or a newspaper in which he emboldens managers to take excessively risky decisions could be held liable, if the *mens rea* requirement is fulfilled.

It is important to bear in mind that in both cases the conduct which the defendant encourages or assists must be foreseen to take place under conditions that, if materialised, will qualify as one of the types of fraud described in sections 2-4 or as conspiracy to defraud. As mentioned, it is not necessary that the main offence take place.

Moreover, liability for encouraging or assisting is also possible even if the main perpetrator would not act with the *mens rea* described in Sections 2-4 of the Fraud Act, i.e. he would not act dishonestly or/and without the intent. According to Section 47 (5) of the Serious Crime Act 2007:

"In proving for the purposes of this section whether an act is one which, if done, would amount to the commission of an offence—

(a) if the offence is one requiring proof of fault, it must be proved that—

(i) D believed that, were the act to be done, it would be done with that fault;

(ii) D was reckless as to whether or not it would be done with that fault; or

(iii) D's state of mind was such that, were he to do it, it would be done with that fault".

These rules could find application in cases where a person encouraged a manager and the latter believed that it is correct to take the risk, which in fact was excessive, thus not fulfilling the limb of dishonesty. In view of these rules, a person assisting or encouraging could be held liable either when he was reckless about the state of mind of the perpetrator or if he was himself dishonest and acted with the intent of exposing the company to a risk of loss or with the intent that the fact that the manager exposes the company to the risk will make gain for the person encouraging or assisting or for another person foreseen by him.

There is no defence of withdrawal or revocation that applies to assistance and encouragement.[267]

So far it does not seem that these provisions will be used on an important scale. But, if a decision is made to intensively tackle excessive risk-taking, Sections 44-46 of the Serious Crime Act could find application to the example situations set out above.

4.3. Attempt

As in other legal systems also in England and Wales not only an accomplished offence, but also an attempt to commit it may lead to a criminal conviction. The legal basis for such criminalisation used to be at common law, but became statutory with the adoption of the Criminal Attempts Act 1981.[268] Section 1 of this act provides in Subsection 1 (1) that:

"If, with intent to commit an offence to which this section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence."

[267] *Simester and Sullivan's Criminal Law* (note 14) p. 306.
[268] *Simester and Sullivan's Criminal Law* (note 14) p. 339.

Without entering into a discussion on the details of the law on attempt in English law, the following main issues will be considered. The *actus reus* of this offence requires that the perpetrator does an act which is more than merely preparatory to the commission of the offence. While attempt was still a common law offence, the main difficulty was to decide when the conduct was sufficiently close to the commission of the offence, which resulted in the development of the tests of proximity, such as the 'last act' test, the 'substantial step' test and the 'unequivocal act' test. The lack of a definition in the Criminal Attempts Act 1981 of what is more than merely preparatory ensured the continued prevalence of this discussion. The issue will be a question of facts, thus it will be for the jury to decide whether what the perpetrator did amounted to more than mere preparation.[269]

In view of the language used by Section 1 – "does an act", which generally expresses the legislators' intent to exclude liability for omission – there should be no liability for omission.[270] As will be shown below, in the context of this study, this restriction will have very limited impact.

Moreover, according to Section 1 (4) liability for attempt is excluded in case of conspiracy (common law or statutory), aiding, abetting, counselling, procuring or suborning the commission of an offence. On the other hand, a person may be held liable for attempt, even if the commission of the offence is impossible (Section 1 (3)).

The requirement of *mens rea* is defined as "intent to commit an offence", where the word "offence" refers to the offence, which *actus reus* the perpetrator attempts to fulfil.

Fraud is an offence to which Section 1 of the Criminal Attempts Act 1981 applies (Section 1 (4)). In view of the design of the modalities of fraud, the possibility to commit it in the form of attempt will remain limited.[271] According to Ashworth, there are two kinds of attempts. The first kind consists of situations where the perpetrator has not yet accomplished all the necessary acts to complete the offence (incomplete attempts), whereas the second kind comprises situations in which the

[269] *Simester and Sullivan's Criminal Law* (note 14) pp. 340f.
[270] *Simester and Sullivan's Criminal Law* (note 14) p. 344.
[271] *Alridge and Parry on Fraud* (note 41) p. 473.

perpetrator completed all the acts but the foreseen result did not materialise (complete attempts).[272]

As already mentioned, the definitions of all the three modalities of fraud contain very limited *actus reus* and important impact remains on *mens rea*. According to Section 1 of the Criminal Attempts Act 1981, the perpetrator must act with the intention to commit an offence. Without entering into discussions on the *mens rea* of attempt in various configurations of *mens rea* of the main offence,[273] one can argue that it is not possible to convict for attempted fraud, if dishonesty and intention to make gain or cause loss or expose to loss could not be proved.

What can be examined is the extent to which the *actus reus* of Sections 2-4 can remain unfulfilled. Because of the "inchoate mode"[274] in which this offence was drafted, the possibility of committing an attempted fraud will be limited and very often the perpetrator will enter into the phase of the commission of fraud.[275] It could be helpful in particular in cases where it remains unclear which of the sections has to be used for indictment. Since the offence is created in Section 1 and Sections 2-4 only describe ways to commit it, the charge of attempt should refer to Section 1 and this way avoid the problems of precise choice.[276] As to fraud by abuse of position only incomplete attempt is possible, since this offence requires no result. For instance, a manager could be held liable for attempted fraud by abuse of position, if he prepared a contract that exposes the company to a risk which he was not allowed to take and he is about to sign it. For the same reason, the issue whether the harm actually materialised or whether the company was effectively exposed to risk has no impact on the criminalisation of attempt in the same way as it has no impact, the problem of proof aside, on criminalisation of the main offence.

In view of the fact that attempt is excluded in cases of omission, there will be no possibility to punish fraud by abuse of position in this form. For the same reason it will not be possible to commit attempted fraud by failing to disclose information.

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[272] Ashworth, *Principles...* (note 76) p. 439.
[273] *Simester and Sullivan's Criminal Law* (note 14) pp. 346ff.
[274] See 1. Introduction and history.
[275] *Alridge and Parry on Fraud* (note 41) p. 474.
[276] *Blackstone's Guide to The Fraud Act 2006* (note 54) p. 62.

If the exposure to excessive risk can be subsumed under Section 2 (fraud by false representation), for liability for attempt it is necessary to prove that either the false representation has not been made or that, if made, it was not false. As was mentioned above, the representation is made in the moment when it is pronounced in case of oral representation, posted in case of mail and sent in case of email. The liability for attempted fraud will be mainly possible in case of mistake of fact or failures of communication.[277] For the representation that is made by mail or email, one could argue that attempt is made if the letter or email containing it was prepared for sending, but was not sent (e.g. the perpetrator was arrested on the way to the post office).[278] As for the oral representation, it will be more difficult to imagine a case where the conditions of Section 1 are fulfilled, since before the representation is pronounced the acts amount rather to preparation, whereas if a representation has been pronounced, but nobody heard it, it will be hard to prove it. One could imagine a case where a video message of a director was made, but not yet presented to the shareholders fulfilling this condition.

The second possibility of attempting to commit Section 2 fraud is when the representation is true, but the perpetrator is convinced that it is false.[279] Section 1 (2) of Criminal Attempts Act 1981 extends criminalisation of attempt to situations, in which the facts are such that the commission of the offence is impossible. In other words, there is no impossibility defence in this regard. Thus the defendant's error in this regard does not preclude his liability, but since the offence cannot be effectively committed, it can only be regarded as attempt.

4.4. Conspiracy

Within the current state of English law, there exist two types of liability for conspiracy to commit an offence. The main option, common for all offences, is the statutory conspiracy provided for by the Criminal Law Act 1977. Although the old common law offences of conspiracy were to a large extent abolished, some remains of

[277] *Blackstone's Guide to The Fraud Act 2006* (note 54) p. 63.
[278] *Montgomery and Ormerod on Fraud* (note 38) p. D-2030.
[279] *Montgomery and Ormerod on Fraud* (note 38) p. D-2030.

the old law persist, including the offence of conspiracy to defraud, which is highly relevant for the topic of this study.

It is important to note that both the statutory and the common law offences of conspiracy (to defraud) in question can result in criminal liability without the commission of the main offence (the offence to which the perpetrators conspire). That is why they are considered here as inchoate offences. At the same time they punish conspiracy involving two or more persons and therefore allow punishment of cooperation in the pre-commission phase of the offence of fraud. The latter aspect might also be useful in cases where it is for some reasons impossible or difficult to prove the commission of fraud, but it is however possible to prove conspiracy. Both types of conspiracy will be analysed here together with their application to cases of excessive risk-taking in their inchoate aspect in this chapter, while its application to cases of cooperation will be treated in the following chapter.

4.4.1. Statutory Conspiracy

4.4.1.1. Rules

Section 1 of the Criminal Law Act 1977 provides that:

"If a person agrees with any other person or persons that a course of conduct will be pursued which, if the agreement is carried out in accordance with their intentions, either–

(a) will necessarily amount to or involve the commission of any offence or offences by one or more parties to the agreement, or

(b) would do so but for the existence of facts which render the commission of the offence or any offences impossible,

he is guilty of conspiracy to commit the offence or offences in question."

According to the above section the *actus reus* of statutory conspiracy consists in an agreement with at least one more person to perform a course of conduct which would include the commission of an offence by at least one party to the agreement. In

view of Section 1 (b) the impossibility of committing the offence does not exclude liability for conspiracy.

The scope of offences which can fulfil the above condition is vast. First of all, all offences triable within England and Wales, statutory or at common law, can be taken into account. Moreover, this scope was extended by means of Section 1A of the Criminal Law Act 1977 to offences triable under foreign law.[280] Furthermore the agreement may concern the commission of an inchoate offence, which in practice will consist in conspiracy to assist in or encourage the commission of an offence. The scope of liability is however limited by the fact that conspiracy does not encompass offences to be committed in form of complicity. However, in such cases it is probable that the perpetrators can be charged for conspiracy to commit assisting or encouraging.[281] Criminal liability is also excluded for conspiring to aid, abet, counsel or procure.[282]

It is argued that the agreement between the parties to the conspiracy must constitute a project that they want to bring to completion.[283] This project must be common and not only similar and parallel.[284] The fact that two managers prepare or commit acts of fraud, even knowing about each other's activity does not amount to conspiracy, if there was no common agreement between them.

There is no agreement as to how broadly the expression "course of conduct" should be interpreted, whether it ought to include only the acts or omissions to which the conspirators agreed or if it should comprise also their consequences.[285] In view of the inchoate mode according to which the definition of fraud is designed, even if the narrower view is admitted, conspiracies to commit fraud will generally fall within the scope of this expression.

Moreover, Section 1 of the Criminal Law Act 1977 uses the problematic word "necessarily" to describe the relation between the acts planned by the conspirators and

[280] *Simester and Sullivan's Criminal Law* (note 14) pp. 311f.
[281] *Simester and Sullivan's Criminal Law* (note 14) p. 312.
[282] *Simester and Sullivan's Criminal Law* (note 14) p. 258.
[283] *Simester and Sullivan's Criminal Law* (note 14) p. 313.
[284] *Subhash Mehta v Regina* [2012] EWCA Crim 2824, para. 36; *Simester and Sullivan's Criminal Law* (note 14) p. 313 – In order to exemplify when the collaboration between two persons does not amount to conspiracy, the author cites the Canadian case of *Sokoloski* ([1977] 2 SCR 523), in which it was ruled out that an arrangement to meet between a seller and a buyer amounts to conspiracy to sell drugs.
[285] *Simester and Sullivan's Criminal Law* (note 14) pp. 319f.

the commission of one or more offences. It results that if the perpetrators agreed to a course of conduct there is always a way to say that it does not necessarily lead to the commission of an offence, since there is always a foreseeable course of conduct, which would exclude such a possibility.[286] Extravagant defences based on such an argument will probably not be admitted. However, if there exists a reasonable possibility that the goal to which the perpetrator conspired can be attained without infringing the law, they cannot be held liable for conspiracy.[287] This issue is also related to the problem of agreements between the parties, which are subject to conditions and the rule concerning these cases will probably be applied to resolve the above difficulty. Namely, if the conspirators agree that they will commit an offence, but under certain circumstances, it is enough to charge for conspiracy, since it is the intention of the perpetrators that if the condition is fulfilled they will perform an act or omission, which constitutes an offence.[288]

A withdrawal from carrying out the plan does not exclude defendant's liability, if a person became party to a conspiracy.[289]

The *mens rea* requirement of the offence of conspiracy is quite complex and gave rise to problems of interpretation and suggestions of reform, which are yet to be implemented.[290] It would go beyond the scope of this study to analyse this discussion in detail and a brief summary of the rules should suffice for the purposes of this chapter. Simester and Sullivan's Criminal Law summarises these rules in the following way:

" (i) D must intend that the agreement to which she is a party should be carried out.

(ii) D must intend or know of the existence of any fact or circumstance necessary for the commission of the agreed offence.

(iii) Where a fact or circumstance necessary for the commission of the agreed offence is not in existence at the time of the agreement, D must intend or know that any such fact or circumstance will exist at the time the offence takes place.

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[286] Ashworth, *Principles...* (note 76) pp. 454f. Simester et al. give an example of a conspiracy to rob a bank, which would not be committed, if the perpetrators find out that the bank is heavily guarded by armed police, see: *Simester and Sullivan's Criminal Law* (note 14) p. 318.
[287] Reed [1982] Crim LR 819 (CA); *Simester and Sullivan's Criminal Law* (note 14) p. 318.
[288] Ashworth, *Principles...* (note 76) p. 455.
[289] Ashworth, *Principles...* (note 76) p. 453.
[290] The Law Commission, Law Com No 318, Conspiracy and Attempts, 2009, para 2.137 and 2.146.

(iv) If D is to be guilty of conspiracy, at least one other party to the agreement must satisfy conditions (i) through (iii) above.

(v) It is not necessary for D to intend to play any active part in carrying out the agreement."[291]

It is possible, in accordance with the language of Section 1 of the Criminal Law Act 1977, to charge for conspiracy to commit more than one offence. It is however very important to carefully formulate the charge, since all the parties to the alleged conspiracy must have the required *mens rea* to all the offences mentioned in the charge. Otherwise it is also possible to formulate different charges for different conspiracies, according to what the particular defendant agreed on.[292]

If the above conditions are fulfilled a person can be held liable for conspiracy, unless the only other party to the agreement is his spouse or civil partner, a person below the age of criminal liability, a victim of the offence subject to the agreement or a limited company (Section 2 Criminal Law Act 1977).[293] Although it is necessary that at least two persons form a conspiracy, there is no need for both to be convicted. If, for procedural reasons, one of the persons is acquitted, the other may still be held criminally liable.[294]

4.4.1.2. Application to excessive risk-taking

Although conspiracies that did not go beyond mere agreement rarely find their way to court,[295] cases of conspiracy to commit fraud in a corporate environment might be more suitable for prosecution due to availability (unless the perpetrators are particularly cautious) of evidence (e.g. emails).

Due to the fact that the three modalities of fraud constitute one offence created by Section 1 of the Fraud Act, conspiracy to commit it need not refer to a precise modality, which might help to formulate a charge when it is impossible to decide

[291] *Simester and Sullivan's Criminal Law* (note 14) p. 331.
[292] *Simester and Sullivan's Criminal Law* (note 14) p. 336.
[293] *Simester and Sullivan's Criminal Law* (note 14) pp. 332ff.
[294] *Simester and Sullivan's Criminal Law* (note 14) pp. 335f.
[295] *Simester and Sullivan's Criminal Law* (note 14) p. 337.

under which modality of fraud the agreed course of conduct can be subsumed.[296] However, in view of the above-described necessity that an agreement between the parties is formulated and the *mens rea* requirements are fulfilled, it is necessary that the conspiring persons agree to the relevant circumstances, e.g. that they (or one of them) will make a false representation or abuse one's position.

The main offence – fraud – must be, according to the plan, committed by at least one of the parties to the agreement, so a plan which would enable a person outside of the conspiracy to perform the main offence will not amount to statutory conspiracy, contrary to the common law one. However, it might amount to a different offence (e.g. encouraging and assisting crime or complicity).[297]

In view of Section 1 (2) of the Criminal Law Act 1977 the rules on *mens rea* applicable to conspiracy result in the fact that the requirements as to the knowledge or intention on the side of the conspirator are higher than for the main perpetrator. In particular, the conspirator to commit Section 4 fraud by abuse of position certainly needs to know about the circumstances giving rise to the position of trust, while it is unclear whether such a requirement would be necessary for the main offender. A similar situation applies to the fraud described in Section 3.[298] As to Section 2, the main perpetrator need not know that the representation is untrue or misleading, while it is enough that he knows that it might be so. In case of conspiracy he must know that the representation is false (or misleading), or intend that this is the case.[299]

In the context of this study statutory conspiracy can be used to punish excessive risk-taking in cases in which two or more persons agreed on a course of conduct, which according to their plan will expose their company to an excessive risk of loss in circumstances, which will qualify this main act as an offence of fraud, i.e. at least one of the conspirators will abuse his position, make false representation or fail to disclose information acting dishonestly and with the required intention. The other

[296] *Blackstone's Guide to The Fraud Act 2006* (note 54) pp. 40f.
[297] *Blackstone's Guide to The Fraud Act 2006* (note 54) p. 40. Curiously the Authors refer to "an agreement to enable third parties to inflict loss". It seems that such agreement may in certain circumstances be a conspiracy to commit fraud, since while fraud does not require proof of result, it is not necessarily that the loss occurs.
[298] See discussion of this problem: *Mens rea* as regards Section 4 Fraud (3.2.3.) and as regards Section 3 Fraud (3.3.2.3.).
[299] *Blackstone's Guide to The Fraud Act 2006* (note 54) p. 43; *Alridge and Parry on Fraud* (note 41) p. 477.

conspirators do not need to have the same intention or to act dishonestly, but they must know that the main perpetrator will fulfil this requirement or intend that it is so. Since the conspirators must intend that the agreement be carried out, it is difficult to claim that they are not dishonest or that they have no intention to expose another to risk of loss. However it is not necessary for all of them to occupy the position required in Section 4, be under an obligation to disclose as in Section 3 or to make the representation as in Section 2.

The conspirators need not know that what they plan will amount to fraud, since ignorance of law is not a defence,[300] but they need to know about the circumstances necessary for the commission of the agreed offence or intend or know that "any such fact or circumstance will exist at the time the offence takes place".[301] Therefore they need to know either that the conspirator who, according to the plan, will be the main perpetrator has the legal duty to disclose in case of Section 3 fraud, or that he occupies the position of trust described in Section 4 or they must intend that at the moment when the offence would take place, he has this duty or occupies this position.

Statutory conspiracy may be used to punish managers intending to expose their company to excessive risk if the actual fraud did not take place, either because the perpetrators abandoned their plan or the plot was discovered before the perpetrators entered the phase of attempt. It can also find its application in cases where fraud was actually committed by one of the conspirators, but for different reasons it is impossible or impractical to charge for the actual offence (e.g. there is not enough proof for one of the perpetrators). It might be useful in such cases to charge all of the perpetrators for conspiracy, instead of charging only some of them for fraud and leaving others unpunished or charging them for conspiracy. In this way, statutory conspiracy might be used to punish collaboration in excessive risk-taking. This possibility is attractive inasmuch as it allows sentencing the perpetrator to the punishment of the same severity as for the main offence of fraud.

[300] *Simester and Sullivan's Criminal Law* (note 14) p. 691.
[301] *Simester and Sullivan's Criminal Law* (note 14) p. 331.

4.4.2. Common Law Conspiracy to defraud

Conspiracy to defraud is a common law offence, which, despite widespread criticisms survived various changes of laws and proposals of its abolition. Similarly to its statutory law equivalent, it can also be of use in order to punish managers taking excessive risk, although with limitations to its use, which will be described below.

The origins of conspiracy as a common law offence date back to the Middle Ages.[302] The Criminal Law Act 1977 which introduced the statutory law of conspiracy abolished most of the common law offences of conspiracy, except *inter alia* conspiracy to defraud. Around the same period as the enactment of this statute, a general feeling started to grow that conspiracy to defraud should be abolished. Lord Diplock was a notably vocal critic expressing the shortcomings of conspiracy to defraud as an offence being based in common law and because of the extreme broadness of its design, in particular allowing the punishment of conspiring to commit acts that would not, if committed, constitute in themselves a substantive offence.[303] Various reports were produced that in some cases recommended limitation of the scope of conspiracy to defraud, while always recognising the practical need for maintaining the offence.[304] Finally the report that led to the adoption of the Fraud Act recommended its entire abolition.[305] However, as explained in the introduction to this chapter, the consultation of the project led the government to withdraw the proposed abolition and at present the common law conspiracy to defraud is valid law.[306]

There is still an on-going debate on the use of the common law offences, the entire scope of which is beyond the scope of this study.[307] As to the conspiracy to defraud, certain reluctance to use this offence may be observed also among the judges.[308] Moreover, it is the rule that, if a conduct fulfils the conditions for a

[302] For details on the history of conspiracy to defraud see *Montgomery and Ormerod on Fraud* (note 38) pp. D-7002ff, with sources referenced there.
[303] *Montgomery and Ormerod on Fraud* (note 38) pp. D-7007ff. For the criticism of Lord Diplock see e.g. the judgment in *Withers* [1974] 3 WLR 751, [1975] A.C. 842, 861-862.
[304] Law Commission, Criminal Law: Conspiracy to Defraud (1974) Working Paper No 56; Law Commission, Law Com No 76, Report on Conspiracy and Criminal Law Reform, 1976; Law Commission: Conspiracy to Defraud Working Paper No 104, 1987; Law Commission, Law Com No 228, Conspiracy to Defraud, 1994.
[305] Law Com No 276 (note 2) para 9.6.
[306] *Montgomery and Ormerod on Fraud* (note 38) pp. D-7008f.
[307] See e.g. *Blackstone's Guide to The Fraud Act 2006* (note 54) pp. 48ff.
[308] See for instance the analysis of Mr Justice Hickinbottom in the Ruling in Regina v. Evans (Eric) and others [2014] 1 WLR 2817.

statutory offence, it should be prosecuted as such unless "there is good reason for doing otherwise".[309] Hence, the provisions of the Fraud Act should be used in the first place to charge for offences described there. The Attorney General issued "guidelines for prosecutors on the use of the common law offence of conspiracy to defraud",[310] according to which conspiracy to defraud should be preferred over statutory fraud in two categories of situations: a) if the conduct can more effectively be prosecuted as conspiracy to defraud; b) if the conduct can only be prosecuted as conspiracy to defraud, with examples given for both of them. As to the first category of situations, the prosecutor might find it more effective to charge for conspiracy to defraud rather than fraud if the cases are complicated because for instance various different offences are alleged, several jurisdictions are involved or the variety of types of victims suffered from the offence.[311] Cases falling under the second category will mostly concern situations where it was intended that the main offence be committed by a person, who is not part of the conspiracy.

4.4.2.1. Elements

The current definition of conspiracy to defraud comes from the speech of Viscount Dilhorne in the judgment of the House of Lords in Scott v Metropolitan Police Commissioner[312]:

"…it is clearly the law that an agreement by two or more by dishonesty to deprive a person of something which is his or to which he is or would be or might be entitled and an agreement by two or more by dishonesty to injure some proprietary right of his, suffices to constitute the offence of conspiracy to defraud."[313]

In view of this definition conspiracy to defraud may occur in two ways: "either by agreeing to prejudice a person's economic interests or by agreeing to prejudice a person's right properly to discharge his duty".[314] The second option is relevant for

[309] *Blackstone's Guide to The Fraud Act 2006* (note 54) p. 51.
[310] Attorney General's guidelines for prosecutors on the use of the common law offence of conspiracy to defraud. First published 2007. Updated version 29 November 2012.
[311] Attorney General's guidelines for prosecutors on the use of the common law offence of conspiracy to defraud. First published 2007. Updated version 29 November 2012.
[312] Scott v Metropolitan Police Commissioner, [1975] AC 819.
[313] Scott v Metropolitan Police Commissioner [1975] AC 819, 840.
[314] *Montgomery and Ormerod on Fraud* (note 38) p. D-7009.

cases where a person is misled in exercising his public duty, so it will be irrelevant for the topic of this study. It is the first one that is of interest here. In the words of the judge in the *Wai Yu-Tsang* case, conspiracy to defraud in this case means to "be party to an agreement with the common intention to defraud one or more of the persons named in the indictment".[315]

As for the *actus reus*, there must be in the first place an agreement between two or more parties to prejudice another person's interests. There must be a common understanding between the conspirers how these interests would be prejudiced. Withdrawal from the agreement does not preclude criminal liability, similarly as in case of statutory conspiracy and contrary to what might be possible for complicity.[316] It can only influence the level of punishment.[317] In particular two rules concerning the agreement are different to the one in the statutory conspiracy and result in the broader scope of application of this common law offence. Firstly, the agreement need not foresee the commission of a concrete substantive (statutory or common law) offence.[318] This provision will be relevant when the parties to the agreement agreed to prejudice the economic interests of another, but it is impossible, for different reasons, to prove all the elements of fraud. Secondly, there is no need, according to the agreement, that the main offence be performed by a member of the conspiracy.[319]

The agreement in question must foresee prejudice to the economic interests of another person. This can take different forms (e.g. deprivation of property), but the one which is relevant for this study, is when the agreement focuses on imperilment of the victim's property interest. The agreement might not contain the plan to cause loss, but it is enough that the economic interests of the victim are put at risk.[320] The defendant cannot escape the liability by claiming that they believed that the victim would profit or even that the victim eventually took profit from their activity.[321] The nuances of this issue will be elaborated below while analysing the relevant cases.

Similarly to fraud, there are two *mens rea* requirements for the conspiracy to defraud: dishonesty and intention to defraud. Dishonesty is understood in the same

[315] *Wai Yu-Tsang Appelant v R* [1992] 1 AC 269, 269.
[316] *Simester and Sullivan's Criminal Law* (note 14) pp. 259-261.
[317] *Blackstone's Guide to The Fraud Act 2006* (note 54) p. 206.
[318] *Blackstone's Guide to The Fraud Act 2006* (note 54) p. 206.
[319] *Montgomery and Ormerod on Fraud* (note 38) p. D-7014.
[320] *Blackstone's Guide to The Fraud Act 2006* (note 54) p. 209.
[321] *Blackstone's Guide to The Fraud Act 2006* (note 54) p. 209.

way as described for the offence of fraud and certain judgements cited there were indeed issued under conspiracy to defraud (they will be subject to more detailed analysis in this section). Conspiracy to defraud is triable only on indictment,[322] which means that the Crown Court has exclusive jurisdiction over it.[323] Hence, the remarks on the specificity of jury trials apply also to this offence. As to the managers who agreed to expose the company to excessive risk, but in their perception acted for its benefit, the same reservation as described above will apply. Therefore in order to consider the manager as dishonest it will most probably be necessary that he was either motivated by direct and tangible personal interest or that he acted without integrity or knowingly and intentionally breached rules governing the execution of his duties. However it will be for the jury to decide in concrete case whether they found the perpetrator dishonest.

Ormerod and Williams make clear reference to situations of excessive risk-taking: "In theft, D is not dishonest if he believes he has a right to do the act in question and this must also apply in conspiracy. If however, he knows for example, that no 'ordinary decent company director' would take the risk in question, then he knows that the risk is an unjustifiable one and it is dishonest for him to take it". And further: "If *no* director could have believed the risk was justified, it follows that the defendant did not; but it would seem right that the jury be directed that they must find this is so."[324] This understanding is also in agreement with the judgment in *Sinclair*.[325]

Conspiracy to defraud contains the requirement of intention formulated as "intention to defraud". In the words of Ormerod and Williams: "If the conspirators know that the effect of carrying out the agreement will be to put V's property at risk, then they intend prejudice to V and, if they are dishonest, they are guilty of conspiracy to defraud him. This is so notwithstanding that it turns out that V's property is unimpaired, or even that he makes a profit out of the transaction."[326]

The understanding of these elements will be illustrated and elaborated in view of two cases: *Allsop* and *Wai Yu-Tsang*. Before going into this analysis, it is necessary to point out the territorial limitation of the scope of conspiracy to defraud, which

[322] *Blackstone's Criminal Practice 2013* (note 50) A5.63/p. 102.
[323] *Blackstone's Criminal Practice 2013* (note 50) D3.13/p. 1296.
[324] Ormerod, Williams, *Smith's Law of Theft* (note 18) p. 208.
[325] See subchapter 3.6.1. (Dishonesty)
[326] Ormerod, Williams, *Smith's Law of Theft* (note 18) p. 210.

might be relevant in cases of international companies pursuing business in different territories. The general rule is that an agreement, which was made in England or Wales, but foresees commission of fraud outside this jurisdiction cannot be prosecuted as conspiracy to defraud in England and Wales. The exceptions to this rule are stated in Section 5.3 of the Criminal Justice Act 1993, according to which:

"A person may be guilty of conspiracy to defraud if—

(a) a party to the agreement constituting the conspiracy, or a party's agent, did anything in England and Wales in relation to the agreement before its formation, or

(b) a party to it became a party in England and Wales (by joining it either in person or through an agent), or

(c) a party to it, or a party's agent, did or omitted anything in England and Wales in pursuance of it,

and the conspiracy would be triable in England and Wales but for the fraud which the parties to it had in view not being intended to take place in England and Wales."

4.4.2.2. Cases

Interestingly two judgments that are most instructive from the perspective of this study were issued in cases where defendants were charged for conspiracy to defraud. In two important cases the English courts confirmed that the excessive risk-taking could constitute conspiracy to defraud. Due to the importance of these judgments for this study, they will be treated more in detail.

4.4.2.2.1. R. v Allsop

In *Allsop*[327] the appellant questioned his conviction for conspiracy to defraud. The facts can be summarised according to the judgment as follows. *Allsop* was a "sub-broker" for a hire-purchase finance company Prestige Finance Corporation. "His function was to introduce business to Prestige in the shape of prospective hire-

[327] *R. v Allsop* [1977] 64 Cr App R 29. (hereinafter: *Allsop*)

purchasers who wished to acquire motor cars."[328] Part of this function was the filling-in of application forms containing details of the transaction, which in some cases would be entered falsely. "For example, the price of the car concerned would be inflated so as to allow an illusory deposit to be shown as having been paid by the intending hire-purchaser; or the value of a car taken in part exchange would be stated at more than the true figure."[329] It was clear that on none of these occasions did Allsop want to cause damage to Prestige. "What he sought to bring about was an increase in the business he took to Prestige. He expected and believed that the transactions he introduced would in the end be duly completed so that Prestige would achieve their contemplated profit to the ultimate advantage of all concerned—including the appellant who got his commission."[330] For these actions *Allsop* was convicted of conspiracy to defraud (he acted in collusion with other persons[331]) and in his appeal he questioned his conviction arguing that the jury had been instructed incorrectly, since the judge had indicated that the prejudice of the company did not necessarily need to amount to the loss of money.

The case allowed the Court of Appeal to tackle two issues: the *mens rea* of conspiracy to defraud (and indirectly of fraud) and the meaning of "prejudice" in the context of this offence.

The main question of this judgment concerned the mental state of the defendant. The questioned judgment was based on the understanding that "the appellant realised that the making of the false statements was likely to lead to the detriment or prejudice of the hire-purchase company in the sense of economic loss, but not necessarily the loss of money",[332] while the appellant argued that "the jury should have been directed that they must be satisfied that the appellant intended to cause economic loss to the hire-purchase company".[333] The Court of Appeal opted for the first interpretation, thus stating that the *mens rea* requirement for conspiracy to defraud is fulfilled if the defendant "intends by deceit to induce a course of conduct in

[328] *Allsop* 29.
[329] *Allsop* 30
[330] *Allsop* 30
[331] *Allsop* 30.
[332] *Allsop* 29.
[333] *Allsop* 29.

another which puts that other's economic interests in jeopardy … even though he does not intend that actual loss should ultimately be suffered by that other.[334]

For the purpose of explaining why the Court adopted this view, Lord Justice Shaw went into a deeper analysis of the offence of fraud and its *mens rea* requirement stating: "Generally the primary objective of fraudsmen is to advantage themselves. The detriment that results to their victims is secondary to that purpose and incidental. It is "intended" only in the sense that it is a contemplated outcome of the fraud that is perpetrated."[335] In order to reinforce this statement, he also elaborated on the meaning of loss: "'Economic loss' may be ephemeral and not lasting, or potential and not actual; but even a threat of financial prejudice while it exists it may be measured in terms of money."[336] And further "Interests which are imperilled are less valuable in terms of money than those same interests when they are secure and protected."[337] This way the Court justified the extension of criminalisation to exposing to a risk of loss, while claiming that in fact a risk of loss is a loss already suffered. If this understanding of loss were to be admitted, it would probably not be necessary to add exposing to the risk of loss to the definition of intent in the offence of fraud, since the term loss would already comprise such a possibility. However, while defining this offence for the purpose of the new Fraud Act, it was preferred not to rely on this broad understanding of the meaning of loss and, at least for the sake of clarity, the intention to expose to a risk of loss as an alternative to the intention to cause a loss was expressly added.

4.4.2.2.2. Wai Yu-Tsang

A similar problem arose in the case of *Wai Yu-Tsang*[338]. The defendant in this case was the chief accountant of a bank who "failed to cause to be recorded in the bank's computerised ledgers the dishonour of United States cheques totalling U.S.$124m., which the bank had purchased. Instead details were recorded in private

[334] *Allsop* 29.
[335] *Allsop* 31.
[336] *Allsop* 31.
[337] *Allsop* 32.
[338] *Wai Yu-Tsang Appelant v R* [1992] 1 AC 269 (hereinafter: *Wai Yu-Tsang*).

ledgers, and entries giving a false impression were made in the bank's accounts."[339] The chief accountant was convicted of "conspiring with the managing director, the general manager and others to defraud the bank and its existing and potential shareholders, creditors and depositors, by dishonestly concealing in the accounts of the bank the dishonouring of those cheques."[340] He was tried alone and convicted for conspiracy to defraud. Similarly to the *Allsop* case, the judge directed the jury that "imperilling the economic or proprietary interests of such person or persons was sufficient to constitute fraud even if no loss was suffered and the defendant did not desire that any loss should be caused."[341] This was questioned by the defendant in his appeal, which was dismissed and the Privy Council was to pronounce its opinion in the case. This case is even more interesting from the point of view of this study, in that it was not proven (at least until the decision in the case was taken) that any effective loss was suffered by the bank or its clients.[342] Arguably the defendant was acting in the interest of the bank, since he wanted to prevent a run on the bank, which would otherwise occur. Therefore he wanted to prevent the actual loss the bank and his clients would most probably have suffered, if the run had taken place. In the same time concealing the information about cheques put the bank and its clients at risk.

Similarly to the *Allsop* case, the debate focused on the *mens rea*. The defence argued that the defendant did not intend to put the bank at risk, but rather to save it and suggested that if he did the former, it amounted to no more than recklessness.[343] The prosecution claimed that the objective of the defendant was to conceal information and saving the bank was only his motive.[344]

First of all the Privy Council addressed the previous jurisprudence on the matter, in particular expressing its agreement with the reasoning presented in *Allsop*. The Council admitted that in that case, it can be argued, as was done in Smith & Hogan Criminal Law[345], that there was an intention on the part of the defendant that

[339] *Wai Yu-Tsang* 269.
[340] *Wai Yu-Tsang* 269.
[341] *Wai Yu-Tsang* 269.
[342] *Wai Yu-Tsang* 272.
[343] *Wai Yu-Tsang* 271f.
[344] *Wai Yu-Tsang* 272.
[345] The judgment refers to: John Smith, *Smith & Hogan Criminal Law*, 6th edition (Lexis Law Publishing, 1988) p. 273.

the company pay for the cars, while the company would not have paid, but for the defendants acts, although it suffered no loss in the end.[346]

The court decided to uphold the interpretation expressed in *Allsop*:

"[I]t is enough for example that, as in *Reg. v. Allsop* and in the present case, the conspirators have dishonestly agreed to bring about a state of affairs which they realise will or may deceive the victim into so acting, or failing to act, that he will suffer economic loss or his economic interests will be put at risk. It is however important in such a case, as the Court of Appeal stressed in *Reg. v. Allsop*, to distinguish a conspirator's intention (or immediate purpose) dishonestly to bring about such a state of affairs from his motive (or underlying purpose). The latter may be benign to the extent that he does not wish the victim or potential victim to suffer harm; but the mere fact that it is benign will not of itself prevent the agreement from constituting a conspiracy to defraud."[347]

The decision in *Wai Yu-Tsang* confirms, which might be doubtful in view of the facts in *Allsop*, that despite the fact that the motive of the defendant is to bring a positive result for the company, it is the immediate intention which counts for the fulfilment of the *mens rea* requirement.

To sum up the analysis of the two cases, one can argue that the case of *Allsop* need not be necessarily about risk-taking, since the victim actually suffered loss, since the company "paid too much for cars worth less than their pretended value; and … relied upon the creditworthiness of hire-purchasers as measured by the deposit stated to have been paid when none had been paid."[348] However, because of the way the judge instructed the jury in the case, the Court of Appeal was faced with the question, whether *mens rea* is fulfilled if D's action "was likely to lead to the detriment or prejudice",[349] and responded positively.[350] Moreover the case shows already how the understanding of exposure to risk as actual loss can lead to punishment for conspiracy to defraud in cases of excessive risk-taking.

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[346] *Wai Yu-Tsang* 279.
[347] *Wai Yu-Tsang* 280.
[348] *Allsop* 32
[349] *Allsop* 29.
[350] *Blackstone's Guide to The Fraud Act 2006* (note 54) p. 211.

In *Wai Yu-Tsang* the case was effectively about risk-taking, since no loss was proved. Lord Goff went much further in his *dictum* by referring to: "a state of affairs which they realise will *or may* deceive the victim into so acting, or failing to act, that he will suffer economic loss or his economic interests will be put at risk".[351] The use of "or may" triggered the question of recklessness, that Lord Goff, as stated in the judgment, wanted to avoid. Extending conspiracy to defraud to recklessness would extend the meaning of this offence far beyond the scope of statutory conspiracy.[352] However, as one author argues, it is not necessary to involve the question of recklessness, since the conspirators intend that a certain state of affairs arise so the proposed reformulation of Lord Goff's *dictum* would be: "the conspirators have dishonestly agreed to bring about a state of affairs [so] that he [the victim] will suffer economic loss or his economic interests will be put at risk".[353] Nevertheless, the definition formulated by Lord Goff seems to have gained acceptance.[354] In any case, both understandings do not require that the perpetrators intend to cause loss, but the intention to cause a state of affairs in which the economic interests of the victim are put at risk is satisfactory for the commission of conspiracy to defraud.

4.4.2.3. Summary

No case similar to *Allsop* and *Wai Yu-Tsang* has reached higher jurisdiction since the adoption of the Fraud Act. The offence of conspiracy to defraud has been widely criticised. While it is still in use, even after the introduction of the Fraud Act,[355] it is difficult to predict its future. Nonetheless, as it stands, if the prosecution has good reasons to use the common law conspiracy to defraud, it allows charging for excessive risk-taking, if the conditions described above are fulfilled. Moreover, it is possible that both decisions influence the understanding of *mens rea* under this Act.

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[351] *Wai Yu-Tsang* 280, emphasis added.
[352] See e.g. *Blackstone's Guide to The Fraud Act 2006* (note 54) p. 211.
[353] *Montgomery and Ormerod on Fraud* (note 38) p. D-7018.
[354] It was cited e.g. in: *R. v Goldshield Group Plc and Others* [2009] 1 Cr App R 33.
[355] For example the LIBOR scandal is under investigation as conspiracy to defraud. See: SFO Press Release from 28 October 2014, http://www.sfo.gov.uk/press-room/latest-press-releases/press-releases-2014/libor-investigation-further-charge-.aspx, last viewed: 26.03.2015.

5. Cooperation in the commission of the offence

The scope of criminal liability of managers exposing their companies to excessive risk can further extend according to the rules of secondary participation. Also those who participate in different ways in the offences committed by the managers can be held liable according to these rules.

This subchapter will sketch the rules of criminal liability for complicity in the context of the topic and with reference to conspiracy, which was analysed in detail in the previous part.

It could be mentioned that Section 4 of the Criminal Law Act 1967 can be used to pursue the person who helped a manager after the commission of the crime in the sense of impeding his apprehension or prosecution. However, this offence does not seem to present any important particularity for the topic, thus it will not be further analysed.

5.1. Secondary participation

According to the English criminal law a person can commit an offence as principal or as a secondary participant. If two (or more) managers participate in taking a decision which is considered to be an abuse of position or two (or more) persons participate in false representation incriminated under Section 2 of the Fraud Act to the same extent, they will most probably be charged as principals. However, the rules on complicity broaden the scope of liability and may apply to persons whose participation in the commission of the offence would not amount to the level of principal offender. If the conditions are fulfilled, the secondary participant may also be charged for the main offence.[356] Moreover, the form of charge need not give precise indication of which type of participation is alleged, although this practice could be questioned from the perspective of Article 6 (1) of the ECHR. However, in view of the requirements of the law providing for liability for secondary participation, which are different from those for the principal, it will be necessary to prove different elements of *actus reus* and *mens rea* depending on which type of participation is

[356] *Simester and Sullivan's Criminal Law* (note 14) p. 204.

chosen by the prosecution.[357] This section will focus only on the question to which extent the rules of secondary participation broaden the scope of liability in the cases of interest here, especially considering that a detailed account of the problems of secondary participation in English law would require a separate study.

Contrary to the inchoate offences, liability in case of secondary participation is dependent on the commission of the main offence,[358] and the law providing it does not create separate offences.[359] The activity of the secondary participant must take place before the offence is completed.[360] It is not possible to attempt secondary participation, since it has been expressly excluded by Subsection 1 (4) (b) of the Criminal Attempts Act 1981. It is possible to avoid criminal liability in case of withdrawal, under certain conditions, mainly consisting in actively counteracting the effects of the accomplice's previous contribution with the aim of preventing the commission of the offence.[361]

Section 8 of the Accessories and Abettors Act 1861, as amended by the Criminal Law Act 1977 provides that:

"Whosoever shall aid, abet, counsel, or procure the commission of any indictable offence, whether the same by an offence at common law or by virtue of any Act passed or to be passed, shall be liable to be tried, indicted, and punished as a principal offender."

Complicity according to this section is composed of the following elements: the conduct element (aiding, abetting, counselling or procuring), the connection with the commission of the offence by the principal, and the *mens rea*. Since the latter is common for all types of conduct, it will be analysed before the remaining elements.

5.1.1. Mens rea

Mens rea in case of complicity is composed of two elements: the accomplice must have the intention in respect of his own contributions (aiding, abetting,

[357] *Simester and Sullivan's Criminal Law* (note 14) p. 204.
[358] *Simester and Sullivan's Criminal Law* (note 14) p. 204.
[359] *Simester and Sullivan's Criminal Law* (note 14) p. 257.
[360] *Simester and Sullivan's Criminal Law* (note 14) p. 203.
[361] *Simester and Sullivan's Criminal Law* (note 14) pp. 259-261.

counselling or procuring) and he must either know or at least foresee the "essential matters"[362] which constitute the offence of the principal.[363]

As to the first element of *mens rea*, it is important to stress that it is his own participation that the accomplice must intend, not necessarily the commission of the offence by the principal. There is one exception to this rule. Contrary to the other modalities of conduct, procurement, as implied by its nature, requires the intention on the side of the accomplice that the principal commit the offence.[364]

With respect to the second element, there is doubt whether the perpetrator must know the essential matters which constitute that offence[365] or whether also wilful blindness could result in criminal liability in case of secondary participation. It appears in view of the recent jurisprudence that it is enough that the accomplice considers that it is probable that the essential matters of the principal's offence exist.[366]

As to the essential matters, it is considered that the accomplice "must appreciate that [the principal] intends or contemplates doing actions which constitute the *actus reus* of an offence, although [the accomplice] need not recognise that those actions in fact constitute an offence."[367] It is possible that the accomplice appreciates that the principal has several possible scenarios in mind, which constitute different offences and finally he commits one of them. It is also necessary that the former have some understanding of the *mens rea* of the latter. If he thinks that the principal may commit the offence by negligence, he cannot be held liable for an intentional offence. However the accomplice need not know all the details of the foreseen offence (time, place, object unless relevant for the definition of the offence).[368]

[362] *Johnson v. Youden* [1950] 1 KB 544, 546.
[363] *Simester and Sullivan's Criminal Law* (note 14) p. 218.
[364] *Simester and Sullivan's Criminal Law* (note 14) p. 219.
[365] *Johnson v. Youden* [1950] 1 KB 544, 546.
[366] *Simester and Sullivan's Criminal Law* (note 14) p. 226.
[367] *Simester and Sullivan's Criminal Law* (note 14) p. 229.
[368] *Simester and Sullivan's Criminal Law* (note 14) pp. 229ff.

5.1.2. Conduct

The conduct element can take four different forms: aiding, abetting, counselling or procuring. Each of these forms has its own meaning, although in practice they will overlap on various occasions. For example, abetting can easily also constitute aiding or counselling.[369] Moreover, it is not necessary to specify to which of the forms the charge refers, which might prove very helpful for prosecutors in formulating charges in such cases.[370]

Aiding consists of providing help or assistance. The action of the accomplice must effectively be of help since it is not enough to become a secondary participant by just trying to aid. The contribution must be somehow helpful, but not necessarily to a substantial degree. There is no need that the accomplice be present on the scene or that his aid be provided on the scene of the offence. Nor is it necessary that the principal be aware that the aid is being provided.[371]

Abetting is understood as encouraging, which can occur through any kind of behaviour and it is a matter of the assessment of facts to decide if a particular conduct amounts to abetting. Even a simple gesture or silence might fulfil this conduct element. Contrary to aiding, the communication of encouragement must reach the principal, although it need not be effective in the sense that no proof is necessary of the influence of the encouragement on the conduct of the principal offender.[372] The necessary link with the main offence is satisfied by the fact that the encouragement reached the offender, but the liability is not excluded, if the main offender would have acted anyway.

The meaning of counselling "covers such conduct as advising on an offence and giving information required for an offence".[373] It will comprise also acts that consist in urging someone to commit an offence.[374]

[369] *Simester and Sullivan's Criminal Law* (note 14) p. 210.
[370] *Simester and Sullivan's Criminal Law* (note 14) p. 208.
[371] *Simester and Sullivan's Criminal Law* (note 14) pp. 209f.
[372] *Simester and Sullivan's Criminal Law* (note 14) p. 212.
[373] Ashworth, *Principles...* (note 76) p. 414.
[374] *Simester and Sullivan's Criminal Law* (note 14) p. 212.

Procuring means "to produce by endeavour".[375] Therefore a causal link must exist between the activity of the principal and the procurement,[376] however the latter must not be the sole or main influence leading to the commission of the offence.[377]

For criminal liability for secondary participation it is necessary that the action of an accomplice be connected with the commission of the offence. Hence, a person will not be criminally liable if the aid was without influence on the commission or the encouragement was forgotten or never reached the principal.[378]

It is possible that aiding or abetting will be committed by omission. Such a modality is not excluded, but presents certain difficulties as to the conditions of abetting when the person is charged for encouraging the commission of an offence by not preventing it. In such cases it is required in particular that the person has a legal duty to prevent an offence or by his inaction encourages the perpetrator and intends to encourage him.[379] This could be the case of a senior manager (a director) who tacitly encourages a manager to take an excessively risky decision by not doing anything while being informed about it. A similar situation might occur in case of two senior managers. Such non-intervention might amount to the commission of fraud by abuse of position by omission (Section 4 (2)). But if it does not, the manager may be held liable if his inaction encouraged the other to proceed and it was the intention of the former to encourage the latter.[380]

In a reverse case, lower-level management will less likely be held liable for abetting the director by failing to react to his risky policy. To its defence will come for example the decision in *Clarkson*, in which the Court of Appeal quashed the convictions of two soldiers who entered a room in which a rape was taking place and observed the occurrence without preventing it but also without encouraging its commission.[381]

It is possible to foresee criminal liability in a case in which a manager or another person embarks on the commission of an offence together with another

[375] Attorney-General's Reference (No 1 of 1975) [1975] QB 773, 779.
[376] Ashworth, *Principles...* (note 76) p. 141.
[377] *Simester and Sullivan's Criminal Law* (note 14) p. 212.
[378] *Simester and Sullivan's Criminal Law* (note 14) pp. 213ff.
[379] *Simester and Sullivan's Criminal Law* (note 14) p. 217.
[380] *Simester and Sullivan's Criminal Law* (note 14) p. 217.
[381] *R. v Clarkson* (1971) 55 Cr App R 445.

manager and the latter commits fraud in a way which exposes the company to excessive risk, which was not part of the agreement, but had nonetheless been envisaged as a possibility by the first person.[382]

5.2. Aspects of conspiracy

Both statutory conspiracy and conspiracy to defraud incriminate situations in which two (or more) perpetrators cooperate in the commission of the offence. Both of them might be used to punish acts that consist in cooperating in exposing the company to excessive risk. Nevertheless, in the design of the liability for conspiring in both versions provided by English law, there is no need that the actual offence (fraud) be committed since both are inchoate offences. For this reason they were analysed above in the section on inchoate offences.

Common law conspiracy to defraud was used before the adoption of the Fraud Act to fill the lacunae of the offences of deception under the Theft Act. The use of these offences for accomplished frauds might diminish since the broad scope of criminalisation of fraud together with rules of complicity give the prosecution enough room to formulate charges without resorting to conspiracy.[383]

6. Reasons for excluding criminal liability

There exists a variety of defences in the English criminal law which can apply to managers tried for fraud in the context of excessive risk-taking. A complex analysis of all of them would go beyond the scope of this study. There is no need to elaborate on intoxication or insanity since their application to situations relevant in this study will be no different than to other cases. This subchapter refers only to three reasons for excluding criminal liability (not necessarily considered defence in English law) selected for its relevance in the context of this study namely consent, superior order and expert opinions.

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[382] Such liability would be based on the complicated and controversial concept of joint enterprise. It would go beyond the scope of this study to analyse all the aspects of this modality of liability, so the interested Reader is directed to consult literature on the topic, e.g.: *Simester and Sullivan's Criminal Law* (note 14) pp. 232ff and Ashworth, *Principles...* (note 76) pp. 420ff.
[383] *Montgomery and Ormerod on Fraud* (note 38) p. D-7003/D.7.02.

6.1. Consent of the victim

The consent of the victim can, under certain conditions, exclude criminal liability in English law, either because it will render lawful the action of the defendant or because it will exclude one of the elements of *actus reus* or *mens rea*.[384] In case of fraud, consent will arguably work in the second way and be in principle evaluated within the assessment of dishonesty. Moreover, it is difficult to imagine the commission of fraud by false representation or fraud by failing to disclose information with consent of the victim, unless the victim was somehow tricked into giving it. As to fraud by abuse of position, consent of the victim will not only exclude dishonesty, but also abuse.[385] The defendant is not abusing his position, if he is allowed to act the way he acts. Such consent could be valid only if the victim had the necessary information to assess properly the situation. If the defendant knew that the consent was given by the victim who did not have the understanding of the issue at stake, he acts dishonestly and he commits an abuse. Moreover, if it is the defendant, who misinformed the victim, he could be held liable also for fraud by false representation.[386]

The question which will have the crucial impact on the scope of fraud by abuse of position is: who is the victim, i.e. who is entitled to give consent? The most straightforward answer is that it is the same person whose financial interests the defendant has the duty to safeguard or not to act against. In cases relevant for this study, it will be the company and the consent in order to be valid, should be given in accordance with the rules of civil and company law. This means, that even if the consent is given, there might remain persons who did not agree and whose interests were exposed to a risk of loss, which would qualify for criminal liability provided the consent was not given (e.g. minority shareholders, clients). In such cases, if the prosecutor finds that the wrongdoing justifies prosecution, he might still charge for

[384] *Simester and Sullivan's Criminal Law* (note 14) p. 765. For general rules on consent in English criminal law, see: *Simester and Sullivan's Criminal Law* (note 14) pp. 763ff.
[385] *Alridge and Parry on Fraud* (note 41) p. 167.
[386] *Alridge and Parry on Fraud* (note 41) p. 168.

the conspiracy to defraud, since this offence does not precisely define its victim, but only requires the defrauding of another person.[387]

Another question relates to the problem of belief that the consent was given or the belief that the consent would be given. As to the first one, it will be rather difficult to claim that the defendant was dishonest, if he was acting in an honest belief that the victim consented to what he is doing. As to the second possibility, the question is more difficult.

The idea of justifying the defendant in such scenario is not unknown, which can be demonstrated by Section 2 of the Theft Act 1968 excluding dishonesty of the defendant "if he appropriates the property in the belief that he would have the other's consent if the other knew of the appropriation and the circumstances of it".[388] This provision applies however to the understanding of dishonesty for the offence of theft and it could only be applied to fraud by analogy. Irrespective of the question if that is probable, it seems justified to claim that the juries may in some cases find that the defendant did not act dishonestly, if he honestly believed that such consent would have been given.[389] This would probably be the case, if the defendant had to take rapid decisions without having the possibility to ask for permission, while being honestly convinced that consent would be granted, on condition that the victim had the entire information about the situation.[390]

6.2. Orders of a superior

Superior orders do not provide for justification for criminal conduct under English law.[391] However, an order of the superior may result in acquittal of the defendant because of lack of *mens rea*, in particular and yet again depending on the question of dishonesty. If the fact that the order came from a superior made the

[387] The case of *Wai Yu-Tsang* might be an example: the defendant was charged "with conspiring… to defraud the bank and its existing and potential shareholders, creditors and depositors", *Wai Yu-Tsang*, 269.
[388] Theft Act 1968, Section 2 (1) (b).
[389] Law Com No 276 (note 2) marginal number 7.72; Ormerod, Williams, *Smith's Law of Theft* (note 18) p. 133.
[390] *Alridge and Parry on Fraud* (note 41) p. 31; *Montgomery and Ormerod on Fraud* (note 38) p. D-1017.
[391] *Simester and Sullivan's Criminal Law* (note 14) p. 755.

manager believe that ordinary and honest people would not consider this act as dishonest, then the second element of the *Ghosh* test would not be fulfilled. On the other hand, if a senior manager is convinced that the orders of the director require him to perform an abuse of position he cannot escape liability merely because the orders came from a superior.[392]

6.3. Expert opinion

The question whether the conduct of a manager can be justified by the fact that he based his act on an opinion of an expert can also be solved by reference to the concept of dishonesty. It will be hard to claim, that if the manager believed in the correctness of the expert opinion, he committed the act dishonestly. However, if he had doubts about the correctness of the opinion, or, in a worse scenario, he knew it was incorrect, but used it to cover his act, it can be considered that honest and reasonable people would consider his act as dishonest.

7. Offence of reckless misconduct in the management of a financial institution

In order to complete the analysis of the English law in relation to criminalisation of managers for excessive risk-taking it is necessary to mention the new criminal offence of reckless misconduct in the management of a financial institution introduced by the Financial Services (Banking Reform) Act 2013.[393] The interest of this provision for the study results from the fact that although for criminal liability the provision requires the failure of a financial institution, this result may be brought recklessly, in particular by excessively risky management. Certain scepticism as to practical implications of the provision may be justified, as its design, as will be demonstrated below, renders it very difficult to prove.[394] These difficulties were already known at the moment of adopting the offence, but it was considered however that it would still positively influence the decision making process by senior bank

[392] *Simester and Sullivan's Criminal Law* (note 14) pp. 755f.
[393] As to the reasons for including this offence into the scope of the study, see also fn 40.
[394] Christopher Coltart, 'Banking act is a paper tiger', *Law Society Gazette*, 3 February 2014.

management.[395] Its real impact remains to be seen as the offence will only enter into force on 7 March 2016.[396]

The introduction of the offence was recommended by the Parliamentary Commission on Banking Standards, which was created in the aftermath of the financial crisis "to consider and report on professional standards and culture of the UK banking sector […] lessons to be learned about corporate governance, transparency and conflicts of interest, and their implications for regulation and for Government policy and to make recommendations for legislative and other action."[397] The Commission found that despite the existence of various criminal offences, such as theft of fraud, they "do not cover the apparent mismanagement and failure of control by senior bankers which has been at the heart of the recent concerns about standards and culture in banking."[398] In view of that the Commission recommended creating a new offence of reckless misconduct in the management of a bank.[399]

The offence is defined in Section 36 (1) of the Financial Services (Banking Reform) Act 2013 with various explanations provided in this and the following section.[400] Its application is limited to senior managers of financial institutions concerned. The senior manager is a person who performs a senior management function under an arrangement with the institution.[401] The act does not define what are the senior management functions, but provides that it will be decided by the Financial

[395] Changing banking for good, Report of the Parliamentary Commission on Banking Standards, Volume II, June 2013, HL Paper 27-II HC 175-II, recital 1182.
[396] Statutory Instrument, 2015 No 490 (C. 27) Banks and Banking, The Financial Services (Banking Reform) Act 2013 (Commencement No 9) Order 2015, 4th March 2015.
[397] Changing banking for good, Report of the Parliamentary Commission on Banking Standards, Volume I, June 2013, HL Paper 27-I HC 175-I, page 2.
[398] Changing banking for good, Report of the Parliamentary Commission on Banking Standards, Volume II, June 2013, HL Paper 27-II HC 175-II, recital 1174.
[399] Changing banking for good, Report of the Parliamentary Commission on Banking Standards, Volume II, June 2013, HL Paper 27-II HC 175-II, recital 1182.
[400] Section 36 (1): A person ("S") commits an offence if—
(a)at a time when S is a senior manager in relation to a financial institution ("F"), S—
(i)takes, or agrees to the taking of, a decision by or on behalf of F as to the way in which the business of a group institution is to be carried on, or
(ii)fails to take steps that S could take to prevent such a decision being taken,
(b)at the time of the decision, S is aware of a risk that the implementation of the decision may cause the failure of the group institution,
(c)in all the circumstances, S's conduct in relation to the taking of the decision falls far below what could reasonably be expected of a person in S's position, and
(d)the implementation of the decision causes the failure of the group institution.
[401] Section 37 (7) of the Financial Services (Banking Reform) Act 2013.

Conduct Authority and the Prudential Regulation Authority.[402] In any case it will be a person belonging to the top management of the bank, since such person must be able to influence the decision making process as to the way in which the business of the institution is to be carried on. The institutions concerned by the offence are mainly UK incorporated banks, but also under certain conditions building societies or a UK investment firms.[403]

Contrary to the offence of fraud, the offence of Section 36 contains various requirements of *actus reus* and only one requirement of *mens rea*. Therefore it will be the former that will mostly shape the scope of application of the offence. In order to be criminally liable it is necessary that (i) the defendant either took or agreed to the taking of a decision on how the business of the bank should be carried on or failed to take steps that could prevent such a decision. Moreover (ii) the conduct of the perpetrator in relation to the taking of the decision falls far below what could reasonably be expected of a person in his position. Eventually (iii) the implementation of the decision caused the failure of the institution.[404] Hence, criminal liability will only be triggered when the bank effectively fails and the link of causality must be established between the decision, in the taking of which the senior manager participated in the way described above and the failure of the bank. This requirement may be the biggest hurdle to overcome by the prosecution.

As to the *mens rea* requirement, the offence of Section 36 punishes reckless misconduct in the management of a financial institution.[405] Therefore it is not necessary that the perpetrator intends the failure of the bank or agrees to its occurrence. It is sufficient that he is aware of a risk that the implementation of the decision may cause the failure of the bank. Contrary to the offences described above Section 36 does not contain the requirement of dishonesty.

If it enters into force the offence might punish a manager who took a decision or participated in taking a decision on an excessively risky way in which the business of the institution should be carried on, provided that the manager's conduct in relation

[402] Section 37 (8) of the Financial Services (Banking Reform) Act 2013.
[403] Financial Services (Banking Reform) Act 2013, Explanatory Notes, recital 218.
[404] For the explanation what is the failure of the institution see: Section 37 (9) and (10) of the Financial Services (Banking Reform) Act 2013.
[405] For the analysis of the most suitable for of *mens rea* for this offence, see: Changing banking for good, Report of the Parliamentary Commission on Banking Standards, Volume II, June 2013, HL Paper 27-II HC 175-II, recital 1176ff.

to taking this decision falls far below the standard expected from him and he is aware of the risk of failure of the institution that the implementation of this decisions may cause. However the manager can only be found liable, once the institution collapses and at the condition of establishing the causal link between the decision and the institution's failure. Since the offence has not yet entered into force it is very difficult to predict whether any conviction will ever take place, how the courts will interpret the offence and what its influence on the management culture in the institutions concerned by Section 36 will be. In any case, in view of the requirement of the effective failure of the institutions, this offence can only be applied in order to punish an already occurred calamity.

8. Punishment

According to Subsection 1 (3) of the Fraud Act a person guilty of fraud is liable: (a) on summary conviction, to imprisonment for a term not exceeding 12 months or to a fine not exceeding the statutory maximum (or to both); (b) on conviction on indictment, to imprisonment for a term not exceeding 10 years or to a fine (or to both).[406] Hence fraud is an offence triable either way and therefore no time limitation for prosecution applies.

The punishment for making or supplying articles for use in frauds (Section 7) is the same as for the offence of fraud. As to possession etc. of articles for use in frauds (Section 6), the punishment provided for is of the same type, with the only exception that the maximum imprisonment cannot exceed 5 years.

According to Section 58 (3) of the Serious Crime Act 2007, for the inchoate offence of encouraging and assisting the perpetrator is liable to any penalty for which he would be liable on conviction of the anticipated or reference offence. The rules are similar for attempts (Section 4 (1)Criminal Attempts Act 1981).

As to statutory conspiracy, the punishment for the statutory version should not exceed the maximum which is provided for the main offence (Section 3 Criminal Law

[406] The Sentencing Guidelines Council issued also guidelines for sentencing for this offence: Sentencing for Fraud – Statutory offences. Definitive Guideline, October 2009

Act 1977).[407] Before the legislative intervention, conspiracy to defraud at common law was subject to imprisonment at large.[408] Section 12 of the Criminal Justice Act 1987 limits the punishment for this type of conspiracy to the maximum of 10 years' imprisonment and or an unlimited fine.

Complicity is understood as the commission of the main offence, so it is subject to the same punishment as the latter.

The punishment for the offence of reckless misconduct in the management of a bank provided for in Section 36 of the Financial Services (Banking Reform) Act 2013 is on summary conviction imprisonment for a term not exceeding 12 months or a fine or both, while on conviction on indictment, to imprisonment for a term not exceeding 7 years or a fine, or both.

9. Solution to the five cases

As to the first two cases in view of fraud described in Section 4, both managers occupy a position in which they are expected to safeguard, or not to act against, the financial interests of the bank. The use of the position is improper, since they are supposed to act within the allowed limits of risk, thus their courses of conduct constitute an abuse. It is clear for the second one that he intends to make a gain for himself. The first manager might be acting with the same intention (e.g. intent not to lose work and salary), but even if he does not have such motivation, the extended definition of intention allows to consider that since he is aware that it will be virtually certain that his decision exposes the bank to a risk of loss, this limb will also be fulfilled. Both managers might be possibly found dishonest, since they are breaching rules governing the way they should execute their duties. The probability of conviction is smaller in the first case as the perpetrator does not have any personal intention, while in the second case the manager expects a bonus. The fact that they hope that at the end of the day everything works fine does not preclude proving their *mens rea*, as shown in the case of *Wai Yu-Tsang*.

[407] *Blackstone's Guide to The Fraud Act 2006* (note 54) p. 44.
[408] *Montgomery and Ormerod on Fraud* (note 38) p. D-7027/D.7126.

As to the third case, the director fulfils the limb of the required position. The question whether he committed an abuse of position will be intertwined with the question of dishonesty. If the test proves that the manager acted dishonestly, his conduct will be also abusive. For answering this question it will be important whether the manager knowingly acted outside the scope of his duties. Hence the crucial question will be whether the manager was allowed to invest on the stock exchange and whether it was not out of the scope of business of the company, as prescribed by articles of association or other acts. If it can be proved that such investments were not permitted, it is likely that the manager would be considered dishonest. In this case a conviction for theft would also be possible, since if he was not allowed to invest the money in this way, he usurped the right of the owner. Also the *mens rea* requirement of intention to permanently deprive would be fulfilled according to its broad understanding held in *Fernandes*, extending this concept to situations, where the perpetrator deals with the property in a way that "he knows he is risking its loss".[409] However if such investing on stock exchange was indeed permitted, the likelihood of him being found dishonest, even if his investment strategy was too risky, is less significant. In such case, he could still be held liable for theft if he retains the gains from the investment.[410]

The manager in case 4 could potentially be held liable for fraud by failing to disclose information (Section 3 FA 2006) and fraud by abuse of position (Section 4 FA 2006). The liability for the first one will depend on whether the manager had the duty to disclose information about the problems of the new model (which he most probably had). The conviction for the second one would require demonstrating that by concealing the information and presenting the model as fit for production the manager abused his position (which is also likely since breaching professional duties can be considered to constitute an abuse). But most of all the outcome of this case will depend on the evaluation of the dishonesty of the director. As the case stands, the likelihood of conviction is limited, unless it is possible to demonstrate that the manager had direct interest (e.g. in form of commission) to conceal the problems or that he acted with particular lack of professional integrity, e.g. he purposefully shredded documentation concerning the problem. Without such element the case may

[409] *Fernandes* [1996] 1 Cr App R 175.
[410] Section 5 (3) of the Theft Act 1968; See also *Montgomery and Ormerod on Fraud* (note 38) pp. D-3011-3014/D. 3.38-3.106.

rather be considered as misjudgement, but not fraud. It is however highly likely that the jury will admit that a reasonable and honest director would not conceal information on a problem that could hamper the success of a new car model.

The course of conduct of the manager in case 5 will be in the first place evaluated in view of the offence of bribery and since there is no limitation for prosecution applicable to this offence, so there is no incentive to incriminate this conduct under other offences, as will be seen e.g. in the analysis of the French legal system.[411] Moreover the offence does not require proof of dishonesty. The question relevant for this study is whether the manager could be punished also for exposing the company to excessive risk of loss. Without entering into details of corporate criminal liability, it is conceivable that the company would be subject to liability, for example under Section 7 of the Bribery Act 2010. However, even if this is not the case, the company might suffer loss for several other reasons, for example losing the chance to get the contract in question or because of damage to its reputation. The manager's intention is for the company to profit and not to be exposed to risk. However using the company's money for bribing public officials is not a proper use of these funds, thus all the elements of fraud by abuse of position are fulfilled. A conviction will be much less likely, if the manager used his own funds for the bribery. The likelihood that the jury would find the manager dishonest is diminished by the fact that he acted mainly (or only) for the benefit of the company. Moreover the risk of loss is not directly linked to his act, but remote and might not materialise. Hence, it is rather unlikely that he is also prosecuted for fraud. However, he might obviously be prosecuted for bribery as well as for theft of company's funds that he used to bribe the public official.

Other offences described in this chapter might also be of application in the cases analysed above. If the perpetrator in the course of his action made a false representation he might be liable for fraud described in Section 2. In particular this could occur in the last case, which could also result in liability for fraud described in Section 3. If other persons were involved in these cases, they could be held liable either for conspiracy to defraud or for the statutory offence of conspiracy or for the main offence through the rules of complicity. In such cases the inchoate offence of

[411] Section 1 of the Bribery Act 2010.

encouraging or assisting could also be applied. The most important threshold in all these analysis will be always linked to the question of dishonesty. Once this requirement is fulfilled, the English law offers vast possibilities to criminalise managers described in the first four cases.

As regards the negligent version of the cases, the English legal system does not provide a possibility to convict the managers.

10. Conclusions

The English legal system offers a plethora of offences which may be applied to managers who expose their companies to excessive risk. Cases analysed in this study will in the first place fall into the definition of the offence of fraud, particular the modality described by Section 4 of the Fraud Act 2006 called fraud by abuse of position. Moreover, managers could potentially be also liable for the common law offence of conspiracy to defraud or the offence of theft. Depending on the particularities of concrete cases other modalities of fraud could also potentially be applied. The English legal system extends also the scope of criminalisation by providing for liability for possession etc. of articles for use in fraud; making or supplying articles for use in fraud, encouraging and assisting an offence, attempt and statutory conspiracy. At the same time the statutes offer the quite severe penalty of a maximum of 10 years' imprisonment for almost all these offences.

However, the application of these offences to excessive risk-taking by managers will be greatly limited and depended on the limb of dishonesty and its particularities. The law does not provide for the definition of this notion, but only for a formal test from the judgement in *Ghosh*, which only provides for the standard according to which the limb must be assessed (dishonest according to honest and reasonable people). The question whether a manager was dishonest will be answered by the tribunal of facts, which will be the jury in cases, where the latter is involved. The jury is composed of twelve laymen and may not include anybody with any experience in business. Moreover, the jury does not give reasons for their assessments. The difficulty to foresee the outcome of concrete cases leads to very

limited use of these offences to cases of excessive risk-taking, which does not provide such obvious wrongdoing as cases of loss.

The Law Commission claimed that fraud is not meant to be a "general dishonesty offence".[412] The Commission's intention was that "[d]ishonesty should only function as a negative element to rebut the *prima facie* criminality of the defendant's conduct".[413] In contrast to this statement, as was shown above in different parts of the analysis, it is dishonesty that makes a criminal offence out of a sometimes very innocent course of conduct. For example, the way from use to abuse in Section 4 will lead through the question of dishonesty. A very broad definition of intent and position contribute to the conclusion that the question of dishonesty will be decisive for the defendant's criminal liability.

The English legal system provides also for an offence of reckless misconduct in the management of a financial institution (Section 36 of the Financial Services (Banking Reform) Act 2013) which does not require proof of dishonesty. The offence may punish senior managers of financial institutions who take excessively risky decisions. However the requirement that the institution effectively collapsed as result of the implementation of this decision, together with other *actus reus* requirements allow doubting whether the offence can effectively be used.

[412] Law Com No 276 (note 2) marginal number 5.57
[413] Law Com No 276 (note 2) marginal number 5.57

Chapter III. FRANCE

1. Introduction and history

Before the enactment of the offence of abuse of company assets (*abus de biens sociaux*) an act of misuse of these assets could be punished only by virtue of the offence of breach of trust (*abus de confiance*), which criminalised fraudulent misappropriation of entrusted property and was provided by Article 408 of the old, Napoleonic, Penal Code of 1810. This offence, the equivalent of the English embezzlement, was not well suited for this task, since it was designed to punish misappropriation, so it forced the courts to extensively interpret the requirements of this offence.[1] Moreover, the old formulation of the breach of trust contained an enumerative list of contracts on the basis of which the right to use another person's property was transferred to the defendant. The list did not contain the contract creating a company (*contrat de société*) forcing the jurisprudence to develop a theory, on the basis of which it was assumed that this contract implies the conclusion of another contract - that by which the power of attorney was granted (*contrat de mandat*) - which was on the list.[2]

The broad interpretation of the provision led to criticism for infringement of the principle of legality.[3] Moreover, the creativity of judges did not help to fill all the gaps. For instance, if a director signed in the name of the company a guarantee for his personal debts, it was not possible to consider it as misappropriation (*détournement*), since no use of assets was made yet.[4] The provision also excluded from its scope situations in which the object of misappropriation was real property.[5]

[1] For details see section 3.2 Breach of trust, and in particular 3.2.2. Misappropriation.
[2] Wilfrid Jeandidier, *Abus de confiance*, JurisClasseur Pénal Code Code > Art. 314-1 à 314-4 Date du fascicule : 25 Février 2012, Date de la dernière mise à jour : 31 Décembre 2013, para 41.
[3] Donnedieu de Vabres, Henri, 'IV. Crimes et délits contre les biens', *Revue de Science Criminelle et Droit Pénal Comparé*, (1938), pp. 716-725, 719f.; Wilfrid Jeandidier, *Abus des biens, du crédit, des pouvoirs ou des voix*, JurisClasseur Pénal des Affaires, Date du fascicule : 1er Avril 2011, Date de la dernière mise à jour : 18 Mars 2014, para 2.
[4] Jeandidier, *Abus des biens…* (note 3) para 2.
[5] Frédéric Stasiak, *Droit pénal des affaires,* 2nd edition (Paris: L.G.D.J., 2009) p. 236.

The shortcomings of the provision, the political and financial scandals of the III French Republic, in particular the *Stavisky* affair,[6] as well as the will to reinforce the confidence of the investors during the recovery period from the financial crisis led in 1935 to the enactment of a new offence, namely the abuse of company assets (*abus de biens sociaux*).[7] The offence was provided by a statutory order (*décret-loi*) for public limited companies (*société anonyme*)[8] and in the same year its application was extended to limited liability companies (*société à responsabilité limitée*).[9] The scope of this offence was however limited, both as to the types of company to which it applied and as to the circle of potential perpetrators. Thus the offence of breach of trust retained its validity for all those cases, to which the offence of abuse of company assets was inapplicable.

The legal basis changed in 1966 but the new law kept the provision almost intact.[10] Finally the law was incorporated into the Commercial Code, where it remains until today, in article L241-3 4° and 5° for limited liability companies and in article L242-6 3° and 4° for public limited companies.[11] Since its enactment until now the law remained almost identical with the original text of 1935.[12] Moreover, the offence was unaffected by different initiatives to decriminalise business activities.[13] In particular the *Coulon* report recommended retaining the offence.[14]

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[6] Stasiak, *Droit pénal des affaires* (note 5) p. 236.
[7] Jeandidier, *Abus des biens…* (note 3) para 3; Annie Médina, *Abus de biens sociaux. Prévention – Détection – Poursuite* (Paris: Dalloz, 2001) p. 3.
[8] Décret-loi du 8 août 1935.
[9] Décret-loi du 30 octobre 1935.
[10] Loi du 24 juillet 1966.
[11] L'ordonnance n° 2000-912 du 18 septembre 2000.
[12] Didier Rebut, *Abus de biens sociaux*, Répertoire de droit pénal et de procédure pénale, Dalloz, janvier 2010 (dernière mise à jour : juin 2011), para 9. Recent changes concerned the applicable penalities. Article 71 of *Loi n° 2008-776 du 4 août 2008 de modernisation de l'économie (1)* provided for disqualifications applicable to the perpetrators of the abuse of company assets provided by the Commercial Code. Most recently, a new aggravating circumstance (Article 30 of *Loi n° 2013-1117 du 6 décembre 2013 relative à la lutte contre la fraude fiscale et la grande délinquance économique et financière*) as well as a possibility to apply the forfeiture of civic, civil and family rights (Article 27 of *Loi n° 2013-907 du 11 octobre 2013 relative à la transparence de la vie publique*) have also been added (See: 7. Punishement).
[13] In the past decades several initiatives turned into laws, which aimed at limiting the enormous number of criminal provision concerning business activities (as to company law, the law n° 2001-420 of 15 May 2001 can be cited as the main example). Despite the enactment of these decriminalising statutes, several authors pointed out that no real decriminalisation has taken place. The statutes have mainly abolished provisions that were rarely used in practice anyway and left the core of white-collar offences intact. Moreover, some of the abolished offences reappeared in a different form enforced by means of administrative law, e.g. as to competition offences (See Rebut, *Abus de biens sociaux* (note 12) para 6ff.; Stasiak, *Droit pénal des affaires* (note 5) p. 9; Michel Véron, *Droit pénal des affaires*, 9th edition

The legislative technique adopted for the offence of abuse of company assets is fairly complex. The offence is constructed according to four modalities of the commission of this offence. The modalities are grouped respectively in two different paragraphs: the abuse of company assets and the abuse of company credit (L241-3 4° and L242-6 3°) and the abuse of powers and the abuse of votes (L241-3 5° and L242-6 4°). However, the jurisprudence is not very strict in differentiating between these modalities, and judgments evoking more than one of these modalities are not unusual. The modalities are not considered to be separate offences, which is proved by the fact that the issue of the relationship between convictions for more than one of the modalities does not appear in this context. It is also a general practice, which this chapter will also respect, to use the name of the first modality – "abuse of company assets" – while referring to all the modalities, unless it is made clear that only the first modality is meant.[15]

Secondly, one of the particularities of the French approach is that there is no general offence of abuse of company assets, applicable to all types of companies, but instead the French law incriminates the abuse separately for different types of commercial entities. Moreover, the offence has not been provided for all types of business entities. In particular two groups of companies are not concerned. The first one is related to the function of the offence, which should help to counterbalance the limited liability of companies. Therefore entities, in which the liability of members is unlimited, have been excluded from the scope of the offence, e.g. general partnerships (*sociétés en nom collectif),* limited partnerships like partnerships limited by shares (*sociétés en commandite simple*) or undisclosed partnerships (*sociétés en participation*)*, de facto* partnerships (*sociétés créées de fait*)*,* economic interest groupings (*groupements d'intérêt économique)* and associations (*associations*).[16] In the case of these companies the misuse of their assets can only be incriminated by use of the breach of trust offence.[17] It will be similar as regards the second exclusion,

(Dalloz, 2011) p. 16f; Agathe Lepage, Patrick Maistre du Chambon, Renaud Salomon, *Droit pénal des affaires*, 2nd edition, (Paris: LexiNexis Litec, 2010) pp. 3f.

[14] "La dépénalisation de la vie des affaires", Groupe de travail présidé par Jean-Marie Coulon, Rapport au garde des Sceaux, ministre de la Justice, January 2008, p. 22, 33-34. The only exception concerned the suggestion to delete the abuse of votes (although only as regards limited liability company – SARL), which has fallen out of use (p. 33).

[15] Rebut, *Abus de biens sociaux* (note 12) para 10.

[16] Lepage, Maistre du Chambon, Salomon, *Droit pénal des affaires* (note 13) p. 314.

[17] Lepage, Maistre du Chambon, Salomon, *Droit pénal des affaires* (note 13) p. 314.

which concerns foreign companies.[18] However, the courts do not treat the requirement that the company must be French very strictly, considering as French companies such entities which, although formally foreign, function as *de facto* French companies,[19] in particular if they have their effective headquarters in France.[20] Because the analysis of the plethora of acts incriminating the abuse of company assets for different types of entities[21] would be long and necessarily encyclopaedic and in view of minimal differences between these provisions, this chapter will concentrate on the offence of abuse of company assets provided by the Commercial Code, and in particular on those provided for the two major types of limited companies: the limited liability company (*société à responsabilité limitée* – SARL) and the public limited company (*société anonyme* – SA), upon which the law has focused since the enactment of the offence in 1935.

Finally, the scope of application of the abuse of company assets is limited to persons occupying – de jure or *de facto* – certain positions in the company.[22] This rule provides for another gap in liability for the abuse, which can be remedied, yet again, only by use of the breach of trust offence. This latter offence, newly formulated for the new Penal Code of 1994 (CP), is phrased in more abstract terms, in particular without a limited list of contracts on the basis of which the assets were entrusted.

It is not excluded that acts, which constitute an abuse of company assets, fulfil also the requirements to constitute a breach of trust. According to the French rules on

[18] Cass. crim., 3.06.2004, Bull. crim., n° 152 p. 567. For an analysis of this problem see the comment of Delphine Caramalli under this decision published in: Receuil Dalloz, 2004, no 44, p. 3213ff.
[19] Jeandidier, *Abus des biens…* (note 3) para 5.
[20] Stasiak, *Droit pénal des affaires* (note 5) p. 238; Cass. crim., 31.01.2007, Bull. crim., n° 28 p. 102.
[21] The offence of abuse of company assets has been provided not only for entities regulated by the Commercial Code but also for other types of companies provided in other statutes, for instance: *sociétés coopératives, sociétés mutuelles d'assurance, sociétés immobilières de construction, sociétés civiles de placement immobilier, sociétés par actions simplifiées, sociétés en commandite par actions, sociétés civiles faisant publiquement appel à l'épargne, sociétés d'exercice libéral et sociétés d'économie mixte*. These provisions are very similar to those provided for the SARL and the SA, although some differences exist. For more details see: Eva Joly, Caroline Joly-Baumgartner, *L'abus de biens sociaux. Á l'épreuve de la pratique* (Paris: Economica, 2002) pp. 16ff.; Médina, *Abus de biens sociaux…* (note 7) pp. 15ff.; Lepage, Maistre du Chambon, Salomon, *Droit pénal des affaires* (note 13) p. 314.
[22] The scope of application is enlarged by the rules on complicity, see below: 5. Cooperation in the commission of the offence.

such conflicts, the perpetrator has to be charged for the former offence as it is *lex specialis* and since it foresees a more severe punishment.[23]

This chapter will present the rules on criminal liability for the abuse of company assets and for the breach of trust in the context of excessive risk taking. It will start with an analysis of the legal interests protected by these offences (2. Legal interest deserving criminal law protection), after which the two offences will be analysed in detail (3. Definition of the main offences). An extensive analysis will be devoted to the first of the two offences, since its applicability to situations relevant for this study is much broader. Furthermore the chapter will present the rules on liability for inchoate offences in this context (4. Inchoate offences), for cooperation in the commission of the two offences (5. Cooperation in the commission of the offence) and will briefly analyse possible reasons for excluding criminal liability, in particular the issue of consent (6. Reasons for excluding criminal liability). The foreseen punishment will also be presented (7. Punishment). The conclusions to the chapter will be preceded with the solution to the five cases described in the introduction to this study.

2. Legal interest deserving criminal law protection

The French doctrine generally dedicates little place, e.g. in comparison with the German one, to the analysis of the question of what is the legal interest deserving criminal protection. This is no different as far as the offences analysed in this chapter are concerned. However, some conclusions as to the legal interest can nevertheless be deduced from various aspects of the offences' design.

In part of the literature the abuse is counted amongst offences against property or, in other terms, against another person's assets (*délit d'atteinte aux biens*).[24] While that is certainly true, it does not reveal the full nature of the offence.[25] The titles of the respective chapters, in which the abuse of company assets is placed, already provide some limited guidance as to the protected legal interest, since they use the expression

[23] Frédéric Desportes, Francis Le Gunehec, *Droit Pénal Général*, 14th edition (Paris: Economica, 2007) p. 246; Jeandidier, *Abus des biens…* (note 3) para 6.
[24] Médina, *Abus de biens sociaux…* (note 7) p. 7.
[25] Rebut, *Abus de biens sociaux* (note 12) para 15-17.

"Offences involving" followed by the type of the company, to which the offences refer, e.g. "Offences involving limited liability companies". These titles suggest that the company is at the centre of attention of the offences, in contrast to those crimes that have been placed under the heading "Felonies and misdemeanours against property", which is the case of the offence of breach of trust.

Contrary to the latter offence, the abuse of company assets does not require a result in form of negative financial consequences for the victim (i.e. owner of the assets).[26] As will be further explained below, merely exposing the company to abnormal risk is sufficient for criminal liability. The fact that the risk did not materialise in a loss, but the company eventually profited from the act does not exclude liability.[27] Moreover the risk need not relate to a financial loss: it may also consist in exposure of the company to fiscal or criminal sanctions (although they will admittedly have financial consequences).[28] These factors have led some authors to consider that the offence punishes abuses of management (*abus de gestion*).[29] In this sense the offence punishes the managers for making their own interests prevail over the interests of the company thus punishing disloyalty, which is linked also with the origins of the offence, introduced in 1935 in order to protect the confidence of investors at a time when the French economy was making an effort to recover from financial crisis.[30]

The above interpretation of the protective scope of the abuse of company assets is similar to the conception focusing on company property insofar as both refer to the interests of the company. The term "company interests" is also used to define the requirements of the offence. Therefore, the understanding thereof is crucial for delineating the protective scope of the abuse of company assets.[31] The jurisprudence generally rejects the interpretation associating the interests of the company only with the interests of its shareholders and opts for an understanding, which emphasises the company's own interest. This interpretation is strengthened especially by the refusal

[26] Marie-Paule Lucas de Leyssac, Alexis Mihman, Droit pénal des affaires, Manuel théorique et pratique (Paris: Economica, 2009) p. 187.
[27] Yvonne Muller, 'Le droit pénal des conflits d'intérêts', *Droit pénal* (January 2012), n° 1 étude 1, point 13.
[28] Yvonne Muller, 'L'abus réprimé : la correction par le juge', *Gazette du Palais* (19 December 2009), n° 353, pp. 30ff., 31.
[29] Rebut, *Abus de biens sociaux* (note 12) para 10; Muller, 'L'abus réprimé (note 28) p. 30.
[30] Médina, *Abus de biens sociaux*... (note 7) p. 3.
[31] For more details, see below: 3.1.3.2.1. The notion of company interests.

to consider the shareholders' consent as exculpatory, as well as by convictions of managers of companies, of which they are sole shareholders.[32]

By adopting such an approach, and as has been recognised in some judgments the Court of Cassation, the abuse of company assets in fact protects the interests of the stakeholders such as employees, creditors or suppliers.[33] However, this is done indirectly as the courts consequently refuse to allow third persons to join the procedure as civil parties by reason of the sustained damage by them.

The focus on company interests does not mean that the interests of the shareholders are neglected. Indeed, as mentioned above, the interests of latter were one of the original reasons for the enactment of the offence. However, it is considered that shareholders' interests are sufficiently protected if the company interests are protected, since the former benefit from the well being of the company.[34] Nor are shareholders admitted as civil parties, which may be more surprising than in the case of the stakeholders. Only the company is recognised as the victim of the offence.[35] However, the shareholders are admitted to act in criminal procedure in the name of the company, which is justified by the fact that the management of the company, normally entitled to do so, might be composed of the alleged perpetrators.[36]

The extension of the application of the offence to cases, in which corruption was involved,[37] might suggest that the protection offered by this offence extends also to different kinds of legal interest of a public nature.[38] This interpretation, however, is far-fetched. The possibility to punish a manager for abuse of company assets in such a case is provided due to the fact that because of the act of bribery, the company assets are at risk –not in order to punish the act of corruption itself, which is criminalised by

[32] Alain Dekeuwer, 'Les intérêts protégées en cas d'abus de biens sociaux', *La Semaine Juridique Entreprise et Affaires* (26 October 1995), n° 43, pp. 500ff., para 17.
[33] Joly, Joly-Baumgartner, *L'abus de biens sociaux*... (note 21) p. 93.
[34] Dekeuwer, 'Les intérêts protégées en cas d'abus de biens sociaux' (note 32) para 15.
[35] Rebut, *Abus de biens sociaux* (note 12) para 257ff. Interestingly the jurisprudence went back and forth on this point, as first denying the shareholder the right to participate in the procedure as civil parties, then allowing them to join the procedure in this capacity from the 1970s (Cass. crim., 6.01.1970, Bull. crim., n° 11 p. 22) in order to deny it again in the years 2000 (Cass. crim., 13.12.2000, Bull. crim., n° 373 p. 1135). See also: Lucas de Leyssac, Mihman, *Droit pénal des affaires*… (note 26) p. 220; Rebut, *Abus de biens sociaux* (note 12) para 262-263.
[36] Lucas de Leyssac, Mihman, *Droit pénal des affaires*… (note 26) pp. 218-219; Rebut, *Abus de biens sociaux* (note 12) para 254ff.
[37] For more details, see below: 3.1.3.2.2. Being contrary to the interests of the company.
[38] Médina, *Abus de biens sociaux*... (note 7) p. 8.

a different offence. Moreover, abuse of company assets is used for a practical reason: the longer limitation period thanks to the rules postponing its starting point.[39]

As to breach of trust, despite the fact that the name of the offence could suggest that it aims at protecting the relation between the owner and the person to whom the property is entrusted, its goal is to protect another person's property.[40] This interpretation finds its confirmation in two aspects of the offence. Firstly, those breaches of contract which normally fall into the scope of the offence, are not punishable, if the perpetrator becomes the owner of the item in question before the act, but after the handover of the item.[41] Secondly, the consent of the owner excludes the commission of the offence.[42]

3. Definition of the main offences

3.1. Abuse of company assets (*abus de biens sociaux*)

The provisions providing for the abuse of company assets read as follows.

For limited liability companies (SARL)[43]:

"Article L241-3

The following shall be punished by a prison sentence of five years and a fine of 375,000 euros:

[…]

4° If managers use the company assets or credit, in bad faith, in a way which they know to be contrary to the interests of the company, for personal purposes or in order

[39] Rebut, *Abus de biens sociaux* (note 12) para 73, 76.
[40] Corinne Mascala, *Abus de confiance*, Répertoire de droit pénal et de procédure pénale, Dalloz, octobre 2003, para 2.
[41] Jean Larguier, Philippe Conte, *Droit pénal des affaires*, 11th edition (Armand Colin: 2004) pp. 170f.
[42] Jeandidier, *Abus de confiance…* (note 2) para 67.
[43] All the translations of legal acts in this chapter use the translation published on the official website run by the French government – http://legifrance.gouv.fr/ –, which makes available French legal acts as well as provides for translation of some of them. However, in case of the Commercial Code, the translation is corrected where it seemed necessary. The French original of the law is also taken from that website.

to benefit another company or undertaking in which they are directly or indirectly involved;

5° If managers use the powers which they possess or the votes which they have in this capacity, in bad faith, in a way which they know to be contrary to the interests of the company, for personal purposes or to encourage another"[44]

For public limited companies (SA):

"Article L242-6 -

The following shall be punished by a prison sentence of five years and a fine of 375,000 euros:

[…]

3° If the chairman, directors or managing directors of a public limited company use the company assets or credit, in bad faith, in a way which they know to be contrary to the interests of the company, for personal purposes or in order to benefit another company or undertaking in which they are directly or indirectly involved;

4° If the chairman, directors or managing directors of a public limited company use the powers which they possess or the votes which they have in this capacity, in bad faith, in a way which they know to be contrary to the interests of the company, for personal purposes or in order to benefit another company or undertaking in which they are directly or indirectly involved."[45]

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[44] « *Est puni d'un emprisonnement de cinq ans et d'une amende de 375 000 euros :*
...
4° Le fait, pour les gérants, de faire, de mauvaise foi, des biens ou du crédit de la société, un usage qu'ils savent contraire à l'intérêt de celle-ci, à des fins personnelles ou pour favoriser une autre société ou entreprise dans laquelle ils sont intéressés directement ou indirectement ;
5° Le fait, pour les gérants, de faire, de mauvaise foi, des pouvoirs qu'ils possèdent ou des voix dont ils disposent, en cette qualité, un usage qu'ils savent contraire aux intérêts de la société, à des fins personnelles ou pour favoriser une autre société ou une autre entreprise dans laquelle ils sont intéressés directement ou indirectement. »

[45] « *Est puni d'un emprisonnement de cinq ans et d'une amende de 375 000 euros le fait pour :*
...
3° Le président, les administrateurs ou les directeurs généraux d'une société anonyme de faire, de mauvaise foi, des biens ou du crédit de la société, un usage qu'ils savent contraire à l'intérêt de celle-ci, à des fins personnelles ou pour favoriser une autre société ou entreprise dans laquelle ils sont intéressés directement ou indirectement ;
4° Le président, les administrateurs ou les directeurs généraux d'une société anonyme de faire, de mauvaise foi, des pouvoirs qu'ils possèdent ou des voix dont ils disposent, en cette qualité, un usage

The provisions for the two types of limited company are analogous and differ only as to the description of the perpetrator according to the functions foreseen for each type of company. All other elements of the offence are identical. The descriptions of the offence of the abuse of company assets or credit (L241-3 4° and L242-6 3°) and of the abuse of powers and votes (L241-3 5° and L242-6 4°) have exactly the same elements with the only exception being the object of the offence. Therefore the analysis of these elements will proceed in the following order. The first section will present different categories of functions, which fall into the scope of the offence, delimiting the circle of potential perpetrators (3.1.1. Perpetrator). The second section will analyse the four objects of the abuse and the relationship between them (3.1.2. Object of the abuse). It will be followed by the study of the description of the course of conduct (3.1.3. Course of conduct – Abuse) and of the two different requirements of *mens rea* (3.1.4. *Mens rea*).

3.1.1. Perpetrator

The range of possible perpetrators of the abuse of company assets is relatively restricted and comprises only persons enumerated in the provisions providing for this liability. Within the SARL the liability is limited to managers (*gérants*) (Article L241-3 4° and 5°). The SA can be managed according to two models: the traditional French single-board model and the dual-board model. If the company is managed according to the classic system criminal liability for abuse of company assets is provided for the chairman (*le président*), the directors (*les administrateurs*) and the managing directors (*les directeurs généraux*) (Article L242-6 3° and 4°) together with their deputies (Article L248-1). In a company structured according to the dual-board system members of the executive board (*directoire*) and members of the supervisory board (*conseil de surveillance*) may incur criminal liability (Article L242-30). As to other types of companies, in a partnership limited by shares (*Société en commandite par actions*) criminal liability for abuse of company assets is limited to the managers (*gérants*) (Article L243-1) and in a simplified joint-stock company (*Société par actions simplifiée*) to the chairmen (*president*) and directors (*dirigeants*) (Article

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qu'ils savent contraire aux intérêts de la société, à des fins personnelles ou pour favoriser une autre société ou entreprise dans laquelle ils sont intéressés directement ou indirectement. »

L244-1). In a European Company (*Société européenne*) the scope of liability is the same as in the SA and concerns the chairman, directors, managing directors, and their deputies, members of the executive board or members of the supervisory board (Article L244-5).

Moreover criminal liability is extended to persons who exercise the above functions *de facto* (Articles L241-9, L246-2, L242-30, L244-4) and to liquidators (*liquidateurs*) (Article L247-8).

This list, which will be analysed more in detail below, refers to companies regulated by the Commercial Code. For other types of companies regulated by this act the liability for abuse of company assets has not been provided. However, it should be borne in mind that there exist entities, for which liability for this offence has been provided in other acts than the one now under discussion, as was mentioned in the introduction to this chapter. Since they follow a similar model to the companies described in the Commercial Code, they will not be subject to further analysis.[46]

The terms listed above refer precisely to positions within companies. Powers and responsibilities associated with these positions are prescribed by French company law, including the rules on nomination and dismissal, on civil liability as well as regarding the scope of competence. The following sections will present a more detailed analysis of these functions in order to provide a precise understanding of the circle of possible perpetrators of abuse of company assets.

Instead of an abstract definition, the French model opted for a precise definition of the circle of possible perpetrators extended, however, by the inclusion of persons who exercise the functions *de facto*.[47] This latter category will add an element of imprecision to an otherwise very strictly designed law, since it will be subject to case by case evaluation in order to verify whether the defendant fulfilled the criteria to be qualified as a *de facto* manager.[48]

As will be shown below, in all companies only the top management can be held liable as principal offender and within some companies even supervisory bodies

[46] For further details see: Jeandidier, *Abus des biens…* (note 3) para 82; Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 21) pp. 225ff.
[47] Rebut, *Abus de biens sociaux* (note 12) para 200.
[48] Lepage, Maistre du Chambon, Salomon, *Droit pénal des affaires* (note 13) p. 326.

will be excluded from the scope of the offence. No senior or junior manager can be held liable, if it cannot be proved that he *de facto* exercised one of the functions enumerated above. However this circle may be extended by means of the rules on complicity, since for this form of liability, French criminal law does not require the fulfilment of the requirement describing the perpetrator's position.[49] Senior and junior managers may thus be punished as secondary participants in the abuse of company assets, provided that the conditions of liability for complicity are fulfilled (see 5. Cooperation in the commission of the offence).

Since the other elements of the offence apply in the same way to all potential perpetrators, in order to avoid cumbersome enumerations, in the sections that will follow this subchapter, the word "manager" will be used while referring to all persons who can be held liable for the offence of abuse of company assets, unless it is specified that it refers specifically to the function of a *gérant*.

3.1.1.1. SARL

In the French limited liability company (SARL) the term *gérant*, which can be translated as manager or executive[50], refers to a person or persons managing the company (Article L223-18). In the exercise of their function they are directed and controlled by the members (*associés*).[51] According to Article L223-18 a manager must be a natural person, however he does not need to be a member of the company. They are appointed by the members of the company in the articles of association (*les statuts*) or by their resolution at the general meeting.[52] In the absence of a rule in the articles of association providing for a different duration, they are nominated for the whole life of the company (Article L223-18 para 3). Members need to agree to a

[49] Mirelle Delmas-Marty, Geneviève Giudicelli-Delage (eds.), *Droit pénal des affaires*, 4th edition (Paris : Pr. Univ. de France, 2000) p. 341; Rebut, *Abus de biens sociaux* (note 12) para 216f.
[50] The translation as manager will be used hereinafter.
[51] Mads Andenas, Frank Wooldridge, *European Comparative Company Law* (Cambridge University Press, 2009) p. 283.
[52] This resolution shall be adopted by the majority of the members representing more than half of the company shares and in case of lack of such agreement by normal majority (Article L223-29), unless otherwise provided by the articles of association (Andenas, Wooldridge, *European Comparative Company Law* (note 51) p. 283). The same conditions apply to the removal of a manager. The resolution does not need to provide explanation for the reasons of the removal. However, a manager may sue the company for damages if there was no just cause for his dismissal (Andenas, Wooldridge, *European Comparative Company Law* (note 51) p. 283). They may also be removed by a court at the request of any member, if there is just cause to do so (Article L223-25 para 2).

contract between the manager and the SARL (Article L223-19). This will in particular apply to the usual service contracts. [53]

In relation to the members of the company, the powers of the managers are framed by the articles of association or, where this is not the case, by the rules of Article L221-4 (Article L223-18 para 4). Article L221-4 provides that the manager may perform all acts of management in the interests of the company (para 1). If there is more than one manager, each of them is entitled to act separately according to these powers, unless another manager objects to the operation before its conclusion (para 2).

In relation to third persons, the powers of the managers to act in the name of the company are as extended as possible, even including acts which are outside the company's stated business objectives (*objet social*), unless the other party knew that the act did not concern these objectives (Article L223-18 para 5). The limitations of powers provided by the articles of association do not apply in relation to third persons. Also objections of one manager to an act of another will have no effect on a third person, unless this person was aware of the objection (Article L223-18 para 6-7). The only limitation, which applies to the third parties in any case, concerns the powers which are reserved for the shareholders by law.

According to Article L223-22 the managers are jointly or individually liable, according to the circumstances, to the company or to third parties for infringement of legislative or regulatory provisions as well as for breaches of articles of association and for negligent mismanagement.[54]

Managers (*gérants*) of the SARL are punished by virtue of Article L241-3 4° and 5°.

3.1.1.2. SA

According to French company law there are two possible governance structures of the SA: a single-board structure and the newer dual-board structure,

[53] Andenas, Wooldridge, *European Comparative Company Law* (note 51) p. 283.
[54] Andenas, Wooldridge, *European Comparative Company Law* (note 51) p. 285.

inspired by the German AG.[55] Within the single-board structure, the governance of the company is assured by the board of directors (*conseil d'administration*). This board consists of between 3 and 18 directors (*les administrateurs*) (Article L225-17) who are appointed by the general meeting except the first ones who are nominated by the articles of association (Articles L225-16 and L225-18 para 1). Directors are appointed for terms provided by the articles of association, but not exceeding six years, and can be dismissed at any time by the general meeting (Article L225-18 para 2). A legal person can become a director. However, the legal person must nominate a permanent representative who will be subject to the same rules as other directors; in particular, he can be held criminally liable for abuse of company assets (Article L225-20).[56]

Article L225-35 explains the role for this body within the company: "The board of directors determines the broad lines of the company's business activities and ensures their implementation. Without prejudice to the powers expressly invested in meetings of the shareholders, and in so far as the […] articles […] permit, it deals with all matters relating to the conduct of the company's business and decides all pertinent issues through its deliberations.

"In its dealings with third parties, the company is bound even by acts of its board of directors which do not come within the purview of the company's corporate mission, unless it can prove that the third party knew that a specific action was extraneous to that mission or, given the circumstances, could not have been ignorant of that fact, and mere publication of the memorandum and articles of association does not suffice to constitute such proof" (Article L225-35 (2)).

The board convenes and deliberates according to the rules provided by the articles of association (Article L225-36-1), but at least half of the members are always necessary for the quorum and the voting takes place by normal majority, unless the articles of association require a larger majority (Article L225-37). The remuneration

[55] Maurice Cozian, Alain Viandier, Florence Deboissy, *Droit des sociétés*, 24th edition (Paris: LexisNexis, 2011) p. 364.

[56] In certain cases, the board of directors can appoint a director on a provisional basis, which is subject to confirmation by the next general meeting (Article L225-24). An employee of the company may become a director under certain conditions (Article L225-22). Moreover, the articles of association may foresee that the board of directors shall contain directors elected by the company employees (or even including employees of its direct or indirect subsidiaries), which for certain companies became obligatory (Articles L225-27 and L225-27-1).

of the board is granted in the form of directors' fees by the general meeting in form of an annual fixed amount. The board of directors determines upon the distribution of these fees among themselves (Article L225-44).

The board is presided over by the chairman (*le président*) who is elected from among the board and must be a natural person. The board determines his remuneration. His term is limited by the term of the board and he can be re-elected. He may be dismissed by the board of directors at any time (Article L225-47).

According to Article L225-51 the role of the chairman of the board of directors is to organise and oversee the work of the board and to report about its work to the general meeting. He should oversee the correct functioning of the company's management structures and make sure that the directors are capable of accomplishing their tasks.

The person who is effectively managing the company is the managing director (*le directeur général*). This function can be fulfilled by the chairman of the board (who is then called *Président-directeur general*, popularly abbreviated as PDG[57]) or another person appointed by the board of directors, not necessarily a member of the board (Article L225-51-1 para 1).[58] The managing director is assisted by no more than five deputy managing directors (*directeur général délégué*) appointed by the board of directors on the proposal of the general manager (Article L225-53 para 1 and 2).

The board of directors may dismiss the general manager at any time, as well as the deputy managing directors on the proposal of the general manager. If dismissed without just reason, the dismissed manager is entitled to claim damages, except if he is the chairman of the board of directors (Article L225-55 para 1).

Article L225-56 provides for the rules on the functions and powers of the general manager. He is "invested with the most extensive powers to act on behalf of the company in all circumstances." In the exercise of his powers, he is limited by the company's stated business objectives and by the powers attributed by law to the shareholders' meetings and to the board of directors. (I para 1). In relation with third parties, the general director as well as the deputy managing directors represent the

[57] Andenas, Wooldridge, *European Comparative Company Law* (note 51) p. 286.
[58] Andenas, Wooldridge, *European Comparative Company Law* (note 51) pp. 286f.

company, which is bound by these acts even if they fall outside the company's stated business objectives, unless the third party was aware that the act exceeded these objectives or could not have been unaware of it in view of the circumstances (I para 2 and II). Provisions in the articles and decisions of the board of directors limiting the powers of the managers as described in this article are not binding as regards third parties (I para 3 and II).

The Commercial Code offers the possibility, introduced in 1966, to give the company governance a different structure, namely in accordance with the dual-board system. Such structure needs to be proclaimed in the articles of association, but can be introduced to an existing (single-board) company (Article L225-57). According to this structure, the company is governed by the executive board (*directoire*), which exercises its functions under the supervision of the supervisory board (*conseil de surveillance*) (Article L225-58). In this model the executive board becomes an equivalent of the managing director in the single board system.[59] The crucial difference of this system consists in the separation between the management and the supervision functions,[60] since none of the members of the supervisory board can be a member of the executive board (Article L225-74).

The executive board is normally composed of up to five members (Article L225-58 para 1) appointed by the supervisory board that assigns the function of chairman of the board to one of them (Article L225-59 para 1). Only natural persons can become members of the executive board (Article L225-59 para 3), whereas the supervisory board may be constituted also of legal persons (Article L225-76). In the latter case, the legal person must choose a permanent representative who will be subject to the same rules of liability as a natural person, and in particular may be held liable for abuse of company assets.

The members of the executive board can be dismissed at any moment by the general meeting, and, if the articles of association so provide, by the supervisory board. Dismissal without just reason may give rise to damages (Article L225-61). It is also the supervisory board that decides upon the remuneration of the members of the executive board (Article L225-62). As to the powers and the consequences in relation

[59] Andenas, Wooldridge, *European Comparative Company Law* (note 51) p. 291.
[60] Cozian, Viandier, Deboissy, *Droit des sociétés* (note 55) p. 364.

to third persons of the decisions of this board, the rules are similar to those provided for the managing director (Articles L225-64, L225-66). Also similar rules as for the board of directors are provided for the supervisory board, but their functions are limited to the permanent supervision of the management of the company by the executive board (Article L225-68 para 1). Among the tasks of this board feature the carrying out of controls and inspections, which the board considers appropriate and in this regard it may request necessary documents. The executive board has to present a report to the supervisory board at least once per quarter (Article L225-68 para 3 and 4). The supervisory board presents its observations on the executive board's report and the accounts to the general meeting (Article L225-68 para 6). The law requires prior approval by the supervisory board of certain operations of the executive board, for instance the sale of real property, which can be further extended by the articles of association (Article L225-68).

In companies managed according to the single-board system, the chairman (*le président*), directors (*les administrateurs*) and managing directors (*les directeurs généraux*) may be punished by virtue of Article L242-6 3° and 4°. Article L242-30 extends this liability to the management in SA structured according to the dual-board system, i.e. to members of the executive board (*directoire*) and members of the supervisory board (*conseil de surveillance*).

According to Article L248-1 rules of criminal liability applicable to managing directors are also applicable to deputy managing directors.

3.1.1.3. Other types of joint stock companies

The category of *sociétés par action* (joint stock companies), to which the SA belongs, comprises three more types of companies: *Société en commandite par actions* (SCA – partnership limited by shares), *Société par actions simplifiée* (SAS – simplified joint-stock company) and *Société européenne* (SE – European Company). The Commercial Code introduced criminal liability for the offence of abuse of company assets for certain types of perpetrators by making reference to the definition of the offence provided for the SA. These potential perpetrators will be examined in this section.

According to Article L226-1 the SCA, the capital of which is divided into shares, is formed by one or more managing partners (*commandités*), who shall be indefinitely and jointly liable for the company debts, and limited partners (*commanditaires*) who shall have the capacity of shareholders and who shall assume the losses only up to the amount of their contributions. The company is managed by the managers (*gérants*) who are initially appointed in the articles of association and subsequently by the routine shareholders' meeting with the agreement of all the managing partners, unless otherwise provided by the articles of association (Article L226-2). The manager may be chosen among the partners, but this is not necessary (Article L226-2 para 3). The managers' powers and the effects of their acts on third parties are formulated in the same way as for the managers of the SARL (Article L226-7). In their duties, they are overseen by the supervisory board, which is appointed by the shareholders' meeting, composed of at least three shareholders not being managing partners. The latter are also excluded from the election of the members of this board (Articles L226-9 and L226-4). The members of the supervisory board cannot be held liable for the acts of the management and its results. Their liability is limited to personal errors and they can be liable under civil law for torts of which they were aware and which they did not communicate to the general meeting (Article L226-13).

Among these persons, only managers (*gérants*) of an SCA can be principal authors of abuse of company assets. Article L243-1 provides that they are subject to the provision defining the offence in the SA.

The SAS is a simplified form of SA, providing for more flexible rules, which might be useful for certain types of enterprises, in particular small- and medium-sized ones.[61] Article L244-1 providing for criminal liability for abuse of company assets in this type of company by extension of the rules applicable in the SA enumerates two types of suitable perpetrators: the chairman (*président*) and directors (*dirigeants*). As to the first category, it is defined by the provisions on the SAS in a similar way to the definition of powers and effects of his actions on third parties in the case of the general manager in a classic SA (Article L227-6).

[61] Paul Le Cannu, Bruno Dondero, *Droit des sociétés*, 5th edition, (Paris: L.G.D.J., 2013) pp. 625f. Andenas, Wooldridge, *European Comparative Company Law* (note 51) p. 287.

As to the second category – the directors –, this term is not defined in the provisions regulating the SAS, although they use this term. As could be seen from the above analysis, it is unusual for the definition of the abuse of company assets to make reference to a category of potential perpetrators, which is not precisely defined. The lack of such precision is due to the flexibility given in designing the management of the SAS. Hence, although the term seems in theory to be imprecise, it is submitted that in a concrete case it will be most simple to deduce from the articles of association, who is managing the company and consequently also targeted by the definition of the offence.

Le Cannu and Dondero list three possible categories of persons managing the SAS who are considered to be *dirigeants*. The first type consists only of the chairman, who is explicitly targeted by article L244-1, as was seen above. Into the second category fall the managing directors (*les directeurs généraux*) and deputy managing directors (*directeur général délégué*), who, if the articles of association so provide, exercise the powers conferred on the chairman (Article L227-6 para 3). The third category comprises all other individuals or collegial functions, which are defined in the articles of association and are assigned the task of managing the company.[62] Members of the second and third categories will be considered *dirigeants* in the sense of Article L244-1. By contrast, any other persons, in particular members of other types of body, the goal of which would be to control the management of the SAS, e.g. supervisory board, if constituted, will not be able to be held criminally liable for abuse of company property. This interpretation is further reinforced by the wording of Article L227-8, which provides that "The rules establishing the liability of members of the board of directors and the executive board of public limited companies shall apply to the chairman and directors of the simplified joint-stock company." The provision is silent as far as the supervisory board is concerned, contrary to the provision on the liability in the SA managed according to the dual system – Article L242-30.[63]

The European Company is the last possible form of joint stock companies offered by the French Commercial Code. It has a similar structure to the SA with the

[62] Le Cannu, Dondero, *Droit des sociétés* (note 61) pp. 639ff.
[63] Médina, *Abus de biens sociaux…* (note 7) p. 189.

possibility to adopt the single- or the dual-board system.[64] Detailed analysis of the management structure of the European Company would go beyond the scope of this study, because of complexities related to the variety of legal sources – European and national – providing the rules for this type of company.[65] Article L244-5 provides that "the penalties imposed on the chairman, the directors, managing directors, members of the executive board or members of supervisory board of public limited companies are applicable to the chairman, directors, managing directors, members of the executive board or members of supervisory board of the European companies". Hence, criminal liability in the European Company under French law extends to the same persons as in the SA, in particular including members of the supervisory board, contrary to the situation as regards the SAS.

3.1.1.4. Other functions

This list is further extended by additional categories of actors within the management applying to various types of the above-mentioned companies.

The first category comprises persons who, although not formally occupying the positions analysed in the previous sections, *de facto* exercise them. In the context of the SARL Article L241-9 extends criminal liability for abuse of company assets also to "any person who, either directly or indirectly, has in reality managed a limited liability company on behalf of, or in the place of, its legal manager."

An analogous provision extends criminal liability within the SA, SCA and European Company. By virtue of article L246-2, provisions on the criminal liability of the chairman, the directors or the managing directors of public limited companies or European companies and the managers of partnerships limited by shares are also applicable to "any person who, directly or through an intermediary, has effectively managed, administered or run such a company through or on behalf of its legal representatives." Article L242-30 stretches the scope of this extension to those who

[64] Article 38 of the Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European company (SE), OJ 10.11.2001, L 294/1.
[65] For details see e.g. Le Cannu, Dondero, *Droit des sociétés* (note 61) pp. 699ff. and Jacques-Louis Colombani, 'France', in: Krzysztof Oplustil, Christoph Teichmann (eds.), *The European Company - all over Europe. A state-by-state account of the introduction of the European Company* (Berlin: De Gruyter Recht, 2004) pp. 77ff (83ff).

would *de facto* exercise the functions of a member of the executive board or of the supervisory board in a company managed according to the dual-board system. The same rule applies to a *de facto* chairman or director of a SAS (Article L244-4).[66] In sum, by force of all these provisions, criminal liability is extended to persons exercising *de facto* all the functions described in the previous sections.

Liability for the abuse of company assets is also provided for the liquidators (*liquidateurs*) by an analogous version of the offence foreseen by Article L247-8, although limited to the abuse of assets or credit. Interestingly this offence is applicable to entities whose managers are not subject to criminal liability for that offence, i.e. general partnerships (*sociétés en nom collectif*) and partnerships limited by shares (*sociétés en commandite simple*), which is supposedly explained by the fact that, in contrast with the latter, the liquidator does not bear unlimited liability for the losses of these companies.[67]

3.1.2. Object of the abuse

According to the definitions provided by Article L241-3 4° and 5° and its equivalents the abuse can have four objects, which are divided into two groups, resulting in four possible modalities of its commission. The first group (L241-3 4°) consists of abuse of company assets or credit, while the second group (L241-3 5°) consists of the abuse of the manager's powers and voting rights. These terms overlap to a considerable extent and interpretation given to them by the French jurisprudence does not attempt to delimit the scope of each category.[68]

3.1.2.1. Assets

The expression *bien social* or *biens sociaux* – company asset(s) – is understood as broadly as possible.[69] It comprises any kind of property, financial

[66] For an analysis of criteria according to which a person is considered a *de facto* manager, see Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 21) pp. 230ff.; Médina, *Abus de biens sociaux…* (note 7) pp. 197ff.
[67] Stasiak, *Droit pénal des affaires* (note 5) p. 239; Rebut, *Abus de biens sociaux* (note 12) para 213.
[68] Médina, *Abus de biens sociaux…* (note 7) p. 52.
[69] Jeandidier, *Abus des biens…* (note 3) para 11.

assets, chattels or real estate.[70] It includes also intellectual property (e.g. rights of authorship, patents, trademarks etc).[71] It is also considered that into this category fall as well different rights (*droits*),[72] claims (*créances*),[73] orders (*commandes*),[74] or lists of clients (*clientèle*).[75] However, it has not yet been clarified whether assets resulting from a criminal offence would always be considered a possible object of abuse, but at least one judgment goes in this direction.[76]

The assets must belong to the company. By way of illustration, the court acquitted an unemployed individual who used for personal purposes the money he received as a public grant in order to develop his enterprise, instead of injecting it into the company, since he was personally the beneficiary of the aid and not the company.[77]

The extensiveness of this list makes the scope of the offence of abuse of company assets much broader than the range of property offences such as theft (*vol*), fraud (*escroquerie*) or breach of trust, which are excluded for instance with respect to real property.[78]

3.1.2.2. Credit

As will be shown in the next section, the abuse of company assets can occur in cases in which the loss to the company actually materialised, or in cases where the company assets were exposed to a risk of loss. As for the abuse of company credit, it primarily concerns exposing the assets of the company to a risk of loss. It must already be signalled, however, that the differentiation between these two modalities is not entirely clear, especially as to the question when an abuse of credit becomes an

[70] Stasiak, *Droit pénal des affaires* (note 5) p. 241.
[71] Jeandidier, *Abus des biens…* (note 3) para 12, Cass. crim., 14.11.1973, Bull. crim., n° 415 p. 102.
[72] Rebut, *Abus de biens sociaux* (note 12) para 115.
[73] Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 21) p. 68; Cass. crim., 15.03.1972, Bull. crim., n° 107 p. 260.
[74] Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 21) p. 68.
[75] Jeandidier, *Abus des biens…* (note 3) para 12; Cass. crim., 6.05.2009, N° de pourvoi: 08-86378.
[76] Jeandidier, *Abus des biens…* (note 3) para 12; Cass. crim., 3.10.2007, N° de pourvoi: 07-81603.
[77] Cour d'Appel Paris, 12.01.1990, JurisData n°1990-021266.
[78] Delmas-Marty, Giudicelli-Delage, *Droit pénal des affaires* (note 49) p. 342.

abuse of assets, since both concern the financial situation of the company, and because of the broad interpretation of the term "assets".[79]

The notion of credit (*crédit*) refers to the good reputation of the company as a viable business partner, which normally translates into its ability to get loans or to become guarantor of others' debts. Therefore it can include the moral reputation of the company as well as its financial standing.[80] The classic example given to explain this kind of abuse is when the company becomes a guarantor of the director's personal debt, thus diminishing its capacity to take more loans[81] and running unnecessary risk that it will have to pay the director's debt, if he is not able to do that.[82] This modality also includes situations in which the defendant issues in the name of the company documents, which oblige the company to pay at a later date, e.g. by signing a bill of exchange.[83]

The abuse of company credit is limited to its financial consequences. This offence does not punish cases where damage done to the company concerns only its reputation, if this does not in any way affect the assets of the company.[84] Therefore, a comfort letter (*lettre de confort*) issued by the company (and signed by the defendant in the name of the company) in favour of another person, for instance the defendant in his private capacity, and providing assurances as to that person's credibility, would not constitute the offence of abuse of company credit, since it does not create legal obligations for the company. In such cases, however, the commission of abuse of powers might be considered.[85]

3.1.2.3. Powers

The term "powers" in the context of the offence of abuse of powers by managers can be understood in two different ways. The first theory considers that it refers to the powers of a shareholder, in case the manager is himself a shareholder of the company. This interpretation would be explained mainly by the legislative

[79] Médina, *Abus de biens sociaux…* (note 7) p. 55.
[80] Rebut, *Abus de biens sociaux* (note 12) para 117.
[81] Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 21) p. 72.
[82] Rebut, *Abus de biens sociaux* (note 12) para 117.
[83] Cass. crim., 10.11.1964, Bull. crim., n° 291.
[84] Médina, *Abus de biens sociaux…* (note 7) pp. 45f.
[85] Médina, *Abus de biens sociaux…* (note 7) p. 47.

technique differentiating between the first pair of modalities – abuse of company assets and credit–, which can be committed by managers in the execution of their functions and the second pair – abuse of powers and votes–, which the managers can commit, if they influence the general meeting to take a decision, which is against the interests of the company.[86] According to this theory the offence of abuse of powers, together with the abuse of votes, incriminates managers' behaviour during assemblies or shareholders' meetings, if it is contrary to company interests.[87] This theory and thus also such a strict differentiation between the two pairs of modalities have been generally rejected by both literature and jurisprudence.[88]

The second theory, which won prevalence among both the doctrine and the jurisprudence, understands under the term "powers" all of the rights to act that the law or the articles of association confer on the manager.[89] This already large interpretation tends to be extended furthermore by the jurisprudence including also the rights effectively exercised by managers and not only granted by the two mentioned sources.[90] This does not mean nevertheless that the offence may extend without limit. For instance one court acquitted a manager who, in his personal capacity, asked certain shareholders to manifest their confidence in him, by giving him the right to vote in their place as proxy, while at the same time informing them about their freedom to turn down his request.[91] However, the court decided differently in a case, where it found that the powers were correlated with the authority linked to the function of the manager, the authority and influence linked with it that the manager abused.[92] In this case, the court sentenced the defendant for having organised a disadvantageous acquisition of his company by another one, although it was outside

[86] Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 21) p. 76.
[87] Iouda Tchernoff, *Traité de droit pénal financier* (Dalloz, 1937) n°68, cited after: Jeandidier, *Abus des biens…* (note 3) para 14.
[88] Jeandidier, *Abus des biens…* (note 3) para 14; Rebut, *Abus de biens sociaux* (note 12) para 121; Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 21) p. 77.
[89] Lepage, Maistre du Chambon, Salomon, *Droit pénal des affaires* (note 13) p. 319; Jeandidier, *Abus des biens…* (note 3) para 15; Rebut, *Abus de biens sociaux* (note 12) para 121.
[90] Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 21) pp. 76f.
[91] Delmas-Marty, Giudicelli-Delage, *Droit pénal des affaires* (note 49) p. 352; Cass. crim., 27.02.1978, Bull. crim., n° 76 p. 192.
[92] Rebut, *Abus de biens sociaux* (note 12) para 20; Lucas de Leyssac, Mihman, *Droit pénal des affaires…* (note 26) p. 197.

the scope of his competences to decide upon it and the decision was taken by the competent body.[93]

3.1.2.4. Votes

The last of the objects of the abuse is denominated in the French original as "*voix*", which can mean vote or votes. This term refers to the shareholders' right to vote, and thus in turn to situations in which shareholders have transferred their right to vote to the managers who become their proxies and cast the vote on their behalf - in particular if it is a blank proxy. The managers may be held liable for this type of offence, if they use this right to vote in a way which is detrimental to the company.[94] The practical application of this modality is currently very limited due to the fact that since the enactment of this offence various limitations to the possibility of giving a blank proxy have been introduced.[95] Therefore this variation remains practically unused. In any case, it can be argued that any abuse of vote, whether exercised in the defendant's own capacity or as a proxy of a shareholder, could be considered as an abuse of power.[96]

3.1.3. Course of conduct - Abuse

In order to describe the course of conduct of the abuse of company assets, it is necessary to analyse its two aspects. Firstly, there needs to be a use of one of the four objects described above. Secondly, this use must be contrary to the company interests.

3.1.3.1. Use

As far as the quantity of cases is concerned, the first variation of the offence, which consists in abusing the assets of the company, outnumbers the other three modalities. Moreover, not only is there no consistency in the delimitation between the

[93] Cass. crim., 10.07.1995, Bull. crim., n° 253 p. 703.
[94] Rebut, *Abus de biens sociaux* (note 12) para 126.
[95] Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 21) p. 87.
[96] Jeandidier, *Abus des biens…* (note 3) para 22.

modalities, as it was mentioned above, but the courts sometimes combine them in one judgement, without necessarily explaining the reasons for doing so. Since the abuse of company assets (*sensu stricto*) and the abuse of company credit are in the same section of their respective articles (L241-3 4° and L242-6 3°), some judgments refer to both of them.[97] The problem does not concern the second pair – the abuse of powers and the abuse of votes (L241-3 5° and L242-6 4°) – because its second element has in practice fallen into disuse. In view of the same rules of procedure and of the same punishment foreseen for all the variations together with a commonly understood wrongdoing behind criminalisation, the perils of infringement of the defendant's rights are rather limited.[98] Taking into account the design of the offence, the focal points deciding upon the manager's liability are the requirement that his act be contrary to company interests and that the manager acted in personal interests.

Although the verb used in the definition of the offence – *usage* – suggests that only active behaviour of the defendant can fulfil this limb,[99] the French jurisprudence admitted the possibility to commit the offence also by omission.[100] An example of such a situation would be where the defendant failed to terminate a contract, which is contrary to the interests of the company (causing losses to the company or exposing it to the risk of loss).[101] In another case, the court convicted a manager of a SARL for not having reduced his remuneration, while the company was generating losses.[102] It is considered to be a case of use of powers not to pursue a claim for a debt, which another person has towards the company that would translate into an abuse of powers if the *mens rea* requirements were also fulfilled.[103] The number of cases in which the manager's wrongdoing consisted merely in an omission is very limited.[104]

The literature tends to be critical on extending the understanding of the word "usage" to inaction.[105] However, authors are inclined to accept the application of the

[97] Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 21) pp. 66f.
[98] Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 21) p. 65.
[99] Stasiak, *Droit pénal des affaires* (note 5) pp. 240f.
[100] Cass. crim., 28.01.2004, N° de pourvoi: 02-88094; Cass. crim., 23.03.2005, N° de pourvoi: 04-84756.
[101] Cass. crim., 31.10.2000, N° de pourvoi: 00-80.824 (assets).
[102] Cour d'Appel Angers, 17.01.1991, Dr. pénal 1991. Comm. 241, cited after: Rebut, 69.
[103] Cass. crim., 15.03.1972, Bull. crim., n° 107, p. 260.
[104] Wilfrid Jeandidier, 'L'Elément matériel des infractions d'affaires où la prédilection pour l'inconsistance', in: *Mélange offerts à Raymond Gassin* (Aix-Marseille: Presses Universitaires d'Aix-Marseille, 2007) pp. 245-263, 253.
[105] Jeandidier, *Abus des biens…* (note 3) para 25.

abuse of company assets to cases of omission taking into account two considerations. Firstly, if the manager is accused of abuse of powers, one can claim that by not using his powers (e.g. to claim a debt in the name of the company) he in fact wrongly uses these powers. Secondly, by deliberately not terminating a situation, which is detrimental for the company, the perpetrator's conduct in fact amounts to what the French literature calls "omission in acting" (*omission dans l'action*) and accepts as use.[106] A manager who does not prevent another manager from committing the abuse of company assets might be also punished as accomplice, if the conditions of this modality are fulfilled (see 5. Cooperation in the commission of the offence).

It is a general rule that the offence is considered to be committed in the moment of the use.[107] As will be explained below, it is also from that point moment of the use, which will be decisive for evaluating whether the act was contrary to company interests. The approach differs in cases where the use (and abuse) starts at a certain point of time (in the moment of the decision or later) and then lasts in time. The jurisprudence considers for instance not pursuing a claim for a debt to be a continuous offence.[108] This issue becomes pertinent in view of three different problems: complicity, handling stolen goods (*recel*) and rules on time limitation of prosecution (*prescription*).[109] It is in particular the latter problem that has resulted in intensive debate (See 7. Punishment).

The offence of abuse of company assets does not require proof of certain result, but is focused on the perpetrator's conduct. This conduct is defined by its possible consequences, which are contrary to the interests of the company and not by the real consequences of the act. Therefore, as far as the liability of the principal is concerned, the offence is committed already in the moment of the abuse and posterior occurrences remain without influence.[110] In particular it has been confirmed by jurisprudence on numerous occasions that restitution or compensation has no impact on the assessment of whether the offence was committed or not.[111]

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[106] Lucas de Leyssac, Mihman, *Droit pénal des affaires*… (note 26) pp. 194-195.
[107] Joly, Joly-Baumgartner, *L'abus de biens sociaux*… (note 21) p. 61.
[108] Cass. crim., 15.03.1972, Bull. crim., n° 107, p. 260.
[109] Joly, Joly-Baumgartner, *L'abus de biens sociaux*… (note 21) pp. 61ff.
[110] Joly, Joly-Baumgartner, *L'abus de biens sociaux*… (note 21) pp. 64f.
[111] E.g. Cass. crim.,16.12.1975, Bull. crim., n° 279, p. 735. For further examples, see Joly, Joly-Baumgartner, *L'abus de biens sociaux*… (note 21) pp. 64f.

To use (*faire un usage*) the company assets means to perform any act affecting these assets.[112] This term comprises certainly the acts of misappropriation, which are less relevant for this study. What is more important, it comprises also other acts of management (*actes de gestion*), which can be divided into two categories. The first one contains acts, called *actes de disposition*, which affect the assets by a legal act (e.g. a contract), i.e. burden them with an obligation (*engager*) or transform them (*transformer*), for example through sale, donation, bequest, and constitution of a guarantee. The second group of acts, named *actes d'administration*, comprise any other acts of assets management, e.g. physically using, maintaining, storing etc.[113]

The use of credit is generally performed by a legal act, in particular by signing in the name of the company a contract, which affects the company's financial credibility. This will be the case, for example, when the manager signs in the name of the company a contract granting a loan under conditions, which are unfavourable for this company. Such a loan could be granted to the company director or to another person mentioned as potential perpetrator, or also to any other person not targeted by the offence, to whom one of the persons targeted by the offence decides to grant such a loan.[114] The president of the board of directors of an SA was convicted in such a case for having granted in the name of the company a loan to another company in which he was the major shareholder. This loan was approved despite the fact that the company granting it was in financial difficulties and the president was aware of that.[115]

Among the four modalities of the offence the abuse of powers is the one that causes the most conceptual problems. The difficulties with the understanding of the term "powers", described in the previous section, extend also to the interpretation of the use of powers. The case law concerning this modality is limited, and rather dated.[116] It is however possible to point out certain types of acts, which the jurisprudence considered to be (ab)use of powers.

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[112] Lepage, Maistre du Chambon, Salomon, *Droit pénal des affaires* (note 13) p. 316
[113] Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 21) p. 57; Jacques-Henri Robert, Haritini Matsopoulou, *Traité de droit pénal des affaires* (Presses Universitaires de France, 2004) p. 474.
[114] Médina, *Abus de biens sociaux…* (note 7) p. 53.
[115] Médina, *Abus de biens sociaux…* (note 7) p. 53.
[116] Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 21) pp. 76f.

The first group of cases comprises situations, in which managers signed contracts or took decisions, which were disadvantageous for the company.[117] The fact that this contract is disadvantageous may be related not only to an actual loss that the company will suffer, but also with unnecessarily high exposure to a risk of loss.[118] Some of these cases resemble the abuse of assets (*sensu stricto*), in others the use of assets will be less evident. For instance, a manager was convicted for abuse of powers for having terminated an employee's employment contract in such a way that it exposed the company to judicial procedures.[119]

Another category comprises cases in which the manager omitted to claim repayment of debt, which another person, company or entity owed to the company.[120] Yet again, it could be debated whether this would not constitute also an abuse of assets. In any case, it is less likely that the problem of exposure to excessive risk will occur in this scenario.[121] Another type of situation, in which the court convicted for abuse of powers, was a take-over of the company organised by its manager and since the company disappeared it was impossible to claim that it suffered any loss.[122]

A further category of abuse of powers, the common denominator of which could be described as disloyal conduct of managers,[123] is exemplified by a case in which the manager convinced some clients of his bank to withdraw their money from this bank and entrust it to him for further investment. It this case the court based its judgment, without giving further details unfortunately, on the existence of the risk that were these investments to end in a failure the bank could be held financially liable for this failure vis-à-vis the clients and could also incur sanctions from the banking supervising authorities.[124] That it is possible to consider this case as an example of abuse of company credit is yet another illustration of the overlap between the

[117] Cass. crim., 08.01.1990, N° de pourvoi: 88-84.675; Cass. crim., 15.01.1990, N° de pourvoi: 89-80.345; Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 21) p. 77.
[118] Cass. crim.,16.01.1989, Bull. crim., n° 17 p. 45.
[119] Cass. crim., 30.01.2001, N° de pourvoi: 00-84.414.
[120] Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 21) pp. 81f., e.g. Cass. crim., 15.03.1972, Bull. crim., n° 107 p. 260; Cass. crim., 05.01.1989, N° de pourvoi: 88-81.217.
[121] See e.g. Jeandidier, *Abus des biens…* (note 3) para 19; Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 21) p. 81.
[122] Robert, Matsopoulou, *Traité de droit pénal des affaires* (note 113) p. 474; Cass. crim., 10.07.1995, Bull. crim., n° 253 p. 703.
[123] Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 21) p. 79.
[124] Cass. crim., 19.11.1979, Bull. crim., n° 325 p. 887.

available modalities.[125] Similar remarks apply to another judgement in which the court convicted a manager for having transferred to the company an obligation to guarantee debts.[126]

In view of these overlaps and the lack of a precise definition of the abuse of powers, the doctrine encounters difficulties in authoritatively establishing the relationship between this and other modalities. In order to solve this problem, different proposals have been formulated. According to the first one the abuse of powers would constitute the broadest modality comprising any kind of decision, while the abuse of assets and credit would constitute special cases of abuse of powers. Another solution would see in the abuse of powers a preliminary step to commit a further offence of abuse of assets or credit, since while committing the abuse of powers or votes, the manager is using the powers conferred on him.[127] The shortcomings of these solutions are that they render in fact the existence of some modalities obsolete.[128] One of the proposals formulated in the literature has suggested to grant the abuse of powers an autonomous function among the modalities, which would be applicable in the three following types of situation:

- when the impact on the assets of the company is indirect and thus difficult to quantify (e.g. organisation of disadvantageous acquisition of the company).

- when the manager infringes the internal rules of the company (e.g. by granting a loan against such rules),

- when the manager's conduct consisted in omission (e.g. not claiming debt owed by another person to the company[129]).[130]

In theory, the abuse of votes would be committed when the manager, to whom the shareholders transferred the right to be their proxy and cast the vote for them, especially in case of blank proxies, use this right in a way which is against the interests of the company. However, as said above, the offence has lost its practical

[125] Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 21) p. 80.
[126] Cour d'Appel Grenoble 25.02.1998, Gaz. Pal. 17-19 octobre 1999, Somm., p. 46, cited after: Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 21) p. 83.
[127] Jeandidier, *Abus des biens…* (note 3) para 21.
[128] Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 21) pp. 84f.
[129] However the Court of Cassation sentenced the perpetrator for abuse of company assets and not abuse of powers in the following case: Cass. crim., 18.12.1997, N° de pourvoi: 96-85657.
[130] Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 21) p. 85.

relevance since the possibilities to give blank proxies were substantially reduced by the law reform in 1983.[131] Therefore, this modality will not be analysed hereinafter.

3.1.3.2. Contrary to the interests of the company

In order for the use of assets, credit, powers or votes by the manager to become an abuse, it must be qualified as contrary to the interests of the company (*contraire à l'intérêt de la société*). The provisions criminalising the abuse provide for this requirement with a formulation suggesting that it is a *mens rea* requirement ("in a way which they know to be contrary to the interests of the company"). However, it is considered that not only in the perception of the manager must the use be contrary to these interests, but also that it must actually be so.

The analysis of this limb will proceed in two steps: firstly, by examining what is understood under the expression "the interests of the company" and secondly, by analysing when the use is considered to be contrary to these interests.

3.1.3.2.1. The notion of company interests

The first question, which the analysis of this expression must answer, is what should be understood by the term "interests of the company". In this respect two theories are represented in the French literature. The first one, called contractual theory (*théorie contractuelle*), considers that the only reason for the existence of a company is the satisfaction of the interests and goals of its shareholders, thus the interest of the company is assimilated with the interest of the shareholders.[132] Following this theory, it would be good for the shareholders, at least in the short term, to use the company funds to cause the price of the stock to rise, although it may not necessarily be in the best interest of the company as such.[133] The rival theory, called institutional theory (*théorie institutionnelle*), perceives the company as "an autonomic economic agent, pursuing its own goals, which are distinct from those of its

[131] Lepage, Maistre du Chambon, Salomon, *Droit pénal des affaires* (note 13) p. 320; Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 21) p. 87.
[132] Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 21) p. 90.
[133] Larguier, Conte, *Droit pénal des affaires* (note 41) p. 342.

shareholders, employees, creditors, tax authorities, suppliers or clients, but which correspond to the general interest of all those actors, which is to assure the well-being and continuous functioning of the company."[134] An intermediate third theory takes into account the interests of the shareholders, in particular their interest in making profit from their investment, while at the same time stressing the own interests of the company, especially its long-term survival and wellbeing.[135]

The French jurisprudence on abuse of company assets demonstrates a clear inclination towards the second and the third interpretations. In one of its judgments the Court of Cassation rejected the first interpretation by saying: "The abuses of company assets prejudice not only the interests of shareholders, but also those of the third parties who contract with it".[136] It is claimed that this interpretation can be justified, *inter alia*, by the choice of the legislator not to use the expression "interest of shareholder" or "company's stated business objectives" (*objet social*).[137] The consequence of adopting this line of interpretation can be seen in the application of the offence of abuse of company property to companies owned by one person, who fulfils the function of its manager, to companies run as family businesses or in cases in which consent to the abuse committed by the manager was granted by the shareholders (see also 6.1 Consent).[138] The inclination towards the third theory, instead of the second one, could be deduced from the courts' reluctance to grant the right to bring civil actions for damages within the criminal procedure to the shareholders, employees or other parties.[139]

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[134] *'Le conseil d'administration des sociétés cotées', "Rapport Viénot"*, Rapport conjoint du CNPF (Conseil National du Patronat Français) et de l'AFEP (Association Française des Entreprises Privées), July 1995, available at: http://www.ecgi.org/codes/documents/vienot1_fr.pdf (last viewed: 11.10.2015) p. 8.

[135] Gilles Mathieu, 'L'acte contraire à l'intérêt social en matière d'abus de biens sociaux', *Gazette du Palais*, (Recueil Juillet-Août 2002), pp. 1045-1049, 1046.

[136] « *Les abus de biens sociaux portent atteinte non seulement aux intérêts des associes, mais aussi à ceux des tiers qui contractent avec elle* » : Cass. crim., 26.05.1994, Bull. crim., n° 206 p. 482. For an extensive list of judgments in this line, see Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 21) p. 93.

[137] Rebut, *Abus de biens sociaux* (note 12) para 33, in this respect see also Médina, *Abus de biens sociaux…* (note 7) pp. 81ff.

[138] Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 21) pp. 93ff.

[139] Stasiak, *Droit pénal des affaires* (note 5) p. 243, e.g. Cass. crim., 28.01.2004, N° de pourvoi: 03-81345; Cass. crim., 9.03.2005, N° de pourvoi: 04-85.825; Cass. crim., 23.02.2005, N° de pourvoi: 04-83.768; Cass. crim., 23.02.2005, N° de pourvoi: 04-83.792.

3.1.3.2.2. Being contrary to the interests of the company

The crucial aspect of the use of company assets, which will qualify the use as abuse, is that the use is contrary to the interests of the company. It is considered that in order to determine whether the use is contrary to these interests, the use must be done without adequate compensation, i.e. generate loss, or expose the company to an abnormal risk, i.e. to a risk, to which the company should not be exposed.[140]

These two factors will be decisive in turning use into abuse in the context of the abuse of assets *sensu stricto* and the abuse of powers. A loss may occur as a result of both modalities, misappropriation would be an example of the first one, not claiming the repayment of debt an example of the latter. However even an exposure to the abnormal risk of loss can qualify use as being abusive. As to the abuse of credit, this modality encompasses situations, where the loss does not need to occur, but the company is exposed to a risk, to which it should not be exposed.[141]

Although the above definition suggests that it is the result of the act that determines its qualification as contrary to the company interests, this offence does not require proof of result. The fact that the result already occurred might make the proof of this limb easier. However, the judge should not focus on the consequences, but he will have to make an abstract evaluation of the act determining whether at the moment of its commission (e.g. at the moment the decision was taken or the contract concluded), it was contrary to the company's interests.[142] This rule has important consequences determining the scope of liability for this offence. Firstly, the fact that the act turned out eventually to be profitable for the company does not preclude liability, if it can be established that at the moment when it was committed, it exposed the company to an abnormal risk of loss.[143] Secondly, the fact that the act turned out to be less advantageous than it could have been expected at the moment when it was undertaken, and in fact exposed the company to an abnormal risk or even eventually caused loss, does not in and of itself render the act contrary to company interests in terms of this offence.[144] This rule corresponds with the philosophy of this offence,

[140] Rebut, *Abus de biens sociaux* (note 12) para 38. See also the classification proposed in: Lucas de Leyssac, Mihman, *Droit pénal des affaires*… (note 26) pp. 199-209.
[141] Joly, Joly-Baumgartner, *L'abus de biens sociaux*… (note 21) p. 86.
[142] Cass. crim., 02.12.1991, N° de pourvoi: 90-87563.
[143] Rebut, *Abus de biens sociaux* (note 12) para 64; Cass. crim., 16.01.1989, Bull. crim., n° 17 p. 45.
[144] Joly, Joly-Baumgartner, *L'abus de biens sociaux*… (note 21) p. 101.

which excludes the possibility that it is used to judge the ability of the management to take good decisions and to make the company prosper, but should be applied to punish managers who knowingly take decisions against company interests.[145]

As to the abuse of powers, it is important to stress that a breach of duty is not necessary to qualify the use as contrary to the company interests. It is possible that the manager breaches some of his duties, e.g. granting a loan against the rules of the bank,[146] but liability under this provision can also result from a use, which remains within the boundaries of the manager's powers, e.g. by signing a contract, which the manager was allowed to sign, but the conditions of which were against the interests of the company.[147] Instead of analysing the breach of rules, the court will have to analyse, as in the context of other modalities, whether the use of powers was of such a nature as to expose the company to an abnormal risk of loss or that such loss was certain.[148] Consequently, if in spite of a breach of the rules – statutory or internal – the company was not exposed to risk of loss, criminal liability for the abuse would be excluded. This problem has arisen, *inter alia*, in cases concerning managers' remuneration. It has been argued that the judges ought not to base their judgment on procedural shortcomings related to granting the remuneration, but that the emphasis should be placed on the question of the company's expectancy to be compensated sufficiently by the manager's work.[149] Moreover, the judges need not evaluate the exact adequacy of remuneration to the work of a manager, which would constitute an excessive intrusion into the life of corporations, but should limit their intervention to the most serious cases of abuse, such as in the judgment concerning a former manager who was receiving remuneration without performing any service at all for the company.[150]

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[145] Robert, Matsopoulou, *Traité de droit pénal des affaires* (note 113) p. 477; Stasiak, *Droit pénal des affaires* (note 5) p. 242; Cass. crim., 27.10.1997, Bull. crim., n° 352, p. 1169 (so called *Carignon* affaire).
[146] Cass. crim., 3.05.1967, Bull. crim., n° 148.
[147] Cass. crim., 8.01.1990, N° de pourvoi: 88-84675; Cass. crim., 15.01.1990, N° de pourvoi: 89-80345. In the latter case the manager did not submit the contract to the executive board, however the abuse of powers resulted from detrimental conditions of the contract, under the terms of which the company was obliged to remunerate an employee during eight years even if the company decided to resign from the services of this employee.
[148] Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 21) p. 86.
[149] Rebut, *Abus de biens sociaux* (note 12) para 50.
[150] Rebut, *Abus de biens sociaux* (note 12) para 49; Cass. crim., 28.03.1996, Bull. crim., n° 142 p. 407.

As to situations, in which being contrary to company interests is defined as the absence of adequate compensation, it can appear in two forms: either as an immediate loss or as a lack of gain. The following situations can be cited as examples of the first form: covering the private expenses of the manager, misappropriation of company assets by the manager or excessive remuneration of managers.[151] As to the lack of gain, it can occur for instance in the case of the sale of goods for an inferior price in comparison with their real value or in cases where company property is used in return for insufficient remuneration, or indeed none at all, provided that the company is not duly compensated in another form.[152]

Whilst use may be considered contrary to company interests due to the certitude that it will lead to a loss, what is important for this study is that the mere risk of such loss is enough. In order to qualify the act as detrimental, the French jurisprudence and doctrine consider that the company should be exposed to an abnormal risk (*risque anormal*), in other words to a risk, to which it should not be exposed (*risque auquel il ne devrait pas être exposé*).[153] This expression, which is left for the consideration of the judges in concrete cases, should exclude from the scope of the offence those situations, in which the company is exposed to the risk, which are inherent to the market or type of transaction in question.[154] The expression has not been defined by the jurisprudence. According to one author the risk can be classified as abnormal when it is "obviously disproportionate or unnecessary" in relation to the expected advantage.[155]

In this context the modality of the abuse of company assets (*sensu stricto*) or of the abuse of powers occurs, if the act of the manager concerning these assets

[151] Rebut, *Abus de biens sociaux* (note 12) para 43, 44, 48ff.
[152] Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 21) p. 97, Rebut, *Abus de biens sociaux* (note 12) para 42.
[153] Cass. crim., 16.01.1964, Bull. crim. 1964 n° 16 p. 27 (abuse of company assets); Cass. crim., 10.11.1964, . crim., n° 291 (abuse of credit); Cass. crim., 03.05.1967, Bull. crim. n° 148 p. 350 (abuse of assets, credit and powers); Cass. crim., 7.03.1968, Bull. crim. n° 80, p. 189 (abuse of powers and abuse of assets in case of a cooperative); Cass. crim., 24.03.1969, Bull crim. No 130 p. 319 (abuse of assets); Cass. crim., 16.03.1970, Bull. crim. n° 107 p. 245 (abuse of credit); Cass. crim., 16.12.1975, Bull. crim. n° 279 p. 735 (abuse of company assets); Cass. crim., 19.11.1979, Bull. crim. n° 325 p. 887 (abuse of powers); Cass. crim., 16.01.1989, Bull. crim. n° 17, p. 45 (abuse of powers); Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 21) p. 98.
[154] Cass. crim., 16.01.1989, Bull. crim. n° 17, p. 45.
[155] Rebut, *Abus de biens sociaux* (note 12) para 61.

exposes them to an abnormal risk.[156] This would take place if a manager uses the company assets in a way, for which the compensation is linked with exposure to abnormal risk. This would be the case if a manager borrows money from the company, or even keeps borrowing on a regular basis, which may lead to confusion between the company assets and those of the manager. Such a practice, even if the manager is the main or only shareholder, is considered to be contrary to the interests of the company if the company does not receive adequate compensation. This applies in particular to cases where no interest is paid on the loaned funds or the situation lasts a relatively long time, since it exposes the company to the abnormal risk that the manager will not pay back the debt.[157] Another case falling into this category is a situation in which the company paid the sum required by the court for the manager's bail or other form of guarantee of this kind, which might translate into a loss should the manager fail to meet its conditions.[158]

The risk need not directly concern financial aspects of the company, but can also consist for instance of exposing the company to the risk of legal sanctions, although such sanctions would most probably imply also a financial loss.[159] Such case would for instance involve a manager who bribes a tax officer, by giving him 15 000 Euro, while expecting a reduction of taxes of 250 000 Euro. Although the company is intended to receive compensation for the money it spent and would make an important saving, this use of company assets carries a risk that, if discovered, not only will the saving not materialise (so the 15 000 Euros would be spent without compensation), but also the company could be sanctioned.[160]

The above examples are linked with an important rule established in the French jurisprudence, which says that if the act in question is unlawful (which is limited in this context to acts, which may be punished with criminal or tax sanctions) it is always considered to be contrary to the interests of the company.[161] Despite a

[156] Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 21) p. 99; Cass. crim., 16.01.1989, Bull. crim. n° 17 p. 45; Cass. crim., 19.11.1979, Bull. crim. n° 325, p. 887.
[157] Rebut, *Abus de biens sociaux* (note 12) para 45; Cass. crim. 09.05.1988, N° de pourvoi: 87-90069.
[158] Tribunal correctionnel Nantes 2.05.1985, RTD com. 1985, p. 830 – cited after: Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 21) p. 171. See also Cass. crim., 16.01.1964, Bull. crim. 1964, n° 16 p. 27.
[159] Rebut, *Abus de biens sociaux* (note 12) para 62.
[160] Example from Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 21) p. 98.
[161] Stasiak, *Droit pénal des affaires* (note 5) p. 243; Cass. crim., 22.04.1992, Bull. crim. 1992 n° 169 p. 441.

certain reluctance to this approach at first, it was confirmed by the judgment in *Carignon*, in which the court said: "whatever short-term benefit it can bring, the use of company funds for the sole purpose of committing a crime such as corruption is contrary to the interest of the company in the way that it exposes the legal person to an abnormal risk of being sanctioned with criminal or tax penalties incurred against it and its managers and because it undermines its creditworthiness (or credit according to the terminology of the offence) and reputation".[162] Since this judgment it has been considered, that not only in relation to corruption, but also in cases of other unlawful (in the above sense) acts, the act is considered contrary to the interests of the company, because it always exposes the company to a risk of a legal sanction.[163] Opposition to this solution diminished following the introduction into the French criminal law of corporate criminal liability in March 1994, which in 2004 was extended to all offences.[164] Explaining this interpretation, one author considered that the reputation of the company is part of its assets and thus exposing that reputation to risk is also contrary to company interests.[165] It is important to mention that the factor which contributed to the use of the offence of abuse of company assets in order to punish corruption is that the limitation period for prosecuting the abuse may be longer than in the case of bribery due to the rules on postponing the moment from which statutory limitation starts to run.[166]

As to the offence of abuse of company credit, it is typically committed by the use of this credit in a way, which exposes the company to a risk to which it should not be exposed. A standard example of such use is a situation, in which the company guarantees a personal loan taken out by the manager. The exposure to an abnormal risk results from the fact that, should the manager fail to repay the loan, the company

[162] "Quel que soit l'avantage à court terme qu'elle peut procurer, l'utilisation des fonds sociaux ayant pour seul objet de commettre un délit tel que la corruption est contraire à l'intérêt social en ce qu'elle expose la personne morale au risque anormal de sanctions pénales ou fiscales contre elle-même et ses dirigeants et porte atteinte à son crédit et à sa réputation" Cass. crim., 27.10.1997, Bull. crim., n° 352, p. 1169 (so called *Carignon* affaire).
[163] Stasiak, *Droit pénal des affaires* (note 5) pp. 243f. Confirmed e.g. in the following judgment: Cour. Cass. 14.05.2003, Bull. crim., n° 97 p. 372.
[164] Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 21) p. 108. The extension was provided for by Article 54 of "Loi n° 2004-204 du 9 mars 2004 portant adaptation de la justice aux évolutions de la criminalité" which modified Article 121-2 of the French Penal Code containing the general rule of corporate criminal liability.
[165] Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 21) p. 112.
[166] Rebut, *Abus de biens sociaux* (note 12) para 73, 76. See also 7. Punishment.

might have to pay in his place, whereas there is no compensation for the company in return for this favour.[167]

In any of these situations, there is no need that any result actually occur, since, as it was explained above, the fact of exposing the assets of the company to a risk of loss can as such already constitute the *actus reus* of the offence.[168]

There exist at least two rebuttable presumptions as to when the act is considered to be or not to be contrary to the interests of the company. According to the first one, if the act does not enter into the framework of the company's stated business objectives, it is presumed to be contrary to its interests. In such cases, it is the task of the defence to prove that the act was not contrary to these interests.[169] Similarly, if the act in question was within the company objectives, it is presumed not to be against its interests.[170]

Finally, special alleviated rules have been developed as to the use of assets within corporate groups. It is not uncommon in such groups that one company is acting in a way, which is as such detrimental to this company, but the act is beneficial to the whole group. This is in particular the case of flows of good and capital between companies being members of the group, which can be done according to conditions, which are less advantageous than those applicable on the market.[171]

3.1.4. Mens rea

The *mens rea* requirement of the offence of abuse of company assets in all its modalities is formulated in the same way and is composed of two elements having different functions in the structure of the offence. The first one – *dol général,* which can be translated as intention – requires that while acting the perpetrator knows that

[167] Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 21) p. 99; Examples in jurisprudence of this and similar situations: Cass. crim., 10.11.1964, Bull. crim. n° 291; Cass. crim., 03.05.1967, Bull. crim. n° 148, p. 350; Cass. crim., 16.03.1970, Bull. crim. 107, p. 245; Cass. crim., 08.12.1971, Bull. crim. n° 346, p. 869. See also: Cass. crim., 08.12.1971, Bull. crim. n° 346, p. 869.
[168] Cass. crim., 08.12.1971, Bull. crim. n° 346, p. 869.
[169] Stasiak, *Droit pénal des affaires* (note 5) p. 244.
[170] Stasiak, *Droit pénal des affaires* (note 5) p. 244.
[171] Stasiak, *Droit pénal des affaires* (note 5) pp. 245f. For more details see e.g. Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 21) pp. 114ff; Lucas de Leyssac, Mihman, *Droit pénal des affaires…* (note 26) pp. 209-215; Cass. crim., 20.03.2007, Bull. crim. n° 86 p. 426.

his act is contrary to the interests of the company and hence excludes liability for negligence. The second element – special intention (*dol spécial*) – requires that the defendant acted in his – broadly understood – own interests. This requirement is crucial in drawing the limit between mismanagement, which ought to remain out of focus of criminal law and criminally punishable acts where the perpetrator gives priority to his own interests over the interests of the company.

For the assessment of the *mens rea* the hope of the defendant that the company will eventually either benefit from his act or at least not suffer any loss plays no role, since the offence does not require proof of intention to cause damage to the company.[172] It has to be assessed whether, in the very moment of the commission of the act, the defendant knew the act to be contrary to the interests of the company, meaning that it would cause loss or expose the company to an abnormal risk of loss. For example, if the manager guarantees in the name of the company his personal debt hoping that he will be able to repay it, he nonetheless commits the abuse of company credit, since he is aware that his conduct exposes the company to a risk to which it should not be exposed.[173]

3.1.4.1. Intention

The first *mens rea* condition – intention (*dol général*) – is formulated by the expression: "in bad faith, in a way which they [the managers] know to be contrary to the interests of the company". The first problem appearing in its analysis is whether the expression "in bad faith" would be considered to be pleonastic, since a manager who knowingly acts to the detriment to the company is necessarily acting in bad faith,[174] or does the provision formulate here two different requirements and if so, what does "bad faith" mean in this context?

The theory opting for autonomous understandings of these two expressions separates the requirement of knowledge from the requirement of intention, considering that bad faith refers to the intention to act (i.e. in acting), while knowing

[172] Stasiak, *Droit pénal des affaires* (note 5) p. 246.
[173] Médina, *Abus de biens sociaux…* (note 7) p. 44.
[174] Jeandidier, *Abus des biens…* (note 3) para 70.

that the act is against the company interests.[175] The abuse of company assets is an intentional offence, so its *mens rea* must be, at least in theory, composed of these two elements.[176] However, judgements pondering separately the two elements are rare.[177] It is much more common for judgments to focus on proving knowledge,[178] while the intention to act is simply implied from the fact that the defendant acted while knowing that the act was contrary to the interests of the company.[179] Moreover, the Court of Cassation admitted that the fulfilment of some elements could be brought out in a judgment only implicitly.[180] Such an approach has even a further consequence, since some judgments do not elaborate on the fulfilment of general intention, but concentrate on the proof of the special intention (personal interests – see below). This is mainly the case, if the proof of special intention renders evident the knowledge of the defendant that the act was contrary to company interests.[181] However, the possibility of addressing only implicitly some elements of the offence does not empty general intention of its function. The French Court of Cassation did not hesitate to quash judgments where the proof of intention was lacking and the reasoning was limited to a description of actual facts.[182]

In certain configurations of facts the courts have a tendency to presume the existence of bad faith from the material elements of the offence, which will be even more reinforced, if additionally the special intention has been proved. This means that the jurisprudence might presume that the manager acted in bad faith, if other elements of the offence are fulfilled.[183] Moreover, due to the professional aspect of the defendants' activities, the expectation as to their understanding of what is beneficial for the company and what is not is set higher than for a normal citizen.[184] In particular

[175] Rebut, *Abus de biens sociaux* (note 12) para 137.
[176] Desportes, Le Gunehec, *Droit Pénal Général* (note 23) p. 418; Rebut, *Abus de biens sociaux* (note 12) para 134ff.
[177] Rebut, *Abus de biens sociaux* (note 12) para 138, e.g.: Cass. crim., 16.12.1975, Bull. crim. n° 279 p. 735.
[178] Rebut, *Abus de biens sociaux* (note 12) para 140; Cass. crim., 8.02.1968 Bull. crim. n° 42; Cass. crim., 28.03.1996, Bull. crim. n° 142 p. 407.
[179] Rebut, *Abus de biens sociaux* (note 12) para 140, Stasiak, *Droit pénal des affaires* (note 5) p. 246, E.g.: Cass. crim., 03.02.1992, Bull. crim. n° 49 p. 118.
[180] Rebut, *Abus de biens sociaux* (note 12) para 139, Cass. crim., 16.03.1970, Bull. crim. n° 107 p. 245.
[181] Rebut, *Abus de biens sociaux* (note 12) para 142, Cass. crim., 5.11.1976, Bull. crim. n° 315, p. 803; Cass. crim., 19.06.1978, Bull. crim. n° 202 p. 525.
[182] Rebut, *Abus de biens sociaux* (note 12) para 143, Cass. crim., 16.02.1987, Bull. crim. n° 72 p. 194.
[183] Médina, *Abus de biens sociaux…* (note 7) p. 212.
[184] Stasiak, *Droit pénal des affaires* (note 5) p. 247.

this will be the case, if the manager acted in a clandestine way[185] or if certain accountancy tricks were applied.[186] This does not mean of course that an open and transparent character of the manager's act precludes automatically that he acted in bad faith.[187] Some authors have argued that such an approach creates the risk that the offence of abuse of company assets is reduced to its material element.[188] However, the fact that the court presumes from certain occurrences that the manager was aware of the act being contrary to company interests, as exemplified above, does not mean that the judgment may completely abstain from explaining why the judges were convinced that it was so.[189]

The knowledge (and the bad faith) of the manager should be assessed at the moment of the commission of the act.[190] More fully, it is in the moment of his act that the manager must know that it will expose the company to, at least, a risk of loss or other negative consequences, to which it should not be exposed. This requirement excludes from the scope of the offence situations of inaptitude or incompetence of managers.[191] It follows from the requirement that the manager must be aware that the act is contrary to the company's interests, and from the fact that no requirement of proof of result is necessary, that he need not precisely foresee its consequences. Therefore, even if the manager was convinced that his act would cause a loss, but in fact it resulted only in a risk of loss, he can still be punished for the abuse of company assets.

The wording of the provision suggests that the manager should effectively know that the act is contrary to the company interests. This might suggest that, if the perpetrator does not know that the act is contrary to company interests, although has some doubts on the matter, he will not be liable for this offence. It appears however that also in such situations the manager might be held liable. A situation, in which the company is exposed to a normal risk – the risk that it is supposed to bear while

[185] Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 21) p. 154.
[186] Stasiak, *Droit pénal des affaires* (note 5) p. 246. Other examples, see: Médina, *Abus de biens sociaux…* (note 7) p. 211.
[187] Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 21) p. 154.
[188] Véron, *Droit pénal des affaires* (note 13) p. 217.
[189] Jeandidier, *Abus des biens…* (note 3) para 70, Cass. crim., 16.02.1987, Bull. crim. n° 72 p. 194; Cass. crim., 22.10.1990, n° de pourvoi: 89-85019.
[190] Médina, *Abus de biens sociaux…* (note 7) p. 208 ; Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 21) p. 154.
[191] Médina, *Abus de biens sociaux…* (note 7) p. 208.

pursuing its business – is not contrary to its interests. If this risk is higher than the normal one, it is considered to be contrary to the company's interests. If a manager does not know for sure that the act is contrary to the company interests, but he is aware that it might be so, than an additional element of risk is present, which renders the risk abnormal. Thus proceeding to the act is contrary to the company's interests. It is however important to stress that if the manager was not aware that the act was contrary to the company's interests, he must be acquitted, even though he ought to have been aware of that.

It can be added as well that the courts are reluctant to justify the lack of the defendant's awareness, which is due to his own faults. A court of appeal rejected such a justification in a case in which a manager evoked in his defence deficiencies in the company's accounting practices.[192]

Moreover, it is generally held that a manager cannot claim that he was acting in good faith because he acted according to the common practice within his company or "as everybody does".[193] That being so, there do exist cases in which the defendant was acquitted for a course of conduct because it was common practice in his company.[194]

There exists older jurisprudence, which extended the application of the offence into the grounds, which have the characteristics of conscious negligence. In one case the Court of Cassation quashed the acquittal of a manager reasoning that the fact that he ignored the fraudulent operations of the main offender (several persons were involved in this case and several offences committed) was insufficient as defence, since from his function emanate the duty to supervise the company and prevent wrongdoing, which he failed to fulfil.[195] Not only the element of intention was missing in this case, but also special intention was not proved. This line of interpretation is currently abandoned.[196]

[192] Cour d'Appel Angers, 22.01.2008 : JurisData n° 2008-362347, cited after: Jeandidier, *Abus des biens…* (note 3) para 70.
[193] Médina, *Abus de biens sociaux…* (note 7) p. 209, Cass. crim., 03.02.1992, Bull. crim. n° 49 p. 118.
[194] Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 21) p. 153.
[195] Cass. crim., 19.12.1973, Bull. crim. n° 480 p. 120.
[196] Jeandidier, *Abus des biens…* (note 3) para 73.

3.1.4.2. Special intention (Dol spécial)

The second element of *mens rea*, which will importantly shape the contours of the offence, is the requirement that the defendant acted in his personal interest, which the provisions of abuse of company assets formulate by demanding that the manager acted "for personal purposes or in order to benefit another company or undertaking in which they are directly or indirectly involved".

This expression comprises two, not mutually exclusive, options. The first one requires that the defendant act for his direct interest. This interest can be of a material, financial nature, but could also be only immaterial or moral.[197] According to the second option the defendant, while committing the abuse, is driven by an indirect interest, which he holds in another company or undertaking. The term "company" must be understood according to French company law. The term undertaking, which is the translation of the French "*entreprise*", has not been defined by the law and was meant to comprise a variety of different entities. It is not clear how far the meaning of this term extends, for instance whether it comprises non-commercial entities, like associations or trade unions.[198]

Since it is a *mens rea* requirement there is no need that the interest pursued by the manager actually be realised. Some authors claim that seeking a probable or possible advantage is enough to fulfil this limb.[199] It seems however that there no need even to assess the probability of the realisation of the defendant's intention. It is the prosecution's task to prove the existence of this element.[200] However, the Court of Cassation in the case of *Rosemain*[201] stated that in case of clandestine operations concerning company funds the pursuit of the defendant's personal interest is presumed and it is for him to prove the contrary.[202]

The interest of the manager is direct if he benefits from it personally. This interest is material in nature, if the purpose of the defendant was to enrich himself or

[197] Delmas-Marty, Giudicelli-Delage, *Droit pénal des affaires* (note 49) p. 352.
[198] Médina, *Abus de biens sociaux…* (note 7) p. 216.
[199] Patin et Rousselet, 'Délits et sanctions dans les sociétés par actions', *Sirey* (1938), n° 292, p. 221, cited after: Médina, *Abus de biens sociaux…* (note 7) p. 215.
[200] Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 21) p. 145.
[201] Cass. crim., 11.01.1996, Bull. crim. n° 21 p. 51.
[202] Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 21) p. 146, where other judgments confirming this line are also cited.

to avoid a loss.[203] This interest can also be of immaterial character. The jurisprudence provides various types of motivation, which it has accepted as fulfilling this limb, such as[204] the protection of family reputation,[205] the hope of obtaining recognition from those who benefitted from the abuse,[206] the preservation of good business relations with another person[207] or influential persons,[208] and attaining prestige or renown.[209] In the case of *Willot* a lower court found the special interest of the manager in his wish to preserve his position and the remuneration linked to it in a situation of a corporate group, where the perpetrator was heading a subsidiary and did not want to risk disobeying the parent company's management.[210] In another case, the court found the defendant's interest in a wish to obtain the support of different influential persons.[211] The wish to perform an operation which was supposed to spark the advancement of the manager's career, was accepted by the Court of Appeal of Paris.[212]

As to the indirect interest, it refers to the defendant's intention that another company or undertaking, to which he is somehow linked, benefit from his act. The manager can be linked to the company due to the fact that he is also a manager in that company or because he is its shareholder, creditor, supplier or employee.[213] His interest in the other company can also be more remote, which would be the case for instance, if he is linked to it by a person close to him, a family member or partner, or through another company in which he also has an interest.[214] The text of the offence does not require, however, that the defendant exercise any function within the company or that he have any defined business relationship with it, so long as it is possible to prove that he has some interest in that company.[215] The indirect interest of

[203] List after: Rebut, *Abus de biens sociaux* (note 12) para 149.
[204] After: Rebut, *Abus de biens sociaux* (note 12) para 150.
[205] Cass. crim., 03.05.1967, Bull. crim. n° 148.
[206] Cass. crim., 07.03.1968, Bull. crim. n° 80.
[207] Cass. crim., 09.05.1973, Bull. crim. n° 216, p. 511; Cass. crim., 19.06.1978, Bull. crim. n° 202 p. 525; Cass. crim., 15.09.1999, N° de pourvoi 98-83.237.
[208] Cass. crim., 9.02.1987, Bull. crim. n° 61 p. 155; Cass. crim., 14.05.2003, Bull. crim. n° 97 p. 372.
[209] Cass. crim., 20 mars 1997, N° de pourvoi 96-81.361.
[210] Tribunal correctionel Paris 10.06.1985, cited after Médina, *Abus de biens sociaux…* (note 7) p. 217.
[211] Cass. crim., 15.09.1999, N° de pourvoi 98-83237.
[212] "Cour d'Appel Paris 6.05.1995, Le Milon/MP, Dr. Sociétés 1995, n° 153, p 17" – cited after Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 21) p. 141.
[213] Delmas-Marty, Giudicelli-Delage, *Droit pénal des affaires* (note 49) p. 352.
[214] Delmas-Marty, Giudicelli-Delage, *Droit pénal des affaires* (note 49) p. 352.
[215] Rebut, *Abus de biens sociaux* (note 12) para 152.

the manager, similarly to the direct one, can be of a moral nature. It can also relate to a future benefit which the manager expects to obtain.[216]

The introduction of the requirement of special intention was meant to ensure that the offence of abuse of company assets is not used to punish mere mismanagement (such as when the manager exposes the company to excessive risk, but in hope that the risk would not materialise and the company would profit) as opposed to mismanagement intended to further the personal interests of the manager(s) to the detriment of those of the company.[217] However, in a number of cases judges have interpreted this requirement widely, in particular as to the moral interest, as set out above. An even more far-reaching example concerns a case in which a personal interest of transferring money to the tax authorities was found in the manager's intent to bring an end to a cumbersome fiscal inspection.[218] In another case one could argue that the court confused the interest of the manager with the interest of the company, since it considered that the personal interest was constituted by the satisfaction of the president of a football club in having high-class players. Is such motivation not welcome, or even desirable, in any president of a sport club?[219]

This does not mean, however, that there are no examples of cases, in which the court was not satisfied with the fulfilment of this limb. The court has acquitted the defendants in cases, where the funds were used in a situation, when they were owed to a third party. This was for instance the case of a manager of a company in financial difficulties, who decided to repay the debt which was due for payment to an association of which he was the treasurer, despite the fact that it was probably not in the best interests of the company.[220] Similarly, the court did not admit the existence of special intention in a case in which the manager issued cheques in the name of the company in order to repay the expenses of undeclared employees, despite the fact that without doubt such acts create a risk of the company being fined.[221]

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[216] Rebut, *Abus de biens sociaux* (note 12) para 153, e.g.: Cass. crim., 19.10.1978, Bull. crim. n°. 282 p. 724.
[217] Médina, *Abus de biens sociaux…* (note 7) p. 213.
[218] Cour d'Appel Colmar 30.04.1985, JurisData n° 1985-601202; Rev. sociétés 1985, p. 833, cited after: Jeandidier, *Abus des biens…* (note 3) para 78.
[219] Jeandidier, *Abus des biens…* (note 3) para 78 ; Cass. crim., 22.10.2008, N° de pourvoi: 07-88111.
[220] Rebut, *Abus de biens sociaux* (note 12) para 157; Cass. crim., 14.06.1993, Bull. crim. n° 208 p. 526.
[221] "Cour d'Appel Toulouse, 01.04.1999, jurisdata n° 040713, JCP 23 decembre 1999, Chronique p. 2064", cited after: Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 21) p. 143.

The vagueness of this requirement has been criticised on various occasions,[222] and has led some authors to conclude that it has become obsolete.[223] Some critics expressed the need to interpret this limb more strictly.[224] On the other hand another author questioned the necessity of keeping this requirement, at least in its current wording, since it can be deduced that any act contrary to company interests, which the manager performs in the knowledge of these circumstances, is somehow realised for personal interests.[225] As Jean-Pierre Brouillaud pointed out, it is difficult to find judgments, where this element is lacking: "most of the time, the personal enrichment of the manager is established, and when it is not, the judge will admit the existence of a moral benefit; if this personal interest is accompanied by the interest of the company, the judge will admit the existence of a partial personal interest, and, finally, when no personal interest can be described with certainty, the judge will presume it."[226] Moreover, in the judgments in which the limb of personal interests was problematic, the failure of lower jurisdiction consisted in the lack of analysis of this element and not in its overly extensive interpretation.[227] Despite the fact that none of the convictions which extensively treated this limb appear to be scandalous, it has been suggested that a legislative intervention should be considered in order to either reinforce this requirement, by limiting it for instance to the interest of material character, or to delete it, thus making the abuse of company assets a true mismanagement offence.[228] So far, no changes have been introduced.

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[222] See e.g. the materials of the conference held at the ESCP-EAP (École supérieure de commerce de Paris) on 2 April 2003: 'L'abus de biens sociaux. Le particularisme français à l'épreuve de l'Europe', published in *Gazette du Palais* (Recueil Novembre-Décembre 2004), pp. 3516-3553 (e.g. the speech of A. Médina, p. 3522, and Jean-René Farthouat, p. 3543).

[223] Quentin Urban, 'De la difficulté pour le juge de caractériser l'abus de biens sociaux', *La semaine juridique – édition générale*, (14 septembre 2005), no 37, pp. 1619-1623, 1622.

[224] See for example: the speech of M. Franck in: the materials of the conference held at the ESCP-EAP (École supérieure de commerce de Paris) on 2 April 2003: 'L'abus de biens sociaux. Le particularisme français à l'épreuve de l'Europe', published in *Gazette du Palais* (Recueil Novembre-Décembre 2004), pp. 3516-3553, 3517f.

[225] Jean-Pierre Brouillaud, 'Faut-il supprimer la notion d'intérêt personnel dans la définition de l'abus de biens sociaux?', *Receuil Dalloz* (2008), no 6, 7 fevrier, pp. 375-378, 375.

[226] "*La plupart du temps, l'enrichissement personnel du dirigeant est établie ; lorsqu'il ne l'est pas, le juge admettra l'existence d'un intérêt moral ; lorsque cet intérêt personnel s'accompagne de l'intérêt social, le juge admettra l'intérêt personnel partiel ; lorsque, enfin, aucun intérêt personnel n'est caractérisé avec certitude, le juge le présumera*." – Brouillaud, 'Faut-il supprimer la notion…' (note 225) p. 377.

[227] E.g. Cass. crim., 4.11.2004, N° de pourvoi: 03-87.327, Cass. crim., 15.10.1990, N° de pourvoi: 89-83.146. Haritini Matsopoulou, 'Le retour en grâce de l'intérêt personnel dans l'abus de biens sociaux', *Recueil Dalloz* (2005), no 30, p. 2075-2077; Brouillaud, 'Faut-il supprimer la notion…' (note 225) p. 378.

[228] Brouillaud, 'Faut-il supprimer la notion…' (note 225) p. 378.

Such a broad interpretation would have significant consequences for the cases relevant to this study. It would in practice allow using the offence in order to punish acts contrary to the company interests and committed with knowledge of their detrimental character, while the requirement of personal interest would be fulfilled by any kind of motivation, like pursuit of vanity or prestige. However, this interpretation seems to extend the offence too far.

The idea of including the personal interest of the manager as an element of the offence was to guarantee that mere incompetence or lack of information is not punished by use of this offence, but that it targets managers driven by dishonesty or greed reflected in the actual mismanagement, in the way that the managers used the company for their own egoistic purposes, neglecting the interests of the company.[229] "There can be no abuse of company assets, unless the manager wanted to make his personal interest prevail over the interest of the company".[230]

It seems to be a general tendency to admit the "diluted" personal interest in cases, in which the act undertaken by the manager is of particularly serious nature. For instance, in one case the court found personal interest in the manager's intention to keep a privileged relationship with a person he considered influential, while also being driven by the wish to enhance the company's possibilities. The court reminded also however that there is no need for criminal liability that the defendant was motivated only by his personal interests, and confirmed the manager's sentence because his act constituted bribery.[231]

In another judgment the personal interests of the manager consisted in consolidating his position within the company by increasing the turnover by any means. The act was contrary to company interests because the transfer of funds occurred without adequate compensation, i.e. resulted in a loss, and not only in exposing the company to a risk of loss.[232] The requirement that the act be contrary to company interests was also fulfilled by lack of compensation in a case, in which the personal interest consisted of the intention to maintain good relations with an

[229] Brouillaud, 'Faut-il supprimer la notion…' (note 225) p. 375; Urban, 'De la difficulté pour le juge…' (note 223) p. 1622.
[230] "*Il ne peut y avoir abus de biens sociaux que si le dirigeant a voulu faire primer son intérêt personnel sur l'intérêt social*", Urban, 'De la difficulté pour le juge…' (note 223) p. 1621.
[231] Rebut, *Abus de biens sociaux* (note 12) para 76, Cass. crim., 14.05.2003, Bull. crim. n° 97, p. 372.
[232] Cass. crim., 09.02.1987, Bull. crim. n° 61 p. 155.

influential person.[233] In another case, the managers made available to another person large amounts of money belonging to the company because of their friendship with that person. A loss occurred also in a case in which the defendant was motivated by his wish to keep good business relations.[234] Even if this could be considered as an example of exposing the company to a risk that this person does not return the money, in this particular case the money was never returned and thus constituted a loss.[235] The outcome was similar in a case in which the defendants agreed to invest in a golf course for reasons of prestige and renown. In theory the company was exposed to a risk that the course would be unprofitable, but in the reality of the case it seems that its profitability was not even considered by the managers and that the company suffered an effective loss.[236]

An analogous conclusion can be drawn from the analysis of cases in which the requirement that the act be contrary to company interests is less evident, since the act consists in exposing the company interests to abnormal risk of loss. It is rare to encounter a case in which the requirement of personal interests would not be fulfilled in a more evident manner, in particular by using the company assets for personal purposes.[237] In a case, in which the defendant's personal interest was to win other persons' gratitude, the court evoked exposure to a risk of loss, but in fact the loss occurred.[238]

However in another case the court sentenced the defendant for exposing his company to excessive risk, by granting a loan to his brother and the court considered that the personal interest was constituted by his intention to safeguard the reputation of the manager and his family. It results from the sentence that eventually the bank suffered no loss.[239]

It would go beyond the scope of this study to analyse the jurisprudence of the French courts in this regard in its entirety. However, in view of the analysis of the

[233] Cass. crim., 15.09.1999, N° de pourvoi: 98-83237.
[234] Cass. crim., 19.06.1978, Bull. crim. n° 202 p. 525.
[235] Cass. crim., 8.12.1971, Bull. crim. n° 346 p. 869.
[236] Cass. crim., 20.03.1997, N° de pourvoi: 96-81361.
[237] Cass. crim., 16.01.1964, Bull. crim. n° 16, p. 27 (abuse of company assets); Cass. crim., 10.11.1964, Bull. crim. n° 291 (abuse of credit); Cass. crim., 24.03.1969, Bull crim. n° 130, p. 319 (abuse of assets); Cass. crim., 16.03.1970, Bull. crim. n° 107, p. 245 (abuse of credit).
[238] Cass. crim., 7.03.1968, Bull. crim. n° 80, p. 189.
[239] Cass. crim., 03.05.1967, Bull crim. n° 148 p. 350.

judgments of the Court of Cassation it is submitted here that in cases in which the fulfilment of the requirement that the act be contrary to the company's interests is limited to the exposure to excessive risk, the courts will likely be reluctant to consider as satisfied the requirement of personal interests, if it does not appear evident, but is limited only to what was called above "diluted" personal interest. It is certainly true that, as one author pointed out, it is the task of the judge to interpret this requirement in concrete cases and the result will depend on the way the judge perceives the manager's behaviour, while having considerable judicial discretion.[240] It cannot be excluded that a court would accept a "diluted" personal interest in the case of mere exposure to a risk of loss, but from the above analysis it results that the likeliness of such a result is limited.

3.2. Breach of trust (*abus de confiance*)

The offence of breach of trust (*abus de confiance*), provided for in Article 314-1 of the French Penal Code, the scope of which - unlike the abuse of company assets - is not limited to the corporate environment, could be assimilated with the offence of embezzlement in the common law system. Before the enactment of the abuse of company assets, it constituted the only possibility to punish managers for the abuse of company assets. Since the entry into force of the latter offence, breach of trust remains applicable to all cases, in which the abuse of company assets cannot be applied, because the defendant does not fall into one of the categories of suitable perpetrators. However, the scope of criminalisation of the breach of trust is narrower since it requires that the defendant have misappropriated the assets in question and a proof of result. In cases in which both offences could apply, e.g. if a manager enumerated as potential perpetrator of the abuse of company assets misappropriated the company property, it is for the latter offence that he has to be sentenced, since it provides for a more severe punishment.[241]

Article 314-1 reads as follows:

[240] Urban, 'De la difficulté pour le juge…' (note 223) p. 1623.
[241] Robert, Matsopoulou, *Traité de droit pénal des affaires* (note 113) p 102 (fn. 8).

"Breach of trust is committed when a person, to the prejudice of other persons, misappropriates funds, valuables or any property that were handed over to him and that he accepted subject to the condition of returning, redelivering or using them in a specified way."[242]

In comparison with the abuse of company assets, this offence is composed of more extensive *actus reus* and less exigent *mens rea* requirements. As to the *actus reus*, it is necessary to prove that the defendant committed a misappropriation. This misappropriation should concern, according to the provision, funds, valuables or any property, an expression which, although it appears *prima facie* to comprise literally any kind of property, including intangible property,[243] according to the commonly accepted interpretation in fact excludes real estate.[244] Since the French original uses the same term as in the case of abuse of company assets – *bien* – with regard to breach of trust this section will also use the term "assets" when referring to the object of the latter offence. These assets should be handed over to the defendant before the commission of the offence upon the condition of returning them or using them in a specified way. The misappropriation should cause damage to the owner of the entrusted assets. The *mens rea* element is limited to general intention to commit what the *actus reus* describes, namely misappropriation and the resulting prejudice, while being aware of the circumstances, i.e. that the assets have been handed over subject to the condition of returning them or using them in a specified way.

The offence of breach of trust is mainly designed to punish cases of effective misappropriation of entrusted assets, which as such falls outside the scope of this research. However, in view of the broad interpretation of some of the limbs of this offence, namely misappropriation and prejudice, certain cases in which the entrusted assets were exposed to risk relevant to this research, may fall into the scope of the offence. For these reasons, this section will refrain from discussing the general problems of the breach of trust, except its essential aspects, and will concentrate on the problems relevant for criminalisation of excessive risk taking by managers.

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[242] "Article 314-1: *L'abus de confiance est le fait par une personne de détourner, au préjudice d'autrui, des fonds, des valeurs ou un bien quelconque qui lui ont été remis et qu'elle a acceptés à charge de les rendre, de les représenter ou d'en faire un usage déterminé*."
[243] Véron, *Droit pénal des affaires* (note 13) p. 55f.
[244] Jeandidier, *Abus de confiance…* (note 2) para 15ff, Stasiak, *Droit pénal des affaires* (note 5) p. 43.

3.2.1. Precondition – conditional handover of the assets

The assets must be handed over to the perpetrator before the misappropriation and it is necessary that he accept the handover. The handover can result from a contract, a judicial decision or a statute.[245] The fact that this contract was void or declared null does not preclude criminal liability for breach of trust.[246] The acceptance can be also factual (i.e. implied from the perpetrator's conduct).[247] The handover must be conditional – he must use them in a certain way or for certain purpose, which is the reason for the assets to be handed over, or/and he must return them at a certain point, in particular at the end of his mission. Liability for this offence is excluded therefore, if there has been a transfer of ownership of the assets to the perpetrator.[248]

The assets of the company handed over to the manager, whether he is a person described in the offence of abuse of company assets or a lower level manager, who cannot be liable for that offence, fulfils without doubt this precondition.[249] The assets belong to the company and the manager receives them only for a certain purpose, which is to use them for the benefit of the company. Moreover he is obliged to return them after his mandate comes to an end. It is irrelevant whether he receives the assets by virtue of the contract, which created the company (*contrat de société*), by the contract giving the manager the power of attorney (*mandat*) or any other form of contractual relation, including his work contract.[250]

3.2.2. Misappropriation

The course of conduct criminalised by the offence of breach of trust, is described by article 314-1 of the French Penal Code by the verb "*détourner*", which can be translated as to embezzle or to misappropriate, but also as to divert, to redirect or to turn away. This translation shows the connotation of the verb, which in the

[245] Stasiak, *Droit pénal des affaires* (note 5) p. 43.
[246] Stasiak, *Droit pénal des affaires* (note 5) p. 41.
[247] Jeandidier, *Abus de confiance…* (note 2) para 30.
[248] Mascala, *Abus de confiance* (note 40) para 38.
[249] Rebut, *Abus de biens sociaux* (note 12) para 33ff, also in the case of *de facto* manager: Cass. crim., 31.01.2007, Bull. crim. n° 26 p. 98.
[250] Jeandidier, *Abus de confiance…* (note 2) para 39, 41. See also: Cass. crim., 19.06.2013, Bull. crim. n° 145, in which the court considered that the working hours can be subject to the breach of trust, if the employee uses his work time for personal purposes.

context of the offence should mean mainly a use of the assets in a way, which is different from the one envisaged in the moment of handing them over.[251] Another way of explaining the understanding of misappropriation would be: to behave, at least for a while, as the owner of the assets.[252]

The most evident case of misappropriation would be constituted by physical destruction of the assets or its loss, e.g. by a legal transaction (e.g. donation).[253] Moreover, misappropriation can also be committed, if the perpetrator uses the assets in a different way than that originally envisaged or if he refuses to return them, when he is supposed to do so.[254] For the fulfilment of this limb it is not necessary that the perpetrator have appropriated the object or that he have profited from it in any way.[255] However, not every kind of misuse and not every situation of refusal to return the object will lead to criminal liability.

As to the refusal to return the object, or in case the perpetrator is late in doing so, the French jurisprudence elaborated criteria in order to distinguish what should remain a civil law dispute in this regard and what constitutes the offence of breach of trust. However, since this form of its commission does not entail exposing the assets to risk envisaged by this study, it will not be elaborated further.[256] Exposing the assets to excessive risk would only possibly fall into the scope of the offence, if it can be qualified as misappropriation of these assets.

In order to be considered misappropriation a misuse must imply that, at least for a moment, the perpetrator wants to behave like an owner of the asset.[257] It is through this intention, but deduced from the way the perpetrator acted, that the way the perpetrator acts should be evaluated. Hence, the same act can be considered innocent or criminal depending on whether the judges consider that the act disclosed the perpetrator's intention to embezzle it.[258] This intention can be deduced by the

[251] Stasiak, *Droit pénal des affaires* (note 5) p. 44, Cass. crim., 8.12.1971, Bull. crim. n° 341 p. 856.
[252] Cass. crim., 13.02.1984, Bull crim. n° 49.
[253] Stasiak, *Droit pénal des affaires* (note 5) p. 44.
[254] Robert, Matsopoulou, *Traité de droit pénal des affaires* (note 113) pp. 101, 103.
[255] Jeandidier, *Abus de confiance…* (note 2) para 60.
[256] In this regard, see e.g. Mascala, *Abus de confiance* (note 40) para 66ff.; Véron, *Droit pénal des affaires* (note 13) pp. 59f.
[257] Jeandidier, *Abus de confiance…* (note 2) para 52; Cass. crim., 13.02.1984, Bull. crim. n° 49; Cass. crim., 16.06.2011, N° de pourvoi: 10-83.758.
[258] Véron, *Droit pénal des affaires* (note 13) p. 59, for an example where the court did not find such intention see e.g.: Cass. crim., 11.01.1968, Bull. crim. n° 10.

judge from the fact that the perpetrator acted for his own benefit, by using the object in question for his own endeavour or personal purpose.[259] According to this interpretation the following situations would fall into the scope of the provision: a banker uses for his personal purpose the funds entrusted by the clients;[260] a driver receives a credit card in order to buy petrol for the car and uses it to cover his personal expenses,[261] an employee uses the employer's computer to visit pornographic websites.[262] This interpretation would assimilate the offence of breach of trust to the abuse of company assets, with its requirement to act in personal interests, however limited to its strict interpretation. Moreover, it is the misuse of assets and not exposure to risk that is targeted by this offence. Cases in which the assets of the company are exposed to a risk of loss, which do not entail that the perpetrator use the assets for his personal purpose remain outside the scope of this offence.

These limits of the offence could be questioned in view of at least one judgment from the Court of Cassation, in which the court upheld the conviction of a manager of a travel agency entitled to issue tickets in the name of Air France, who issued these tickets to a company which was subject to procedures related to its insolvency and which had also lost its licence issued by the International Air Transport Association (IATA). The court considered that the defendant in her capacity as representative of Air France was obliged to verify these aspects of the partner's credibility before issuing the tickets. By not doing so, the defendant took the risk of not being able to transfer to Air France the money due for the tickets and that she should obtain from the company, to which the tickets were sold. Therefore, the court considered, the defendant behaved as if the tickets were her own property.[263] It is important to take into consideration that Air France suffered an effective loss in this case.

[259] Robert, Matsopoulou, *Traité de droit pénal des affaires* (note 113) pp. 101f; Mascala, *Abus de confiance* (note 40) para 62-65; Jeandidier, *Abus de confiance…* (note 2) para 52f.
[260] Cass. crim., 01.04.1968, Bull. crim. n° 115.
[261] Cass. crim., 19.05.2004, Bull. crim. n° 125 p.477.
[262] Cass. crim., 19.05.2004, Bull. crim. n° 126 p. 480.
[263] Cass. crim., 03.07.1997, Bull. crim. n° 265 p. 905.

3.2.3. Prejudice

Although the provision requires proof of prejudice to another person, extensive interpretation of this requirement has resulted in its limited influence in shaping the contours of the offence. This interpretation makes it possible to consider that this limb is fulfilled if the prejudice is only a potential one.[264] Moreover, the prejudice need not be of material character, since a moral prejudice is also accepted, in the form of, for instance, risk of damage to the victim's reputation.[265]

3.2.4. Mens rea

The *mens rea* of the offence consists on the one hand of knowing that the assets were handed over only conditionally and on the other hand of the intention to embezzle them and cause the resulting prejudice, i.e. intention either to appropriate, to retain fraudulently, or to misuse.[266]

This requirement does not create important problems. However, in the case cited above concerning the sale of Air France tickets, it can be questioned, whether the court did not in fact convict the defendant for negligence, since her wrongdoing consisted in not having foreseen that the company, to which she sold the tickets, could have been in financial difficulties. The Court of Cassation rejected this criticism formulated by the defence, however without elaborating on the issue.[267] At least two authors questioned this judgment as excessive in this respect,[268] and it seems that this line of jurisprudence has not been confirmed by further judgments.

[264] Cass. crim., 03.12.2003 Bull. crim. n° 232, p. 935; Mascala, *Abus de confiance* (note 40) para 86.
[265] Mascala, *Abus de confiance* (note 40) para 87, Robert, Matsopoulou, *Traité de droit pénal des affaires* (note 113) p. 108, Cass. crim., 06.04.1882, Bull. crim. 1882, n° 92 – cited after Jeandidier, *Abus de confiance…* (note 2) para 65.
[266] Robert, Matsopoulou, *Traité de droit pénal des affaires* (note 113) p. 109.
[267] Cass. crim., 03.07.1997, Bull. crim. n° 265 p. 905.
[268] Robert, Matsopoulou, *Traité de droit pénal des affaires* (note 113) p. 108, Lepage, Maistre du Chambon, Salomon, *Droit pénal des affaires* (note 13) p. 80.

4. Inchoate offences

4.1. Preparatory acts

The preparatory acts to committing abuse of company assets or to committing breach of trust are not criminalised.

4.2. Attempt

According to Article 121-4 CP an attempt to commit an offence, which is not a felony (*crime*), is criminalised only in cases provided by the statute. Since there is no such provision for the abuse of company assets or for the breach of trust and neither are felonies, attempting to commit one of these offences is not criminalised.[269]

Due to this rule, an act executed in view of committing abuse of company assets will not be punishable, in particular, if the assets were not yet exposed to a risk of loss.[270] It is possible however, to consider that the abuse of credit and the abuse of powers criminalise in fact an attempt to commit the abuse of assets (*sensu stricto*).[271] Although, as it was demonstrated above, the delimitation of these modalities is in practice not very precise, it could be considered that especially the offence of abuse of powers, in cases where it is not accompanied by an abuse of assets, punishes an attempt to commit such abuse. However, it has been pointed out that, since the law excluded criminalisation of attempt for this offence, it ought not to be reintroduced through the back door.[272] Moreover, the fact that the abuse of company assets may be committed by an act contrary to company interests consisting in exposing the company to a risk of loss and not causing an immediate loss is considered to give enough width to the offence, so that the lack of criminalisation of attempt does not constitute an unjustified lacuna.[273]

The attempt to commit a breach of trust is not criminalised for the same reasons as the abuse of company assets, i.e. it is not a felony and no provision

[269] Mascala, *Abus de confiance* (note 40) para 102; Rebut, *Abus de biens sociaux* (note 12) para 269. See also: Cass. crim, 7.04.1998, N° de pourvoi: 97-83801.
[270] Rebut, *Abus de biens sociaux* (note 12) para 269.
[271] Stasiak, *Droit pénal des affaires* (note 5) p. 240.
[272] Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 21) p. 85.
[273] Larguier, Conte, *Droit pénal des affaires* (note 41) p. 343.

provides for criminalisation of attempts to commit that offence. However, the literature points out that in view of the extensive concept of misappropriation in the current doctrine, criminalisation of attempts appears not only unnecessary, but also it would be difficult to establish the starting point of an attempt and when the effective commission of the offence begins.[274]

4.3. Conspiracy

The French criminal law provides for criminalisation of criminal association, which is defined in Article 450-1:

"A criminal association consists of any group formed or any conspiracy established with a view to the preparation, marked by one or more material actions, of one or more felonies, or of one or more misdemeanours punished by at least five years' imprisonment."[275]

Since the punishment foreseen for the abuse of company assets is of five years' imprisonment, it is possible to convict a person who participates in a group preparing to commit this offence under the condition that these preparations passed the stage of mere exchange of opinions and at least one preparatory act has been executed.[276] However, known cases concern most often multiple offences, where abuse of company assets is only one of the planned or committed offences.[277]

5. Cooperation in the commission of the offence

The rules on complicity allow including into the scope of criminalisation of the offence of abuse of company assets persons who do not exercise within the company the functions required for liability as principal offender.[278] The French criminal law, which follows the theory of unity of the offence (*théorie de l'unité de*

[274] Lucas de Leyssac, Mihman, *Droit pénal des affaires*… (note 26) pp. 120.
[275] "*Constitue une association de malfaiteurs tout groupement formé ou entente établie en vue de la préparation, caractérisée par un ou plusieurs faits matériels, d'un ou plusieurs crimes ou d'un ou plusieurs délits punis d'au moins cinq ans d'emprisonnement*."
[276] André Vitu, Fasc. 20: Participation à une association de malfaiteurs, mise à jour : 11 Août 2011, JurisClasseur Code Pénal, para 27.
[277] See e.g. Cass. crim., 15.01.2014, Bull crim. n° 11; Cass. crim., 12.10.2011, Bull. crim., n° 205.
[278] Rebut, *Abus de biens sociaux* (note 12) para 218.

l'infraction), requires for liability for complicity that the commission of the main offence, i.e. abuse of company assets, effectively occurred.[279]

"The accomplice to the offence, in the meaning of article 121-7, is punishable as a perpetrator" (Article 121-6 CP).[280] According to Article 121-7 CP, there exist two forms of complicity: by helping or assisting the main offender or by instigation.[281] To attract liability for complicity in the form of helping or assisting, the aid must be effectively provided, since an attempt to be an accomplice is not punishable.[282] Moreover this act must be prior or simultaneous to the commission of the main offence; however, posterior aid is punishable if it was promised before the act, since it is the moment of the agreement that would be decisive.[283] This modality comprises any act helping the main perpetrator. The French jurisprudence has never given precise criteria to differentiate between the two expressions describing the conduct of the aider – helping (*aide*) and assisting (*assistance*), but in practice the first one tends to be used in situations where the accomplice provides the main perpetrator with the necessary tools, and the second for other types of help, in particular physical help in the commission of the offence.[284] The aid or assistance provided by the accomplice need not effectively help the main perpetrators directly. It can also be indirect.[285]

As to instigation, Article 121-7 CP provides for two modalities of complicity.[286] The first one consists in provoking a person to commit an offence. The criminalisation of provocation is limited to situations in which the accomplice uses one of the means enumerated in the article: a gift, promise, threat, order, or an abuse of authority or powers. This limitation does not apply to the second modality, which consists in giving instructions to the main perpetrator. The instructions given by the accomplice do not need to prove essential to the commission of the offence.[287] Similarly to the first modality, the instigation must be addressed to a concrete person,

[279] Desportes, Le Gunehec, *Droit Pénal Général* (note 23) p. 504. As regards offences which attempts are also punishable, it is sufficient for the accomplice's liability that the main perpetrator attempts to commit the main offence.
[280] Article 121-6: "*Sera puni comme auteur le complice de l'infraction, au sens de l'article 121-7*."
[281] Catherine Elliott, *French Criminal Law* (Willan Publishing, 2001) p. 88.
[282] Desportes, Le Gunehec, *Droit Pénal Général* (note 23) p. 497.
[283] Desportes, Le Gunehec, *Droit Pénal Général* (note 23) p. 498.
[284] Desportes, Le Gunehec, *Droit Pénal Général* (note 23) p. 497.
[285] Desportes, Le Gunehec, *Droit Pénal Général* (note 23) p. 497.
[286] Article 121-7 CP: "Any person who, by means of a gift, promise, threat, order, or an abuse of authority or powers, provokes the commission of an offence or gives instructions to commit it, is also an accomplice."
[287] Desportes, Le Gunehec, *Droit Pénal Général* (note 23) p. 502.

be prior or simultaneous to the commission of the main offence and needs to be effectively committed, since its attempt is not punishable. It can however be indirect.[288]

The *mens rea* requirement of all the modalities of complicity consists in the knowledge concerning the foreseen main offence and the intention to participate in its commission as accomplice. It is important to stress that the accomplice does not need to fulfil the *mens rea* requirement foreseen for the main offence, which will be particularly important in view of the special intention required for the abuse of company assets. In the case of this offence, the accomplice need not act in his personal interests. It is enough (but necessary) that he knows that the main perpetrator is animated by such reasons.[289]

The above rules also apply in the same way to breach of trust. However, it will be in the case of the abuse of company assets that the rules on complicity will significantly broaden the boundaries of the offence. All these persons that do not fulfil the requirement as to the function within the company can fall into the scope of this provision, provided that they help the main perpetrator, furnish him with instructions or provoke him in accordance with the requirements of the rules of complicity. The criminalisation would thus include other categories of managers – senior or junior –, assistants, internal accountants, other employees and also persons from outside the company such as auditors or chartered public accountants.[290] For their criminal liability, it is necessary that these persons have knowledge of the planned offence, in particular of the main perpetrator's special intention and that the abuse is effectively committed. It is not necessary, however, that the main perpetrator be convicted for it.[291]

Moreover complicity plays an important role as regards punishing for omission. The general rule requires that the act of an accomplice is not limited to his mere passiveness. However, the French jurisprudence overcomes this rule on various

[288] Desportes, Le Gunehec, *Droit Pénal Général* (note 23) p. 500.
[289] Desportes, Le Gunehec, *Droit Pénal Général* (note 23) p. 502.
[290] See e.g. Cass. crim., 06.09.2000, N° de pourvoi: 00-80989, in which the court considers criminal liability of a public account, but decided to quash the sentence for luck of proof of his actual help prior or simultaneous to the commission of the main offence.
[291] Desportes, Le Gunehec, *Droit Pénal Général* (note 23) p. 508.

occasions notably in the context of abuse of company assets.[292] A manager can become an accomplice by not preventing another manager from committing an abuse, if it was within his competences to prevent it or if it was his duty, while being aware of this abuse.[293] Furthermore there is no need to prove the special intention of the accomplice. If that intention was present, liability of abuse of powers could be envisaged.

6. Reasons for excluding criminal liability

6.1. Consent of the victim

Since the assets in question belong to the company, consent to the manager's act would need to be given by a supervisory body or by the shareholders. It is generally accepted that such consent – regardless whether it is prior or subsequent to the manager's act – is without relevance for his criminal liability.[294] The courts' reluctance to accept consent as a defence is linked to the above-mentioned understanding of company interests as independent of the interests of the shareholders on the one hand and of consideration given to the interests of third parties on the other.[295] Further reasons given for this approach are that it is a general rule in French criminal law that the consent of the victim does not have exonerating effect and that the bodies giving consent could be manipulated by the manager(s) or even completely overpowered, if the managers are majority shareholders.[296]

The solution is different as regards breach of trust. It is considered that prior consent given by the competent body of the company excludes the possibility to commit misappropriation and to prejudice the owner, thus the offence cannot be committed.[297] Moreover, even if the perpetrator mistakenly understood that consent

[292] Desportes, Le Gunehec, *Droit Pénal Général* (note 23) p. 498.
[293] Cass. crim., 20.03.1997, N° de pourvoi: 96-81361; Cass. crim., 07.09.2005, N° de pourvoi: 05-80163; Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 21) pp. 60f., 242-243; Jeandidier, *Abus des biens…* (note 3) para 25.
[294] Cass. crim., 08.03.1967, Bull. crim. n° 94; Rebut, *Abus de biens sociaux* (note 12) para 35f.; Jeandidier, *Abus des biens…* (note 3) para 37; Larguier, Conte, *Droit pénal des affaires* (note 41) pp. 342f.
[295] Médina, *Abus de biens sociaux…* (note 7) p. 208.
[296] Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 21) p. 95.
[297] Jeandidier, *Abus de confiance…* (note 2) para 67.

was given, his criminal liability may be excluded provided that he acted in good faith.[298]

6.2. Orders of superiors

The problem of the exonerating effect of orders of superiors has not been extensively treated in the French doctrine, but it is submitted here that the solution to it can be deduced in particular from the rules of consent. Denying exonerating effect to the consent of shareholders or supervisory bodies demonstrates the philosophy behind this offence, which is the responsibility of managers for the wellbeing of the company.

As to the abuse of company assets, the configurations that can be envisaged are limited, since the persons considered apt to become perpetrators of this offence are already at the top of the company hierarchy. In the limited cases where managers are ordered to perform certain acts by the shareholders or by other bodies (e.g. the supervisory board in case of the SA under the dual-board regime), such orders cannot release them from considering whether what they are ordered to do is contrary to company interests. If the manager considers that it is contrary to company interests, he should abstain from performing the act and he is subject to criminal liability if he does not do so.

As to the breach of trust, the orders of superiors will have the same function as consent.

6.3. Expert opinions

In theory it is difficult to claim that a manager was aware that his act was contrary to the interests of the company, if he was convinced of its correctness in view of an expert opinion, where there was no reason to doubt its accuracy.[299] If the manager's act is based on an opinion of the expert, according to which it would not be contrary to the company's interests, the defence could try to claim that the *mens rea*

[298] Jeandidier, *Abus de confiance…* (note 2) para 72.
[299] Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 21) p. 152.

requirement of knowledge is missing and thus criminal liability for abuse of company assets is excluded. However the courts have tendency not to admit easily the defence based on that requirement and often presume knowledge from the fact that the manager of such high level "couldn't not know".[300]

As concerns breach of trust, the existence of an expert opinion cannot be considered an exonerating circumstance as such, since this offence does not contain the requirement that what the perpetrator did was contrary to the owner's interests, but it focuses on whether the perpetrator acted as if he was the owner. An expert opinion can be proof that the manager acted diligently, as expected from him according to the contract, by virtue of which he received the assets in question and thus he did not embezzle those assets. However, it is also possible that the opinion demonstrate his intention to go beyond the scope of tasks he was supposed to perform with the assets, and that he therefore misappropriated them.

7. Punishment

The punishment provided for the abuse of company assets committed within companies for which criminal liability is provided in the Commercial Code is five years' imprisonment and a fine of 375,000 euros (Article L241-3, Article L242-6). The only exception concerns the liquidator, for whom the fine is of 9,000 euros (L247-8). As to the abuse of company assets provided in different laws, in some of these provisions the punishment is of the same level,[301] whereas in some others it varies.[302] Article L249-1 adds to this list a possibility to prohibit the perpetrators of the abuse of company assets provided by the Commercial Code to exercise certain functions or activities. It is also possible to apply to them the forfeiture of civic, civil and family rights provided for in Article 131-26 CP.[303] Furthermore, as to the abuse of company assets enshrined in the Commercial Code, a recent law provided for an additional aggravating circumstance elevating the punishment to seven years'

[300] Muller, 'Le droit pénal des conflits d'intérêts' (note 27) point 13.
[301] E.g.: Article L231-11 du Code monétaire et financier.
[302] E.g.: Article L313-32 du Code de la construction et de l'habitation : 5 years' imprisonment and a fine of 150 000 euros.
[303] For more details on additional punishments, see Jeandidier, *Abus des biens…* (note 3) para 93ff. The forfeiture of civic, civil and family rights have been introduced by Article 27 of *Loi n° 2013-907 du 11 octobre 2013 relative à la transparence de la vie publique*).

imprisonment and a fine of 500,000 euros.[304] The condition of applying this aggravated sanction is that the offence was conducted or facilitated using either accounts or contracts opened or subscribed with entities established abroad or by interposition of natural or legal persons or any organization, trust or comparable institution established abroad.[305]

Breach of trust is punished by three years' imprisonment and a fine of 375,000 euros (Article 314-1 CP). Additional circumstances may increase the level of punishment to seven years' imprisonment and to a fine of 750,000 euros (Article 314-2 CP) or to ten years' imprisonment and a fine of 1,500,000 euros (Article 314-3 CP). In the latter cases, liability for participation in a criminal association for the purpose of committing the breach of trust could be also envisaged.

Participation in a criminal association with the purpose of committing the abuse of company assets is punished by five years' imprisonment and a fine of 75,000 euros, unless this association foresaw committing also other, more serious offences, in which case it could be of ten years' imprisonment and a fine of 150,000 euros. The same punishment would also apply to breach of trust, in the case described by Article 314-3.

The punishment provided for the main offence also applies to the accomplice.[306]

An intensive debate in the French doctrine was inspired by the jurisprudence on the problem of how to determine the beginning of the limitation period for prosecution of the abuse of company assets. This period is of three years (Article 8 para 1 of the Code of Criminal Procedure) and it might prove to be too short in various cases, if the abuse does not come to light.[307] The reason for the importance of this problem in the context of the offence of abuse of company assets is that in many

[304] Introduced by Article 30 of *Loi n° 2013-1117 du 6 décembre 2013 relative à la lutte contre la fraude fiscale et la grande délinquance économique et financière*.
[305] "*L'infraction définie au 3° est punie de sept ans d'emprisonnement et de 500 000 € d'amende lorsqu'elle a été réalisée ou facilitée au moyen soit de comptes ouverts ou de contrats souscrits auprès d'organismes établis à l'étranger, soit de l'interposition de personnes physiques ou morales ou de tout organisme, fiducie ou institution comparable établis à l'étranger*." (Last paragraph of Article L242-6 of the Commercial Code, Article 241-3 contains a similar clause).
[306] Desportes, Le Gunehec, *Droit Pénal Général* (note 23) p. 510.
[307] Michel Dobkine, 'Réflexions itératives à propos de l'abus de biens sociaux', *Recueil Dalloz*, (1997), 37e cahier. Chronique, pp. 323-326, 324f.

cases the manager – the perpetrator of the offence – is in a stronger position that the shareholders. He is for instance in a position to influence the flow of information within the company and hide the details of the abuse.[308] Moreover, if the company prospers, the shareholders may have the tendency not to monitor the management very meticulously, while managers may not allow information on misconducts to leave their circle. It is therefore much more likely that the abuse of company assets comes to light in case of internal conflicts within the management or involving employees having relevant information, or if the company starts having financial difficulties. All these situations may occur well after the facts in question.[309] Consideration of this problem resulted in the application of the rules, which were developed by the jurisprudence on breach of trust,[310] postponing the initial moment from which the beginning of the limitation period starts running until the moment when the abuse is discovered.[311] The application of this principle is limited, by the rule that, if there was no concealment or covering up of the act (*dissimulation*), the limitation period starts running from the moment of the presentation of the yearly financial statement (*comptes annuels*), which concerns the assets in question.[312] In case of concealment, which could occur if the manager provides no or insufficient information or if the information is wrong or misleading, the limitation period starts running, if the abuse is discovered by the prosecutors or by the shareholders.[313] Its discovery by other persons alone is not enough to start the period running.[314] These rules have been subject to criticism for extending the limitation period so much that, as highlighted by one author, it is doubtful whether the abuse of company assets is at all subject to the limitation of prosecution.[315] A suggestion, so far not accepted, was

[308] Jean-François Renucci, Houria Mehdi, 'L'Actualité de l'abus de biens sociaux', *Revue Pénitentiaire et de Droit Pénal*, (avril 2002), N° 1, pp. 27-41, 28.
[309] Lucas de Leyssac, Mihman, *Droit pénal des affaires*… (note 26) p. 115.
[310] Philippe Conte, Chantal Giraud-van Gaver, Jacques-Henri Robert, Jean-Christophe Saint-Pau, *Le risque pénal dans l'entreprise* (Paris: Litec, 2003) p. 4.
[311] Rebut, *Abus de biens sociaux* (note 12) para 230f.
[312] Cass. crim., 27.06.2001, Bull. crim. n° 164, p. 541.
[313] Rebut, *Abus de biens sociaux* (note 12) para 238f.
[314] Rebut, *Abus de biens sociaux* (note 12) para 236.
[315] Claude Cohen, 'L'abus de biens sociaux, délit imprescriptible?', *Gazette du Palais*, (Septembre-Octobre 2002), pp. 1300-1301.

formulated to provide for a final limit at which the prosecution of the offence would be barred in any kind of circumstances.[316]

8. Solution to the five cases

Despite the fact that excessive risk taking was subject to some discussion in the doctrine and notwithstanding existing jurisprudence, it is impossible to answer with certainty, whether the judges would convict managers in cases described in the introduction to this study.

In order to envisage liability for the abuse of company assets, it is first necessary that perpetrators in these cases fulfil the requirement concerning the function within the company. If this is not the case, two other possibilities exist to become liable for this offence: either it is possible to consider that a person exercise one of these functions *de facto* and this way falls into the scope of the offence or a person becomes liable as an accomplice, provided that the main perpetrator committed the abuse of company assets. If this is not the case, only liability for breach of trust can be taken into account (see below).

As to case 1, it concerns without doubt a positive act of using the company assets. This act is contrary to the company's interests: since the risk associated with the credit is greater than should be taken and that the company is not adequately compensated for the risk it takes in granting the loan, in other words, the risk the bank takes is abnormal, so it can be considered that this limb is also fulfilled. The *mens rea* requirement of intention does not seem to be a problem, since the manager is aware of the abnormal risk the transaction is running. The question, which is much more difficult to answer, is whether the manager fulfils the requirement of personal interest. As was explained above, the cases in which the courts have sentenced managers for excessive risk taking concerned, in the main, situations in which the personal interest was evident. It cannot be excluded however that the court would admit a "diluted" personal interest, for example in the form of the manager's intention to secure a promotion or a bonus or reinforce the position within the company, as the case may

[316] "La dépénalisation de la vie des affaires", Groupe de travail présidé par Jean-Marie Coulon, Rapport au garde des Sceaux, ministre de la Justice, January 2008, p. 97ff. See also: Jean-François Renucci, 'Infractions d'affaires et prescription de l'action publique', *Recueil Dalloz* (1997) pp. 23ff.

be. The probability of conviction would rise to near certainty where the manager grants the credit to a member of his family or to a company in which he had an interest.

As to the second case, the solution would be similar, with the exception of the requirement of personal interest, which is much more evident (financial gratification). Therefore the probability of conviction is much higher. As to the fact that the manager does not perform the act himself, it can be remedied by the use of abuse of powers or by considering that he was an "intellectual author" of the offence (*auteur intellectuel*), which is allowed in the French system.[317]

In the third case the requirement that the act be contrary to company interests is clearly met, since aggressively investing the funds necessary to pay the company debts exposes the company to an abnormal risk that these funds would be lost. The issue will again be the manager's personal interest, especially if he wished that only the company should benefit from his act. However, taking into account that the company business is construction and not investing on stock exchange and that the way the funds were invested goes way beyond what could be accepted only as a way to secure the funds or let them bring reasonable profit, makes it possible that the courts would accept even the "diluted" personal interest. The case would be even more evident if the manager was intending to keep at least part of the winnings for himself.

The likelihood of conviction is the lowest in case 4. It can already be problematic to consider, whether what the perpetrator did was in fact a "use" under the terms of this offence, since it was an omission, which as such rarely leads to a conviction. Moreover, the use did not concern directly the assets of the company. It would be necessary to analyse it as an abuse of credit and to verify whether the risk to the company's reputation would allow the use of this modality. Even if the court would find that these requirements are met, the requirement of personal interest is very difficult to establish, even in its "diluted" version. Provided that the court would be satisfied with this requirement but saying that the manager did not want to fall out of favour among the other senior managers, all the requirements would be fulfilled in their fairly weak form, so criminal liability in this case will rather be excluded.

[317] Desportes, Le Gunehec, *Droit Pénal Général* (note 23) p. 499.

The fifth case, in contrast, is the least problematic, since the French jurisprudence expressly tackled the issue of unlawful acts in the judgment in *Carignon* considering them to be contrary to company interests for exposing it to abnormal risk of sanctions. Due to the seriousness of the act constituting the abuse, the courts tend to admit a "diluted" personal interest, so it will be sufficient to prove that the manager sought to strengthen his position within the company or appear as successful manager. If a bonus was linked to his performance, the case would be even stronger.

The use of the offence of breach of trust could be envisaged if the manager in question does not perform any of the functions making him a suitable perpetrator of the abuse of company assets. Because of the requirement of misappropriation, it will find only very limited application to cases relevant for this study.

In order to envisage criminal liability for the breach of trust, it is necessary to verify whether the defendant received an object which can be subject to embezzlement by virtue of Article 314-1 CP. With the exception to real property, any assets could fall into this category. In all five cases assets of the company were entrusted to the managers. Moreover, these assets were entrusted to them in order to be used for the benefit of the company and they must be returned to the company at the end of the manager's mission. Only if the act in question concerned exclusively real property would the fulfilment of this limb be problematic.

If the interpretation given to this term by the judgment concerning the Air France tickets is to be disregarded as too extravagant, it is uncertain whether the conduct of the manager in cases 1 and 2 would be considered as misappropriation. It is true that the perpetrator in these cases uses the assets of the bank in a way, which is not in accordance with the conditions of this use and breaches the regulations of the bank. However, the manager does not use the assets for his personal interests (or this interest is remote), so it remains a case of mismanagement, which as such is not targeted by the offence. If some kind of personal interest of the manager were deemed to be present, as in case 2, the chances of conviction would be much higher, as it would be possible to claim that the manager used the bank's funds as if they were his own. The case would probably be even more straightforward, if the loans were granted for example to the manager's brother.

As to case 3, it is the most likely to result in conviction, although it is not possible to foresee this with certainty. The assets of the company, which are supposed to be used to pay its debts, ought not to be used for risky investment. There remains some doubt, however, as to whether the court would take into account for the manager's defence that he wished that the company profit from the funds, which would otherwise remain profitless on the company account. The fact that he was aware of the excessive risk of his investment would be an argument in support of admitting fraudulent misuse. It seems however rather unlikely that the court would convict the manager, if no loss occurred. The probability of conviction would be much higher were the manager to plan on keeping the profit from the investment for himself.

Case 4, which consists of an omission to inform, would most probably fall outside the scope of the offence of breach of trust, since there is no direct link to entrusted assets, which could have been misappropriated or even misused.

As to Case 5, in spite of the liability for corruption, it is difficult to expect a conviction for a breach of trust, if the assets were entrusted to the perpetrator for the purpose of committing bribery. However, if the perpetrator used the funds of the company in order to commit an act of corruption, even for the benefit of the company, it can be argued that he misused the assets, by using them in a different way than agreed and that he put at risk the company reputation. Although the absence of the defendant's personal interest might help his defence, in view of the gravity of the act the court will more likely admit a misuse.

To conclude, the probability of conviction for the breach of trust in the cases relevant for this study is high only in cases 3 and 5. Furthermore, an element of personal interest would probably be necessary as to the former. This result would probably be different were the case of the Air France tickets to be considered as authoritative, since it would probably allow for the admission of liability in cases 1 and 2. In these cases the manager knowingly disobeyed the rules, while also being aware of the risk of loss for the bank. However he did not intend to misappropriate the funds and he wanted the company to profit. Although he intentionally exposed the company to a risk of loss, he did not want to cause prejudice to the company. Moreover, in the Air France tickets case, the loss eventually occurred, whereas the

hypothesis of cases 1 and 2 is that there is no proof of such a result. In order to convict a manager for a breach of trust in these cases, it is necessary to extensively interpret practically all the elements of the offence and move away from the wrongdoing punished by this offence, and as such conviction remains highly unlikely.

As regards the negligent version of the cases, there exists no possibility to convict managers for these acts.

9. Conclusions

The French legal system offers two offences which may be applied to managers who misuse the assets of their companies: the abuse of company assets and abuse of trust. Of the two, mainly the first one can be applied to punish for excessive risk-taking. The offence of abuse of company assets criminalises acts by senior managers, which are against the company interests, when committed intentionally and for personal interest. An act is against company interests, if it leads, in normal circumstances, to a loss or exposes the company to abnormal risk of loss. The main objective of the offence is the protection of the financial interests of the company and indirectly of the shareholders and the stakeholders. The literature points out that the offence penalises also disloyalty of the managers as it does not require a concrete result. Nevertheless, all the potential consequences of the offence relate to the financial condition of the company.

One of the particularities of the French solution is that it emphasises the interests of the stakeholders, by considering that managers cannot escape criminal liability by evoking consent given by shareholders or other bodies of the company to acts against the interests of the company.

The analysis in this chapter has demonstrated that two elements of the offence will limit its applicability to a great extent. Firstly, it is the requirement that the perpetrator acted in his personal interest. This requirement will exclude cases, in which the only interest that animated the manager was the wellbeing of the company. Moreover, it is generally admitted that the offence should not punish acts of mere mismanagement. However, it must not be forgotten that the court extended the understanding of personal interest, although so far most cases using such an

interpretation are of considerable seriousness as far as the requirement of the act being contrary to company interests is concerned, although exceptions exist. Hence, it cannot be excluded that also in cases of excessive risk taking, the court would consider that the defendant acted in his personal interest, if he was motivated by his intention to maintain an important relationship or simply acted in pursuit of vanity.[318] These observations lead to the conclusion that the cases subject to the analysis of this study fall into a grey zone of liability for abuse of company assets and the answer to the question whether the defendant will finally be convicted or acquitted will depend on the particularities of the case.

Secondly, the scope of the offence is further limited as to the circle of potential perpetrators. It applies only to senior managers, although the circle can be extended to persons acting *de facto* as senior managers and by the rules on complicity. To all categories of managers, to whom the abuse of company assets cannot be applied, the offence of breach of trust remains to be considered. Its applicability to the cases which are relevant for this study will be even more limited because of the requirement of misappropriation, which, although interpreted broadly, might be difficult to apply to cases of excessive risk taking, unless it is accompanied by certain additional elements. If the perpetrator acted in his personal interest, it is more likely that the court would consider that he demonstrated by his act a will to behave like an owner, which would fulfil the definition of misappropriation. This makes an interesting parallel between the two offences, suggesting that in relation to both of them, the decisive element concerning criminal liability will be the proof of personal interest. Taking into account the fact that managers committing economic crime are often driven by greed and ambition, this requirement cannot be considered an insurmountable hindrance to establishing criminal liability in cases of excessive risk-taking. In contrast with the abuse of company assets, perpetrators falling only within the scope of breach of trust could evoke the consent or orders of superiors in their defence.

[318] "*Fumées de la vanité*" –Conte, Giraud-van Gaver, Robert, Saint-Pau, *Le risque pénal dans l'entreprise* (note 310) p. 2.

Chapter IV. GERMANY

1. Introduction and history

In the German legal system, the offence criminalising improper use of entrusted assets is called *Untreue*, which is described in Section 266 StGB (*Strafgesetzbuch* – Penal Code) and could be translated as breach of trust, but the same word may also mean infidelity or disloyalty. This offence consists in breaching one's duty to safeguard another person's financial interests and thereby causing financial damage to this person.[1] The provision is formulated as follows:

"(1) Whosoever abuses the power accorded him by statute, by commission of a public authority or legal transaction to dispose of assets of another or to make binding agreements for another, or violates his duty to safeguard the financial interests of another incumbent upon him by reason of statute, commission of a public authority, legal transaction or fiduciary relationship, and thereby causes damage to the person, whose financial interests he was responsible for, shall be liable to imprisonment not exceeding five years or a fine.

(2) Section 243(2), section 247, section 248a and section 263(3) shall apply mutatis mutandis."[2,3]

Whereas Section 266 (2) concerns mainly the problems of punishment and procedural aspects, it is the first paragraph that provides the definition of the offence. According to this definition the offence of *Untreue* consists of two modalities

[1] Alfred Dierlamm, '§ 266 Untreue', in: Roland Hefendehl, Olaf Hohmann (eds.), Münchener Kommentar zum Strafgesetzbuch, Band 5, §§ 263 - 358 StGB, 2nd edition (München: C. H. Beck, 2014) marginal number 1.

[2] The English version of the German laws used in this section is cited according to the (unofficial) translation published at the web page of the Federal Ministry of Justice and Consumer Protection (http://www.gesetze-im-internet.de/); The translation of the German Criminal Code (StGB) has been provided by Prof. Dr. Michael Bohlander.

[3] § 266 StGB *Untreue* (1) *Wer die ihm durch Gesetz, behördlichen Auftrag oder Rechtsgeschäft eingeräumte Befugnis, über fremdes Vermögen zu verfügen oder einen anderen zu verpflichten, mißbraucht oder die ihm kraft Gesetzes, behördlichen Auftrags, Rechtsgeschäfts oder eines Treueverhältnisses obliegende Pflicht, fremde Vermögensinteressen wahrzunehmen, verletzt und dadurch dem, dessen Vermögensinteressen er zu betreuen hat, Nachteil zufügt, wird mit Freiheitsstrafe bis zu fünf Jahren oder mit Geldstrafe bestraft.*
(2) *§ 243 Abs. 2 und die §§ 247, 248a und 263 Abs. 3 gelten entsprechend.*

described alternatively, namely the *Missbrauchstatbestand* (the abuse of power alternative) and the *Treubruchstatbestand* (the breach of trust alternative).[4] The *Missbrauch* alternative consists in abusing the right or power granted to the perpetrator to make binding agreements in the name of another person, while the *Treubruch* alternative consists in breaching the duty to safeguard another person's financial interests.[5] The offence requires the same result for both alternatives, which is damage (*Nachteil*). The relevance of this offence to the topic of this study comes in particular from interpretations which accept, under certain conditions, that the exposure to risk of damage may satisfy the requirement for damage in Section 266. As to the conduct, it can also consist in managing the entrusted assets in an excessively risky way. The exact meaning of these terms and the evolution of their interpretation will be analysed further in the respective sections. This section will focus on the historical and general introduction to the offence of *Untreue*.

The history of this offence in Germany goes back to the sixteenth century and the *Constitutio Criminalis Carolina* from 1532.[6] The offence of *Untreue* described in Section 266 was enacted in the original German Penal Code (*Strafgesetzbuch* – StGB) in 1871, which also drew inspiration from criminal codes of former German states.[7] This version of the offence was highly casuistic, enumerating different categories of persons who could be liable for the offence.[8] It also prompted a debate between scholars who wanted to limit its scope to the course of conduct described as *Missbrauch* and those who opted for a broader criminalisation as described by the *Treubruch* alternative.[9] Over decades none of the schools gained prevalence and eventually the reform of the law, which was adopted on 26 May 1933,[10] incorporated

[4] Because of the fact that the translation into English of these three terms (*Untreue*, *Missbrauch* and *Treubruch*) would give very similar results, which would not evoke the differences between them, these terms will be used in the German original.

[5] Jürgen Seier, 'Untreue', in: Hans Achenbach, Andreas Ransiek (eds.), *Handbuch Wirtschaftsstrafrecht*, 3rd edition (Heidelberg, München, Landsberg, Frechen, Hamburg: C. F. Müller, 2012) marginal number 38.

[6] Dierlamm, '§ 266 Untreue' (note 1) marginal number 18.

[7] Urs Kindhäuser, '§ 266 Untreue', in: Urs Kindhäuser, Ulfrid Neumann, Hans-Ullrich Paeffgen (eds.), *Strafgesetzbuch*, 4th edition (Baden-Baden: Nomos, 2013) marginal numbers 5-6.

[8] Edward Schramm, 'Untreue, § 266 StGB', in: Carsten Momsen, Thomas Grützner, *Wirtschaftsstrafrecht. Handbuch für die Unternehmens- und Anwaltspraxis* (München: C.H. Beck, 2013) marginal number 25.

[9] Seier, 'Untreue' (note 5) marginal number 15. For the analysis of both modalities see: 3.1. Introduction to the offence.

[10] *Gesetz zur Abänderung strafrechtlicher Vorschriften*, entered into force on 1 June 1933; Bernd Schünemann, '§ 266 Untreue', in: Heinrich Wilhelm Laufhütte, Ruth Rissing-van Saan, Klaus

both of them in the alternative form.[11] The circle of possible perpetrators of the offence of *Untreue* remained limited, but, unlike in the pre-1933 version, the new version used a general clause. The definition of the offence in the version from 1933 remains practically intact until today. Smaller modifications concerned the legislative technique and the punishment provided.[12] Despite the lack of significant changes as to the language of the provision, the interpretation evolved considerably in view of the jurisprudence, which will be analysed below. Moreover the scope of the offence was influenced by abolishing certain other provisions, such as special *Untreue* in certain types of companies (old Section 294 AktG and Section 81a GmbHG)[13] or by introducing new ones, as was the case for Section 266b (Misuse of cheque and credit cards).

The reform of 1933 was adopted under the Nazi regime and reflected the criminal policy of that time.[14] Its goal was to fight "profiteering and corruption" ("*Schiebertum und Korruption*") and "to catch all cases deserving punishment without a gap".[15] However, the notions used in the definition of the offence did not belong to the Nazi legal terminology.[16] The concept of legal interests protected by this offence was also dissociated from its Nazi historical context by post-war interpretation, as will be shown in the following section. Nevertheless the broad and abstract definition of the offence survived and troubled further generations of German lawyers.[17] In particular the problems concerned the scope of criminalisation of this offence and

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Tiedemann (eds.), *Strafgesetzbuch. Leipziger Kommentar*, Volume 9/1, §§ 263-266b, 12th edition (Berlin: de Gruyter, 2012) before marginal number 1 (page 664).

[11] Seier, 'Untreue' (note 5) marginal number 16.

[12] Kindhäuser, '§ 266 Untreue' (note 7) marginal number 10; Schünemann, '§ 266 Untreue' (note 10) before marginal number 1 (pages 664-667).

[13] Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 26; Martin Paul Waßmer, '§ 266 Untreue' in: Jürgen Peter Graf, Markus Jäger, Petra Wittig (eds.), *Wirtschafts- und Steuerstrafrecht* (München: C.H. Beck, 2011) marginal number 8.

[14] Seier, 'Untreue' (note 5) marginal number 14.

[15] Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 25; Ernst Schäfer, 'Gesetz zur Abänderung strafrechtlicher Vorschriften vom 26. Mai', *Deutsche Juristenzeitung* (DJZ) 1933, pp. 788ff. (cited after: Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 25).

[16] Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 27.

[17] Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 27. On the influence of the laws adopted under the Nazi regime on today's German criminal law, see: Joachim Vogel, *Einflüsse des Nationalsozialismus auf das Strafrecht* (Berlin: Berliner Wissenschafts-Verlag, 2004); Richard F. Wetzell, 'Introduction. Crime and Criminal Justice in Modern Germany', in: Richard F. Wetzell (ed.), *Crime and Criminal Justice in Modern Germany* (New York, Oxford: Berghahn Books, 2014), pp. 1-30, 14-17. It is interesting to note that the criminal law under the Nazi regime attached criminal liability much more in view of the subjective elemens of the offence, in particular the perpetrator's attitude (so called *Gesinnungstrafrecht*); see in particular in the here cited book by Joachim Vogel, in particular at pp. 16-17 and 81-87.

whether it meets the requirement of certainty enshrined in Article 103 (2) of the German Basic Law of 1949. A popular quote from the German penalist Hellmuth Mayer from 1954 expressed this issue in the following way: "Unless there is a classic old case of *Untreue*, no court and no prosecution office may know, whether § 266 StGB is applicable or not."[18] The offence was critically assessed on so many occasions[19] that *Perron* ironically called *Untreue* "a goose that brings golden eggs to the doctrine and to the defence lawyers".[20] The task of rendering the understanding of the general concept of the offence and of its different elements more precise was left to the jurisprudence and to the doctrine.[21] The Federal Constitutional Court of Germany (*Bundesverfassungsgericht*, BVerfG) proved to be satisfied with these efforts in two judgments verifying the conformity of *Untreue* with the German Constitution, in particular Article 103 (2) thereof; the Court did, however, require a strict interpretation, in particular as regards the limb of result.[22] Nonetheless, some authors of the doctrine still express concerns as to the precision of delimitating the boundaries of *Untreue* and call for a legislative reform of the offence.[23]

The application of *Untreue* to cases wherein the perpetrator (a manager) exposes the person (a company) who entrusted the assets to him to a risk of loss by taking excessively daring business decisions is not new: examples of it can be found throughout the history of the offence.[24] For instance in 1927 the *Reichsgericht* (Imperial Court of Justice) sentenced a bank director for granting overly-risky credit in order to help the financial recovery of an enterprise in economic difficulties (so called *Sanierungskredit*).[25] Other cases concern under-secured loans[26] or speculation

[18] "*Sofern nicht einer der klassischen alten Fälle der Untreue vorliegt, weiss kein Gericht und keine Anklagebehörde, ob §266 StGB vorliegt oder nicht.*" – Hellmuth Mayer, Die Untreue, in: Materialien zur Strafrechtsreform, 1. Band: Gutachten der Strafrechtslehrer, Bonn 1954, pp. 333-356, 337 – cited after Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 14 and Daniel Schilling, *Fragmentarisch oder umfassend?* (Frankfurt, Peter Lang, 2009), p. 12; Seier, 'Untreue' (note 5) marginal number 18.

[19] Schünemann, '§ 266 Untreue' (note 10) marginal number 3 with further references.

[20] Walter Perron, 'Probleme und Perspectiven des Untreuetatbestandes', *Goltdammer's Archiv für Strafrecht*, 2009, pp. 219-234, 220.

[21] Seier, 'Untreue' (note 5) marginal number 17.

[22] BVerfG (10.03.2009) NJW 2009, 2370-2373; BVerfG (23.06.2010) NJW 2010, 3209-3221.

[23] See for example Seier, 'Untreue' (note 5) marginal number 22, Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 27 with further references.

[24] Martin Paul Waßmer, *Untreue bei Risikogeschäften* (Heidelberg: C.F. Müller, 1997), p. 13.

[25] RGSt (Entscheidungen des Reichsgerichtes in Strafsachen) 65, 211 – cited after: Waßmer, *Untreue bei Risikogeschäften* (note 24), p. 13.

[26] Reichgericht, Juristische Wochenschrift 1934, 2923 Nr. 29; Reichgericht, Juristische Wochenschrift 1936, 934 – cited after: Waßmer, *Untreue bei Risikogeschäften* (note 24), p. 10.

with securities.[27] Another relevant notion within the interpretation of this offence is the concept of risk-damage, according to which, in certain circumstances, exposure to risk amounts to actual damage. This concept also goes back to the early time of Section 266 of the (then Imperial) Penal Code 150 years ago. It was developed under the offence of fraud from which *Untreue* borrowed its conceptual framework of damage and under *Untreue* itself.[28] However, the judgments which shaped the current interpretation of the offence in this context were issued in the last ten years.

The offence of *Untreue* belongs to the core of white-collar offences within the German system,[29] a key crime in the context of the separation of management and ownership of limited companies.[30] It was applied to different types of relationship, including business relationships, but in particular in recent years the jurisprudence has focused on abuses committed in the corporate environment, i.e. by organs of the companies or their employees.[31] The debate on the interpretation of this offence has generated an enormous amount of literature and abundant jurisprudence. Practically every possible aspect of *Untreue* has been debated. It is impossible to present here all of these problems and all of the formulated theories. Therefore this chapter will focus only on issues relevant to the topic of this study, and will limit itself to the details which are necessary and useful for the comparison with the other two legislative orders. The reader must also be warned that the analysis provided here is based on jurisprudence that is contradictory on various occasions and may be subject to further changes or adjustments.[32] Further difficulty results from the fact that many judgments were issued with regard to specific, concrete types of activities and it thus remains unclear whether their findings can be extrapolated to the understanding of *Untreue* in general. The analysis will focus mainly on the two major types of limited companies: the limited liability company (*Gesellschaft mit beschränkter Haftung* – GmbH) and the public limited company (*Aktiengesellschaft* – AG).

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[27] RGSt (Entscheidungen des Reichsgerichtes in Strafsachen) 53, 194 – cited after: Waßmer, *Untreue bei Risikogeschäften* (note 24), p. 10.
[28] Schünemann, '§ 266 Untreue' (note 10) marginal number 177-178. Fundamental judgments: Beschluss der Vereinigten Strafsenate des Reichsgerichtes of 20.04.1887, RGSt (Entscheidungen des Reichsgerichtes in Strafsachen) 16, 1, 11 (as regards fraud, Section 263 StGB); RGSt (Entscheidungen des Reichsgerichtes in Strafsachen) 16, 77, 81 (as regards *Untreue*). Both judgments cited after Schünemann, '§ 266 Untreue' (note 10) marginal number 178.
[29] Seier, 'Untreue' (note 5) marginal number 1.
[30] Schünemann, '§ 266 Untreue' (note 10) marginal number 2.
[31] Schünemann, '§ 266 Untreue' (note 10) marginal number 3.
[32] Seier, 'Untreue' (note 5) marginal number 18.

Furthermore, in view of the difficulties encountered in practice in using *Untreue* to punish misconduct in connection with the most recent financial crisis, in 2013 the German legislator introduced specific criminal provisions in relation to the banking and insurance sector, namely Section 54a of the Banking Act and Section 142 of the Insurance Supervision Act. These two sections provide very similar offences, which penalise violation of risk management rules by senior managers, which result in the concrete endangerment of the existence of the undertakings under their direction. While the violation must be committed intentionally, criminal liability is also foreseen if the result was brought about with negligence. So far the German legal system tackled excessive risk-taking with the offence of *Untreue* and at the moment of writing, there has been no jurisprudence concerning this new offence and the relevant literature is very limited. The offence is a clear post-crisis attempt to address excessive risk-taking in crucial financial institutions, thus a description of the German system without a brief analysis of this new law would be incomplete.

The analysis in this chapter will devote its major part to the offence of *Untreue*. It will start with the presentation of the reasons for criminalisation and protected interests (2. Legal interests deserving criminal law protection). The next section will provide an extensive analysis of all elements of the offence of *Untreue* (3. Definition of the offence). The ensuing sections will present the issues of criminalisation of preparation and attempt to commit *Untreue* (4. Inchoate offences), cooperation in the commission of the offence (5. Cooperation in the commission of the offence) and possible reasons for excluding criminal liability, in particular the issue of consent (6. Reasons for excluding criminal liability). The next subchapter will be devoted to the new offences of violations in risk management (7. Special provisions for banking and insurance executives) and followed by presentation of the punishment foreseen for all of the offences analysed (8. Punishment). The penultimate subchapter will examine the five cases in view of the analysed German provisions (9. Solutions to the five cases) before the chapter closes with the conclusions.

2. Legal interests deserving criminal law protection

According to the dominant view, the only legal interests protected by the offence of *Untreue* are property or assets (*Vermögen*).[33] The fact that the required course of conduct consists of breaching the trust of the victim describes only the way in which the assets are targeted, in the same way as deception describes the way the perpetrator attacks property while committing the offence of fraud (*Betrug*, § 263 StGB).[34] The fact that the owner of the assets entrusts them to another person and thus loses control of them requires a counterbalance in the form of criminal protection.[35] Thus *Untreue* is applicable when the person to whom the assets were entrusted misuses the power to decide upon another person's property.[36]

The literature enumerates several other possible protected interests, which however have not gained acceptance. Under the Nazi regime the interpretation of the offence put the emphasis on the aspect of betrayal (*Verrat*), which has now been abandoned.[37] The offence does not protect the freedom to make use of one's own assets,[38] although one of the judgments of the Federal Court of Justice (*Bundesgerichtshof*, BGH) seems to admit such an interpretation.[39] The confidence in

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[33] Walter Perron, '§ 266 Untreue', in: Adolf Schönke, Horst Schröder, Albin Eser et al. (eds.), *Strafgesetzbuch Kommentar*, 29th edition (München: C. H. Beck, 2014) marginal number 1; Dierlamm, '§ 266 Untreue' (note 1) marginal number 1; Kindhäuser, '§ 266 Untreue' (note 7) marginal number 1; Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 2; Seier, 'Untreue' (note 5) marginal number 10; BGH (20.07.1999) NJW 2000, 154-157, 155; BVerfG (23.06.2010) NJW 2010, 3209-3221, 3212. On the difficulties of translating "Vermögen" into English, see 3.5. Result.
German jurisprudence and doctrine explains the justification for criminalisation by reference to a highly debated term "*Rechtsgut*", which can be translated into English as: protected goods or goods-in-law. Further on that debate see: Claus Roxin, *Strafrecht. Allgemeiner Teil*, Volume 1, 4th edition, (München: C.H. Beck, 2006) p. 14ff; Roland Hefendehl, Andrew von Hirsch, Wolfgang Wohlers, *Die Rechtsgutstheorie. Legitimationsbasis des Strafrechts oder dogmatisches Glasperlenspiel?*, (Baden Baden: Nomos, 2003); Claus Roxin, 'The Legislation Critical Concept of Goods-in-law under Scrutiny', *European Criminal Law Review*, 3 (2013), Volume 1, pp. 3-25.

[34] Seier, 'Untreue' (note 5) marginal number 10, Dierlamm, '§ 266 Untreue' (note 1) marginal number 1. Contrary Meyer, according to whom the trust between the principal and the agent is also protected by the offence: Dieter Meyer, 'Nochmals: Ist die Begebung ungedeckter Schecks mittels Scheckkarte durch ihren berechtigten Inhaber strafbar?', *Monatschrift für Deutsches Recht* (MDR), 1971, Volume 11, pp. 893-895, 894.

[35] Dierlamm, '§ 266 Untreue' (note 1) marginal number 2.

[36] Kindhäuser, '§ 266 Untreue' (note 7) marginal number 3.

[37] Dierlamm, '§ 266 Untreue' (note 1) marginal number 1; Kindhäuser, '§ 266 Untreue' (note 7) marginal number 1. For the exposition of the interpretation based on betrayal see: Georg Dahm, 'Untreue', in: Franz Gürtner, *Das kommende deutsche Strafrecht*, Besonderer Teil, 2nd edition (Berlin: Verlag Franz Vahlen,1936), p. 448 ff.

[38] Dierlamm, '§ 266 Untreue' (note 1) marginal number 1; for critical analysis see: Frank Saliger, 'Wider die Ausweitung des Untreuetatbestandes', *Zeitschrift für die gesamte Strafrechtswissenschaft* (ZStW), 112 (2000), volume 3, pp. 563-613, 589 ff.

[39] BGH (29.08.2008) NStZ 2009, 95-100, 99.

the integrity of the person to whom the assets are entrusted (*Vertrauen in die Integrität des Treunehmers*) or confidence in the integrity of the legal and business environment (*Vertrauen in die Redlichkeit des Rechts- und Wirtschaftsverkehrs*) are also excluded.[40] The main reasons given for this approach are the following. Firstly, *Untreue* is systematically connected to the offence of fraud (*Betrug*) as they are in the same chapter of the StGB and the former borrows some conceptual framework from the latter (in particular concerning the result). There is an agreement in the German doctrine that fraud is focused only on protecting property (it is referred to as a genuine property offence – *reines Vermögensdelikt*) and *Untreue* should be interpreted in the same way.[41] Secondly, if the resulting damage is of minor value *Untreue* is prosecuted only upon the request of the victim, which should demonstrate the focus on property as opposed to the relationship between the principal and the agent.[42]

Considering property or assets to be the only protected interests of Untreue has several substantive law and procedural consequences. Firstly, the owner of the assets and the person who suffered damage from the breach of duty (*Geschädigter*) must be identical. However it is possible that the person who entrusts the property and the owner are not identical, if the assets are already being managed by a third person.[43] Secondly, since property is an individual protected interest, the consent of the owner, including presumed consent, may under certain conditions exclude criminal liability.[44] However, as regards limited companies the shareholders' ability to consent is restricted, for example by the requirement that the act would not endanger the existence of the company.[45] Such a limitation demonstrates that although the offence focuses on the owner's (i.e. the company's and the shareholders') assets, it takes into

[40] Seier, 'Untreue' (note 5) marginal number 11; Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 2. Contrary view: Wolfgang Schmid, '§31 Treupflichtverletzungen', in: Christian Müller-Gugenberger, Klaus Bieneck, *Wirtschaftsstrafrecht. Handbuch des Wirtschaftsstraf- und –ordnungswidrigkeitenrechts*, 5th edition (Köln: Dr. Otto Schmidt, 2011) marginal number 3, who considers that *Untreue* protects also confidence in the integrity of legal and business environment. See also in this line: Wolfgang Dunkel, 'Nochmals: Der Scheckkartenmißbrauch in strafrechtlicher Sicht', *Goltdammer's Archiv für Strafrecht*, 1977, pp. 329-340.

[41] Waßmer, '§ 266 Untreue' (note 13) marginal number 9; Schünemann, '§ 266 Untreue' (note 10) marginal number 23.

[42] Seier, 'Untreue' (note 5) marginal number 11; Waßmer, '§ 266 Untreue' (note 13) marginal number 9.

[43] Seier, 'Untreue' (note 5) marginal number 12.

[44] Seier, 'Untreue' (note 5) marginal number 12; for details see below: Section 6. 1. Consent of the victim.

[45] For further details see: 6.1. Consent of the victim.

account some interests of other stakeholders.[46] Thirdly, the interests of third persons such as creditors or employees are not protected by this offence.[47] Only the person who suffered damage from the offence can become an aggrieved party (*Verletzter*) within the criminal procedure (for example as described in Sections 403ff StPO – Code of Criminal Procedure). This category includes shareholders in the cases of GmbH and AG.[48]

3. Definition of the offence

3.1. Introduction to the offence

The relation between the two modalities of the offence of Section 266 StGB – *Missbrauchstatbestand* (the abuse of power alternative, consisting in abusing the right of the perpetrator to make binding agreements in the name of the victim) and *Treubruchstatbestand* (the breach of trust alternative, consisting in breaching the duty to safeguard another person's financial interests) – has been the subject of intensive debate within the German doctrine.[49] Whereas one theory considers that the two modalities constitute two different offences (dualistic theory), the opposite theory claims that *Untreue* is one offence, with the *Treubruch* modality encompassing all its possible occurrences and *Missbrauch* representing a particular form of its commission (monistic theory).[50] The core of this debate concerns the question whether it is necessary to prove in the case of the *Missbrauch* modality a *Vermögensbetreuungspflicht* (the duty to safeguard the financial interests of another person), which is necessary for the *Treubruch*. In other words, the question is whether the criteria for defining this duty elaborated for the *Treubruch* modality apply also for the *Missbrauch* alternative or whether it is enough that the perpetrator has the right to

[46] See also: Kristina Nattkemper, *Die Untreuestrafbarkeit des Vorstands einer Aktiengesellscahft* (Berlin: Duncker & Humblot, 2013) pp. 75-76.
[47] Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 2.
[48] Kindhäuser, '§ 266 Untreue' (note 7) marginal number 129; Seier, 'Untreue' (note 5) marginal number 13.
[49] Dierlamm, '§ 266 Untreue' (note 1) marginal number 24.
[50] Seier, 'Untreue' (note 5) marginal numbers 10-11; Kindhäuser, '§ 266 Untreue' (note 7) marginal number 11. In view of limited practical impact of this debate on the topic of this study, a detailed account has not been given. For more detailed information see for example: Kindhäuser, '§ 266 Untreue' (note 7) marginal numbers 12-26; Dierlamm, '§ 266 Untreue' (note 1) marginal numbers 24-31; Schünemann, '§ 266 Untreue' (note 10) marginal numbers 6ff.

make binding agreements in the name of or for another.[51] Those claiming that the proof of the duty is necessary consider it a common platform for the offence - *Vermögensbetreuungspflicht* defines here the perpetrator and his conduct is the breach of this duty – and thus consider *Untreue* to be one offence (monistic theory). If such necessity is denied, then the two modalities can be considered two different offences (dualistic theory).[52]

Currently the monistic theory is considered to have gained prevalence in the jurisprudence[53] and among the German doctrine.[54] The main argument in favour of choosing that option refers to the wording of the provision and considers that the expression "*dem, dessen Vermögensinteressen er zu betreuen hat*" (to the person, whose financial interests he was responsible for) refers to both modalities.[55] Moreover the debate has lost its intensity since the judgment of the Federal Court of Justice of Germany (BGH) denied application of *Untreue* to cases of misuse of cheque cards due to the lack of a duty to safeguard the financial interests of another person.[56] The legislator reacted with a law reform introducing special offences penalising this kind of behaviour (Section 266b StBG[57]).[58] These decisions of the BGH and of the legislator showed that both consider the proof of the duty to be necessary for all modalities of *Untreue*, and thus their preference towards the monistic theory.[59]

[51] Kindhäuser, '§ 266 Untreue' (note 7) marginal number 20; Schünemann, '§ 266 Untreue' (note 10) marginal numbers 18ff.
[52] Seier, 'Untreue' (note 5) marginal numbers 9-10
[53] Seier, 'Untreue' (note 5) marginal number 52, BGH (26.07.1972) NJW 1972 1904-1905, 1904; BGH (05.07.1984) NJW 1984, 2539-2541, 2540; BGH (13.06.1985) NJW 1985, 2280-2282, 2282; BGH (06.12.2001) NJW 2002, 1585-1589,1585f.; BGH (21.12.2005) NJW 2006, 522-531, 525.
[54] Seier, 'Untreue' (note 5) marginal number 52. The monistic theory is sustained e.g. by Dierlamm, '§ 266 Untreue' (note 1) marginal number 31; Kindhäuser, '§ 266 Untreue' (note 7) marginal number 26; Johannes Wessels, Thomas Hillenkamp, Strafrecht. Besonderer Teil 2, Straftaten gegen Vermögenswerte, 36th edition (Heidelberg et al.: C.F. Müller, 2013) marginal numbers 749-750. The opposite view is represented for instance by Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 13 and to some extent by Schünemann in: '§ 266 Untreue' (note 10) marginal numbers 13-17. Martin Heger, '§ 266 StGB Untreue', in: Kristian Kühl, Martin Heger, *Strafgezetzbuch Kommentar* (Lackner/ Kühl), 28th edition (München: C. H. Beck, 2014) marginal numbers 4, 21; Thomas Fischer, *Strafgesetzbuch*, 61th edition (München: C. H. Beck, 2014) Chapter: Untreue § 266, marginal number 6.
[55] Dierlamm, '§ 266 Untreue' (note 1) marginal number 31; Perron, '§ 266 Untreue' (note 33) marginal number 2.
[56] BGH (26.07.1972) NJW 1972, 1904-1905.
[57] Introduced by the law reform 2. WiKG, 15.05.1986, Schünemann, '§ 266 Untreue' (note 10) before marginal number 1 (page 665).
[58] Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 11.
[59] Dierlamm, '§ 266 Untreue' (note 1) marginal number 26.

Two consequences result from the choice of one of the above theories. Firstly on a procedural level, if *Untreue* is considered to be one offence with two modalities, it would be theoretically unnecessary to warn the defendant that he may be sentenced for the offence as defined in the other modality than the one of which he was originally accused. In the case of two different offences such a change requires prior warning, as provided for in Section 265 (1) StPO[60].[61] However, even though the jurisprudence has accepted the monistic theory, it still considers that such a warning is necessary.[62] Secondly, should the criteria defining the *Vermögensbetreuungspflicht* be applied also to the *Missbrauch* modality, then the perpetrator of *Missbrauch* must have some room for manoeuvre and not only have the right to make a binding agreement for the principal according to detailed and precise instruction leaving him no space for decision making.[63]

The above consequence and the debate concerning the relation between the two modalities of *Untreue* have limited bearing on the analysis in this study, since, as will be demonstrated below, the managers generally have the duty to safeguard their company's property. Moreover it is currently not so rare for judgments to not establish whether the conditions of the *Missbrauch* have been fulfilled, and to limit the analysis to the establishment of the existence of the duty to safeguard another person's financial interests (and breach thereof).[64] This practice has met with criticism from the German doctrine, in view of the duty to precisely ascertain the offence of which one is accused or in respect of which one is sentenced.[65]

The offence of *Untreue* has also received a lot of criticism for being defined without sufficient precision und thus breaching the principle of legality enshrined in Article 103 para 2 of the German Basic Law (*Grundgesetz*) and in Section 1 StGB[66].[67]

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[60] Section 265 (1) The defendant may not be sentenced on the basis of a penal norm other than the one referred to in the charges admitted by the court without first having his attention specifically drawn to the change in the legal reference and without having been afforded an opportunity to defend himself.
[61] Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 12.
[62] Seier, 'Untreue' (note 5) marginal number 60. BGH (15.07.1954) NJW 1954, 1616; BGH (05.07.1984) NJW 1984, 2539-2541, 2540.
[63] Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 12.
[64] Seier, 'Untreue' (note 5) marginal number 39, e.g. BGH (27.02.1975) NJW 1975, 1234-1236; BGH (21.12.2005) NJW 2006, 522-531; BGH (22.11.2005) NJW 2006, 453-456.
[65] Seier, 'Untreue' (note 5) marginal number 40.
[66] Both regulation have the same wording: "*Eine Tat kann nur bestraft werden, wenn die Strafbarkeit gesetzlich bestimmt war, bevor die Tat begangen wurde*." The official translation of the German Basic Law (https://www.btg-bestellservice.de/pdf/80201000.pdf) is the following: "An act may be punished only if it was defined by a law as a criminal offence before the act was committed."

However in two relatively recent judgments the Federal Constitutional Court of Germany confirmed that Section 266 StGB does not violate the above-mentioned Article, provided that it is strictly interpreted.[68] In particular the judgment sets various rules of interpretation that should guarantee its compliance with the imperative of certainty and which will be mentioned in the further analysis below. Moreover it is also considered that the German jurisprudence and doctrine developed elaborate criteria for interpretation for the limbs of this offence, which caused even one of its harshest critics to soften his stance.[69]

In view of the above, this chapter will present the structure of *Untreue* as interpreted by the majority view (the monistic theory). Since *Missbrauch* is considered according to this theory to be *lex specialis*, it should first be established, whether what the perpetrator did would fall into the description of this modality of *Untreue*, and if this was not the case, it should be verified if the act fulfils the criteria of the *Treubruch* modality.[70] The analysis below will follow the same order.

The two modalities differ in their description of the circle of perpetrators and as to the course of conduct. The perpetrator of the *Missbrauch* is described as someone to whom the power has been conferred to administer assets of another (or to dispose of assets of another) or to make binding agreements for another, and the course of conduct as abuse of this power. As to the *Treubruch* modality, its perpetrator is a person having the duty to safeguard the financial interests of another and who commits *Untreue* by violating this duty. The understanding of these terms will be described separately under respective sections (3.2. *Missbrauch* and 3.3 *Treubruch*). As to these modalities, their general understanding will be presented first, which will be followed by a subsection on managers of limited companies (3.4. Managers). However the result as well as the *mens rea* are identical for both modalities and will be analysed in the sections following the study of the two modalities (3.5. Result, 3.6. *Mens rea*).

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[67] Seier, 'Untreue' (note 5) marginal number 19 (footnote 24); Dierlamm, '§ 266 Untreue' (note 1) marginal numbers 3-16; Schünemann, '§ 266 Untreue' (note 10) marginal numbers 24-28.
[68] Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 14. The judgments are: BVerfG (10.03.2009) NJW 2009, 2370-2373; BVerfG (23.06.2010) NJW 2010, 3209-3221.
[69] Bernd Schünemann, 'Die „gravierende Pflichtverletzung" bei der Untreue: dogmatischer Zauberhut oder taube Nuss?', *NStZ*, 2005, pp. 473-476, pp. 473-474.
[70] Seier, 'Untreue' (note 5) marginal number 58.

3.2. *Missbrauch* alternative (abuse of power)

3.2.1. Perpetrator – power to administer assets of another or to make binding agreements for another

For the purposes of the *Missbrauch* modality the perpetrator is defined as a person to whom the power has been accorded "by statute, by commission of a public authority or legal transaction to administer assets of another or to make binding agreements for another".[71]

It results from the above formulation that the perpetrator of the *Missbrauch* alternative must have been granted the power to administer the property of another (*Verfügungsbefugnis*, which can be also translated as the power to dispose of assets of another) or to make binding agreements for another (*Verpflichtungsbefugnis*). The first of these powers – *Verfügungsbefugnis* – enables a person to modify, transfer or dispose of someone else's property, whilst the second one – *Verpflichtungsbefugnis* – empowers him to legally bind the principal by an agreement made on his behalf.[72] The perpetrator may be entitled to act in his own name on someone else's behalf or as an agent.[73] This power must be granted by one of the three mentioned legal sources. A factual possibility to influence one's property situation is not enough. Hence, this modality will not be applicable in cases, where agreements made by another person are binding only because of the rules on protection of bona fide rights. On the other hand, if the power was legally granted to the perpetrator but in the meantime it was withdrawn or expired, but it continues to be valid in relation to third persons (e.g. on the basis of §§ 170 ff. BGB), the perpetrator may be held liable for *Untreue* in the *Missbrauch* alternative.[74]

The first condition of this definition is that the power accorded to the perpetrator concerns someone else's property and not his own or that the agreement is made for another, which requires analysis of what is understood as someone else's assets according to Section 266 (3.2.1.1. Someone else's assets). The second issue to be analysed is the source of the power (3.2.1.2. Source of power) and thirdly, since

[71] "*durch Gesetz, behördlichen Auftrag oder Rechtsgeschäft eingeräumte Befugnis, über fremdes Vermögen zu verfügen oder einen anderen zu verpflichten*".
[72] Seier, 'Untreue' (note 5) marginal number 100.
[73] Dierlamm, '§ 266 Untreue' (note 1) marginal number 34.
[74] Dierlamm, '§ 266 Untreue' (note 1) marginal number 34.

this chapter adopts the majority monistic theory, the duty to safeguard the financial interests of another will complete the definition of the perpetrator of the *Missbrauch* modality (3.2.1.3.).

3.2.1.1. Someone else's assets

The subject of the offence is any kind of property belonging, at least partly, to a person other than the perpetrator.[75] The fact that the perpetrator co-owns the assets in question does not exclude his liability, thus a partner in a partnership (*Personengesellschaft*) may also commit *Untreue* with assets of the partnership.[76] The qualification of property as belonging to someone else must be assessed according to civil law criteria and not with regard to whom the assets belong in the economic sense.[77] This rule has significant consequences. It results that if the company is the owner of the assets, the ultimate owner of the shares can be liable for *Untreue* concerning the assets of this company.[78] It is in particular relevant in cases of limited companies owned by one person, for instance in a one-person company with limited liability (GmbH) the owner may commit the offence by making a binding agreement on behalf of this company, or by administering its assets.[79] In the same sense, if the owner loses control over his property (e.g. in the course of an insolvency procedure), he remains its owner and therefore cannot commit *Untreue* in relation to these assets. This latter aspect demonstrates also that the offence of *Untreue* is not meant to protect the interests of creditors (which are protected in particular by Sections 283ff StGB).[80]

3.2.1.2. Source of power

According to Section 266 StGB the power to administer assets of another or to make binding agreements for another can be accorded by statute, by an act (by commission) of a public authority or by a legal transaction.

[75] Dierlamm, '§ 266 Untreue' (note 1) marginal number 35.
[76] Kindhäuser, '§ 266 Untreue' (note 7) marginal number 30.
[77] Perron, '§ 266 Untreue' (note 33) marginal number 6.
[78] Schünemann, '§ 266 Untreue' (note 10) marginal number 72.
[79] Perron, '§ 266 Untreue' (note 33) marginal number 6.
[80] Kindhäuser, '§ 266 Untreue' (note 7) marginal number 30.

The power is granted by statute in a limited number of cases, when the law expressly provides that a person has to administer assets of another person. This is mainly the case in the context of parental custody[81] and marital property rights[82].[83]

It is more often the case that a combination of sources will determine the perpetrator's status. In particular the law may establish that through receiving a certain function a person is granted certain power(s), but that the function is in fact entrusted by an act of a public authority. This is mainly the case regarding custody awarded by the court,[84] administration or execution of testaments,[85] compulsory execution and insolvency or bankruptcy.[86] Liquidators appointed by the court would also fall into this category.[87,88] It also comprises appointment to public offices with which such a power is associated (e.g. mayors, tax officers).[89]

It is the third category of sources of empowerment – a legal transaction – that will be the most pertinent for cases relevant to this study. Managers may be perpetrators of *Untreue* in the modality of *Missbrauch*, if they were entrusted with the power to make binding agreements for their company, or if they are allowed to administer the assets of the company in a way which has legal consequences. These managers can be divided into two groups.

The first category comprises managers who are appointed by a legal act to a function within the company and the power associated with this function is described in the law. Into this category fall different types of persons specifically authorised to make agreements in the name of the company,[90] managing associates/partners of

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[81] §§ 1626, 1631 BGB.
[82] §§ 1353, 1357 BGB
[83] Dierlamm, '§ 266 Untreue' (note 1) marginal number 37.
[84] "*Der Vormund* (§ 1793 BGB), *der Pfleger* (§§ 1909 ff. BGB), *der Betreuer* (§§ 1896 ff. BGB), *die Beistandschaft* (§ 1712 BGB)".
[85] "*Der Nachlassverwalter* (§ 1985 BGB), *der Nachlasspfleger* (§ 1960 Abs. 2 BGB), [...] *der Testamentvollstrecker* (§§ 2200, 2205, 2215 BGB)".
[86] "*Der Gerichtsvollzieher* (§§ 753 ff. ZPO), *der Zwangsverwalter* (§§ 150 ff. ZVG), [...] *der Insolvenzverwalter* (§ 27 InsO)".
[87] *Der Abwickler einer AG* (§§85, 265 Abs. 3, 268 AktG), *Notvorstand* (§§ 85, AktG) *Liquidator einer GmbH* (§§66 Abs. 2, 70 GmbHG), *Liquidator einer Genossenschaft* (§§ 83 Abs. 3, 88 GenG). *Liquidatoren, Abwickler* (§§ 29, 48, 49 BGB, §§146, 149 HGB). *Insolvenzverwalter* (§56 InsO), *vorläufiger Insolvenzverwalter* (§§ 21, 22 InsO).
[88] Seier, 'Untreue' (note 5) marginal number 106. The list in this paragraph is presented according to the list in this source (all the quotations from: marginal number 106), as well as according to: Dierlamm, '§ 266 Untreue' (note 1) marginal number 38.
[89] Dierlamm, '§ 266 Untreue' (note 1) marginal number 38.
[90] *Prokuristen* (§§ 48 ff. HGB), *Handlungsbevollmächtigte* (§§ 54 ff. HGB)

different partnerships[91] and managing directors of corporations, including members of their managing bodies[92] and liquidators appointed contractually[93].[94]

Managers whose function is not described specifically in law may fall into the second category of perpetrators to whom the power to make legally binding decisions in the name of the company is granted through typical contracts such as service contracts (*Dienstverträge*) or work contracts (*Arbeitsverträge*), provided that such a right has been granted.[95] It also includes situations where the perpetrator is allowed to act in his own name on someone else's behalf, e.g. a commission agent (*Kommissionär*[96]).[97]

The power must be given to the perpetrator through a valid act. If it occurs that the act was invalid, the perpetrator cannot be liable for the *Missbrauch* alternative, however his liability might still be possible under the *Treubruch* modality.[98]

3.2.1.3. Duty to safeguard the financial interests of another

According to the dominant view, it is not enough that the perpetrator has been granted the power to administer assets of another or to make binding agreements for another, but he must also have the duty to safeguard the financial interests of that person (*Vermögensbetreuungspflicht*). In accordance with this view the understanding of this duty is identical with the one defining the perpetrator of the *Treubruch* modality.[99] Thus it is necessary that the perpetrator is supposed to take care of another person's interests (and not his own), that representing the interests of that person is at the core of their relationship and that while representing these interests the perpetrator

[91] "*Die Geschäftsführende Gesellschafter einer BGB-Gesellschaft* (§ 714 BGB), *einer oHG* (§§ 125, 126 HGB), *einer KG* (§§ 161, Abs. 2, 170, 125 HGB), *einer KG auf Aktien* (§§ 282 f. AktG), *einer GmbH & Co. KG* (§§ 161 Abs. 2, 125 HGB, 35 GmbHG)".
[92] "*Der Geschäftsführer einer GmbH* (§§6, 35 GmbHG); *der Vorstand einer AG* (§§ 78, 84 AktG*), einer Genossenschaft* (§ 24 GenG), eines Vereins (§ 26 BGB), *einer Stiftung* (§§ 86, 26 BGB); *die geschäftsführende Direktoren einer SE* (§ 40 Abs. 1 SEAG)".
[93] "*Vertraglich eingesetzte Liquidatoren*".
[94] The list in this paragraph according to the list in: Seier, 'Untreue' (note 5) marginal number 108.
[95] Seier, 'Untreue' (note 5) marginal number 109.
[96] §§ 383 ff. HGB.
[97] Seier, 'Untreue' (note 5) marginal number 110.
[98] Petra Wittig, *Wirtschafsstrafrecht*, (München: C. H. Beck, 2010) chapter: § 20 Untreue, marginal number 27.
[99] Wittig, *Wirtschafsstrafrecht* (note 98) marginal number 78; BGH (06.12.2001) NJW 2002, 1585-1589,1585f.; BGH (21.12.2005) NJW 2006, 522-531, 525; BGH (22.11.2005) NJW 2006, 453-456, 454.

has some margin of discretion and is not limited to executing precise orders. The duty will be analysed in detail in the following section (3.3.1.2. Duty). In fact it is the requirement of some scope of discretion that may exclude certain types of relationship, since the first two criteria will be by definition fulfilled if the person has the power to administer the property of another or to make binding agreements for another.

3.2.2. Conduct

A person described in the previous section commits *Untreue* in the *Missbrauch* alternative if he abuses the power to administer assets of another or to make binding agreements for another and at the same time, as the dominant theory requires, breaches his duty to safeguard the financial interests of another.

Situations to which this modality applies consist of making use of the power to conclude a valid transaction or to make a legally binding statement, which goes beyond the scope of authorisation granted internally to the perpetrator.[100] A necessary condition is a discrepancy between the power vested in the perpetrator and the internal agreement on the use of this power (the agreement between the owner and the agent).[101] A classic example of such a situation is the German procuration (*Prokura*). Although the procuration might be limited by agreement or law (e.g. in accordance with Section 49 (2) of the *Handelsgesetzbuch*, the Commercial Code - HGB), this limitation has no effect on third parties (Section 50 HGB). Similar discrepancies may occur as to the external power and internal authorisation of: a commission agent (*Kommissionär*, Sections 383, 385 HGB), a managing partner of a general partnership (*offene Handelsgesellschaft*, Section 126 (1) and (2) HGB), manager of a GmbH (Section 37 of the *Gesetz betreffend die Gesellschaften mit beschränkter Haftung*, Limited Liability Companies Act - GmbHG) and the management board of an AG (Section 82 *Aktiengesetz*, Public Limited Companies Act - AktG).[102]

[100] Wittig, *Wirtschafsstrafrecht* (note 98) marginal number 33.
[101] Petra Wittig, '§ 266 Untreue', in: Bernd von Heintschel-Heinegg (ed.), *Beck'scher Online-Kommentar StGB*, 27th edition (München: C. H. Beck, 2015, retrieved from: www.beck-online.beck.de on 28.09.2015) marginal number 13.
[102] Kindhäuser, '§ 266 Untreue' (note 7) marginal number 86.

Therefore this alternative is excluded when the scope of power and the scope of authorisation are identical, since going beyond the authorisation will be equal to going beyond the power. This situation might however lead to liability for the *Treubruch* alternative. The same occurs in situations where the perpetrator goes beyond his power (e.g. when a legal representative who shares joint power acts on his own).[103]

The *Missbrauch* modality requires that the agreement concluded by the perpetrator or the statement issued by him have legally binding consequences. Hence this modality is excluded if the act is null or void.[104] For instance the perpetrator should conclude a valid contract by which he sells the owner's real estate or which obliges the latter to deliver certain goods. Hence, criminal liability in this case is dependent on the civil legal validity of the legal action of the perpetrator.[105] If the act is not legally valid, only liability for *Treubruch* can be considered.[106] An example of such a case is 'collusion' (*Kollusion*), which is understood in German law to be a situation where an agent agrees with the third party to conclude an agreement in the name of his principal that would be detrimental to the latter. Since such an agreement is invalid by law (Section 138 (1) BGB) only liability for *Treubruch* is possible.[107]

There may be cases where a person performs an act which, although it is as such permitted, forms part of a larger plan to go beyond the scope of what that person is authorised to do. For example, a person entitled to take cash from the company safe does so, but in order to use the funds for a private purpose. Such a person will not be liable for the *Missbrauch* alternative, but rather - if at all - for *Treubruch,* or possibly for embezzlement (§ 246 StGB).[108]

The perpetrator's power to make binding agreements must be valid at the moment the offence is committed (i.e. when he is making use of this power). The validity in this regard is assessed according to civil law criteria, on which criminal

[103] Kindhäuser, '§ 266 Untreue' (note 7) marginal number 90.
[104] Dierlamm, '§ 266 Untreue' (note 1) marginal number 136.
[105] Schünemann presents a minority view where he favours a partially autonomous criminal law concept of *Missbrauch* - '§ 266 Untreue' (note 10) marginal numbers 46-52.
[106] Wittig, '§ 266 Untreue' (note 101) marginal numbers 16f.
[107] Kindhäuser, '§ 266 Untreue' (note 7) marginal number 90, Seier, 'Untreue' (note 5) marginal number 49; See also the arguments in favour of *Missbrauch* in: Gunther Arzt, 'Zur Untreue durch befugtes Handeln', in: Wolfgang Frisch, Werner Schmid, Festschrift für Hans-Jürgen Bruns (Köln, Berlin, Bonn, München, Carl Hezmanns Verlag, 1978) pp. 365-383, pp. 368-370.
[108] Dierlamm, '§ 266 Untreue' (note 1) marginal number 137.

liability is here dependent.[109] This requirement concerns the external power and not the internal agreement. Thus liability for *Missbrauch* will be possible, if the perpetrator has (still) the power to make binding agreements,[110] although the internal agreement is invalid or no longer valid.[111]

There is no liability for *Missbrauch* in cases in which the perpetrator has no power to make a valid agreement in the name of the owner, but the transaction's effect is due to the regulation protecting bona fide transactions.[112] This may be the case if the perpetrator sells an item that he received on loan, which may make him liable for embezzlement (*Unterschlagung*, Section 246 StGB).[113]

Additionally, acts which are not considered an expression of will in legal terms, but consist only of physical interaction with the assets, although having consequences for the property rights (e.g. combination or intermixture of movable things) may only be considered under the *Treubruch* alternative.[114]

The internal limits of the authorisation for the perpetrator are generally provided by the relationship between him and the owner, in other words by his duty to safeguard the financial interests of another.[115] In the case of foreign companies, the scope of authorisation might need to be sought in the law of the jurisdiction which applies to the company.[116]

It is possible to commit the *Missbrauch* alternative by omission.[117] However this possibility is necessarily limited to situations where omission is equal to a statement with legal consequences, i.e. leads to a conclusion of a transaction or to a renunciation of a right.[118] This will comprise situations where the silence of a party leads to the conclusion of a contract (Section 362 HGB), to its prolongation, or to its (remaining in) existence, when for example a lack of notification of defects in due

[109] Wittig, *Wirtschafsstrafrecht* (note 98) marginal number 36.
[110] E.g. on the basis of Sections 170 ff. BGB. For instance, Section 170 BGB provides that: "If authority is granted by declaration to a third party, it remains in force in relation to this third party until he is notified by the principal of the expiry thereof."
[111] Kindhäuser, '§ 266 Untreue' (note 7) marginal number 89.
[112] Seier, 'Untreue' (note 5) marginal number 45; Kindhäuser, '§ 266 Untreue' (note 7) marginal number 88, for example on the basis of Sections 932 ff. BGB, 56, 366 Abs. 2 HGB.
[113] BGH (16.06.1953) NJW 1954, 202.
[114] Kindhäuser, '§ 266 Untreue' (note 7) marginal number 87.
[115] Kindhäuser, '§ 266 Untreue' (note 7) marginal number 92.
[116] Wittig, '§ 266 Untreue' (note 101) marginal number 18a.2.
[117] Wittig, *Wirtschafsstrafrecht* (note 98) marginal number 34.
[118] Perron, '§ 266 Untreue' (note 33) marginal number 16.

time implies the acceptance of a product (Sections 377 and 378 HGB) or in cases where the silence of a bank means acceptance of the balance of an account.[119] The court has considered as *Missbrauch* the inaction of a lawyer leading to a claim being time barred,[120] or a bailiff's failure to declare that the debtor hid valuable real estate.[121]

3.3. Treubruch alternative (breach of trust)

3.3.1. Perpetrator – Duty to safeguard the financial interests of another

Section 266 describes the perpetrator as a person who has "the duty to safeguard the financial interests of another incumbent upon him by reason of statute, commission of a public authority, legal transaction or fiduciary relationship"[122] (*Vermögensbetreuungspflicht*).

3.3.1.1. Sources

The definition of the perpetrator of the *Treubruch* modality enumerates four possible sources, from which stem the duty to safeguard the financial interests of another. The first three – namely statute, commission of a public authority and legal transaction – are identical to the ones mentioned in the definition of the *Missbrauch* alternative and should be understood in the same way. The power to administer assets of another or to make binding agreements for another is linked to the duty of the empowered person to safeguard the financial interests of the principal, thus persons who could be perpetrators of the *Missbrauch* alternative also fall into the scope of *Treubruch*.[123] However the *Treubruch* modality is broader, since there exist types of functions or contracts, which entail this duty, but without allowing the making of

[119] Seier, 'Untreue' (note 5) marginal number 73.
[120] BGH (11.11.1982) NJW 1983, 461-462, 461; Heger, '§ 266 StGB Untreue' (Lackner/ Kühl) (note 54) marginal number 6.
[121] RGSt (Entscheidungen des Reichsgerichtes in Strafsachen) 71, 31ff cited after: Seier, 'Untreue' (note 5) marginal number 74.
[122] „*kraft Gesetzes, behördlichen Auftrags, Rechtsgeschäfts oder eines Treueverhältnisses obliegende Pflicht, fremde Vermögensinteressen wahrzunehmen*".
[123] Seier, 'Untreue' (note 5) marginal number 130.

binding agreements for the principal. The list of categories of these functions is long, the existence of the duty in relation to certain types of persons is subject to debate, and enumerating them all would go beyond the scope of this study.[124] Since most of the managers were already included within the scope of *Missbrauch*, the main category - which will be added here and whose liability is possible only under *Treubruch* - are members of the supervisory board (*Aufsichtsrat*) in GmbH or AG.[125]

The fourth possible source of duty is a fiduciary relationship (*Treueverhältnis*). This category allows the comprisal of different types of relationships, in which the perpetrator manages the interests of another person, but without a formal granting of power to him through a statute, a commission of a public authority or a legal transaction.

In particular four types of situations are foreseen by this category. The first group includes situations, in which the source of power turned out to be invalid.[126] This might be the case if the management of a company has been nominated by an invalid decision, for example in case of an AG in which the management board (*Vorstand*) has been nominated by the irregularly appointed supervisory board, and despite that fact (or possibly not being aware of that) the management exercises its functions normally.[127] The second category comprises situations where the perpetrator's legal relationship has terminated, but he continues to exercise it assuming that this is the will of the principal.[128] The duty will only be admitted when the perpetrator continues to execute his function as such and not in cases where only some particular duties remain after the cessation of the function related to the termination of the contract.[129]

The third category of situations falling under this category concerns situations where the assets have been entrusted for a purpose which is contra bonos mores or

[124] For more information on other types of functions see for example: Dierlamm, '§ 266 Untreue' (note 1) marginal numbers 68-132.
[125] Seier, 'Untreue' (note 5) marginal number 135.
[126] Schünemann, '§ 266 Untreue' (note 10) marginal number 63.
[127] Seier, 'Untreue' (note 5) marginal number 137, Dierlamm, '§ 266 Untreue' (note 1) marginal number 163; BGH (22.09.1982) NJW 1983, 240-241.
[128] Seier, 'Untreue' (note 5) marginal number 138; See also: BGH (14.07.1955) NJW 1955, 1643-1644.
[129] Dierlamm, '§ 266 Untreue' (note 1) marginal number 164.

against the law (gesetzes- oder sittenwidrige Rechtsgeschäfte).[130] *This issue is subject to debate.* First of all, the mere fact that the perpetrator *did not perform the act (e.g. in order to bribe a public official or to speculate in a way which is against the market regulations), for which purpose the assets were entrusted, cannot in and of itself make him responsible for Untreue.*[131] *The question is under what conditions using these assets for different purposes than agreed can be punished as Untreue. The majority opinion accepts that this category of situations is also a source of duty* to safeguard the financial interests of another.[132] This opinion is supported by the argument that there is no lawless area, where the property is not protected, and this protection remains in spite of the origin and the use of entrusted assets.[133] The minority view denies protection through *Untreue* in such cases by pointing out that the lack of protection of property is not at stake, and that the real question is whether property is worth being protected by means of criminal law in such cases. In view of Sections 73 ff. StGB, which foresee the confiscation of anything obtained in order to commit a crime, it would be illogical to protect the owner of property that is supposed to be confiscated. As *Untreue* might not be the right qualification in this view, money laundering (§ 261 StGB) should be applied instead.[134] Nevertheless liability for *Untreue* is still possible in cases where the perpetrator has the duty to safeguard the financial interests of another, but only a particular agreement within this relationship is against the law (e.g. where the owner and the perpetrator agree that the latter will use the entrusted funds in order to finance the acquisition of falsified banknotes). His duty pertains as to the entrusted assets in general and he can be responsible for *Untreue*, if he uses them for a private purpose.[135]

The fourth category concerns *de facto* management, which will be analysed in the section on managers of companies and excessive risk-taking (3.4).

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[130] BGH (17.11.1955) NJW 1956, 151-153; BGH (19.01.1965) NJW 1965, 770-772; BGH (06.12.1983) NJW 1984, 800-801.
[131] Wittig, '§ 266 Untreue' (note 101) marginal number 27; Dierlamm, '§ 266 Untreue' (note 1) marginal number 166.
[132] Dierlamm, '§ 266 Untreue' (note 1) marginal number 167.
[133] Dierlamm, '§ 266 Untreue' (note 1) marginal number 167. See also Schünemann, '§ 266 Untreue' (note 10) marginal number 64.
[134] Kindhäuser, '§ 266 Untreue' (note 7) marginal numbers 41-42; Dierlamm, '§ 266 Untreue' (note 1) marginal number 168.
[135] Kindhäuser, '§ 266 Untreue' (note 7) marginal number 42.

3.3.1.2. Duty

The expression "duty to safeguard the financial interests of another" is as such very wide and only through restrictive interpretation by the jurisprudence and the doctrine have its boundaries been shaped toward compliance with the principle of legality.[136] Not every duty to not act in a way which would infringe the financial interests of another person can turn the person having such a duty into a potential perpetrator of *Untreue*.[137] The German doctrine and jurisprudence have developed a series of criteria which qualify a relationship as a "duty" in the sense of Section 266. These criteria are: the perpetrator must be acting in the interests of another person; safeguarding someone else's interests should be at the core of his relationship with the principal; and, while executing it, he would be granted some independence.

3.3.1.2.1. Someone else's interests

This criterion requires that the relationship between the perpetrator and the principal is of such a nature that the perpetrator is supposed to take care of the principal's interests.[138] In other words, it must serve the interests of another person (*Fremdnützigkeit*).[139] This requirement excludes from the scope of the offence situations, in which there exist contractual obligations, but the parties act mainly in their own interests (for instance, contracts of sale or loan).[140]

3.3.1.2.2. Core duty

The second criterion requires that the duty to safeguard the financial interests of another person or to somehow represent his interests is at the core of the relationship between the principal and the perpetrator and does not constitute mere

[136] Wittig, *Wirtschafsstrafrecht* (note 98) marginal number 94.
[137] Wittig, *Wirtschafsstrafrecht* (note 98) marginal number 95.
[138] Kindhäuser, '§ 266 Untreue' (note 7) marginal number 43.
[139] BGH (15.06.1976), *Goltdammer's Archiv für Strafrecht* 1977, 18-19.
[140] Wittig, *Wirtschafsstrafrecht* (note 98) marginal number 97.

accessory obligations.[141] This requirement is meant to guarantee that *Untreue* does not become a tool to punish every failure to honour contractual obligations.[142]

This issue is quite clear as to bilateral contracts (*Synallagmatischer Verträge*), e.g. the contract of sale, where both parties have certain obligations that have an impact on each other's financial interests, but they are acting for their own good, without taking responsibility for another's financial interests. If their action causes damage to another's property, the latter is damaged 'from outside', not 'from inside'. The obligation to act in good faith (§ 242 BGB) or duties to avoid damage to another party are not enough to constitute the duty required for the offence.[143]

On the basis of this criterion the following relationships are in principle considered not to amount to the level of the duty to safeguard the financial interests of another in the sense of §266 (some of them could already be excluded with the previous requirement): a contract of sale, even including a title retention clause, a contract for work and labour (*Werkvertrag*), an employment contract (*Arbeitsvertrag*), and a loan (*Darlehen*).[144] The opposite is true, however, if the contract is designed in a way that gives the perpetrator power of attorney (e.g. an employment contract containing such a clause, or a contract of sale in the form of commission sale).[145]

3.3.1.2.3. Independence

The third criterion shaping the understanding of the duty to safeguard the financial interests of another in the sense of Section 266 requires that the perpetrator, while managing the interests of the principal, have at least a certain degree of independence in taking the decisions (*Selbstständigkeit*).[146] This requirement is essential in determining the position of the perpetrator in the sense that it eliminates

[141] Perron, '§ 266 Untreue' (note 33) marginal numbers 23-28; BGHSt (30.10.1985) NStZ 1986, 361-362; BGH (04.11.1988) NStZ 1989, 72-73; BGHSt (22.05.1991) NJW 1991, 2574-2575.
[142] Wittig, *Wirtschafsstrafrecht* (note 98) marginal number 104; BGH (03.05.1978) NJW 1978, 2105-2107, 2106f.
[143] Dierlamm, '§ 266 Untreue' (note 1) marginal number 65, Kindhäuser, '§ 266 Untreue' (note 7) marginal number 45.
[144] Kindhäuser, '§ 266 Untreue' (note 7) marginal number 45.
[145] Kindhäuser, '§ 266 Untreue' (note 7) marginal number 46.
[146] BGH (11.12.1957) NJW 1960, 53-54, 53; BGH (03.08.2005) NStZ 2006, 38-39, 39; BGH 22.05.1991 NJW 1991, 2574-2575, 2574; Schünemann, '§ 266 Untreue' (note 10) marginal number 82-85.

from the scope of the offence those types of relationship where the person is only "the extended arm of the principal",[147] while the latter is not losing control of his affairs and thus is not in need of criminal law protection.[148] The necessity of this requirement has also been confirmed by the BVerfG, who required that the perpetrator have a "certain margin of discretion".[149] Although common agreement exists that this criterion is necessary, there is no agreement as to its definition.[150]

It is without question that merely "mechanical" tasks or activities are excluded from the scope of the offence in view of this criterion (e.g. courier, messenger, or secretarial work).[151] The debate concerns essentially whether to include into the scope of possible perpetrators of *Untreue* persons collecting, administering and delivering money, e.g. cashiers, waiters.[152] A narrower view excludes these persons for not having some margin of discretion.[153] According to this interpretation, persons who receive precise orders are not included in the scope of this offence, such as a secretary requested to buy a flight ticket or a person working at the counter of a train station.[154] A broader view tends to include them under certain additional conditions (e.g. if their task comprises issuing receipts or giving change).[155] A theory that has been adopted by the jurisprudence in order to assess the level of discretion considers that it is sufficient if "the perpetrator had to act in a certain way, but was also able to act differently".[156]

The discussions on the criteria defining the duty to safeguard the financial interests of another - the dimensions of which could only be sketched out above - are of limited relevance to the liability of the managers in this study since, as will be

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[147] "*der verlängerte Arm des Vermögensinhabers*" (Kindhäuser, '§ 266 Untreue' (note 7) marginal number 47).
[148] Kindhäuser, '§ 266 Untreue' (note 7) marginal number 47.
[149] "*... so dass der Verpflichtete* [...] *einen gewissen Spielraum, eine gewisse Bewegungsfreiheit oder Selbstständigkeit hat* " BVerfG (23.06.2010) NJW 2010, 3209-3221 at [108].
[150] Dierlamm, '§ 266 Untreue' (note 1) marginal numbers 52-63.
[151] Wittig, '§ 266 Untreue' (note 101) marginal number 32.
[152] Dierlamm, '§ 266 Untreue' (note 1) marginal number 54; BGH (21.09.1988) wistra 1989, 60-61, 61; BGH (11.12.1957) NJW 1960, 53-54, 53; BGH (26.05.1983) NStZ 1983, 455.
[153] Wittig, '§ 266 Untreue' (note 101) marginal number 32. He should be allowed to act at least in two different ways: BGH (11.02.1982) NStZ 1982, 201; BGHSt (22.05.1991) NJW 1991, 2574-2575, 2574.
[154] Kindhäuser, '§ 266 Untreue' (note 7) marginal number 50.
[155] Dierlamm, '§ 266 Untreue' (note 1) marginal number 54; BGH (21.09.1988) wistra 1989, 60-61, 61; BGH (11.12.1957) NJW 1960, 53-54, 54; BGH (26.05.1983) NStZ 1983, 455.
[156] "*der Betreuer so handeln muss oder auch anders handeln darf*" Kindhäuser, '§ 266 Untreue' (note 7) marginal number 48, BGH (11.02.1982) NStZ 1982, 201; BGH (14.01.1986) StV 1986, 203-204.

demonstrated below, they fulfil these criteria even if the narrower view on independence is adopted.

3.3.2. Conduct

A person fulfilling the requirements described above commits *Untreue* in form of the *Treubruch* alternative by breaching the duty to safeguard the financial interests of another (*Verletzung der Vermögensbetreuungspflicht*) in any other way than by committing *Missbrauch*.

An important issue, which will determine whether what the perpetrator did can be considered as breach of this duty, concerns the standards applicable to determine the fulfilment of the duty. These standards can be provided for by the same sources establishing the relationship at the basis of the duty: a statute (see for example Sections 1639ff, 1664, 1802ff, 2216ff BGB)[157], a commission of a public authority or a contract. If none of these sources provide for more precise instructions, they should be sought in rules setting the general standards for certain types of relationship, such as 'reasonable care' (*übliche Sorgfalt*),[158] 'care of a prudent mercantile trader' (*Sorgfalt eines ordentlichen Kaufmanns*),[159] 'care of a prudent businessman' (*Sorgfalt eines ordentlichen Geschäftsmanns*),[160] or 'care of a prudent and conscientious manager' (*die Sorgfalt eines ordentlichen und gewissenhaften Geschäftsleiters*)[161].[162]

Only the breach of the duty that constitutes the special position of the perpetrator towards the owner's property can be the basis for responsibility for *Untreue* (*Sachlich-Inhaltlich Zusammenhang*).[163] Furthermore, not every rule that the perpetrator breaches may lead to criminal liability, but only of those rules which aim at protecting property.[164] Moreover, the breach must concern the scope of

[157] Kindhäuser, '§ 266 Untreue' (note 7) marginal number 63.
[158] Kindhäuser, '§ 266 Untreue' (note 7) marginal number 63, citing the following provisions: §§ 276, 665, 677, 27 Abs 3, 86, 713 BGB.
[159] § 347 HGB.
[160] § 43 Abs. 1 GmbHG.
[161] § 93 Abs. 1 AktG.
[162] The list in this paragraph after: Kindhäuser, '§ 266 Untreue' (note 7) marginal number 63.
[163] Dierlamm, '§ 266 Untreue' (note 1) marginal number 185; BGHSt (30.10.1985) NStZ 1986, 361-362, 362; OLG Hamm (20.01.2000) NStZ-RR 2000, 236-237, 237.
[164] Wittig, '§ 266 Untreue' (note 101) marginal number 35b; Kindhäuser, '§ 266 Untreue' (note 7) marginal number 63.

competences of the perpetrator. Therefore, for example, if an angry manager throws his mobile phone on the floor and destroys it, he is not liable for *Untreue*.[165]

In the case of *Treubruch* the duty can be breached not only through an act which has legal consequences and which is an expression of will, but also through material acts that are not legal acts. The following behaviour can be cited as examples: taking money from the cash till,[166] and the combination or intermixture of movable things that will lower their value.[167] However not every breach of duty will constitute *Treubruch*; it must be related to the scope of functions (*Aufgabenkreis*) of the perpetrator.[168]

Moreover, in cases of granting credits and sponsoring, the First Senate of the Federal Court of Justice required that the breach be '"severe" (*gravierend*)[169]. The reasoning behind this decision is to differentiate between a breach of a duty, which constitutes a mere violation of civil law or company law rules, and a violation which would lead to criminal liability.[170] Therefore it is possible to speak about the asymmetrical "accessoriness" of criminal provisions to civil or company law provisions since not every breach of duty will constitute a *Treubruch* in the sense of §266, whereas every *Treubruch* will necessarily entail a violation of civil or company law duties.[171]

This solution resulted in controversy. The Third Senate of the BGH considered that the First Senate had added a requirement to the definition of the offence which had not been provided by the legislator, and denied the necessity that the breach of duty be 'severe'.[172] However, this criticism was rejected by the BVerfG in a recent

[165] Urs Kindhäuser, *Strafrecht. Besonderer Teil II*, 4th edition (Baden Baden: Nomos, 2005) p. 41.
[166] BGH (17.11.1955) NJW 1956, 151-153 151f.; BGH (11.12.1957) NJW 1960, 53-54, 53.
[167] Kindhäuser, '§ 266 Untreue' (note 7) marginal number 64.
[168] Kindhäuser, '§ 266 Untreue' (note 7) marginal number 62.
[169] Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 53; BGH (15.11.2001) NJW 2002, 1211-1216, 1214; BGH (06.12.2001) NJW 2002, 1585-1589,1587; also in LG Düsseldorf (22.07.2004) NJW 2004, 3275-3287, 3280. See also BGH (13.04.2011) NJW 2011, 1747-1752, 1749 at [30].
[170] Kindhäuser, '§ 266 Untreue' (note 7) marginal number 75a.
[171] Dierlamm, '§ 266 Untreue' (note 1) marginal number 174, Klaus Lüderssen, 'Gesellschaftsrechtliche Grenzen der strafrechtlichen Haftung des Aufsichtsrats', in: Dieter Dölling, *Jus Humanum. Grundlagen des Rechts und Strafrechts, Festschrift für Ernst-Joachim Lampe* (Berling: Duncker & Humblot, 2003), pp. 727-742, p. 729; Wolfgang Wohlers, 'Die strafrechtliche Bewältigung der Finanzkrise am Beispiel der Strafbarkeit wegen Untreue', *ZStW*, 123 (2011), pp. 791-815, 801.
[172] Kindhäuser, '§ 266 Untreue' (note 7) marginal number 75b, Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 54 – BGH (21.12.2005) NJW 2006, 522-531, 526f.

judgment which re-confirmed the requirement,[173] and was welcomed by certain authors.[174]

It remains unclear whether this requirement will remain within the structure of the offence, in particular as to cases other than granting credits and sponsoring. It has been pointed out that, while in these two domains, its use may be justified to curb excessive criminalisation in view of a particularly broad discretion of the managers, the need to use it in other areas may be unnecessary and doubtful in the absence of legislative expression of such a requirement.[175] Moreover, the use of this clause may also have limited impact, since it is as such rather vague.[176]

Untreue in both its modalities can be committed by omission.[177] Seier gives the following examples of such cases: failure to prevent existing danger; neglect of control duties; omission to insure entrusted property; allowing valuable products or real estate to decay; lack of proper bookkeeping; failure to declare a claim into the insolvency estate; missing an opportunity to increase the assets.[178] Silence which leads to the prolongation of a contract is to be regarded as *Missbrauch*; failing to terminate a(n) (unfavourable) contract should be analysed as *Treubruch*.[179] In view of these rules, a manager who is helping another to commit *Untreue* by turning a blind eye to the latter's actions and against his duty could also be criminally liable.

The German doctrine divides offences that can be committed by omission into two categories depending on whether they expressly provide for such a possibility (genuine omission offences – *echte Unterlassungsdelikte*) or the offence punishes causing certain result and the offender was supposed to prevent this result (derivative omission offences – *unechte Unterlassungsdelikte*).[180] The legal basis for punishing genuine omission offences is the definition of a concrete offence. For the derivative omission offences the legal basis combines the provision on the offence in question

[173] BVerfG (23.06.2010) NJW 2010, 3209-3221, 3215 at [112].
[174] E.g. Dierlamm, '§ 266 Untreue' (note 1) marginal number 176.
[175] Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 55.
[176] Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 55; Kindhäuser, '§ 266 Untreue' (note 7) marginal number 75b.
[177] Seier, 'Untreue' (note 5) marginal number 74.
[178] Seier, 'Untreue' (note 5) marginal number 75.
[179] Seier, 'Untreue' (note 5) marginal numbers 72-74; Perron, '§ 266 Untreue' (note 33) marginal number 35a.
[180] Michael Bohlander, *Principles of German Criminal Law* (Oxford and Portland, Oregon: Hart, 2009) p. 40.

and Section 13 (1) StGB. For the latter category of omission offences the German legislator provided the option to reduce punishment (Section 13 (2)) in order to accommodate situations where omission would constitute a less dangerous occurrence of the offence. By contrast, genuine omission offences do not benefit from this reduction, since they express the harm that the legislator aimed to prevent while criminalising such conduct.[181]

The dominant view considers *Untreue* to be a genuine omission offence, since its description comprises cases that are committed through inaction.[182] However, it is considered that the reduction of punishment provided for in Section 13 (2) can be applied as well, since the duty described in the definition of the offence is very similar to the one described in Section 13 (1). Therefore a refusal to apply Section 13 (2) would be unjust.[183]

3.4. Managers of companies and excessive risk-taking

3.4.1. Senior management in GmbH

The manager(s) (*Geschäftsführer*) of a limited liability company (*Gesellschaft mit beschränkter Haftung* - GmbH) have the duty to safeguard their company's financial interests and they can be liable for *Untreue*, if they breach this duty and cause damage or risk-damage to the company.[184] The managers manage the company and represent it in transactions with third parties.[185] Therefore they can be liable for both modalities of *Untreue*. The duty of the managers is, in particular, enshrined in

[181] Wolfgang Wohlers, Karsten Gaede, '§ 13 Begehen durch Unterlassen', in: Urs Kindhäuser, Ulfrid Neumann, Hans-Ullrich Paeffgen (eds.), *Strafgesetzbuch*, 4th edition (Baden-Baden: Nomos, 2013), marginal numbers 65-66.
[182] Seier, 'Untreue' (note 5) marginal number 76; Waßmer, '§ 266 Untreue' (note 13) marginal number 11; Schünemann, '§ 266 Untreue' (note 10) marginal number 202.
[183] Dierlamm, '§ 266 Untreue' (note 1) marginal number 142; Seier, 'Untreue' (note 5) marginal number 78. The BGH points out in one judgment that *Untreue* is a particular offence in the context of the division between genuine and derivative omission offences. The latter category is based on a duty to prevent certain result. As regards *Untreue*, such duty is a condition defining the perpetrator of the offence and it can be breach both by a positive act and by an omission. Therefore, regardless if one opts for applying Section 13 (1) StGB or not, the *Untreue* by omission resembles the category of derivative omission offences and thus the benefits of Section 13 (2) StGB should be applicable (See: BGH (21.07.1989) NJW 1990, 332-333, 333).
[184] Seier, 'Untreue' (note 5) marginal number 311. BGH (27.08.2010) NJW 2010, 3458-3464.
[185] Mads Andenas, Frank Wooldridge, *European Comparative Company Law* (Cambridge: Cambridge University Press, 2009) p. 301.

Sections 35 and 43 GmbHG.[186] Section 43 sets the standard, according to which they should "manage the company with the degree of care and skill of a prudent businessman."[187] Further duties may be stipulated either in the law, in the service agreements, or in resolutions of general meetings.[188] While representing the company the managers are obliged to observe the restrictions provided in the articles of the company or by resolutions of shareholders (Section 37 (1) GmbHG). However these limitations are not binding in relation to the third parties, unless the third party was aware of these restrictions (Section 37 (2) GmbHG).[189] This discrepancy may result in liability for *Missbrauch*, if the managers conclude an agreement in disregard of these limitations.[190]

According to Section 44 GmbHG the above-described rules concerning the managers apply also to their deputies (*stellvertretende Geschäftsführer*).[191]

In a GmbH a supervisory board may also be established and in certain cases its establishment is obligatory.[192] In many aspects the rules concerning this board follow the analogous provisions which apply to the AG, where the supervisory board is always obligatory. In particular concerning the standard of care in the execution of the board members' duties the law refers to the statute on the AG (Section 52 (1) GmbHG), which will be described below.

Shareholders (*Gesellschafter*) of a GmbH are not bound by the duty to safeguard the company's interests in the sense of Section 266 StGB, regardless of the proportion of shares a shareholder owns. Nonetheless a shareholder might become liable for *Untreue* for his acts performed as a *de facto* manager, but the scope of his duties will be defined according to the rules for this category of executives (see below).[193]

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[186] Dierlamm, '§ 266 Untreue' (note 1) marginal number 92.
[187] Andenas, Wooldridge, *European Comparative Company Law* (note 185) p. 301; § 43 (1) GmbHG *Die Geschäftsführer haben in den Angelegenheiten der Gesellschaft die Sorgfalt eines ordentlichen Geschäftsmannes anzuwenden*.
[188] Andenas, Wooldridge, *European Comparative Company Law* (note 185) p. 301.
[189] Andenas, Wooldridge, *European Comparative Company Law* (note 185) p. 301.
[190] Kindhäuser, '§ 266 Untreue' (note 7) marginal number 86; Wittig, *Wirtschafsstrafrecht* (note 98) marginal number 33.
[191] Dierlamm, '§ 266 Untreue' (note 1) marginal number 92.
[192] Andenas, Wooldridge, *European Comparative Company Law* (note 185) p. 304.
[193] Dierlamm, '§ 266 Untreue' (note 1) marginal number 97.

Particular problems occur in cases concerning one-man GmbHs, in which the sole shareholder is also the manager of the company. The majority view is that such companies should be treated in the same way as any other GmbH.[194] Although earlier jurisprudence considered that the position of such a sole shareholder and manager is no different to that of any other GmbH manager,[195] it has been suggested that the doctrine on consent ought to be taken into account.[196] Accordingly the criminal liability for *Untreue* would be limited only to acts, which affect the nominal capital (*Stammkapital*), the liquidity or survival of the company.[197] However this solution has been also criticised as too formalistic, since it does not reflect the reality of company life, where shareholders are allowed to decide on the life and death of the company, while criminalising life-threatening acts performed as sole managers.[198]

De facto managers (*faktische Geschäftsführer*) are also among potential perpetrators, regardless of whether their status is due to the fact that their nomination was void or in cases where the person intentionally does not want to officially undertake the managerial function, however he assumes control of the company.[199] His liability for *Untreue* will be necessarily limited to the *Treubruch* modality.[200] In order to assess if a person can be considered a *de facto* manager the intensity with which he executes the management function, the timespan as well as whether he is in practice considered a manager in relation to third parties should be taken into account.[201] The so-called 'strawperson' (*Strohmann*) who is only formally the manager, but does not execute this function in practice, will not be held criminally liable unless he effectively uses the powers formally granted to him.[202]

[194] Seier, 'Untreue' (note 5) marginal number 324.
[195] BGH (29.05.1987) NJW 1988, 1397-1400, 1398f.
[196] Seier, 'Untreue' (note 5) marginal number 324, see also: BGH (20.12.1994) NStZ 1995, 185-186, 185.
[197] BGH (20.12.1994) NStZ 1995, 185-186; BGH (24.08.1988) NJW 1989, 112-113. See also the analysis of the problem of consent below in section 6.1. Consent of the victim.
[198] Seier, 'Untreue' (note 5) marginal number 325.
[199] Seier, 'Untreue' (note 5) marginal number 299, BGH (24.06.1952), BeckRS 1952, 31196211.
[200] Schmid, '§31 Treupflichtverletzungen' (note 40) marginal number 100.
[201] Dierlamm, '§ 266 Untreue' (note 1) marginal number 94; See also: Alfred Dierlamm, 'Der faktische Geschäftsführer im Strafrecht - ein Phantom?', *NStZ*, 1996, pp. 153-157.
[202] Schünemann, '§ 266 Untreue' (note 10) marginal number 246; Seier, 'Untreue' (note 5) marginal number 305.

3.4.2. Senior management in AG

Within a public limited company (*Aktiengesellschaft*, AG) members of the management board (*Vorstand*) have the duty to safeguard the financial interests of the AG. Since they have the right to take binding decisions in its name, they can be liable for both *Missbrauch* and *Treubruch* modalities.[203] Their internal duties are shaped in particular by Sections 76 and 93 AktG. In particular Section 93 (1) sets the standard for assessment of management duties by providing that the board members must apply in their management activities the diligence of a prudent (*ordentlich*) and conscientious (*gewissenhaft*) manager.[204] This standard should be applied to all managerial responsibilities and is generally considered to be objective in the sense that it does not take into account individual abilities and shortcomings.[205] It is not an ordinary businessman who is the model person here, but "a person in a leading and responsible position in a specific enterprise".[206] Section 93 (1) clarifies however that a board member does not breach his duty of care if, while taking the managerial decision, he could reasonably consider that he is acting on the basis of adequate information and for the benefit of the company.[207] According to Section 78 (1) AktG the management board represents the company in relations with third parties. The members of the board might be bound towards the company by limitations of this power of representation (Section 82 (1) AktG). In the same way as in the case of the empowerment of managers of a GmbH, these limitations may create discrepancies between what the management can do and what the management is allowed to do, and thus the members of this board are potential perpetrators of the *Missbrauch* alternative.[208]

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[203] Seier, 'Untreue' (note 5) marginal number 226, e.g.: BGH (06.12.2001) NJW 2002, 1585-1589; BGH (27.02.1975) NJW 1975, 1234-1236; BGH (27.08.2010) NJW 2010, 3458-3464.

[204] Alternative formulation: "Care of a careful and conscientious businessman" – Andenas, Wooldridge, *European Comparative Company Law* (note 185) p. 310. §93 Abs 1 Satz 1 AktG: "*Die Vorstandsmitglieder haben bei ihrer Geschäftsführung die Sorgfalt eines ordentlichen und gewissenhaften Geschäftsleiters anzuwenden*."

[205] Andenas, Wooldridge, *European Comparative Company Law* (note 185) p. 310.

[206] Andenas, Wooldridge, *European Comparative Company Law* (note 185) p. 310.

[207] §93 Abs 1 Satz 2 AktG: "*Eine Pflichtverletzung liegt nicht vor, wenn das Vorstandsmitglied bei einer unternehmerischen Entscheidung vernünftigerweise annehmen durfte, auf der Grundlage angemessener Information zum Wohle der Gesellschaft zu handeln*."

[208] Kindhäuser, '§ 266 Untreue' (note 7) marginal number 86.

Similarly as regards *de facto* managers of a GmbH, criminal liability for *Untreue* is also possible for *de facto* members of the management board.[209]

Members of the supervisory board (*Aufsichtrat*) of an AG can be also liable for *Untreue*, however only for its *Treubruch* modality, since the board does not make binding agreements.[210] A supervisory board member can be liable for *Untreue* only in respect of its main function, which is the monitoring of the management board's decisions (Section 111 (1) AktG). Hence, members of the board who breach other duties, as for example confidentiality duties or by accepting forbidden premiums will not be liable for *Untreue*.[211] Although according to Section 116 AktG the standard of care provided for the management board should be used accordingly for the members of the supervisory board, it is in practice less demanding and adapted to the functioning of this board, which is due to the different scope of duties of this body and to the fact that these activities are generally performed as an auxiliary occupation.[212] For this reason members of the board are allowed in principle to trust the documents provided by the managerial board and are not obliged to perform their own inquiries.[213] They could be liable for *Untreue* for example, if they fail to reverse or they expressly accept a decision of the management board, which is damaging for the company.[214] However they do not breach their duty if they fail to report to the police an offence they deem to have been committed by one or more members of the management board.[215]

Only exceptionally does the supervisory board perform tasks of a managerial nature. In particular this is the case for the appointment and dismissal of members of the management board and for setting their remuneration (Section 87 AktG), as well as approving certain transactions as provided by Section 111 (4) Sentence 2 AktG. These decisions are to be assessed according to the standard of duty described above (diligence of a prudent and conscientious manager) and, for instance, the board

[209] Waßmer, '§ 266 Untreue' (note 13) marginal number 49. On the problem of *de facto* managers of limited companies see also: Bernd Groß, *Die strafrechtliche Verantwortlichkeit faktischer Vertretungsorgane bei Kapitalgesellschaften* (Berlin: Duncker & Humblot, 2007).
[210] Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 114.
[211] Seier, 'Untreue' (note 5) marginal number 236.
[212] Seier, 'Untreue' (note 5) marginal number 235.
[213] Dierlamm, '§ 266 Untreue' (note 1) marginal number 79; Lüderssen, 'Gesellschaftsrechtliche Grenzen…' (note 171) p. 730-731.
[214] Seier, 'Untreue' (note 5) marginal number 236.
[215] Dierlamm, '§ 266 Untreue' (note 1) marginal number 79.

members could be liable for *Untreue* if they fail to approve a decision, which is profitable for the company.[216] The most extensive debate has concerned the board's task to set the management's remuneration. In the Mannesmann/Vodafone case the court had to assess criminal liability for *Untreue* of the supervisory board for granting very large bonuses, i.e. remuneration granted after the performance of the management's activity. The Regional Court of Düsseldorf considered that although the members of the supervisory board breached their duty, that breach was not 'severe' (*gravierend*).[217] This judgment would alter the structure of the offence by adding this latter criterion to the assessment of the breach of duty. However the BGH subsequently rejected this solution in its review of the judgment and considered that the additional requirement of 'severity' need not be proven.[218] These judgments prompted not only an abundant reaction from the doctrine, but also a legislative change of Section 87 AktG, which provides more detailed rules according to which the supervisory board has to set the management's remuneration, which may result in less difficulty in assessing whether the supervisory board breached their duty during this assessment.[219]

The shareholders of the AG, as persons who can in any case terminate the life of the company, are considered not to have the duty to safeguard the company's financial interests in the sense of Section 266, regardless whether they are minority or majority shareholders, provided that they do not hold office within the company with which such a duty is associated (e.g. as members of the management board or *de facto* managers).[220]

According to Section 94 AktG the rules concerning the members of the management board apply also to their deputies (*Stellvertreter von Vorstandsmitgliedern*).[221]

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[216] Seier, 'Untreue' (note 5) marginal number 236.
[217] LG Düsseldorf (22.07.2004) NJW 2004, 3275-3287, 3280ff.
[218] BGH (21.12.2005) NJW 2006, 522-531, 526f.
[219] Seier, 'Untreue' (note 5) marginal number 239; Andreas Ransiek, 'Anerkennungsprämien und Untreue - Das „Mannesmann"-Urteil des BGH', *NJW*, 2006, pp. 814-816. See also: Dierlamm, '§ 266 Untreue' (note 1) marginal numbers 267-271 and references cited there.

[220] Wittig, *Wirtschafsstrafrecht* (note 98) marginal number 124; Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 114; Seier, 'Untreue' (note 5) marginal number 243.
[221] Dierlamm, '§ 266 Untreue' (note 1) marginal number 95.

The German jurisprudence and doctrine were also confronted with the problem of how to define the scope of duty, and its breach, in the case of foreign companies such as the English Private Company Limited by shares (Ltd.), whose managers act within the scope of jurisdiction of the German criminal courts. It is considered that the rules provided by the law according to which the company was established define this duty, regardless of whether Germany company law contains equivalent rules or not.[222]

3.4.3. Other managers in GmbH and AG

In order to assess if other managers, who do not fulfil the above functions, have the duty to safeguard their company's financial interests and thus can be held liable for *Untreue*, it is necessary to verify in each case whether the conditions describing this duty are fulfilled. It must be verified that the perpetrator was in a relationship with the company requiring that he act in the interest of the company, that safeguarding this company's financial interests was the core of this relationship, and that in performing this role he enjoyed a certain degree of independence. The work contract alone does not imply the existence of a duty to safeguard the financial interests of the employer.[223] Although the position of each manager must be considered individually in concrete cases in view of the rules describing his position (whether based in the law or according to the terms of his contract), it can be assumed that the managers will in most cases fulfil these criteria. Namely the position of manager implies that the main task of the person is to act for the benefit of the company while managing its affairs. The main criterion which will decide whether a concrete manager can be held liable for *Untreue* is whether he was granted the required independence while executing this function.

For example, the jurisprudence has repeatedly held that an employee of a bank who has some management function has the duty to safeguard the bank's financial

[222] Perron, '§ 266 Untreue' (note 33) marginal number 21e; Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 116; BGH (13.04.2010) NStZ 2010, 632-635, 634.
[223] Schmid, '§31 Treupflichtverletzungen' (note 40) marginal number 117a.

interests.[224] Similarly, commercial representatives or sales agents (*Handelsvertreter*) have also been considered to have such a duty.[225]

3.4.4. Excessive risk-taking as breach of duty

The situations in which managers expose their companies to excessive risk can fall into several categories of cases treated by the German jurisprudence and analysed by the doctrine. Many of these cases would fall into the category of so-called *Risikogeschäfte* (*Risikogeschäft* in singular), which can be translated, albeit imprecisely, as 'risky business' or 'speculative transaction'. *Risikogeschäfte* are "business decisions in which it is uncertain whether they lead to a loss or to a gain",[226] or decisions which may prove to be a failure.[227] If defined as such, the *Risikogeschäfte* are a rather normal element of business life and as such are not criminalised.[228]

Such a situation becomes relevant for criminal liability if the manager, who has the duty to safeguard his company's financial interests, breaches this duty by undertaking risky business or concluding a speculative transaction and as a result the company suffers harm in the form of damage or risk-damage. The question of result in this context will be dealt with in the next section. The problem discussed here concerns the issue of when the perpetrator, while taking a risk-bearing decision breaches his duty to safeguard the company's financial interests.

The following transactions can be cited as examples of typical *Risikogeschäfte*: transactions in which one party executes its obligation immediately while the other's contribution is stretched over time,[229] speculation (for example with

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[224] Dierlamm, '§ 266 Untreue' (note 1) marginal number 82. For instance: BGH (11.01.1955) NJW 1955, 508-509; BGH (23.03.1993) wistra 1993, 222.
[225] Dierlamm, '§ 266 Untreue' (note 1) marginal number 98. OLG Koblenz (13.02.1968) MDR 1968, 779-780; OLG Hamm (12.03.1957), NJW 1957, 1041-1042; OLG Köln (20.06.1967) NJW 1967, 1923-1924.
[226] Wittig, *Wirtschafsstrafrecht* (note 98) marginal number 42: "*unternehmerische Entscheidung, bei der ungewiss ist, ob sie zu einer Vermögensminderung oder -mehrung führt*".
[227] Thomas Hillenkamp, 'Risikogeschäft und Untreue', *NStZ*, 1981, pp. 161-168, 165; Kindhäuser, '§ 266 Untreue' (note 7) marginal number 73; Waßmer, *Untreue bei Risikogeschäften* (note 24), p. 10.
[228] Kindhäuser, '§ 266 Untreue' (note 7) marginal number 73, BGH (22.11.2005) NJW 2006, 453-456, 455.
[229] Uwe Hellmann, 'Risikogeschäfte und Untreuestrafbarkeit', *Zeitschrift für Internationale Strafrechtsdogmatik* (ZIS), 2007, volume 11, pp. 433-443, 433.

financial instruments),[230] or investments in particular in longer-term projects such as research or advertising campaigns.

In order to answer the question, whether the perpetrator breaches his duty while venturing a risky transaction it is necessary to establish how much risk the person in question is allowed to take. This will result in the first place from the rules governing the internal relations between the manager and the company enshrined in the applicable law, the provisions of his contract, rules governing the execution of his duties and applicable standards of care.[231] Furthermore, it will depend on the agreement between the manager and the principal. Hence, if the principal agreed that the manager would be permitted to pursue very daring business, there is no breach of duty, even if such acts would be considered not to fulfil the normal standards of care in the given circumstances.[232] However, the agreement must comply with the rules on valid consent. Moreover the scope of possible consent may be limited as is the case for both GmbH and AG (see below 6.1 Consent of the victim), as mentioned above.[233] At the same time the principal may narrow the scope of risk which the manager is allowed to take in comparison to the standards of the business in question. In such a case, the manager would not be able to successfully claim that he fulfilled this standard and would be liable for *Untreue*.[234]

If the above sources do not provide for precise direction as to the level of risk allowed to be taken and the principal did not give any particular instructions, it is assumed that the level of allowed risk should be assessed according to the purpose of the business and standards of care typical for this type of business activity.[235] Hence in certain situations speculation will be completely forbidden. This is the case for instance for the managers of foundations or cooperatives as far as the preservation of their assets is concerned.[236] Speculation with the money of a savings bank

[230] Hellmann, 'Risikogeschäfte und Untreuestrafbarkeit' (note 229) p. 433.
[231] Perron, '§ 266 Untreue' (note 33) marginal number 20; BGH (27.02.1975) NJW 1975, 1234-1236, 1234f.; BGH (21.03.1985) wistra 1985, pp. 190-91; Fischer, *Strafgesetzbuch* (note 54) marginal number 63, Kindhäuser, '§ 266 Untreue' (note 7) marginal numbers 73 ff.
[232] Seier, 'Untreue' (note 5) marginal number 382.
[233] Seier, 'Untreue' (note 5) marginal number 382; BGH (20.12.1994) NStZ 1995, 185-186; BGH (24.08.1988) NJW 1989, 112-113.
[234] Hillenkamp, 'Risikogeschäft und Untreue' (note 227) p. 166.
[235] Perron, '§ 266 Untreue' (note 33) marginal number 20; BGH (4.02.2004), StV 2004, 424.
[236] Wittig, *Wirtschafsstrafrecht* (note 98) marginal number 43; Seier, 'Untreue' (note 5) marginal number 381; see for instance: BGH (11.10.2000) NStZ 2001, 155.

(*Sparkassen*) is also considered to be forbidden.[237] Nonetheless within the market of financial instruments, for example in undertakings dedicated to investment in commodity futures, the permitted level of risk is much higher.[238]

It is impossible to define such rules in an abstract manner, since the standard of care varies according to the type of business activity.[239] In particular it should not be implied from the mere fact that the act exposed the company to risk or that the risk materialised in damage that the perpetrator's decision was necessarily contrary to his duty.[240] The breach of duty can occur in two situations: the perpetrator omits to perform a necessary risk analysis and takes his decision intuitively or he performs such analysis but despite its suggestions ventures into risky business "like a gambler".[241] The BGH considered in the *Bundesligaskandal* case that the transaction is forbidden if "the risk of loss is more probable than the prospect of gain".[242] However this approach, although possibly correct in most situations, appears to be too restrictive as there may be situations in which it can be allowed to pursue a more daring business, as for example granting credit to enterprises in difficulty (so called *Sanierungskredite*) or to victims of a flood disaster.[243] A definition which would also encompass such situations would consider it a breach of duty where the transaction, all circumstances taken into account, cannot be economically acceptable or justified.[244]

A particular area where *Risikogeschäfte* take place is the banking industry with granting credit as a particular example of such a transaction. Criminally relevant activities within banking activities may occur in at least three contexts: firstly where the client is the perpetrator and the bank is a victim; secondly where a representative of the bank is a perpetrator and the client is a victim and thirdly where it is the bank

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[237] Wittig, *Wirtschafsstrafrecht* (note 98) marginal number 43. See e.g. BayObLG (20.07.1965) BayOblGSt 1965, 88-91.
[238] BGH (06.12.1983) NJW 1984, 800-801, 801.
[239] Waßmer, *Untreue bei Risikogeschäften* (note 24), p. 28.
[240] Wittig, *Wirtschafsstrafrecht* (note 98) marginal number 44; BGH (21.03.1985) wistra 1985, 190-191.
[241] Seier, 'Untreue' (note 5) marginal number 385.
[242] BGH (27.02.1975) NJW 1975, 1234-1236, 1236: "*die Gefahr eines Verlustgeschäftes wahrscheinlicher ist als die Aussicht auf Gewinnzuwachs*".
[243] Seier, 'Untreue' (note 5) marginal number 385.
[244] Perron, '§ 266 Untreue' (note 33) marginal number 20; Waßmer, *Untreue bei Risikogeschäften* (note 24), p. 73ff.; Seier, 'Untreue' (note 5) marginal number 385. See also critically: Schünemann, '§ 266 Untreue' (note 10) marginal number 116.

which is the victim of its representative.[245] This study will focus only on the third of these contexts.

The following representatives of the bank are *inter alia* considered as potential perpetrators of *Untreue*: branch managers (*Filialleiter*), independently acting credit men or credit analysts (*eigenverantwortlich handelnde Kreditsachbearbeiter*), senior executives (*leitende Angestellte*) as well as control personnel such as internal auditors or agents or members of supervision bodies.[246]

As far as the breach of duty is concerned the following situations are typically considered to breach this duty in terms required by Section 266 StGB: breaching the legal or internal rules on credit limitations,[247] transactions accomplished without the necessary procedural steps (e.g. without necessary agreement of another person), breaches of instructions received from senior management, and granting credits for which the client's credibility was insufficiently verified.[248]

In order to establish whether the representative of the bank can be liable for *Untreue* in the case of erroneously granted credits it is necessary to verify whether he breached his duty to safeguard the financial interests of the bank. This can definitely not be inferred from the success or the failure of the transaction as such, but rather from the assessment concerning the fulfilment of different obligations imposed by the legal framework and internal rules of the bank, in particular the Banking Act (*Gesetz über das Kreditwesen* - KWG).[249] Not only the rules as such shoulod be taken into account but also their application, which means that if the banker is allowed in exceptional cases to disregard these norms, it ought to be considered within the assessment of his criminal liability as well.[250]

In general the representative of the bank who decides upon granting the credit has to be sufficiently informed in order to correctly assess the risk of loss and the

[245] Seier, 'Untreue' (note 5) marginal number 267.
[246] This list reproduced after: Seier, 'Untreue' (note 5) marginal number 272.
[247] BGH (21.03.1985) wistra 1985, pp. 190-91, 191.
[248] After Seier, 'Untreue' (note 5) marginal number 271; Hillenkamp, 'Risikogeschäft und Untreue' (note 227) p. 166. In the context of banking, see: Susanne Martin, *Bankuntreue* (Berlin: Duncker & Humblot, 2000) p. 87-97 with abundant jurisprudence cited there.
[249] Perron, '§ 266 Untreue' (note 33) marginal number 20a; Seier, 'Untreue' (note 5) marginal number 273.
[250] Seier, 'Untreue' (note 5) marginal number 273.

chances of profit.[251] Since the banking law contains specific rules on how to make such assessments, the question has arisen of the impact of the breach of one of such rules for the general assessment of the breach of duty. This issue was subject to several judgments of the BGH, in particular in the context of Section 18 KWG, which sets a higher standard for the gathering of information about the client by the bank in the context of large loans.[252] The BGH considered that although a breach of Section 18 KWG rules can signify a breach of duty in the sense of Section 266 StGB, the banker has the duty to perform an overall assessment of the client's credibility. This means that even while fulfilling Section 18 KWG requirements he might breach his duty to safeguard the bank's financial interest, but also that even if he breaches this provision, he might not be criminally liable if the assessment had been correctly performed in a different way.[253] In a subsequent judgment the BGH continued this line by confirming that if certain information, which was supposed to be obtained, is missing, there is no breach of duty if it was substituted by different yet equivalent information.[254] The court considered that if the obligation to gather information, such as the one established in Section 18 KWG, is breached in a particularly serious way (*gravierend*) it constitutes in any case a breach of duty in terms of Section 266 StGB.[255]

Credits granted to enterprises in difficulties (so called *Sanierungskredite*) can imply a much higher level of risk than loans granted in normal circumstances. It is however allowed to take that risk if the credit is granted in the framework of a plan to allow the enterprise to regain stability, and if the existence of the bank would not be threatened. The purpose of such a loan is so that older claims on that enterprise, which it is temporarily unable to repay, may also be recovered in future.[256] Such credit may be considered in such circumstances "the least evil" and thus a higher level of risk is allowed.[257]

[251] Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 69.
[252] Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 70.
[253] BGH (06.04.2000) NJW 2000, 2364-2366, 2365.
[254] BGH (15.11.2001) NJW 2002, 1211-1216, 1214.
[255] BGH (15.11.2001) NJW 2002, 1211-1216, 1214; Kindhäuser, '§ 266 Untreue' (note 7) marginal number 77.
[256] Dierlamm, '§ 266 Untreue' (note 1) marginal number 239; BGH (15.11.2001) NJW 2002, 1211-1216, 1215.
[257] Dierlamm, '§ 266 Untreue' (note 1) marginal number 241.

If it is established according to these rules that the person responsible for granting the loan breaches his duty and provided that it resulted in damage (in the form of risk-damage or actual harm), than he can be liable for *Untreue*. If the transaction of credit is valid externally, but the breach of duty concerns only the internal limitations, the perpetrator will be liable for the *Missbrauch* alternative. If it is not valid, then only the *Treubruch* modality can be considered.[258]

Active corruption committed by managers in order for their companies to obtain for instance a lucrative contract has not been qualified as such as *Untreue* for the moment.[259] The reluctance of the courts might be explained by two problems. Firstly, while paying bribes without the consent of the owner of the assets would normally be considered *Untreue*, [260] it is not uncommon that the perpetrator acts with such a consent, whether it is expressed, tacit or hypothetical.[261] The second problem concerns difficulties in establishing the damage and, relatedly, intent to cause such damage.[262] The lack of instructive jurisprudence helping to clarify this problem is due to the fact that the major cases, in particular the Siemens/ENEL case, were treated as problems of creating so-called slush funds or hidden funds (*schwarze Kassen*).

While the slush fund or other hidden money might serve the purpose of corruption, this need not always be the case. The breach of duty is said to consist in the fact that a certain amount of money is set apart and hidden, which might result in different types of problems.[263] This issue came to light firstly in the public sphere, namely in the context of political parties or the use of resources of public institutions, where the lack of financial transparency exposed the party to a risk of having to repay received public subventions.[264] Only with the judgment in the Siemens/ENEL case has this issue been extended to the private sector, in which the secret fund was created

[258] Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 68. In the context of banking mismanagement and the financial crisis see also: Christian Schröder, 'Die strafrechtliche Bewältigung der Finanzkrise am Beispiel der Untreue', *ZStW*, 123 (2011), pp. 771-790; Wolfgang Wohlers, 'Die strafrechtliche Bewältigung der Finanzkrise am Beispiel der Strafbarkeit wegen Untreue', *ZStW*, 123 (2011), pp. 791-815; Thomas Fischer, 'Die strafrechtliche Bewältigung der Finanzkrise am Beispiel der Untreue – Finanzkrise und Strafrecht', *ZStW*, 123 (2011), pp. 816-826.
[259] Kindhäuser, '§ 266 Untreue' (note 7) marginal number 113.
[260] Kindhäuser, '§ 266 Untreue' (note 7) marginal number 113.
[261] Seier, 'Untreue' (note 5) marginal number 401.
[262] Seier, 'Untreue' (note 5) marginal number 401, see also OLG Frankfurt (26.02.2004) NStZ-RR 2004, 244-246.
[263] Schramm, 'Untreue, § 266 StGB' (note 8) marginal numbers 58-63, 142-146.
[264] Seier, 'Untreue' (note 5) marginal number 197.

for the purposes of corruption in order to receive attractive contracts for Siemens.[265] In this case, the BGH found that the breach of duty consisted in hiding the funds and making it also impossible to correctly enter them into the company's books),[266] while the damage consisted in that the company could not use the funds anymore.[267] Although the valid consent of the management board could have kept the perpetrator's act within the scope of what he was permitted to do,[268] it was excluded in this case because of the breach of compliance rules and there was no consent of the supervisory board or of the shareholders. Further problems caused by this case concerned the limb of result and will be explained in the next section.

Whether the establishing of the hidden fund constitutes *Untreue* in form of *Missbrauch* or of *Treubruch* depends upon the classification of the transfer of money as a valid transaction (e.g. on the basis of Section 138 BGB).[269] In the same way as above, a person who does not establish the hidden fund himself, but takes over its administration from another person, can be sentenced as well for *Untreue* for not having entered the funds into the company's books and for not having returned the funds to the company, which remains in the impossibility to use the funds, provided that this person has the required duties towards the company.[270]

3.5. Result

A breach of duty to safeguard the financial interests of another person becomes criminally relevant, save for the *mens rea*, if it causes damage (*Nachteil*) to the entrusted assets.[271] Already from the text of the provision it becomes clear that the damage must affect the assets of the person, to which the duties refer.[272] However, the person of the owner and the person entrusting the assets do not have to be identical.[273] Where the assets affected belong only to the perpetrator, liability is ruled out. This is

[265] BGH (29.08.2008) NStZ 2009, 95-100, 96f.
[266] BGH (29.08.2008) NStZ 2009, 95-100, 97 at [37].
[267] BGH (29.08.2008) NStZ 2009, 95-100, 98 at [43].
[268] Dierlamm, '§ 266 Untreue' (note 1) marginal number 244.
[269] Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 63.
[270] Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 145.
[271] Perron, '§ 266 Untreue' (note 33) marginal number 39.
[272] Wittig, *Wirtschafsstrafrecht* (note 98) marginal number 135; BGH (11.11.1982) NJW 1983, 461-462, 462; BGH (25.04.2006) NStZ 2006, 401-402, 402 at [7].
[273] Dierlamm, '§ 266 Untreue' (note 1) marginal number 177.

particularly relevant to partnerships: for criminal liability for *Untreue* in such cases, other partners' assets must also be affected.[274]

The concepts used in the analysis of result for the purposes of the definition of *Untreue* have been developed mainly within the debates on the offence of fraud (*Betrug* – Section 263 StGB), which also requires a result in the form of damage. The German doctrine uses these theories, but makes necessary corrections adapting them to the needs of *Untreue*.[275]

In order to delineate the damage, it is first necessary to define the relevant assets that can be damaged. The German doctrine formulated several theories of assets (*Vermögenslehren*), which will firstly be summarised (3.4.1.). This will be followed by an explanation of the understanding of damage (3.4.2.) and causation (3.4.3.). The last section will present a highly relevant theory for the purpose of this study, which allows - under certain circumstances - exposure of assets to a risk of loss to be considered as damage under Section 266 StGB (3.4.4.).

Before entering into these problems, it is necessary to make a terminological clarification. Two notions can be used to describe what belongs to a person: *Eigentum* and *Vermögen*. The first one stresses the aspect of ownership (*eigen*=own), referring mainly to the legal relationship between the owner and his property. The notion of *Vermögen* is broader and refers more generally to assets of a person from a legal-economic point of view. *Eigentum* comprises everything that can be property of a person in civil law terms (chattels, land, intellectual property), whereas *Vermögen* encompasses also certain non-tangible assets, which cannot be owned in the former sense (e.g. a list of clients).[276] Since it is the term *Vermögen* which is used in the analysis of *Untreue*, this chapter will use the term "assets" and not property for these purposes.

[274] Kindhäuser, *Strafrecht. Besonderer Teil II* (note 165) p. 42; BGH (17.03.1987) NStZ 1987, 279-280, 279.
[275] Kindhäuser, '§ 266 Untreue' (note 7) marginal number 94.
[276] Bohlander, *Principles of German Criminal Law* (note 180) p. 213.

3.5.1. Concepts of assets

The various concepts of assets formulated in the doctrine and jurisprudence can be summarised according to three main approaches: the legal approach and the economic approach representing each other's opposing views and the legal-economic theory being a compromise of both.[277]

The legal approach (*juristischer Vermögensbegriff*) defines assets as the sum of all property rights (*Vermögensrechte*) and obligations of a person.[278] This theory is considered by its critics as on one hand too broad, since it might include rights without economic value and on the other hand too narrow, since not all resources which have such value can be included (e.g. business secrets, client base, workforce (*Arbeitskraft*) are excluded).[279]

The rival approach, which takes into account the shortcomings of the former, proposes a so-called economic notion of assets (*wirtschaftlicher Vermögensbegriff*). It considers that anything that has any economic value and that a person has at his disposal is to be treated as assets of that person.[280] Since this approach does not take into account the legal situation of the assets, the notion includes also goods that originate from illegal transactions or rights that cannot be enforced.[281]

The main deficiencies of this theory are lack of precision in the delimitation of the scope of the assets, which might result in uncertainty as to the scope of the offence and inconsistency with other branches of law, resulting in criminal law protection being granted to assets which are left without protection by, for example, civil law.[282]

Therefore the latter view, developed for the purposes of the definition of the offence of fraud, has been adopted for the purposes of *Untreue* with a necessary

[277] Dierlamm, '§ 266 Untreue' (note 1) marginal number 205.
[278] Roland Hefendehl, '§ 263 Betrug', in: Roland Hefendehl, Olaf Hohmann (eds.), Münchener Kommentar zum Strafgesetzbuch, Band 5, §§ 263 - 358 StGB, 2nd edition (München: C. H. Beck, 2014) marginal number 337.
[279] Urs Kindhäuser, '§ 263 Betrug', in: Urs Kindhäuser, Ulfrid Neumann, Hans-Ullrich Paeffgen (eds.), *Strafgesetzbuch*, 4th edition (Baden-Baden: Nomos, 2013) marginal number 19; Dierlamm, '§ 266 Untreue' (note 1) marginal number 205.
[280] Klaus Tiedemann, '§ 263 Untreue', in: Heinrich Wilhelm Laufhütte, Ruth Rissing-van Saan, Klaus Tiedemann (eds.), *Strafgesetzbuch. Leipziger Kommentar*, Volume 9/1, §§ 263-266b, 12th edition (Berlin: de Gruyter, 2012) marginal number 130; Dierlamm, '§ 266 Untreue' (note 1) marginal number 205.
[281] Kindhäuser, '§ 263 Betrug' (note 279) marginal number 23.
[282] Tiedemann, '§ 263 Untreue' (note 280) marginal number 131; Kindhäuser, '§ 263 Betrug' (note 279) marginal number 24.

correction, which resulted in a compromise approach represented by the so-called legal-economic theory (*juristisch-ökonomische Vermögenslehre*).[283] The economic notion of assets is limited within this theory to assets which according to the widely-used formula are "under the protection of the legal order or at least without its disapproval".[284] This view excludes from the scope of protection granted by the offence of *Untreue* those assets which come from an illegal transaction.[285] There is also no damage if the assets of a person are reduced because of a payment which might not have been enforced in court due to evidentiary problems, but made for an existing debt.[286] The legal-economic theory is considered dominant by the doctrine and also accepted by the jurisprudence.[287]

3.5.2. Determination of damage

The method used in order to verify whether damage occurred is called *Gesamtsaldierung*, which can be translated as "comprehensive balancing".[288] This method consists in comparing the sum of the assets before and after the conduct (the breach of duty) and establishing whether a loss occurred.[289] This means that there is no damage if directly through the conduct (even constituting a breach of duty) the loss

[283] Schramm, 'Untreue, § 266 StGB' (note 8) marginal numbers 131-132.
[284] "*unter dem Schutz der Rechtsordnung oder wenigstens ohne deren Missbilligung zustehen*", Dierlamm, '§ 266 Untreue' (note 1) marginal number 205; Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 132; Hefendehl, '§ 263 Betrug' (note 278) marginal number 353.
[285] Perron, '§ 266 Untreue' (note 33) marginal number 39b.
[286] Perron, '§ 266 Untreue' (note 33) marginal number 39b.
[287] Kindhäuser, '§ 263 Betrug' (note 279) marginal number 31; Dierlamm, '§ 266 Untreue' (note 1) marginal number 205, Perron, '§ 266 Untreue' (note 33) marginal number 39b; Schünemann, '§ 266 Untreue' (note 10) marginal number 166. See also BVerfG (23.06.2010) NJW 2010, 3209-3221, 3215ff. The above analyses only briefly summarises a very large discussion on the content of the assets for the purposes of the definition of offences of fraud and *Unteue*, since a detailed account would go beyond the scope of this study. For more details see for examples: Hefendehl, '§ 263 Betrug' (note 278) marginal numbers 336-488; Kindhäuser, '§ 263 Betrug' (note 279) marginal numbers 16ff.; Dierlamm, '§ 266 Untreue' (note 1) marginal numbers 126-238.
[288] Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 125.
[289] Perron, '§ 266 Untreue' (note 33) marginal number 40; BGH (17.08.2006) NStZ-RR 2006, 378-379, 378: " *Ob ein Vermögensnachteil eingetreten ist, muss grundsätzlich durch einen ex-ante vorzunehmenden Vergleich des gesamten Vermögens vor und nach der beanstandeten Verfügung unter wirtschaftlichen Gesichtspunkten geprüft werden. An einem Nachteil fehlt es regelmäßig, wenn wertmindernde und werterhöhende Faktoren, zu denen auch Gewinnerwartungen zählen können, sich gegenseitig aufheben*". BGH (09.02.2006) NStZ-RR 2006, 175-176; BGH (27.02.1975) NJW 1975, 1234-1236.
Also BVerfG (23.06.2010) NJW 2010, 3209-3221, 3216 at [119]: "*Grundsätzlich soll der Vermögensnachteil als Taterfolg der Untreue nach heutiger Rechtsprechung und herrschender Lehre durch einen Vergleich des gesamten Vermögens vor und nach der beanstandeten Verfügung unter wirtschaftlichen Gesichtspunkten geprüft werden*".

is compensated by a gain in the assets which is equal to or higher than the loss,[290] for instance by liberation from a debt.[291] Damage must be understood here only in an economic sense.[292] Hence loss in creditworthiness or reputation can be considered only if it is financially quantifiable.[293]

Typical examples of damage would be situations where goods are given away or sold below the market price or damaged, when goods are acquired above the market price, or if private use is made of them, contrary to their original purpose.[294]

The compensation must result directly from the conduct and not from a subsequent action, since a subsequent compensation is irrelevant for criminal liability.[295] However there is a standing line of jurisprudence considering that, if already in the moment of the commission of the breach of duty the perpetrator is able to compensate the loss with his liquid means and is willing to do so (*ersatzwillig und -fähig*), it is considered that there is no damage.[296] Although this rule has been considered to be breaking the logic excluding the influence of subsequent compensation, it remains in keeping with the logic of the offence of *Untreue*. Since its objective is the protection of assets, a perpetrator keeping liquid means ready to compensate the damage to these assets already in the moment of the act does not in fact create even an endangerment of these assets.[297]

In general, different acts should be analysed separately according to the method of *Gesamtsaldierung*. However, if several acts are economically closely linked, then the assessment would have to address them as a whole.[298] This rule is

[290] Wittig, *Wirtschafsstrafrecht* (note 98) marginal number 138; BGH (27.08.2003) NStZ 2004, 205-207, 206: "*Ein Nachteil liegt deshalb nicht vor, wenn durch die Tathandlung selbst zugleich ein den Verlust aufwiegender Vermögenszuwachs begründet wird*". BGH (15.03.1979) MDR 1979, 636 b).
[291] Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 125.
[292] See for example BGH (02.07.1997) NStZ 1997, 543-544, 543.
[293] Seier, 'Untreue' (note 5) marginal number 167.
[294] Seier, 'Untreue' (note 5) marginal number 168.
[295] BGH (06.05.1986) NStZ 1986, 455-456.
[296] Kindhäuser, *Strafrecht. Besonderer Teil II* (note 165) p. 44; BVerfG (23.06.2010) NJW 2010, 3209-3221, 3217 at [126]; BGH (16.12.1960) NJW 1961, 685-686; BGH (06.04.1982) NStZ 1982, 331-332; BGH (30.10.2003) NStZ-RR 2004, 54-55.
[297] Seier, 'Untreue' (note 5) marginal number 177f.
[298] Kindhäuser, '§ 266 Untreue' (note 7) marginal number 112, BGH (23.05.2002) NStZ 2002, 648-652, 650.

relevant in particular to publicity campaigns, the introduction of new production methods, or efforts intended for saving a company in crisis.[299]

It is generally admitted that damage in terms of Section 266 StGB can be incurred also by omitting to make a gain by a regularly conducted business, although this rule also meets strong opposition among the doctrine.[300] In this regard uncertain expectations or unfounded hopes are not sufficient for establishing criminal liability.[301]The jurisprudence requires that the profit or the saving can be expected "with certainty" ("*mit Sicherheit*") had the perpetrator used the given opportunity.[302] For example, damage occurs in this sense if the perpetrator acquires land or signs a contract in the name of the owner of the assets for a less advantageous price than the one which was available.[303]

The method of *Gesamtsaldierung* is complemented by the rules on the individual impact of damage ("*individuellen Schadenseinschlag*") in order to take into account particularities which result from the fact that the same goods might not have the same value for different persons,[304] and that an analysis in terms of exchange might not make sense in order to assess the correctness of the act.[305] This 'individualised' approach allows the costs of an exuberant birthday party of the CEO to be considered as damage. The service received for the funds spent on the party might have been equal in economic terms, but the company had no interest in spending its funds in this way.[306] In the same line goes the so-called "theory of missed objective" ("Zweckverfehlunglehre"), which is used instead of the *Gesamtsaldierung*

[299] Seier, 'Untreue' (note 5) marginal number 173.
[300] Kindhäuser, *Strafrecht. Besonderer Teil II* (note 165) p. 43, Seier, 'Untreue' (note 5) marginal number 169, Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 126. Vehement criticism has been formulated by Schünemann, '§ 266 Untreue' (note 10) marginal number 173. One of the focal point of this discussion concerned so called Kick-Back payments (*Kick-Back Zahlungen*), which consist in contracting a supplier for an increased price and the management receiving a benefit from the amount by which the price was increased. The main problem is whether the contract could have been concluded for the lower (not increased) price. For more information see e.g. Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 147ff; Seier, 'Untreue' (note 5) marginal number 392ff; Nickel Szebrowski, *Kick-Back* (Köln, Berlin, München: Heymanns 2005).
[301] BGH (28.01.1983) NJW 1983, 1807-1810, 1808, OLG Stuttgart (18.09.1998) NJW 1999, 1564-1566, 1566.
[302] BGH (28.01.1983) NJW 1983, 1807-1810, 1809.
[303] BGH (09.03.1989) wistra 1989, 224. More examples, see: Dierlamm, '§ 266 Untreue' (note 1) marginal number 210.
[304] BGH (16.08.1961) NJW 1962, 309-312.
[305] Kindhäuser, '§ 266 Untreue' (note 7) marginal number 108.
[306] Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 133. See also: OLG Hamm (21.06.1985) NStZ 1986, 119-120.

in order to assess the damage in cases where funds are spent for purposes which do not bring an equivalent benefit for the giver (e.g. sponsoring).[307] According to this method damage occurs if funds were assigned to be given for a concrete objective and they were not used for it.[308] For example if a manager is supposed to spend funds in order to finance a campaign aiming to help victims of an earthquake and he spends them to a homelessness charity or buys paintings for the company's headquarters, the damage in terms of *Untreue* occurs.[309]

Concerning slush funds, as examined in the above-mentioned case of Siemens/ENEL, the court found that the damage lay in the fact that the hidden funds were unavailable to the company, and the fact that the perpetrator intended to use the money for the benefit of the company was considered irrelevant.[310] According to the economic concept of assets the future profit from the contract may be considered compensation for the loss of money, and there would be no damage if that profit is higher than the loss. However, according to the legal-economic concept of assets, the benefit obtained through illegal activities (corruption) cannot be taken into account (these concepts will be further developed in the following subchapter).[311] This approach provoked an intensive critical reaction from the doctrine, which accused the court of changing the nature of the offence.[312] In particular, the judges were reproached for allegedly transforming *Untreue* into an offence which protects the freedom of using one's assets[313] or criminalises preparation to commit corruption or accounting offences.[314] Despite the criticism, this line of jurisprudence seems to solidify. The Federal Constitutional Court considered that it does not raise

[307] Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 134; Stephan Beukelmann, '§ 263 Betrug', in: Bernd von Heintschel-Heinegg (ed.), *Beck'scher Online-Kommentar StGB*, 27th edition (München: C. H. Beck, 2015, retrieved from: www.beck-online.beck.de on 28.09.2015) marginal number 60; as to breach of duty in cases of sponsoring, see Kindhäuser, '§ 266 Untreue' (note 7) marginal number 79f.
[308] Seier, 'Untreue' (note 5) marginal number 183.
[309] Kindhäuser, '§ 266 Untreue' (note 7) marginal number 105, Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 134.
[310] BGH (29.08.2008) NStZ 2009, 95-100, 98ff. The extent of this case (Siemens) renders impossible the discussion of its details within the framework of this study. This summary is based on the résumé of Seier, 'Untreue' (note 5) marginal number 404ff.
[311] Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 143.
[312] Seier, 'Untreue' (note 5) marginal number 405.
[313] Dierlamm, '§ 266 Untreue' (note 1) marginal number 248; Matthias Jahn, 'Untreue durch die Führung „schwarzer Kassen" – Fall Siemens/ENEL', *Juristische Schulung* (JuS), 2009, pp. 173-176, 175.
[314] Frank Saliger, '§ 266 Untreue', in: Helmut Satzger, Wilhelm Schluckebier, Gunter Widmaier (eds.), *StGB Strafgesetzbuch Kommentar*, 2nd edition (Carl Heymanns Verlag, 2014) marginal number 77.

constitutional concerns,[315] and the BGH followed it in its judgement in the *Trienekens* case.[316] Moreover, it appears as if the court extended the reading given in Siemens/ENEL, and possibly in an inconsequent way, since it considered that the manager of a GmbH or the management board of an AG can be liable. It was however pointed out in the literature that it is difficult to conceive of a sense in which the company loses the possibility to use the assets moved to the hidden fund, if these persons are in control of it.[317] However the question is linked with the question of objective limits of consent to illegal transactions, the problem which is as such subject to debate (see below 6.1. Consent of the victim).

3.5.3. Risk-damage – 'Schadensgleiche Vermögensgefährdung'

Not only an effective loss, but also a situation in which there exists a risk that the assets will be damaged fulfils the Section 266 requirement of damage.[318] The German doctrine and jurisprudence use mainly two expressions to describe this type of damage: "*schadensgleiche Vermögensgefährdung*", which means "endangerment equal to damage" and "*Gefährdungsschaden*", which could be translated as 'risk-damage'.[319]

The concept of risk-damage has been developed within the doctrine and jurisprudence concerning the offence of fraud and has been incorporated into the analysis of *Untreue* similarly to other concepts related to the notion of result.[320] The translation of this concept was not frictionless, as important differences resulted in the risk that the offence would through this notion expand far beyond the boundaries given in the law. The first major difference concerns the rules of attempt of both offences. While an attempted fraud is punishable, an attempt to commit *Untreue* is not.[321] On one hand it may prompt the judges to use the concept of risk-damage, especially in particularly striking cases, and thus overcome the lack of actual

[315] BVerfG (23.06.2010) NJW 2010, 3209-3221, 3217.
[316] BGH (27.08.2010) NJW 2010, 3458-3464, 3462.
[317] Seier, 'Untreue' (note 5) marginal number 407f.
[318] Wittig, *Wirtschafsstrafrecht* (note 98) marginal number 149.
[319] Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 136.
[320] Seier, 'Untreue' (note 5) marginal numbers 166, 179.
[321] Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 137; See also section 4.2. Attempt.

damage.[322] On the other hand, since the law excludes the criminalisation of attempt it ought not to be introduced through the back door.[323] The second difference is in the *mens rea* requirement, which for fraud requires that the perpetrator acts with the intent of obtaining for himself or a third person an unlawful material benefit.[324] By contrast, *Untreue* can be committed without such intent and it is punishable even if the perpetrator hoped for the final positive outcome of his actions for the principal (although considered possible and accepted causing economic harm).[325] In the case of *mens rea* in the form of conditional intent, this allows punishment of the perpetrator who does not want to cause loss, but is aware that his act may result in the risk-damage situation and proceeds with his plan accepting such a possibility.[326] The problems of interpreting *mens rea* will be further developed in the next subchapter.

Not all types of endangerment of the assets may be considered risk-damage; this is only possible where the situation of risk economically analysed results in an actual decrease of the value of the victim's assets.[327] The assets must be endangered in a concrete and not merely abstract way.[328] In other words, the existing risk must result in the assets being worth less than if the risk situation had not occurred.[329] For instance, if a bank decides to alienate a claim for repayment of a credit it is worth less, if it was given with insufficient guarantees. However it is not excluded that the debtor would repay it entirely without problem. Hence the risk-damage is different to the actual damage in that the eventual loss might still not occur.

One of the arguments evoked in order to explain this interpretation is of economic character. Through the notion of risk-damage the jurisprudence and the doctrine take into account that "the prices in a market-driven economic system are formed according to the laws of demand and supply" and within this process the

[322] Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 137.
[323] Wittig, *Wirtschafsstrafrecht* (note 98) marginal number 150.
[324] "*in der Absicht, sich oder einem Dritten einen rechtswidrigen Vermögensvorteil zu verschaffen*" (§ 263 StGB Betrug).
[325] Perron, '§ 266 Untreue' (note 33) marginal number 49.
[326] For further analysis of the *mens rea* in case of Risk-damage see 3.6. *Mens rea*.
[327] BGH (17.02.1999) NJW 1999, 1489-1492, 1491. Kindhäuser, '§ 266 Untreue' (note 7) marginal number 110: "*Im Grundsatz wird ein Schaden dieser Art unter der Voraussetzung angenommen, dass bereits die Gefährdungslage bei wirtschaftlicher Betrachtung zu einer gegenwärtigen Minderung des Vermögensgesamtwertes führt*." Dierlamm, '§ 266 Untreue' (note 1) marginal number 211: "*Eine konkrete Vermögensgefährdung soll dem effektiven, real eingetretenen Vermögensnachteil gleichstehen, wenn sie bei wirtschaftlicher Betrachtung bereits zu einer Minderbewertung der gegenwärtigen Vermögenslage führt*."
[328] Dierlamm, '§ 266 Untreue' (note 1) marginal number 212.
[329] BVerfG (23.06.2010) NJW 2010, 3209-3221, 3218 at [137].

expectations as to possible prices define the value of assets as well.[330] The concept of risk-damage takes into consideration the accounting rules based on the above consideration, which require the inclusion of foreseeable risk and costs related to the depreciation of the value of the endangered assets.[331]

In the case of 'risky business' or 'speculative transactions' (*Risikogeschäfte*) the earlier jurisprudence considered that if the perpetrator fulfilled the criteria which allowed the court to consider that he took excessive risk in comparison to that which he was authorised to take, and thus breached his duty to safeguard the financial interests of the owner of the assets, in such situations the result in the form of risk-damage can be admitted.[332] The court used normative formulae in order to define the result, such as: "a financial loss exists if the offender behaving just like a gambler deliberately and against the rules of professional diligence accepts a highly increased risk of loss only in hope of a highly dubious gain".[333] Risk-damage can be admitted where the principal ought to have seriously considered that the loss would occur, or that its occurrence was obvious.[334] Further jurisprudence introduced the concept to different areas of application of *Untreue*, such as improper bookkeeping, granting credits or creating slush funds.[335] The concept was met with criticism in the doctrine for extending the scope of the offence beyond the will of the legislator, in particular by introducing criminalisation of attempt, which was not provided for this offence.[336]

The Federal Constitutional Court of Germany analysed the concept of risk-damage from the point of view of its conformity with the German Basic Law, in particular with the imperative of certainty, in its judgment from 2010.[337] The Court held that the use of this concept does not infringe the German Basic Law. However, it

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[330] BVerfG (23.06.2010) NJW 2010, 3209-3221, 3219 at [140].
[331] See e.g. Section 253 I and IV HGB; BVerfG (23.06.2010) NJW 2010, 3209-3221, 3219 at [141].
[332] Seier, 'Untreue' (note 5) marginal number 386; Hillenkamp, 'Risikogeschäft und Untreue' (note 227) p. 166; Andreas Ransiek, 'Risiko als Problem des Untreuetatbestandes', *ZStW* 116 (2004), volume 3, pp. 634-679, 658-659.
[333] BGH (27.02.1975) NJW 1975, 1234-1236, 1236: "*Ein Vermögensschaden ist dann anzunehmen, wenn der Täter nur nach Art eines Spielers bewußt und entgegen den Regeln kaufmännischer Sorgfalt eine aufs äußerste gesteigerte Verlustgefahr auf sich nimmt, nur um eine höchst zweifelhafte Gewinnaussicht zu Erlangen*"
[334] BGH (09.07.1987) NJW 1987, 3144-3145, 3145;
[335] For extensive analysis of the jurisprudence see for example Dierlamm, '§ 266 Untreue' (note 1) marginal numbers 212ff.
[336] Waßmer, '§ 266 Untreue' (note 13) marginal number 184; Seier, 'Untreue' (note 5) marginal number 186.
[337] BVerfG (23.06.2010) NJW 2010, 3209-3221, 3218ff.

insisted on a restrictive interpretation of the concept and provided essential rules on its use.[338]

Firstly, it must be possible to quantify the loss due to the risk-damage situation.[339] These kinds of assessments are daily practice in business or commercial activities.[340] The BVerfG considered the use of the concept of risk-damage without such quantification, but based only on above-mentioned normative criteria, to be constitutionally questionable. The use of these criteria might be tempting in order to circumvent the limitative function of the limb of result.[341] However such practice blurs the difference between the element of conduct (breach of duty) and its result (damage), which each have separate functions within the structure of the offence and as to setting boundaries of criminalisation.[342] This way the interpretation would go against the wish of the lawmakers who expressly excluded the possibility of punishment for attempted *Untreue* since they wanted to criminalise the damaging of entrusted assets, and not their mere endangerment.[343] Therefore the court requires that in each case damage caused by the exposure to risk must be quantified according to recognised (e.g. accounting) methods, and if necessary expert witnesses should be called.[344] If it is impossible to assess it precisely, then the minimum level would be taken into account,[345] and if the quantification is doubtful, the defendant must be acquitted.[346]

The jurisprudence has used the concept of risk-damage in the context of several types of breaches of duty to safeguard another person's financial interests causing the exposure of the assets of the victim to a risk of loss.

For example, the repayment claim that the bank has towards its debtor can be sold and its price is determined by the assessment of the probability that the debt will be repaid. If the credibility of the debtor was incorrectly assessed or insufficient guarantees were taken, the value of such a claim can be lower than the one initially

[338] Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 138.
[339] BVerfG (23.06.2010) NJW 2010, 3209-3221, 3220 at [151].
[340] BVerfG (23.06.2010) NJW 2010, 3209-3221, 3219f. at [146].
[341] BVerfG (23.06.2010) NJW 2010, 3209-3221, 3220 at [149].
[342] BVerfG (23.06.2010) NJW 2010, 3209-3221, 3220 at [149].
[343] BVerfG (23.06.2010) NJW 2010, 3209-3221, 3220 at [150].
[344] BVerfG (23.06.2010) NJW 2010, 3209-3221, 3220 at [151].
[345] Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 139.
[346] BVerfG (23.06.2010) NJW 2010, 3209-3221, 3220 at [151].

assumed.[347] This consideration led the 1st Criminal Panel of the BGH to consider in one case that the concept of risk-damage is unnecessary and that it is in fact a case of actual damage.[348] However the judgment of the Federal Constitutional Court of Germany suggests that this kind of result will remain the domain of risk-damage.[349] That being so, the BVerfG pointed out that through the use of this concept the offence does not punish the mere endangerment of the assets, but the actual decrease in their value. The value of risk-damage is not equal to the possible damage, if the risk materialises, but to the amount by which the value of the assets has been diminished because of the risk.[350]

In order to establish whether in the context of granting credit the bank suffered harm in the form of risk-damage it is necessary to assess the impact of this result using economic tools, since the normative criteria have been rejected, as described above.[351] Such analysis must take into account the whole economic context of the credit (and not only for example its initial value), expected interests and other revenues and the analysis of the financial standing of the debtor, and must be expressed in concrete money value and not only by means of assertions or suppositions.[352]

Another example can be improper accountancy. It can fulfil the criteria of risk-damage, if the fact that the bookkeeping is not done diligently creates a concrete risk that valid claims are not enforced and debts not recovered in time.[353] Yet another example consists of situations, where the act creates the risk that the victim may be called to pay compensation or damages because of the perpetrator's conduct.[354]

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[347] BGH NJW 2002, 1211-1216, 1216.
[348] BGH (20.03.2008) NJW 2008, 2451-2455, 2452.
[349] Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 138f.
[350] BVerfG (23.06.2010) NJW 2010, 3209-3221, 3219 at [142]; BGH (24.08.1999) wistra 2000, 60-61, 61.
[351] Dierlamm, '§ 266 Untreue' (note 1) marginal number 240.
[352] Dierlamm, '§ 266 Untreue' (note 1) marginal number 240. Compare also: BGH (15.11.2001) NJW 2002, 1211-1216, 1216; BGH (20.03.2008) NJW 2008, 2451-2455, 2452; BGH (20.10.2009) NStZ 2010, 329-330.
[353] Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 140; Seier, 'Untreue' (note 5) marginal number 196
[354] Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 140.

The risk-damage result has also been accepted in situations where the perpetrator's act created the risk that the owner of the assets will be damaged by losing subventions, contracts or having to pay fines.[355]

Although the recent understanding of risk-damage narrowed this concept, since it now requires that it constitute a quantifiable loss for the assets of the company, it is still subject to critical remarks from the German doctrine, mainly for extending the scope of criminalisation (this despite the lack of criminalisation of attempt) and the still imprecise terms used to define the offence.[356]

Further attempts to curb the scope of application of the concept of risk-damage concern the *mens rea* requirements and will be analysed in the section devoted to this limb of *Untreue*.

3.5.4. Attribution of damage/Causality

In case of any offence requiring a result, to which *Untreue*, as it was seen above, belongs, it is necessary to link the result with the conduct of the offence.[357] Furthermore the requirement of causality is already expressed in Section 266 StGB, which requires that the perpetrator "abuses the power … or violates his duty … and **thereby** causes damage" (emphasis added, in German original: *dadurch*).[358] This requirement naturally concerns both types of result: actual damage and risk-damage.

The German criminal law requires that the link between the perpetrator's act and the result be established according to an evaluation consisting of two steps: establishment of causality (*Kausalität*) and objective ascription (*objektive Zurechnung*).[359]

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[355] BGH (18.10.2006) NJW 2007, 1760-1767, 1765.
[356] Seier, 'Untreue' (note 5) marginal number 186.
[357] Hans-Heinrich Jescheck, Thomas Weigend, *Lehrbuch des Strafrechts* (Berlin: Duncker & Humblot, 1996) p. 277; Schmid, '§31 Treupflichtverletzungen' (note 40) marginal number 175; BGH (06.04.2000) NJW 2000, 2364-2366, 2365.
[358] Saliger, '§ 266 Untreue' (note 314) marginal number 79.
[359] Jescheck, Weigend, *Lehrbuch des Strafrechts* (note 357) p. 277. The notion of objective ascription is subject to debates within the German doctrine and it would go beyond the scope of this study to make even a summary of the different available theories. Therefore this section will present only aspects relevant for delimitation of the scope of criminal liability for *Untreue*. For more information on causality and objective ascription see Jescheck, Weigend, *Lehrbuch des Strafrechts* (note 357) p. 277ff.; Roxin, *Strafrecht. Allgemeiner Teil* (note 33) pp. 343ff. or Uwe Murmann, *Grundkurs*

In the first step it is necessary to establish whether the conduct (the breach of duty in case of *Untreue*) was a "*conditio sine qua non*" of the damage. This is done through an intellectual operation consisting of imagining the course of action without the conduct in question. If in such a situation the damage as it *in concreto* occurred would be impossible, than the causal link must be denied and hence so too criminal liability.[360] However, it is not necessary that the perpetrator's conduct be the only cause of the damage.[361] The condition would not be fulfilled only if the result was caused only by other events.[362]

In the second step, it must be established whether it is possible to objectively ascribe the causation of the damage to the perpetrator. The discussion on the scope of applicability of the theory of objective ascription is still on-going in the German doctrine.[363] Whereas the applicability of the criterion of the connection with the breach of duty (*Pflichtwidrigkeitszusammenhang*) is generally accepted, the use of two other criteria – the connection with the legal interests protected by the offence (*Schutzzweckzusammenhang*) and the direct relation between the breach of duty and the damage caused (*Unmittelbarkeit*), – remains subject to debate.[364]

The criterion of the connection with the breach of duty is not fulfilled if the damage would also have occurred had the perpetrator acted according to his duty.[365] For illustrating this requirement the literature gave the following examples. If the breach of duty consisted in not observing a rule requiring another manager to approve the decision of the perpetrator, but this manager would have agreed to it anyway, the criterion of connection is not fulfilled, and criminal liability is excluded.[366] Another example would be constituted by a case in which a bank employee responsible for granting loans did not assess credit suitability according to the rules and subsequently

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Strafrecht (München, C. H. Beck, 2015) pp. 152-202; in English: Bohlander, *Principles of German Criminal Law* (note 180) p. 45ff. including literature cited in these publications. In the context of *Untreue* see Frank H. Gerkau, *Untreue und objektive Zurechnung* (Hamburg: Kovač, 2008).

[360] Jescheck, Weigend, *Lehrbuch des Strafrechts* (note 357) p. 277ff, Saliger, '§ 266 Untreue' (note 314) marginal number 78. The exact formulation in Jescheck, Weigend, *Lehrbuch des Strafrechts* (note 357) p. 277: "*ein Erfolg ist durch eine Handlung dann verursacht, wenn die Handlung nicht hinweggedacht werden kann, ohne dass der Erfolg entfiele*."

[361] Saliger, '§ 266 Untreue' (note 314) marginal number 78.

[362] Seier, 'Untreue' (note 5) marginal number 203.

[363] Saliger, '§ 266 Untreue' (note 314) marginal number 79; See also Martin, *Bankuntreue* (note 248) p. 134ff.; Bernd Schünemann, 'Die „gravierende Pflichtverletzung" bei der Untreue: dogmatischer Zauberhut oder taube Nuss?', *NStZ*, 2005, pp. 473-476, 475f.

[364] Saliger, '§ 266 Untreue' (note 314) marginal numbers 79-84.

[365] Saliger, '§ 266 Untreue' (note 314) marginal number 81,

[366] Example given by: Seier, 'Untreue' (note 5) marginal number 204.

the borrower is unable to repay the loan, liability for *Untreue* is excluded if the creditworthiness of the borrower was in any case unquestionable at the moment of granting the loan.[367] One can argue whether even causation exists in these cases, while it is not the lack of another manager's approval or lack of observing the rules while assessing the credit suitability that increased the risk of damaging the company financial interest. The requirement of connection with the breach of duty would be lacking in a case where the assessment of creditworthiness, even if carried out correctly would lead to granting the credit and was based on falsified data provided by the borrower and the bank employee was unaware of the falsification.[368]

The question is how probable this putative scenario must be in order to exclude liability for *Untreue*. The view represented in the jurisprudence and by one group of scholars requires that in order for the harm to be ascribed to the perpetrator it must be certain that the harm would not have occurred, had the perpetrator acted according to the rules.[369] However another group of scholars considers that it is sufficient for criminal liability that the perpetrator increased the risk that the forbidden result would occur.[370]

According to the criterion of connection with the legal interests protected by the offence, only harm which the norm forming the duty and breached by the perpetrator aimed at preventing must be objectively ascribed to the offender.[371] In other words, the perpetrator should have breached a norm the purpose of which was to prevent the harm caused by the perpetrator, i.e. financial damage.[372] For example the perpetrator who caused financial damage to the budget of a political party by infringing rules prescribed by the statute on political parties would not be liable for *Untreue*, since the function of this statute is to ensure the transparency of political party funding, and not preventing them from financial damage.[373] The outcome would

[367] BGH (06.04.2000) NJW 2000, 2364-2366, 2365.
[368] Saliger, '§ 266 Untreue' (note 314) marginal number 81.
[369] The classic jurisprudence is: BGH (25.09.1957) NJW 1958, 149-151. For abundant literature reference see: Roxin, *Strafrecht. Allgemeiner Teil* (note 33) p. 392.
[370] Roxin, *Strafrecht. Allgemeiner Teil* (note 33) pp. 392ff.; Jescheck, Weigend, *Lehrbuch des Strafrechts* (note 357) pp. 584-586. For criticism of this theory see: Günther Jakobs, *Strafrecht. Allgemeiner Teil*, 2nd edition (Berlin, New York: Walter de Gruyter, 1993) pp. 235ff.
[371] Saliger, '§ 266 Untreue' (note 314) marginal number 82.
[372] Seier, 'Untreue' (note 5) marginal number 207.
[373] Hans-Ludwig Günther, 'Die Untreue im Wirtschaftsrecht', in: Bernd Heinrich et al. (eds.), *Festschrift für Ulrich Weber* (Bielefeld: Verlag Ernst und Werner Gieseking, 2004) pp. 311-317, p. 316.

be similar for the granting of credits. Criminal liability would depend on whether the perpetrator breached one of the duties which regulate the policy of the bank in general and are not aimed at protecting its financial interests, or that regulate the granting of concrete credits. Only in the latter case could the damage be ascribed to the perpetrator and criminal liability for *Untreue* be possible.[374]

At least two problems are associated with this criterion. The first one, of a more dogmatic nature, concerns the allocation of this issue within the structure of the offence. While some authors consider it a problem of duty and its breach,[375] other authors analyse it within the problem of causality and objective ascription of result,[376] as it is also done in this chapter.[377] Nonetheless, the decision on where to place this issue does not change the scope of criminal liability for *Untreue*. The latter will be influenced by the solution to the second major problem, namely the extent to which the breached norm focuses on protecting the assets of the victim. While the doctrine formulated requirements that the norm should be originally designed in order to prevent damage,[378] or serve specifically and directly this purpose,[379] according to some recent jurisprudence it is enough if the norm serves also and even indirectly the purpose of damage prevention.[380] According to the Federal Constitutional Court of Germany, there must be a specific connection to prevention of damage to the assets.[381] Despite these discrepancies it is admitted by the majority that the fulfilment of this requirement is necessary for criminal liability and that the lack of a breach of a norm which has no connection with the protection of the victim's assets should exclude criminal liability for *Untreue*.[382]

A criterion still subject to debate concerns the question whether the damage must have resulted directly (*unmittelbar*) from the breach of duty. This requirement is

[374] Martin, *Bankuntreue* (note 248) p. 140.
[375] E.g. Perron, '§ 266 Untreue' (note 33) marginal number 19a, Dierlamm, '§ 266 Untreue' (note 1) marginal number 47.
[376] Saliger, '§ 266 Untreue' (note 314) marginal number 82ff.; Seier, 'Untreue' (note 5) marginal number 207ff.
[377] Jescheck, Weigend, *Lehrbuch des Strafrechts* (note 357) p. 287f.
[378] "*genuine zum Zwecke der Schadensverhinedung aufgestellt*" – Seier, 'Untreue' (note 5) marginal number 207.
[379] "*spezifisch und unmittelbar dem Vermögensschutz dienen*" – Dierlamm, '§ 266 Untreue' (note 1) marginal number 47.
[380] "*wenigstens auch, und sei es mittelbar*" – BGH (13.09.2010) NJW 2011, 88-96, 91. See also: BVerfG (23.06.2010) NJW 2010, 3209-3221, 3218f.
[381] "*der spezifische Vermögensbezug*" BVerfG (23.06.2010) NJW 2010, 3209-3221, 3218 at [133].
[382] Seier, 'Untreue' (note 5) marginal number 208. Against: Saliger, '§ 266 Untreue' (note 314) marginal number 83.

generally rejected in the doctrine and rather absent in the jurisprudence.[383] Hence, the fact that the breach of duty and the damage were part of a more complicated chain of events does not exclude criminal liability, provided that the other criteria have been fulfilled.[384]

3.6. *Mens rea*

According to Section 15 StGB: "Unless the law expressly provides for criminal liability based on negligence, only intentional conduct shall attract criminal liability." Since Section 266 StGB does not contain any such mention, *Untreue* can only be committed intentionally.[385] German criminal law distinguishes three grades of intent:

- direct intent in the first degree (*Absicht*)

- direct intent in the second degree (*Direkter Vorsatz* or *dolus directus*)

- conditional intent (*Bedingter Vorsatz* or *dolus eventualis*).[386]

The perpetrator acting with *Absicht* wants to perform the act described by its elements and at least hopes that the result may occur. In the case of *dolus directus*, the perpetrator's ultimate goal might be different than described by the offence, but the perpetrator knows that while realising this goal he is certain or highly probable to perform the act described by the *actus reus*. If the perpetrator acts with *dolus eventualis*, the realisation of the *actus reus* is not the perpetrator's goal, but he considers it as possible and accepts this possibility.[387]

It is admitted that *Untreue* can be committed with any of the three grades of intention, including *dolus eventualis*.[388] This means that for criminal liability it is

[383] Saliger, '§ 266 Untreue' (note 314) marginal number 84; Seier, 'Untreue' (note 5) marginal numbers 211ff.; Martin, *Bankuntreue* (note 248) pp. 148-151. In favour of the criterion: Heger, '§ 266 StGB Untreue' (Lackner/ Kühl) (note 54) marginal number 16.
[384] See for example BayObLG (20.07.1995) NJW 1996 268-272, 271.
[385] Wittig, *Wirtschafsstrafrecht* (note 98) marginal number 163; Schünemann, '§ 266 Untreue' (note 10) marginal number 189.
[386] Terminology used in this section according to Bohlander, *Principles of German Criminal Law* (note 180) p. 63.
[387] Jecheck/Weigend 297. See also Bohlander, *Principles of German Criminal Law* (note 180) pp. 63ff.
[388] Seier, 'Untreue' (note 5) marginal number 82, BGH (06.04.2000) NJW 2000, 2364-2366, 2365.

necessary that the perpetrator wanted (*Absicht*) or knew with certainty, regarded as highly probable (*dolus directus*) or considered possible and accepted (*dolus eventualis*) that, while being aware of his duty to safeguard the financial interests of another person, he either abused the rights given to him (*Missbrauch*) or breached the duty to safeguard these interests (*Treubruch*) and thereby caused the damage (or risk-damage).[389] The question of the *dolus eventualis* as regards risk-damage and the problem of awareness about the duty require further explanation (*infra*).

The offence does not require any kind of special intent. In particular there is no need for the perpetrator to act for his personal interest or with intent to make a gain for himself or another person.[390] The fact that the perpetrator perceived that in general he acted for the benefit of the victim does not exclude criminal liability.[391]

As to *dolus eventualis*, this is the grade of intention which is the closest to negligence. Hence the jurisprudence requires a strict approach to its requirements, in particular in cases where the perpetrator did not act for his own benefit.[392] As the BGH explained in one of its judgments, the perpetrator acting with advertent negligence (*bewußte Fahrlässigkeit*),[393] although aware of the risk of result (damage or risk-damage), hopes that this risk does not materialise, whereas the perpetrator acting with *dolus eventualis* accepts the possibility that the risk may materialise if he cannot realise his objective otherwise, although he does not want this to happen.[394] However, this requirement has been criticised in the doctrine as an attempt to curb the

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[389] Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 152, whose terminology differentiates however between *dolus directus* in the first degree in case of certainty and *dolus directus* in the second degree if the perpetrator contemplates (*beabsichtigen*) the possibility that he commits the act described in the *actus reus*. *Dolus eventualis* is defined in the same way as above.

[390] Schünemann, '§ 266 Untreue' (note 10) marginal number 189; Perron, '§ 266 Untreue' (note 33) marginal number 49.

[391] BGH (06.05.1986) NStZ 1986, 455-456, 455; Perron, '§ 266 Untreue' (note 33) marginal number 49.

[392] BGH (27.02.1975) NJW 1975, 1234-1236, 1236; BGH (23.05.2002) NStZ 2002, 648-652, 650.

[393] This term after Bohlander, *Principles of German Criminal Law* (note 180) p. 63; as he points out no German concept of *mens rea* fully corresponds with the English concept of recklessness, therefore English criminal law terminology is avoided and the terms used in this section should be understood only as translations of German terms without the English law connotations.

[394] "*Bedingter Vorsatz unterscheidet sich von der bewußten Fahrlässigkeit dadurch, daß der bewußt fahrlässig handelnde Täter darauf vertraut, der als möglich vorausgesehene Erfolg werde nicht eintreten und deshalb die Gefahr in Kauf nimmt, während der bedingt vorsätzlich handelnde Täter sie um dessentwillen in Kauf nimmt, weil er, wenn er sein Ziel nicht anders erreichen kann, es auch durch das unerwünschte Mittel erreichen will.*" BGH (27.02.1975) NJW 1975, 1234-1236, 1236. See also Schünemann, '§ 266 Untreue' (note 10) marginal number 191.

extent of criminalisation of *Untreue*, which according to these authors should be done by a restrictive interpretation of the *actus reus* instead.[395]

It is the general rule that intention in all its three forms should concern all of the elements of the *actus reus*.[396] As to the result element in the form of risk equal to damage (*schadensgleiche Vermögensgefährdung*) the *mens rea* requirement is fulfilled in case of the first two grades of intention, if the perpetrator is willing while acting to expose the owner of the assets to the risk as described in the previous section or is certain or holds it to be highly probable that such risk will be the result of his act. There has been however a controversy concerning the volitional element of *mens rea* in case of *dolus eventualis*.[397] The classic solution required that the perpetrator considered it possible that his act causes a risk to the assets he had the duty to safeguard and accepts this possibility, although it is not his will that such risk is created.[398] However the 2nd Criminal Panel of the BGH in the Kanther/Weyrauch case required that the perpetrator in such case not only accepts the possibility of creating the risk, but also has to accept the prospect of the occurrence of the actual damage.[399] The case concerned the creating of hidden funds by certain members of the Hessen branch of the CDU. Since the introduction of the rules on transparency of political parties finances, the maintaining of such accounts was infringing these rules and created a risk that the party would lose the state subsidy to which the parties are entitled depending on the electoral support they receive.[400]

The solution given by the court was mainly motivated by concerns about the scope of the offence, which the court attempted to curb by means of a restrictive interpretation of *mens rea*.[401] The court was in particular concerned that conviction of *Untreue* with a result limited only to risk equal to damage and with *mens rea* in form of *dolus eventualis* means in fact introducing punishment for attempted *Untreue*, which has been excluded by the StGB.[402] However this solution created incongruence

[395] Perron, '§ 266 Untreue' (note 33) marginal number 50, Schünemann, '§ 266 Untreue' (note 10) marginal number 190.
[396] Jescheck, Weigend, *Lehrbuch des Strafrechts* (note 357) p. 295.
[397] Kindhäuser, '§ 266 Untreue' (note 7) marginal number 123; Seier, 'Untreue' (note 5) marginal numbers 187ff.
[398] BGH (06.04.2000) NJW 2000, 2364-2366, 2366; BGH (15.11.2001) NJW 2002, 1211-1216, 1216.
[399] BGH (18.10.2006) NJW 2007, 1760-1767, 1766.
[400] BGH (18.10.2006) NJW 2007, 1760-1767, 1761.
[401] Seier, 'Untreue' (note 5) marginal numbers 186-188.
[402] BGH (18.10.2006) NJW 2007, 1760-1767, 1766. On attempted *Untreue*, see section 4.2. Attempt.

between the *actus reus* and *mens rea* requirements, as the *mens rea* would go further be referring to (conditional intention of) actual damage, while for *actus reus* the risk-damage would suffice. This problem was already noticed and addressed in the judgment. Curiously, the Court justified it by comparison with attempt, where the intention of the perpetrator goes further than his *actus reus*.[403] Although some authors welcomed the Court's attempts at limiting the scope of the offence, the method used by the court evoked criticism.[404] The doctrine's disapproval stemmed not only from the above-mentioned incongruence, but also from the classification of the perpetrator's intention as *dolus eventualis*. It has been established that the perpetrator knew (and accepted) the risk which was created by his act, which means that while acting his intention had the grade of *dolus eventualis* as to damage. However, if at the level of *actus reus*, it is the risk-damage (*Gefährdungschaden*) which is assumed, then the perpetrator acted with direct intention (*dolus directus*), since he knew with certainty that his act would create the risk of damage.[405]

The solution given in the above judgments was confirmed in two subsequent judgments issued by the 2nd Criminal Panel[406] and by the 5th Criminal Panel of the BGH.[407] However the 1st Criminal Panel of the BGH rejected outright the solution given in these judgments.[408] However the Court solved the case in question by considering that in cases of capital investment or credit transactions exposure to risk can be already considered as actual damage, as it was seen in the previous section, and the perpetrator does not act with *dolus eventualis* but with direct intention, since he wanted to expose them to this risk.[409]

This judgement draws attention to the following problem related to admitting discrepancies between the description of the *actus reus* and the *mens rea* of the offence of *Untreue*. If the theory requiring the perpetrator to accept the actual damage gains acceptance within the doctrine then a perpetrator who accepted the damage, but

[403] BGH (18.10.2006) NJW 2007, 1760-1767, 1767, Seier, 'Untreue' (note 5) marginal number 188.
[404] Schünemann, '§ 266 Untreue' (note 10) marginal number 196; Andreas Ransiek: '„Verstecktes" Parteivermögen und *Untreue*', *NJW*, 2007, pp. 1727-1730; Bernd Schünemann, 'Zur Quadratur des Kreises in der Dogmatik des Gefährdungsschadens', *NStZ*, 2008, pp. 430-434. Also Perron, '§ 266 Untreue' (note 33) marginal number 50.
[405] Ransiek, '„Verstecktes" Parteivermögen...' (note 404) p. 1729.
[406] BGH (25.05.2007) NStZ 2007, 704-705.
[407] BGH (02.04.2008) NJW 2008, 1827-1830, 1830.
[408] BGH (20.03.2008) NJW 2008, 2451-2455, 2452.
[409] BGH (20.03.2008) NJW 2008, 2451-2455, 2451f.

whose act was limited to creating a risk-damage situation, would be punished for *Untreue*. At the same time a perpetrator who only accepted the possibility that he may create a risk-damage situation and did not accept the actual damage, but in fact caused it, would have to be acquitted. Such a solution elevates *mens rea* to a decisive factor for criminal liability and gives it prevalence over the *actus reus*. This interpretation is doubtful since a person who accepts that he will create a risk of damage, in particular a risk of the type that it fulfils the criteria of risk-damage as described above, might find it difficult to claim that he only agreed to create a risk, but did not want to create the damage as such. The acceptance of risk of damage implies the possibility that the harm occurs.

In spite of the above problem, if the solution of the 2nd Criminal Panel is rejected, the perpetrator may be liable for *Untreue* in the context of risk-damage in three *mens rea* configurations: if he agrees to the damage and causes only risk of damage or if he agrees only to create the risk of damage and causes the risk of damage as well as if he agrees only to the risk of damage but causes the damage itself.

The coexistence of both theories is unwelcome inasmuch as it can result in one court sentencing a manager who did not want to create damage, but merely risk – and does so, whilst another court might acquit a manager who created effective damage if his *mens rea* was limited to creation of risk.

In a judgement issued after the above-mentioned judgements of the BGH the Federal Constitutional Court of Germany did not repeat the requirements formulated by the 2nd and repeated by the 5th Criminal Panel, stating only that intention in form of *dolus eventualis* should be sufficient for criminal liability for *Untreue*.[410] This may suggest, together with elaborate analysis of the *actus reus*, in particular in the context of risk-damage, that the court did not approve of the attempts to limit these concepts through *mens rea* requirements, but considered, as did several authors in the doctrine, that the solution ought to be sought rather in a strict interpretation of the limbs of the *actus reus*.[411]

[410] BVerfG (23.06.2010) NJW 2010, 3209-3221, 3214 at [105].
[411] BVerfG (23.06.2010) NJW 2010, 3209-3221, 3218 at [137]; Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 141; Kindhäuser, '§ 266 Untreue' (note 7) marginal number 123.

The fulfilment of the *mens rea* requirement of intention may be excluded because the perpetrator erroneously perceived a fact which constitutes one of the elements of the offence.[412] In relation to the offence of *Untreue*, this can be considered in particular in two situations. Firstly, there exists common agreement that criminal liability is excluded if the perpetrator erroneously thought that he acted in accordance with the owner's will.[413] Nevertheless, criminal liability is not excluded if the perpetrator acted hoping that the owner would subsequently approve of his act.[414]

Secondly, a mistake as to whether the perpetrator had the duty to safeguard the victim's financial interests or about its breach may exclude criminal liability as well. The scope of this error is however subject to debate, in which three positions have been formulated, reflected also in the jurisprudence.[415] One aspect of this problem is whether the error as to the duty ought to be considered a mistake of fact (*Tatbestandsirrtum*) or analysed as a problem of mistake of law (*Verbotsirrtum*). The classification of the perpetrator's mistake as one of these categories may have a significant impact on the final outcome as to his criminal liability, since a mistake of fact excludes the perpetrator's intent and thus the commission of the offence *per se*, while a mistake of law excludes criminal liability (because of lack of guilt) only if it was unavoidable (Section 17, 1st sentence StGB). If the perpetrator's mistake was avoidable, it can still have influence on the final sentence, but only by mitigating the penalty (Section 17, 2nd sentence StGB).

The first theory considers that any mistake which concerns the duty to safeguard the victim's financial interests, including mistakes concerning the legal background of this duty, should be considered to be a mistake on the facts, thus excluding that the perpetrator acted intentionally.[416] The contrary view considers that only mistakes as to the factual aspects of the background of the duty can be considered mistakes of fact, while a mistake as to the assessment of legal aspects of

[412] Section 16 I StGB: "Whosoever at the time of the commission of the offence is unaware of a fact which is a statutory element of the offence shall be deemed to lack intention." For more information on the mistake of facts (Tatbestandsirrtum) see Jescheck, Weigend, *Lehrbuch des Strafrechts* (note 357) p. 306ff.
[413] Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 153; Kindhäuser, '§ 266 Untreue' (note 7) marginal number 122; Dierlamm, '§ 266 Untreue' (note 1) marginal number 282; BGH (17.06.1952) BeckRS 1952 30397513.
[414] Seier, 'Untreue' (note 5) marginal number 83.
[415] Seier, 'Untreue' (note 5) marginal number 84.
[416] Dierlamm, '§ 266 Untreue' (note 1) marginal number 282.

the duty ought to be viewed as a mistake of law.[417] A compromise view requires that in order for the perpetrator to act intentionally, it is necessary that he have a "layman's insight into the normative evaluation of the underlying facts"[418] (*Parallelwertung in der Laiensphäre*).[419]

There exists so far no agreement as to the solution of this problem and different approaches can also be found in the jurisprudence.[420] One author suggests that a pragmatic and plausible approach, which the BGH seem to apply as well,[421] would favour the application of a mistake of fact where the legal background of the breached duty reaches a certain degree of complexity. If the legal background is evident, however, it should be the mistake of law that comes into play.[422]

4. Inchoate offences

4.1. Preparatory acts

It is a general rule of German criminal law that preparatory acts, which do not fulfil the criteria of attempt, are not punishable.[423] Only where there are particular reasons of criminal policy nature the law provides for special offences criminalising preparatory acts.[424] However no such offences exist as regards *Untreue*, and thus preparatory acts to commit the offence of *Untreue* are not criminalised.

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[417] Kindhäuser, '§ 266 Untreue' (note 7) marginal number 122. See also Schünemann, '§ 266 Untreue' (note 10) marginal numbers 192-197.
[418] This English explanation of the German expression – "*Parallelwertung in der Laiensphäre*" – used in the context of mistake of law is taken from Bohlander, *Principles of German Criminal Law* (note 180) p. 120.
[419] Perron, '§ 266 Untreue' (note 33) marginal number 49; Schmid, '§31 Treupflichtverletzungen' (note 40) marginal number 199. See also: Günther Jakobs, 'LG Düsseldorf: *Untreue*-Vorwurf wegen Verletzung gesellschaftsrechtlicher Sonderpflichten - Mannesmann/Vodafone', *NStZ*, 2005, pp. 276-278, 277f.
[420] For example for the first theory: BGH (17.06.1952) BeckRS 1952 30397513; BGH (06.05.1986) NStZ 1986, 455-456; second theory: BGH (17.09.2009) NStZ 2009, 694-697, 696. Saliger, '§ 266 Untreue' (note 314) marginal number 105, See also: BGH (21.12.2005) NJW 2006, 522-531, 527ff.
[421] BGH (18.10.2006) NJW 2007, 1760-1767, 1766. See also: BGH (21.12.2005) NJW 2006, 522-531, 531.
[422] Saliger, '§ 266 Untreue' (note 314) marginal number 105.
[423] Jescheck, Weigend, *Lehrbuch des Strafrechts* (note 357) p. 523.
[424] Jescheck, Weigend, *Lehrbuch des Strafrechts* (note 357) pp. 523f.

4.2. Attempt

According to Article 23 (1) StGB attempts to commit a felony entail criminal liability, whereas attempted misdemeanours are punishable only if expressly provided so by law.[425] *Untreue* belongs to the category of misdemeanours.[426] Since the law does not contain any provision on criminal liability for attempted *Untreue*, this offence can be punished only if it was fully committed.[427]

The debates over the boundaries of criminalisation through the offence of *Untreue* pointed out that extensive interpretation of certain elements, in particular the notion of risk-damage, result in practice in introducing the criminalisation of attempted *Untreue* through the back door.[428] However if this concept is to be understood as stated by the Federal Constitutional Court and as explained above, the dangers of this interpretation have diminished.[429]

4.3. Conspiracy

The German criminal law provides in Section 30 (2) StGB for liability for conspiring to commit an offence. However the application of this provision is limited to felonies, and thus *Untreue*, which is a misdemeanour, is excluded from its scope.[430]

5. Cooperation in the commission of the offence

According to German law, criminal liability can be incurred by different types of participation in the offence (*Beteiligung*), which can be divided into two groups: liability as a principal (*Täterschaft*) and liability as a secondary participant (*Teilnahme*).[431] Leaving aside the cases of sole perpetrator, liability as a principal can

[425] § 23 *Strafbarkeit des Versuchs (1) Der Versuch eines Verbrechens ist stets strafbar, der Versuch eines Vergehens nur dann, wenn das Gesetz es ausdrücklich bestimmt*.
[426] Section 12 (2), for details see 8. Punishment.
[427] Wittig, *Wirtschafsstrafrecht* (note 98) marginal number 14; Schünemann, '§ 266 Untreue' (note 10) marginal number 206.
[428] Alfred Dierlamm, 'Untreue - ein Auffangtatbestand?', *NStZ*, 1997, pp. 534-536, 535.
[429] BVerfG (23.06.2010) NJW 2010, 3209-3221, 3220.
[430] Bohlander, *Principles of German Criminal Law* (note 180) p. 175.
[431] Bohlander, *Principles of German Criminal Law* (note 180) p. 154. This section is mainly based on Bohlander, *Principles of German Criminal Law* (note 180) pp. 153ff, including the English terminology he uses.

occur in two forms: joint principals (*Mittäterschaft*) and principal by proxy (*Mittelbare Täterschaft*). The category of secondary participation contains two forms of committing an offence: instigation (*Anstiftung*) and aiding (*Beihilfe*).[432]

Only a person who has the duty to safeguard the financial interests of another person can commit *Untreue* as a principal.[433] Persons who do not have such a duty can fall into the scope of criminal liability for this offence only as secondary participants, i.e. instigators or aiders.[434] The majority of scholars follow the so-called *Einheitstäterbegriff* (lack of distinction between principals and participants). According to this theory, if a person has the duty to safeguard another person's financial interests and breaches this duty causing the required result, he commits *Untreue* as a principal even if what he did would amount to secondary participation (aiding or instigating).[435] For instance, if a manager provides assistance to another person in the commission of *Untreue* or induces this person to commit this offence, the manager breaches his duty and fulfils the definition of the offence, thus he will be liable as a principal and not as a secondary participant (provided that the requirements of secondary participation are fulfilled; see below).[436] Similarly, in case of two managers (both duty holders) where one successfully instigates the other to commit *Untreue*, both could be considered principals. However, liability as principal is limited to breaches of the given person's duties. As a result where a person is a duty-holder towards the victim but the latter is damaged because of the breach of another duty (a duty that this person does not have), such act does not classify this person as a principal.[437] For example, in the Mannesmann/Vodafone case the liability of the members of the management board was considered as aiding to commit *Untreue* by their involvement in granting excessive remuneration, but not as principals, since the

[432] Bohlander, *Principles of German Criminal Law* (note 180) p. 154.
[433] Seier, 'Untreue' (note 5) marginal number 61; Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 156; Kindhäuser, '§ 266 Untreue' (note 7) marginal number 127; BGH (10.11.1959) NJW 1960, 158-159, 158.
[434] Seier, 'Untreue' (note 5) marginal number 62, Kindhäuser, '§ 266 Untreue' (note 7) marginal number 127; Perron, '§ 266 Untreue' (note 33) marginal number 52; BGH (21.10.1983) wistra 1984, 22-23, 23; BGH (21.12.2005) NJW 2006, 522-531, 530.
[435] Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 156.
[436] Seier, 'Untreue' (note 5) marginal number 64. Against this theory and in favour of application of rules of control (*Tatherschaft*): Reihart Maurach, Friedrich-Christian Schroeder, Manfred Maiwald, *Strafrecht Besonderer Teil*, Teilband 1, Straftate gegen Persönlichkeits- und Vermögenswerte, 9th edition (Heidelberg: C. F. Müller Verlag, 2003) §45 Untreue, marginal number 21.
[437] Wittig, *Wirtschafsstrafrecht* (note 98) marginal number 7.

duty as regards this competence was vested only in the members of the supervisory board.[438]

5.1. Principals

5.1.1. Principal by proxy

According to Section 25 (1) StGB "[a]ny person who commits the offence himself or through another shall be liable as a principal".[439] The first part of this sentence refers to the sole perpetrator and the second to the figure of principal by proxy. The latter form of perpetration provides for the conviction of persons who do not commit the offence themselves (so called *Hintermann*, meaning a person behind), but use another person (an agent) as an instrument (*als "Werkzeug"*)[440] for this purpose, controlling the situation due to superior knowledge or superior powers over the agent.[441] It is the element of control of the act (*Tatherrschaft*), which is crucial for the differentiation between this form of committing the offence and secondary participation in its commission, and in the case of a principal by proxy the offence should appear as the deed of the *Hintermann* and not that of the agent.[442]

Often the person who effectively performs the act (the agent) is not liable for the offence. He may lack an element of *actus reus* (e.g. special personal characteristic of the perpetrator), or a *mens rea* component (e.g. knowledge or special intention of obtaining a gain for oneself). The agent's act may also be lawful (*rechtmäßig*) under an accepted defence or commited without personal guilt (*schuldlos*), which may be due to an accepted defence or because the perpetrator is considered to lack criminal capacity (e.g. minors).[443] However the BGH has admitted in certain cases the criminal liability of principals by proxy in situations where agents' liability was not excluded.

[438] LG Düsseldorf (22.07.2004) NJW 2004, 3275-3287, 3283; BGH (21.12.2005) NJW 2006, 522-531, 528.
[439] § 25 Täterschaft (1) *Als Täter wird bestraft, wer die Straftat selbst oder durch einen anderen begeht*.
[440] Jescheck, Weigend, *Lehrbuch des Strafrechts* (note 357) p. 664.
[441] Bohlander, *Principles of German Criminal Law* (note 180) p. 156.
[442] Jescheck, Weigend, *Lehrbuch des Strafrechts* (note 357) p. 664.
[443] Bohlander, *Principles of German Criminal Law* (note 180) p. 156; Jescheck, Weigend, *Lehrbuch des Strafrechts* (note 357) pp. 665ff.

These cases concerned power structures such as the state security apparatus of the former German Democratic Republic or mafia organisations.[444]

In the context relevant for this study, this form of liability may be applied if managers – duty holders – use other persons to perform acts which are contrary to the duty of those managers and result in harm as required by Section 266 StGB. However, it is possible that the order given by the duty holder to perform such an act may constitute a breach of duty in itself, thus the person would be liable as sole perpetrator, without invoking liability as principal by proxy.

5.1.2. Joint principals

According to Section 25 (2) StGB "[i]f more than one person commit the offence jointly, each shall be liable as a principal (joint principals)".[445] The notion of joint principals addresses the situations in which several persons act according to a common plan, which entails commission of an offence, and the tasks within this plan are distributed so that they do not all fulfil the required elements of the offence. If this is the case these persons are liable as principals regardless of the nature of their contribution(s).[446] The criterion of qualification as joint principal is, similarly to principals by proxy, control over the act (*Tatherrschaft*), which exists if the participant "offers a contribution that *has an impact* on how the common plan is shaped or enforced, and as long as he wants to influence the actual mode of commission".[447] In other words, it is because of a common plan and the influence which the perpetrators have on the planning or the commission of the offence, that

[444] For the analysis of this problem see for example: Bohlander, *Principles of German Criminal Law* (note 180) p. 158-159; Günter Heine, Bettina Weißer, '§ 25 Täterschaft', in: Adolf Schönke, Horst Schröder, Albin Eser et al. (eds.), *Strafgesetzbuch Kommentar*, 29th edition (München: C. H. Beck, 2014), marginal numbers 22ff; Wolfgang Schild, '§ 25 Täterschaft', in: Urs Kindhäuser, Ulfrid Neumann, Hans-Ullrich Paeffgen (eds.), *Strafgesetzbuch*, 4th edition (Baden-Baden: Nomos, 2013), marginal numbers 120ff; Wolfgang Joecks, '§ 25 Täterschaft' in: Bernd von Heintschel-Heinegg (ed.), Münchener Kommentar zum Strafgesetzbuch, Band 1: §§ 1-37 StGB, 2nd edition, (München, C. H. Beck, 2011) marginal number 132ff.

[445] § 25 (2) Begehen mehrere die Straftat gemeinschaftlich, so wird jeder als Täter bestraft (Mittäter).

[446] Jescheck, Weigend, *Lehrbuch des Strafrechts* (note 357) p. 674; Bohlander, *Principles of German Criminal Law* (note 180) p. 161ff.; Urs Kindhäuser, *Strafrecht. Allgemeiner Teil*, 4th edition (Baden Baden: Nomos, 2009) p. 342.

[447] Bohlander, *Principles of German Criminal Law* (note 180) p. 162, italics are original.

they are considered to be (joint) principals, in spite of the differences in what they effectively do in the process of the realisation of this plan.[448]

The distinction between this form of commission of an offence and secondary participation, especially in the form of aiding, is particularly relevant because punishment for the latter form would be mitigated by application of Section 49 (1) StGB, possibly even twice (see below).[449] However, according to the *Einheitstäterbegriff*, persons who are duty-holders in terms described in the previous section are to be considered principals even if their contribution amounts only to aiding or instigating. Those who do not have the duty to safeguard the financial interests of the company can never be (joint) principals in any case. Thus situations in which this form of liability would find its application in cases relevant for this study are limited to acts in which only the cooperation of two or more managers constitutes a breach of duty, or where it is only due to their parallel breach of duty that the required harm occurred (e.g. if a collegial decision needs to be taken).[450]

5.2. Secondary participants

An instigator is a person who intentionally induces another to intentionally commit an unlawful act. He shall be liable to be sentenced as if he were a principal (Section 26 StGB).[451]

An aider is a person who intentionally assists another in the intentional commission of an unlawful act (Section 27 (1) StGB). Pursuant to Section 27 (2) StGB the sentence for the aider shall be based on the penalty for a principal and mitigated according to Section 49 (1) StGB (on mitigation see below).[452]

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[448] Bohlander, *Principles of German Criminal Law* (note 180) p. 163.
[449] Bohlander, *Principles of German Criminal Law* (note 180) p. 161.
[450] BGH (21.12.2005) NJW 2006, 522-531, 527; See also: Gerhard Seher, 'Grundfälle zur Mittäterschaft', *Juristische Schulung* (JuS), 2009, 304-309, 307f. In view of the explained theories one can argue that in the context of liability as joint principal, the relevant contribution must in fact be necessary to the commission of *Untreue*.
[451] § 26 Anstiftung "*Als Anstifter wird gleich einem Täter bestraft, wer vorsätzlich einen anderen zu dessen vorsätzlich begangener rechtswidriger Tat bestimmt hat*."
[452] § 27 Beihilfe "(1) *Als Gehilfe wird bestraft, wer vorsätzlich einem anderen zu dessen vorsätzlich begangener rechtswidriger Tat Hilfe geleistet hat*. (2) *Die Strafe für den Gehilfen richtet sich nach der Strafdrohung für den Täter. Sie ist nach § 49 Abs. 1 zu mildern*."

According to German law it is necessary for aiding or instigating that, firstly, the principal intentionally commits an unlawful act, although it is not necessary that he is criminally liable for it, since his liability might be excluded because he was not acting in a guilty manner (*nicht schuldhaft*) for instance because of a valid defence of insanity (*limitierte Akzessorietät* – limited dependence of aiding and instigating on the main offence).[453] Secondly, it requires an intentional act of instigating or aiding.[454] It is thus necessary in the context of this study that, as regards the main offence, a principal – a person having the duty to safeguard the company's financial interests – fulfils the elements of *Untreue* at least with *dolus eventualis*.[455] In view of the *Einheitstäterbegriff*, the secondary participant will not be a duty holder.

In the context of *Untreue*, the qualification of a person as secondary participant and not principal has important consequences *inter alia* as regards the possible punishment. Section 28 StGB provides that "[i]f special personal characteristics (section 14(1)) that establish the principal's liability are absent in the person of the secondary participant (abettor or aider) their sentence shall be mitigated pursuant to section 49(1)".[456] The duty to safeguard another person's financial interests is considered to be a special personal characteristic required by this provision. Thus the punishment provided in Section 266 StGB in case of secondary participants will be mitigated accordingly.[457]

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[453] Jescheck, Weigend, *Lehrbuch des Strafrechts* (note 357) p. 685ff., Bohlander, *Principles of German Criminal Law* (note 180) p. 168.
[454] Bohlander, *Principles of German Criminal Law* (note 180) p. 167.
[455] Bohlander, *Principles of German Criminal Law* (note 180) p. 168.
[456] § 28 Besondere persönliche Merkmale "(1) *Fehlen besondere persönliche Merkmale (§ 14 Abs. 1), welche die Strafbarkeit des Täters begründen, beim Teilnehmer (Anstifter oder Gehilfe), so ist dessen Strafe nach § 49 Abs. 1 zu mildern*."
[457] Section 49 Special mitigating circumstances established by law "(1) If the law requires or allows for mitigation under this provision, the following shall apply:
1. Imprisonment of not less than three years shall be substituted for imprisonment for life.
2. In cases of imprisonment for a fixed term, no more than three quarters of the statutory maximum term may be imposed. In case of a fine the same shall apply to the maximum number of daily units.
3. Any increased minimum statutory term of imprisonment shall be reduced as follows:
a minimum term of ten or five years, to two years;
a minimum term of three or two years, to six months;
a minimum term of one year, to three months;
in all other cases to the statutory minimum."
§ 49 Besondere gesetzliche Milderungsgründe "(1) *Ist eine Milderung nach dieser Vorschrift vorgeschrieben oder zugelassen, so gilt für die Milderung folgendes:*
1. An die Stelle von lebenslanger Freiheitsstrafe tritt Freiheitsstrafe nicht unter drei Jahren.
2. Bei zeitiger Freiheitsstrafe darf höchstens auf drei Viertel des angedrohten Höchstmaßes erkannt werden. Bei Geldstrafe gilt dasselbe für die Höchstzahl der Tagessätze.
3. Das erhöhte Mindestmaß einer Freiheitsstrafe ermäßigt sich
im Falle eines Mindestmaßes von zehn oder fünf Jahren auf zwei Jahre,

In this regard the rules apply differently with respect to instigators as opposed to aiders. The instigator shall be sentenced as if he were a principal (Section 26 StGB). This punishment will be mitigated pursuant to Section 49 (1) StGB as explained above. As to the aider, the law specifies that the punishment shall be based on the penalty for a principal. However, the same provision in general mitigates the punishment for aiders (Section 27 (2) StGB second sentence). The question has arisen whether the punishment shall be mitigated according to both provisions (Section 28 (1) StGB and Section 27 (2) StGB) resulting in the double application of Section 49 (1) StGB, or whether only mitigation provided by Section 28 (1) StGB shall take place.[458] The dominant view, represented also in the jurisprudence, considers that if a person qualifies for the category of aider only by lacking the quality of duty holder, then the punishment shall be mitigated only once (pursuant to Section 28 (1) StGB). If however the person acts in a way which would fulfil the definition of aider in general terms, he should benefit from double mitigation of punishment.[459]

5.2.1. Instigation

Instigation consists in causing another person to commit an unlawful and intentional act.[460] Instigation does not need to be the only cause of the main perpetrator's act; it is sufficient if it is one of the prompting factors.[461] The instigator is liable only if the main perpetrator actually committed *Untreue*.[462] If at the moment of instigation, the future main perpetrator had already decided to commit the offence, the instigator's liability is excluded.[463] The law does not specify in what way the

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im Falle eines Mindestmaßes von drei oder zwei Jahren auf sechs Monate,
im Falle eines Mindestmaßes von einem Jahr auf drei Monate,
im übrigen auf das gesetzliche Mindestmaß."

[458] Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 157.

[459] BGH (08.01.1975) NJW 1975, 837-838, 838; Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 157; Dierlamm, '§ 266 Untreue' (note 1) marginal number 286. Against: Perron, '§ 266 Untreue' (note 33) marginal number 52; Seier, 'Untreue' (note 5) marginal number 63, who considers that the punishment should be mitigated twice in all cases.

[460] Jescheck, Weigend, *Lehrbuch des Strafrechts* (note 357) p. 686.

[461] Kindhäuser, *Strafrecht. Allgemeiner Teil* (note 446) p. 348.

[462] As a general rule the main perpetrator must at least enter the phase of a criminal attempt to commit the offence, but since attempted *Untreue* is not criminal, for the liability of instigators the commission of the main offence is necessary, Jescheck, Weigend, *Lehrbuch des Strafrechts* (note 357) p. 689.

[463] In cases where at the moment of instigation the main perpetrator had already decided to commit the offence, only liability for attempted instigation is possible (pursuant to Section 30 (1) StGB, see: Bohlander, *Principles of German Criminal Law* (note 180) p. 168). However, in order for such a liability to be possible, it is necessary that the attempts to commit the main offence have to be

secondary participant has to instigate the main perpetrator; this can be done by any means, for instance gifts, promises, use of influence or reputation, or even threats.[464]

Instigation must be committed intentionally, which requires a so-called double intention (*doppelter Anstiftervorsatz*): the intention that the concrete intentional offence is committed and the intention to induce its commission.[465] Intention in the form of *dolus eventualis* is enough.[466] The intention to instigate must be directed at a concrete person or circle of persons.[467] Public incitement to commit an offence directed at an unspecified group of persons may however be punished pursuant to Section 111 StGB. The instigator does not need to know all the details of the main offence - only its essential elements.[468]

An instigator to the commission of *Untreue* must know that the person is a duty-holder and that the act which he instigates the duty-holder to commit would constitute a breach of this duty, or at least deems this to be probable and accepts the risk that it may occur. Moreover this person must want the company to suffer damage or risk-damage or consider it probable that such a result will occur and accept this probable outcome.

5.2.2. Aiding

Aiding means intentionally providing help to another person in the commission of an intentional unlawful act.[469] This help may consist in acts of different nature, such as: providing instruments or tools, helping to execute the act, by providing information or advice as well as by giving psychological support - although this last category is subject to controversy.[470] The majority view accepts aiding by providing psychological support if the secondary participant helps the main perpetrator, who already decided to commit the offence, to overcome fear as to its

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criminalised. As this is not the case for *Untreue*, also attempted instigation is not punishable (see also below 8. Punishment.)

[464] Jescheck, Weigend, *Lehrbuch des Strafrechts* (note 357) p. 687.

[465] Kindhäuser, *Strafrecht. Allgemeiner Teil* (note 446) p. 351.

[466] Jescheck, Weigend, *Lehrbuch des Strafrechts* (note 357) p. 687.

[467] Günter Heine, Bettina Weißer, '§ 26 Anstiftung', in: Adolf Schönke, Horst Schröder, Albin Eser et al. (eds.), *Strafgesetzbuch Kommentar*, 29th edition (München: C. H. Beck, 2014) marginal number 19; Jescheck, Weigend, *Lehrbuch des Strafrechts* (note 357) p. 688.

[468] Bohlander, *Principles of German Criminal Law* (note 180) p. 169.

[469] Jescheck, Weigend, *Lehrbuch des Strafrechts* (note 357) p. 691.

[470] Kindhäuser, *Strafrecht. Allgemeiner Teil* (note 446) p. 355.

execution[471] or by strengthening the main perpetrator's will to execute the act (also by promising help, which the main perpetrator does not use in the end).[472] In instances other than providing psychological support, the main perpetrator does not need to be aware of the fact that aid is being provided.[473]

Similarly to instigation, criminal liability for aiding also requires that an act of *Untreue* is in fact committed.[474] Aid can be provided at any point of time until the main offence is completed (*beendet*).[475]

It is subject to debate whether the causal link between the help provided and the commission of the unlawful act is necessary. According to the dominant view such a link is necessary, however it is enough that the aid was only one of the elements that influenced the main act and that it facilitated, intensified or ensured its commission.[476]Attempts to provide help are not criminal.[477] Hence, if the aid had no influence on the act, remained unused or was not delivered, there can be no criminal liability for such a contribution unless it can be considered psychological aid.

The *mens rea* requirement is similar to the one as regards the instigator. The aider must also have so-called double intention, which in this case means intention that the concrete intentional offence be committed and intention to provide help toward its commission. Intention in the grade of *dolus eventualis* is sufficient.[478] The aider must want the unlawful act to be effectively committed, however, he does not need to know all the details concerning the act. The jurisprudence tends to require even less knowledge as to these details than in cases of instigation.[479]

If one person commits first instigation and then aiding in relation to the same act(s), he has to be punished for instigation, which is considered to be more grave.[480]

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[471] Kindhäuser, *Strafrecht. Allgemeiner Teil* (note 446) p. 355.
[472] Jescheck, Weigend, *Lehrbuch des Strafrechts* (note 357) p. 692.
[473] Günter Heine, Bettina Weißer, '§ 27 Beihilfe', in: Adolf Schönke, Horst Schröder, Albin Eser et al. (eds.), *Strafgesetzbuch Kommentar*, 29th edition (München: C. H. Beck, 2014) marginal number 18.
[474] Jescheck, Weigend, *Lehrbuch des Strafrechts* (note 357) p. 695.
[475] Jescheck, Weigend, *Lehrbuch des Strafrechts* (note 357) p. 692; Schünemann, '§ 266 Untreue' (note 10) marginal number 207. See section 8. Punishment for the analysis of the moments when the offence is committed (*vollendet*) and when it is complete (*beendet*).
[476] Wolfgang Joecks, '§ 27 Beihilfe' in: Bernd von Heintschel-Heinegg (ed.), Münchener Kommentar zum Strafgesetzbuch, Band 1: §§ 1-37 StGB, 2nd edition, (München, C. H. Beck, 2011) marignal number 23ff.; Heine/Weißer, '§ 27 Beihilfe' (note 473) marginal number 4.
[477] Heine/Weißer, '§ 27 Beihilfe' (note 473) marginal number 40
[478] Jescheck, Weigend, *Lehrbuch des Strafrechts* (note 357) p. 695.
[479] Kindhäuser, *Strafrecht. Allgemeiner Teil* (note 446) p. 362; Bohlander, *Principles of German Criminal Law* (note 180) p. 173.
[480] Kindhäuser, *Strafrecht. Allgemeiner Teil* (note 446) p. 362.

Also similarly to instigation, liability for aiding in the commission of *Untreue* is limited to persons who are not obliged by the duty which was breached in the commission of the act. Aid can be provided in any form, be it by preparing documents, gathering information, advising on the decision-making process or psychologically supporting the act.[481] According to the dominant view on causality, it is necessary that this help has at least some influence on the act of the main perpetrator. Help can also be provided by accountants or auditors advising the main perpetrator or attesting (contrary to the facts) to the correctness of the company's accounts, unless they have the duty themselves.[482] In the Mannesmann/Vodafone case, the aid of the accused (member of the management board and head of department) consisted in preparing decisions of the supervisory board, the members of which breached their duty by adopting these decisions, and assisting in their enforcement.[483]

Assistants and other personnel collaborating with the managers may perform all of these activities and remain innocent. The crucial factor, which might turn them into secondary participants, is *mens rea*. According to the rule of double intention the secondary participant must know that the person to whom he is providing help is a duty holder and, more pertinently, must want him to breach his duty or know that the act furthered by his aid may constitute a breach of duty and accept this possibility. Moreover, the secondary participant must want to assist in the commission of this breach or at least know that it is possible that his help will facilitate the main act and accept this possibility. Finally, secondary participants must want the company to suffer damage or risk-damage or consider it probable that this result will take place and accept this.

[481] E.g. BGH (15.11.2001) NJW 2002, 1211-1216, 1213.
[482] BGH (18.10.2006) NJW 2007, 1760-1767.
[483] BGH (21.12.2005) NJW 2006, 522-531, 522f, 528.

6. Reasons for excluding criminal liability

6.1. Consent of the victim

The valid consent (*Einverständnis*) of the victim – i.e. the owner of the assets[484] – to the act of the perpetrator excludes criminal liability for *Untreue*.[485] According to the majority opinion, consent in cases of Untreue is not a ground of justification (such as self-defence), but broadens the scope of what the perpetrator is allowed to do within these boundaries of his duty.[486]

In order to exclude criminal liability, consent must be valid and this validity is defined by several rules. First of all consent must be given before the act. If it is given afterwards it cannot exclude criminal liability.[487] Secondly, the person giving consent must be entitled to decide upon the assets, which is particularly important in the context of legal persons (see below).[488] Thirdly, the person must have the legal capacity to consent, and consent was not obtained by means of deception (*Täuschung*) or constraint (*Zwang*).[489] Moreover the person must have enough insight into the situation.[490] Although lack of experience does not exclude the validity of consent a priori, consent could be invalid for example in a situation in which an inexperienced person gives consent to a transaction bearing an uncommonly high risk.[491] Some authors also think that consent is invalid when it authorises an illegal act (e.g. corruption) or is given in violation of legal provisions (e.g. consent given by an organ

[484] See: 2. Legal interests deserving criminal law protection.
[485] Kindhäuser, '§ 266 Untreue' (note 7) marginal number 66; Seier, 'Untreue' (note 5) marginal number 89; BGH (20.07.1999) NJW 2000, 154-157, 155; BGH (18.06.2003) NJW 2003, 2996-3000, 2998-3000; BGH (21.12.2005) NJW 2006, 522-531, 525f.; Wittig, '§ 266 Untreue' (note 101) marginal number 20.
[486] Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 74; Dierlamm, '§ 266 Untreue' (note 1) marginal number 143; BGH (27.08.2010) NJW 2010, 3458-3464, 3461. On the problem of consent and the offence of *Untreue* see the monography of Edward Schramm, *Untreue und Konsens* (Berlin: Duncker & Humblot, 2005).
[487] Seier, 'Untreue' (note 5) marginal number 92; Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 76. However the latter discussed situations in which such consent could be valid, if given during the commission of the offence, see: Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 77 and Schramm, *Untreue und Konsens* (note 485) pp. 186-187; Wittig, '§ 266 Untreue' (note 101) marginal number 21. BGH (21.12.2005) NJW 2006, 522-531, 526.
[488] Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 78.
[489] Seier, 'Untreue' (note 5) marginal number 90,
[490] BGH (07.11.1996) NStZ 1997, 124-125, 125.
[491] Kindhäuser, '§ 266 Untreue' (note 7) marginal number 67; Waßmer, *Untreue bei Risikogeschäften* (note 24), p. 44.

with respect to an act which, according to the by-laws, is beyond the scope of its remit).[492]

Shareholders of a GmbH are entitled to give valid consent to an act which may be damaging for the company, however the limits of this consent are subject to debate.[493] The dominant view considers such consent valid as long as it does not authorise an act which endangers the existence of the company (in economic terms), for example if it risks illiquidity of the company or affects its nominal capital (*Stammkapital*).[494] The opposing view claims that such an interpretation aims at protecting mainly the creditors of the company, which is not the function of *Untreue* and that it should not limit the freedom of shareholders (owners) to decide upon their assets, and thus considers their right to give consent as unlimited.[495]

Similar rules apply to consent given by the shareholders of an AG. Here too, as in the context of the GmbH, part of the doctrine opposes limiting consent.[496] It must be granted by all shareholders or a valid shareholders meeting.[497]

As the shareholders are not considered duty-holders, they cannot be liable for *Untreue* for consent given against the interests of the company.

Presumed consent (*mutmaßliches Einverständnis*) can also in certain circumstances exclude criminal liability for *Untreue*. It may be considered only in situations where obtaining a valid consent from the entitled person was impossible, at least in the necessary timeframe.[498] Presumed consent is a justification developed mainly in the domain of criminal law in medicine, but its general rules apply here as well.[499] It excludes criminal liability if "an evaluation of all circumstances, conducted with due diligence at the time of the act by D[efendant], leads to the conclusion that,

[492] Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 80. Contrary: Seier, 'Untreue' (note 5) marginal number 90, who considers that such view is not in agreement with the protected legal interest of the offence of *Untreue*.
[493] Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 85.
[494] Kindhäuser, '§ 266 Untreue' (note 7) marginal number 71; Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 85.
[495] Perron, '§ 266 Untreue' (note 33) marginal number 21b. See also Dierlamm, '§ 266 Untreue' (note 1) marginal numbers 143ff.
[496] Dierlamm, '§ 266 Untreue' (note 1) marginal number 159.
[497] BGH (21.12.2005) NJW 2006, 522-531, 522f, 525.
[498] Dierlamm, '§ 266 Untreue' (note 1) marginal number 145.
[499] Schramm, 'Untreue, § 266 StGB' (note 8) marginal numbers 81f, Dierlamm, '§ 266 Untreue' (note 1) marginal number 145.

if asked, V[ictim] would consent".[500] The fact that the victim subsequently denies that he would have given consent does not exclude the validity of this justification, if its conditions were fulfilled.[501]

6.2. Orders of a superior

If a lower-tier manager performs at the request of a senior manager an act which he knows to be in breach of his duty and may result in a loss to the company, there is nothing to suggest that the request excludes his criminal liability. However, the senior manager's order may influence the *mens rea* of the lower-level manager, if the senior manager assures him that the decision is correct. Moreover, a question of consent may also arise, however in very exceptional cases, where the senior manager would be entitled to give valid consent in the name of the company.

6.3. Expert opinion

The existence of expert opinion may influence the *mens rea* of the perpetrator if it indicates that the decision in question will not expose the company to inacceptable risk, unless the perpetrator has reason to doubt the accuracy of that opinion.

In the case of collective decisions, each member of the decisive body is obliged to fulfil his duty and do all that he can reasonably do to stop a decision which might be detrimental to the company.[502] It has also been considered in the context of granting credit that members of the decisive body may rely on the opinion of the manager in charge, or of an expert called for this purpose, unless particular circumstances exist, such as doubts or diversity of expert opinions or particularly high risk.[503]

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[500] Bohlander, *Principles of German Criminal Law* (note 180) p. 88.
[501] Bohlander, *Principles of German Criminal Law* (note 180) pp. 88f.
[502] Seier, 'Untreue' (note 5) marginal number 80.
[503] Seier, 'Untreue' (note 5) marginal number 280; Kindhäuser, '§ 266 Untreue' (note 7) marginal number 78, BGH (06.04.2000) NJW 2000, 2364-2366, 2366; BGH (15.11.2001) NJW 2002, 1211-1216, 1216.

7. Special provisions for banking and insurance executives

The so-called Ring-fencing Act (*Trennbankengesetz*),[504] which concerns banking and insurance undertakings and was enacted in reaction to the most recent financial crisis, introduced two special criminal provisions concerning senior banking and insurance managers, which penalise violations of a listed number of risk-management rules, resulting in a situation of concrete endangerment to the existence of the financial or insurance institution.[505] The reason for introducing these provisions was the German legislature's consideration that the instances in which senior managers of banking, financial and insurance undertakings could be held criminally liable for failures in risk management were insufficient.[506] These new offences should contribute to the prevention of a new financial crisis and, were one to occur nonetheless, ought to permit a criminal law response to wrongdoing.[507] The provisions entered into force on 2 January 2014.[508] Since the law has been in force for a relatively short period of time, the literature concerning it is so far rather limited and there is no jurisprudence.

The Ring-fencing Act introduced the offence concerning banking executives by creating a new Section 54a of the Banking Act (*Gesetz über das Kreditwesen* - KWG)[509], and a similar provision concerning insurance undertakings: Section 142

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[504] *Gesetz zur Abschirmung von Risiken und zur Planung der Sanierung und Abwicklung von Kreditinstituten und Finanzgruppen*; Act on Ringfencing of Risks and on Recovery and Resolution Planning for Credit Institutions and Financial Groups, adopted on 7 August 2013 (Bundesgesetzblatt Jahrgang 2013 Teil I Nr. 47, p. 3090ff), entered into force on: 13.08.2013. See: http://dipbt.bundestag.de/extrakt/ba/WP17/508/50871.html (retrieved on 08.10.2015).
The author is very grateful to HammPartner and in particular to Thomas Richter for providing the English translation of the provisions of KWG and VAG used in this section. The author remains responsible for alterations made to this translation.

[505] Peter Häberle, 'KWG 54a Strafvorschriften', in: Georg Erbs, Max Kohlhaas, Friedrich Ambs, *Strafrechtliche Nebengesetze*, Loseblattausgabe, 199th edition (München: C. H. Beck 2014) marginal number 1.

[506] Deutscher Bundestag, *Drucksache 17/12601* (04.03.2013), p. 2.

[507] Alexander Schork, Tilman Reichling, 'Der strafrechtliche Schutz des Risikomanagements durch das sog. Trennbankengesetz', *Corporate Compliance Zeitschrift* (CCZ), 2013, pp. 269-271, 269.

[508] Häberle, 'KWG 54a Strafvorschriften' (note 505) marginal number 1.

[509] Gesetz über das Kreditwesen (KWG), § 54a Strafvorschriften (1) Mit Freiheitsstrafe bis zu fünf Jahren oder mit Geldstrafe wird bestraft, wer entgegen § 25c Absatz 4a oder § 25c Absatz 4b Satz 2 nicht dafür Sorge trägt, dass ein Institut oder eine dort genannte Gruppe über eine dort genannte Strategie, einen dort genannten Prozess, ein dort genanntes Verfahren, eine dort genannte Funktion oder ein dort genanntes Konzept verfügt, und hierdurch eine Bestandsgefährdung des Instituts, des übergeordneten Unternehmens oder eines gruppenangehörigen Instituts herbeiführt.(2) Wer in den Fällen des Absatzes 1 die Gefahr fahrlässig herbeiführt, wird mit Freiheitsstrafe bis zu zwei Jahren oder mit Geldstrafe bestraft.
(3) Die Tat ist nur strafbar, wenn die Bundesanstalt dem Täter durch Anordnung nach § 25c Absatz 4c die Beseitigung des Verstoßes gegen § 25c Absatz 4a oder § 25c Absatz 4b Satz 2 aufgegeben hat, der

Insurance Supervision Act (*Gesetz über die Beaufsichtigung der Versicherungsunternehmen* - VAG).[510] The analysis below will present the legal good

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Täter dieser vollziehbaren Anordnung zuwiderhandelt und hierdurch die Bestandsgefährdung herbeigeführt hat.
Banking Act, Section 54a: (1) Whosoever fails to ensure, contrary to Section 25c subsection (4a) or Section 25c subsection (4b) sentence 2, that an institution or a group set out therein has in place a strategy set out therein, a process set out therein, a procedure set out therein, a function set out therein or a concept set out therein and hereby causes a threat to the existence of the institution, the subordinated enterprise or an institution belonging to the group, shall be liable to imprisonment for a term not exceeding five years or to a criminal fine.
(2) Whosoever in cases under subsection (1) causes the danger negligently shall be liable to imprisonment for a term not exceeding two years or to a criminal fine.
(3) The offence shall only entail liability if BaFin has ordered the offender, pursuant to Section 25c subsection (4c), to remedy the violation of Section 25c subsection (4a) or of Section 25c subsection (4b) sentence 2, the offender contravenes such enforceable order and hereby has caused the threat to the existence [of the institution].

[510] Gesetz über die Beaufsichtigung der Versicherungsunternehmen, § 142:(1) Mit Freiheitsstrafe bis zu fünf Jahren oder mit Geldstrafe wird bestraft, wer entgegen § 64a Absatz 7 nicht dafür Sorge trägt, dass ein Unternehmen über eine dort genannte Strategie, einen dort genannten Prozess, ein dort genanntes Verfahren, eine dort genannte Funktion oder ein dort genanntes Konzept verfügt und dadurch
1. die Zahlungsunfähigkeit oder die Überschuldung des Unternehmens herbeiführt oder
2. herbeiführt, dass die Zahlungsunfähigkeit oder die Überschuldung nur durch die Inanspruchnahme staatlicher Beihilfen im Sinne des Artikels 107 Absatz 1 des Vertrages über die Arbeitsweise der Europäischen Union abgewendet wird.
(2) Mit Freiheitsstrafe bis zu zwei Jahren oder mit Geldstrafe wird bestraft, wer in den Fällen des Absatzes 1 fahrlässig
1. die Zahlungsunfähigkeit oder die Überschuldung des Unternehmens herbeiführt oder
2. herbeiführt, dass die Zahlungsunfähigkeit oder die Überschuldung nur durch die Inanspruchnahme staatlicher Beihilfen im Sinne des Artikels 107 Absatz 1 des Vertrages über die Arbeitsweise der Europäischen Union abgewendet wird.
(3) Die Tat ist in den Fällen des Absatzes 1 Nummer 1 oder des Absatzes 2 Nummer 1 nur strafbar, wenn die Bundesanstalt dem Täter durch Anordnung nach § 64a Absatz 8 Satz 1 die Beseitigung des Verstoßes gegen § 64a Absatz 7 aufgegeben hat, der Täter dieser vollziehbaren Anordnung zuwiderhandelt und hierdurch die Zahlungsunfähigkeit oder die Überschuldung des Unternehmens herbeiführt.
(4) Die Tat ist in den Fällen des Absatzes 1 Nummer 2 oder des Absatzes 2 Nummer 2 nur strafbar, wenn die Bundesanstalt dem Täter durch Anordnung nach § 64a Absatz 8 Satz 1 die Beseitigung des Verstoßes gegen § 64a Absatz 7 aufgegeben hat, der Täter dieser vollziehbaren Anordnung zuwiderhandelt und hierdurch herbeiführt, dass die Zahlungsunfähigkeit oder die Überschuldung nur durch die Inanspruchnahme staatlicher Beihilfen im Sinne des Artikels 107 Absatz 1 des Vertrages über die Arbeitsweise der Europäischen Union abgewendet wird.
Insurance Supervision Act, Section 142:
(1) Whosoever fails to ensure, contrary to Section 64a subsection (7), that an undertaking has in place a strategy set out therein, a process set out therein, a procedure set out therein, a function set out therein or a concept set out therein and hereby
1. causes the insolvency or over-indebtedness of the undertaking or
2. causes that the insolvency or over-indebtedness can only be averted through recourse to state aid within the meaning of Article 107 subsection (1) of the Treaty on the Functioning of the European Union
shall be liable to imprisonment for a term not exceeding five years or to a criminal fine.
(2) Whosoever in cases under subsection (1) negligently
1. causes the insolvency or over-indebtedness of the undertaking or
2. causes that the insolvency or over-indebtedness can only be averted through recourse to state aid within the meaning of the Treaty on the Functioning of the European Union
shall be liable to imprisonment for a term not exceeding two years or to a criminal fine.
(3) In cases under subsection (1) number 1 or subsection (2) number 1 the offence shall only entail liability if BaFin has ordered the offender, pursuant to Section 64a subsection (8) sentence 1, to remedy

protected by these provisions, the requirements of the perpetrator, criminal conduct and result as well as the *mens rea*.

7.1. Protected legal interest

The question of what legal interests are protected by the offence of Section 54a and Section 142 VAG is subject to debate. Indisputably, the overall aim of the offence is to ensure the stability of the financial system as a whole, but the question is whether other legal interests are also protected by the offence.[511] The document explaining the reasons for introducing the provisions of the Ring-fencing Act mentions also "[aiming at] securing the entrusted assets and [ensuring] proper conduct of banking and insurance and financial services".[512] However the unclear wording of the text and the possible overlap in this respect with the offence of *Untreue*, which also protects entrusted assets, does not facilitate giving a clear answer to this problem.[513] The fact that Section 54a KWG and Section 142 VAG punishes only those infringements of risk-management rules that impact on the functioning of the whole institution and not only on interests of particular clients suggests that systemic interests prevail over individual ones in the context of this offence.[514]

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the violation of Section 64a subsection (7), the offender contravenes such enforceable order and hereby causes the insolvency or over-indebtedness of the undertaking.
(4) In cases under subsection (1) number 2 or subsection (2) number 2 the offence shall only entail liability if BaFin has ordered the offender, pursuant to Section 64a subsection (8) sentence 1, to remedy the violation of Section 64a subsection (7), the offender contravenes such enforceable order and hereby causes that the insolvency or over-indebtedness can only be averted through recourse to state aid within the meaning of Article 107 subsection (1) of the Treaty on the Functioning of the European Union.

[511] Deutscher Bundestag, Drucksache 17/12601, p. 2, Häberle 1.

[512] Deutscher Bundestag, Drucksache 17/12601 (04.03.2013), p. 28: "*Die Wahrung einer ordnungsgemäßen Geschäftsorganisation und eines angemessenen und wirksamen Risikomanagements durch aufsichts- und strafrechtliche Regelungen dient nicht nur der Sicherung der angetrauten Vermögenswerte und der ordnungsgemäßen Durchführung der Bank- und Versicherungsgeschäfte und Finanzdienstleistungen, sondern auch der Stabilität des Finanzsystems und der Vermeidung von Nachteilen für die Gesamtwirtschaft durch Missstände im Kredit-, Finanzdienstleistungs- und Versicherungswesen. Vor diesem Hintergrund regelt der Gesetzentwurf die individuelle Strafbarkeit der Geschäftsleiter für Missstände im Risikomanagement, sofern in der Folge eine Instituts- bzw. Unternehmenskrise eintritt und damit eine Gefahr für die Stabilität der Märkte geschaffen wird*."

[513] Häberle, 'KWG 54a Strafvorschriften' (note 505) marginal number 1. To the contrary Cichy, Cziupka and Wiersch consider that both legal goods are protected by the offence as well as "avoiding harm to economy in general"; See: Patrick Cichy, Johannes Cziupka und Rachid René Wiersch, 'Voraussetzungen der Strafbarkeit der Geschäftsleiter von Kreditinstituten nach § 54 a KWG n. F.', *Neue Zeitschrift für Gesellschaftsrecht* (NZG), 2013, pp. 846-852, 847.

[514] Häberle, 'KWG 54a Strafvorschriften' (note 505) marginal number 1.

7.2. Perpetrator

Criminal liability for the offence of Section 54a KWG as well as for the one provided for in Section 142 VAG is applicable only to a limited circle of persons called *Geschäftsleiter* (senior managers). According to the definition in Section 1 (2) KWG, senior managers are those who by virtue of the law or the articles of association manage the business affairs of the undertaking and represent it.[515] Generally this circle will be limited to the most senior managers, for example members of management boards in public limited companies (AG).[516] Section 7a (1) VAG provides a similar definition as regards senior insurance managers.

Persons who do not fulfil these criteria may be liable for the offence according to the general rules on aiding and instigating (see 5.2. Secondary participants). Such persons can be members of the supervisory board (*Aufsichtsrat*), lower level managers or even third persons.[517] The requirement of a previous order from the BaFin (see below) applies also to the liability of these persons.[518]

7.3. Conduct, result and condition for prosecution

The legislative technique as well as the wording of the provision as regards the description of the conduct and its result is not reader friendly and does not translate easily into English. Section 54a describes the criminal conduct as failing to ensure, contrary to Section 25c subsection (4a) or Section 25c subsection (4b) sentence 2, that an institution or a group set out therein has in place a strategy set out therein, a process set out therein, a procedure set out therein, a function set out therein or a concept set out therein and hereby causes a threat to the existence (viability as a going

[515] "Geschäftsleiter im Sinne dieses Gesetzes sind diejenigen natürlichen Personen, die nach Gesetz, Satzung oder Gesellschaftsvertrag zur Führung der Geschäfte und zur Vertretung eines Instituts in der Rechtsform einer juristischen Person oder einer Personenhandelsgesellschaft berufen sind. In Ausnahmefällen kann die Bundesanstalt für Finanzdienstleistungsaufsicht (Bundesanstalt) auch eine andere mit der Führung der Geschäfte betraute und zur Vertretung ermächtigte Person widerruflich als Geschäftsleiter bezeichnen, wenn sie zuverlässig ist und die erforderliche fachliche Eignung hat; § 25c Absatz 1 ist anzuwenden."

[516] Thomas Richter, 'The new German Ringfencing Act establishing criminal liability of banking and insurance executives for failures in risk management', *Journal of Risk Management in Financial Institutions*, 6 (2013) Number 4, pp. 433-443, p. 440.

[517] Häberle, 'KWG 54a Strafvorschriften' (note 505) marginal number 2.

[518] Richter, 'The new German Ringfencing Act…' (note 516) p. 440.

concern) of the institution, the subordinated enterprise or an institution belonging to the group. The elements of this description will be explained in turn.

The application of this provision is limited to certain types of institutions. According to Section 1 (1b) KWG these are credit institutions (*Kreditinstitute*) or financial services institutions (*Finanzdienstleistungsinstitute*) as defined by Section 1 and 1a KWG or groups mentioned by Section 25a (3) of the same law. The offence of Section 142 VAG is applicable to insurance undertakings (*Versicherungsunternehmen*) as defined by Section 1 (1) VAG. These institutions must be under the supervision of the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht* – BaFin). Currently BaFin supervises in Germany around 1850 banks and 700 financial services institutions as well as around 600 insurance undertakings.[519]

Criminal conduct consists in failing to ensure that the credit and financial institution or the insurance undertaking has in place the risk management measures set out in the respective catalogues to which Section 54a KWG and Section 142 VAG make reference.

Risk management measures as regards credit and financial institutions are foreseen in the KWG, in particular in Section 25c. The implementation of these measures is the responsibility of senior managers. Subsections (4a) and Section 25c subsection (4b) sentence 2 provide catalogues of risk-management measures. These are measures that Section 54a refers to as: strategy (*Strategie*), process (*Prozess*), procedure (*Verfahren*), function (*Funktion*) or concept (*Konzept*).

The following quotes from Section 25c give examples of these measures:

"1. a business strategy aimed at the sustainable development of the institution and a consistent risk strategy as well as processes for the planning, implementation, review and adjustment of the strategies […], as a minimum the senior managers must ensure that

[519] See: www.bafin.de, consulted on 15.12.2014.

a) the overall objective, the objectives of the institution for each material business activity as well as the measures for implementing such objectives are documented at all times;

b) the risk strategy at all times takes into account the objectives or risks management with regard to the material business activities as well as the measures for implementing such objectives;

2. procedures for determining and ensuring the risk-bearing capacity […], as a minimum the senior managers must ensure that

a) the material risks of the institution, in particular counterparty, market price, liquidity and operational risks are identified and defined at regular intervals and on an event-driven basis (overall risk profile);

b) as part of the risk inventory, risk concentrations are taken into account and potential material impairments of the asset, revenue or liquidity statues are examined;

3. internal control procedures with an internal control system and an internal audit […], as a minimum the senior managers must ensure that […]

4. appropriate staffing levels and technical and organizational resources of the institution […] as a minimum the senior managers must ensure that […]

5. appropriate contingency plans for emergencies relating to time-critical activities and processes […], as a minimum the senior managers must ensure that […]"

Similar duties, adapted to the type of activities in question, have been formulated for the senior managers of insurance institutions in Section 64a subsection (7) VAG.

Despite the extensive catalogue of measures, it had been raised already during the legislative process that it could still be unclear for the addressees of these provisions when the implementation of these measures can be considered insufficient, and thus that this law might infringe, in particular, the constitutional principle of legal certainty.[520] The legislator addressed this problem by introducing a requirement that

[520] Häberle, 'KWG 54a Strafvorschriften' (note 505) marginal number 3. In this regard see also: Rainer Hamm, Thomas Richter, 'Symbolisches und hypertrophes Strafrecht im Entwurf eines

for criminal liability it is necessary that BaFin first ordered the responsible person to remedy the violation of risk-management rules, which this person contravened and thereby caused the foreseen result (Section 54a (3) KWG and Section 142 (3) VAG).[521]

The last *actus reus* requirement of these offences is that the violation of risk-management rules caused a result, which is described differently for the banking executives and for the insurance executives. The requirement formulated in Section 54a KWG reads as follows: "and hereby causes a threat to the viability as a going concern of the institution, the subordinated enterprise or an institution belonging to the group" (*und hierdurch eine Bestandsgefährdung des Instituts, des übergeordneten Unternehmens oder eines gruppenangehörigen Instituts herbeiführt*). The term '*Bestandsgefährdung*' can also be translated as threat to existence (of the institution).[522] This situation of concrete endangerment of the institution was defined by the now repealed Section 48b KWG, as "the risk of a collapse of the credit institution due to insolvency in the absence of corrective actions".[523] Article 48b KWG described this concept further, in particular by providing for a presumption on the basis of which it can be decided when the situation of the institution can be described as under '*Bestandsgefährdung*'. It is doubtful whether these presumptions, provided for regulatory purposes, could be used in criminal procedure, instead it is necessary to prove that the institution is actually at risk of collapse.[524]

The offence of Section 142 VAG has also a result requirement although formulated differently and requires that by violating the risk-management measures (which BaFin ordered to remedy) the perpetrator:

1. caused the insolvency or over-indebtedness of the undertaking or

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„Trennbankengesetzes"', *Zeitschrift für Wirtschafts- und Bankrecht*, 67 (2013), Volume 19, pp. 865-870.

[521] For discussion on the nature of this requirement see Häberle, 'KWG 54a Strafvorschriften' (note 505) marginal number 4.

[522] The English translation of the term '*Bestandsgefährdung*' as "viability as a going concern" uses the term used in accounting theory. A going concern is a business that functions without the threat of liquidation for the foreseeable future, usually regarded as at least within 12 months. For further information see e.g.: Ahmed Riahi-Belkaoui, *Accounting Theory*, 5th edition (Thomson, 2004) pp. 212-213; Michel Glautier, Brian Underdown, Deigan Morris, *Accounting. Theory and Practice*, 8th edition (Financial Times Prentice Hall, Pearson, 2011) 69ff.

[523] Translation after: Richter, 'The new German Ringfencing Act…' (note 516) p. 437.

[524] Häberle, 'KWG 54a Strafvorschriften' (note 505) marginal number 3; Richter, 'The new German Ringfencing Act…' (note 516) p. 438.

2. caused that the insolvency or over-indebtedness can only be averted through recourse to state aid within the meaning of Article 107 subsection (1) of the Treaty on the Functioning of the European Union

Both offences require also proof of causality and objective ascription between the violation of the rules on risk-management and the result, according to the rules provided for this purpose in the German doctrine (see 3.5.4. Attribution of damage/Causality).

There is no criminal liability for attempt to commit any of these offences (Section 23 (1) StGB).[525]

7.4. *Mens rea*

Both offences have similar *mens rea* requirements. For criminal liability they must be committed intentionally (at least with *dolus eventualis*) as regards criminal conduct.[526] As to the result, they can be committed either intentionally (Section 54a (1) KWG and Section 142 (1) VAG) or negligently (Section 54a (2) KWG and Section 142 (2) VAG).[527] This means that it is not necessary for criminal liability that the senior manager even agreed to the occurrence of the result described above.[528] He could still be held liable (under subsection (2)) if he foresaw the possibility of the occurrence of the '*Bestandsgefährdung*' although hoped that it would not take place (advertent negligence – *bewusste Fahrlässigkeit*) or did not foresee such a possibility, but was able to foresee it (inadvertent negligence – *unbewusste Fahrlässigkeit*).[529]

8. Punishment

Pursuant to Section 266 *Untreue* is punishable by imprisonment not exceeding five years or a fine. The minimum length of imprisonment is one month (Section 38 (2) StGB). The fines provided by the StGB are daily unit fines (Section 40 (1)), which

[525] Häberle, 'KWG 54a Strafvorschriften' (note 505) marginal number 6.
[526] Häberle, 'KWG 54a Strafvorschriften' (note 505) marginal number 5.
[527] According to Section 11 (2) StGB the offences thus formulated are still considered to be intentional.
[528] For details on different types of intention in the German criminal law see: 3.5. *Mens rea*.
[529] Häberle, 'KWG 54a Strafvorschriften' (note 505) marginal number 5.

are calculated according to personal and financial circumstances of the offender and should typically reflect his current average one-day net income or the average income he could achieve in one day (Section 40 (2)). The minimum fine provided for *Untreue* consists of five units and the maximum of 360.

Section 266 (2) provides for a more severe penalty – imprisonment from six months to ten years – if one or more aggravating circumstances occur. The provision does not describe these aggravating factors, but makes references to another provision, which contains the list of these circumstances for the offence of fraud – Section 263 (3) – which should be applied *mutatis mutandis* for *Untreue*. This technique is to some extent unfortunate, since some of these factors do not match the reality of the offence of *Untreue*.[530] From the perspective of this study the most pertinent aggravating circumstance is described under point 2 of this section: the offender "causes a major financial loss or acts with the intent of placing a large number of persons in danger of financial loss by the continued commission of offences of fraud".[531] It is the first part of the sentence – causing a loss of great value – that may in particular occur in the corporate context. It remains unclear what the minimum value at which this rule finds application is. While the threshold of 50 000 € is often cited in this context,[532] the fact that the average loss in *Untreue* cases is 75 000 € may render this exceptional aggravation of punishment part of the normal practice increasing the level of punishment.[533] It is also subject to debate whether result in the form of risk-damage may be taken into account.[534] While the BGH considered that only a real loss can be deemed as a loss in the context of Section 263 (3), it allowed to apply this provision to risk-damage, if its value exceeded 100 000

[530] Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 161; Seier, 'Untreue' (note 5) marginal number 33.
[531] Other aggravating circumstances are: "The offender 1. acts on a commercial basis or as a member of a gang whose purpose is the continued commission of forgery or fraud; […]
3. places another person in financial hardship;
4. abuses his powers or his position as a public official; or
5. pretends that an insured event has happened after he or another have for this purpose set fire to an object of significant value or destroyed it, in whole or in part, through setting fire to it or caused the sinking or beaching of a ship."
According to Section 243 (2) the application of these circumstances shall be excluded if the property is of minor value (Section 266 (2)).
[532] Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 161.
[533] Seier, 'Untreue' (note 5) marginal number 35.
[534] Against: Seier, 'Untreue' (note 5) marginal number 35; in favour: Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 161.

€.[535] In another judgement however, the BGH considered that the risk-damage could be deemed as a loss in terms of Section 263 (3), since in view of the approach requiring that the endangerment have real influence on the value of the assets there exists a decrease of value and thus a loss.[536]

In view of the punishment, *Untreue* is classified as a misdemeanour (*Vergehen*) and not a felony (*Verbrechen*) according to the classification provided in Section 12 StGB. Changes of applicable penalty due to the application of aggravating circumstances do not change this classification (Section 12 (3)).

The limitation period for prosecution of *Untreue* is five years (Section 78 (3) point 4), regardless of any applicable aggravating circumstances (Section 78 (4)).[537] The limitation period starts running from the moment when the damage occurs.[538] If the damage aggravates in time by subsequent occurrences, the limitation period begins at the moment of the last occurrence.[539] In the case of risk-damage, although in the moment when it occurs the offence is committed (*vollendet*), it is considered completed (*beendet*) only in the moment when the actual damage occurs or it becomes clear that the risk will not materialise.[540] Reconciling this rule with the understanding of risk-damage as actual damage is however problematic. It appears as if at the moment of the occurrence of risk-damage, a quantifiable loss emerges with which the offence is both committed and completed and the limitation period starts running.[541] If this risk-damage cannot be quantified, then there is no risk-damage at all.[542]

The punishment provided for the offences of Section 54a KWG and 142 VAG is five years' imprisonment and a fine, or two years and a fine if the result was caused negligently. The limitation period is of five years regardless of the form of *mens rea*, and it starts running from the moment of the occurrence of the foreseen result.[543]

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[535] BGH (02.12.2008) NJW 2009, 528-534, 532.
[536] NStZ (18.02.2009) 2009, 330-331, 331.
[537] For rules on the interruption of the limitation period see: § 78c StGB.
[538] Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 168.
[539] Perron, '§ 266 Untreue' (note 33) marginal number 58, BGH (11.07.2001) NStZ 2001, 650-651, 650.
[540] BGH (11.07.2001) NStZ 2001, 650-651, 650; Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 149; Critically: Schünemann, '§ 266 Untreue' (note 10) marginal number 207 pointing out the conflict with Article 103 (2) of the German Constitution (the Basic Law).
[541] Dierlamm, '§ 266 Untreue' (note 1) marginal number 284.
[542] Andreas Ransiek, '„Verstecktes" Parteivermögen und Untreue', *NJW*, 2007, pp. 1727-1730, 1730.
[543] Häberle, 'KWG 54a Strafvorschriften' (note 505) marginal numbers 6, 9.

9. Solutions to the five cases

In view of the broad definition of perpetrator the managers in all five cases presented in the introductory chapter will fulfil the criteria delimitating the scope of perpetrators of *Untreue*.

As to cases 1 and 2, insufficient guarantees attached to granting of credit constitute typical cases of *Untreue*, since they are typical examples of breaching the duty by a manager responsible for deciding upon granting or refusing the loan. In both cases the manager will be liable as main perpetrator. In the second case, by telling the employees to grant the credit he violates his duty, which is sufficient for the liability as a principal. The breach of duty does not consist in failing to ask for some documents or information, instead the manager grants the credit outright, under conditions which are not acceptable.[544] Therefore it is probable that the court may consider this breach as 'evident'[545] and consider the requirement of 'severity' of the breach to be fulfilled. As to case 1, provided that the granting of credit is not invalid because of civil law rules, the manager would commit the *Missbrauch* modality, since he was entitled to grant the credit (bind the bank externally), but (internally) should not have allowed it under these conditions.

The main question for deciding upon his liability concerns the result of his act and the *mens rea* requirements. In view of the most recent approach to the concept of risk-damage, it is necessary that the insufficient guarantee of the loan result in diminishing the value of the assets of the bank. In both cases this requirement most probably is fulfilled, since if the bank decides to alienate it the value of the claim would be lower. As to the *mens rea*, in both cases the managers know that they are exposing the company to an excessive risk contrary to their duty. In both cases they have at least direct intention to cause risk-damage, so there is no need to refer to *dolus eventualis* and the problems associated with it can be avoided.

As to case 2, it may also result in criminal liability under Section 54a KWG, provided that it can be proved that the senior manager violated one of the rules on

[544] Compare: BGH (15.11.2001) NJW 2002, 1211-1216, 1214.
[545] Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 55.

risk-management and that BaFin ordered this violation to be remedied. Moreover, it is necessary to prove that by violating this rule, the senior manager concretely endangered the existence of the bank.

As to case 3, the breach of duty may also not be difficult to prove, as gambling with the company's money does not meet the standards of diligence as required for example by Sections 43 GmbHG or 93 (1) AktG. Since the investment will be valid externally, the manager would be liable for the *Missbrauch* modality. Here again the question of result will be the most problematic, since the approach presented in older jurisprudence, which would allow to admit that the requirement of risk-damage is fulfilled, if the manager acts "like a gambler", is no longer accepted. If it is impossible to quantify the loss of value of the company's assets (invested at the stock-exchange) by the mere fact of investing them, then only the final result of this investment will determine whether criminal liability exists. Therefore a manager might be liable only if his investment has resulted in a loss. As to *mens rea*, it may take form of *dolus eventualis*, since he was most probably aware of the fact that investment into the stock exchange may bring a loss and accepted this possibility.

In case 4, in order to establish a breach of duty, it is necessary to find the legal basis of the rules and standards governing the way the manager should execute his function. This case can only be *Treubruch*, since there is no question of binding the company externally. It is probable that by hiding the problem, which may lead to significant extra costs for the company, he breached standards of diligence applicable to him. Moreover, it is also possible to calculate an estimate of the costs incurred by the company were it to sell the cars in question, fulfilling the requirement of risk-damage. On the other hand, one can argue that the risk is fairly uncertain, while the postponing of the presentation and reprogramming of the electronics would generate more immediate costs. As to the *mens rea*, the perpetrator was aware of the risk and of the possible loss and, it would seem, agreed with it. However, if he perceived that the costs would have been higher had the presentation been postponed, then he acted in a way as to diminish the loss (in his perception), thus the *mens rea* would not be fulfilled.

As to case 5, according to the current jurisprudence, giving bribes as such does not constitute *Untreue*, if it is performed in the interests of the company and upon

valid agreement of the owner.[546] However some authors consider that consent is always invalid if given to an illegal act such as corruption. So far the German jurisprudence dealt with cases of corruption by punishing managers for creating slush funds. In order for criminal liability for *Untreue* to be possible, the manager must have used slush funds for the purpose of hiding the money, to be used thereafter for the bribing of public officials. This may constitute a violation of bookkeeping rules and in this way the breach of duty would occur. If such a violation may incur negative consequences for the company (e.g. administrative fines etc.), then it may be considered as risk-damage. The courts found also damage in the fact that the owner lost the possibility of using the assets hidden in the slush fund. However, in this case scenario it is unknown if the manager indeed used a slush fund to bribe the public official. If the use of company funds to corrupt a public official is to be considered a breach of duty, the criminal liability would depend on whether the risk-damage could be proved, which requires that the negative consequences if the corruption becomes known offset the gain from the contract.

As to the negligent version of the cases, there is no possibility to convict the managers, as *Untreue* does not provide for liability for negligence.

10. Conclusions

Untreue belongs to one of the most debated offences of the German Criminal Code. Its original sins lay in the compromise between the *Missbrauch* and *Treubruch* theories, which resulted in including both of them into the definition of the offence, and in broad terminology used in defining the limbs of this crime. Decades of efforts by the jurisprudence and doctrine brought much more clarity as to the scope of criminalisation, which was confirmed in the recent judgements of the Federal Constitutional Court of Germany. However, since so many aspects of the offence are debatable and debated, it is impossible to affirm that the understanding of certain limbs will not be broadened or narrowed by further jurisprudence.

From the point of view of this study, the least problematic requirement is the definition of the perpetrator. In view of the broad general clause used in German law,

[546] Seier, 'Untreue' (note 5) marginal number 401.

managers of different levels enter into the scope of this provision, since the crucial element – discretion – will necessarily be fulfilled. This may be the case even if they perform their functions only *de facto* or if the basis of their relationship entitling them to make decisions concerning another person's assets is void or no longer valid. The provision also allows for the inclusion of members of supervisory bodies. Moreover, persons who do not fulfil the requirements to become perpetrators of *Untreue* may be criminally liable for aiding or instigating the commission of this offence.

The perpetrator's conduct consists in breaching his duty to safeguard the financial interests of the principal, which may take place while managing his assets or when making binding agreements in the name of the principal. In order to verify whether a manager breached his duty, it is necessary to examine rules and standards, which are enshrined in legal sources governing his position (statute, commission of a public authority, legal transaction or fiduciary relationship). These sources may provide concrete requirements or more general standards of conduct. The former may require a certain act of risk-management, while the latter may serve as benchmarks in order to conclude whether the risk involved in certain acts is excessive or correct. If the appropriate level of risk cannot be determined in this way, it should be done by examining the purpose of the business and standards of care typical for this type of business activities.

Moreover if, as asserted by some recent jurisprudence, there exists a requirement of 'severity', at least in the context of credit granting and sponsoring, it will be necessary to establish not only that a duty was breached, but also that this breach was 'severe'.

The level of risk that the perpetrator is allowed to take may be heightened by the valid consent of the shareholders, however this would only be the case under certain conditions including, according to the dominant opinion, that it would not endanger the existence of the company.

The breach of duty must cause a result, which may constitute an actual damage or risk-damage. In view of the recent jurisprudential development of the interpretation of the concept of risk-damage, the possibilities of its use are more limited since the risk must be quantifiable and cannot be assessed by means of normative clauses.

Therefore, in order to use the concept of risk-damage, the risk to which the company is exposed must result in a concrete decrease in value of the assets of the company.

An attempt to commit the offence of *Untreue* is not punishable.

Untreue is an intentional offence, which can be committed with all three forms of intention: direct intent in the first degree, *dolus directus* and *dolus eventualis*. As to the latter form in the context of risk-damage, there is a debate over whether it is necessary that the perpetrator accept not only the possibility of the occurrence of risk-damage, but also of actual damage. The first approach seems to prevail, as the latter results in discrepancies between *actus reus* and *mens rea* and loses its relevance in view of the more restrictive interpretation of the concept of risk-damage.

Finally, in view of the difficulties of using *Untreue* for violations of rules of risk-management, in view of the restrictive approach taken by the jurisprudence in recent years, the German legislature decided to introduce two new offences concerning senior managers in banking, financial services and insurance undertakings. These new offences also require a breach of duties, but provide a concrete catalogue of them. For criminal liability the breach of one of these rules does not need to lead to concrete loss, but to concrete endangerment of the existence of the undertaking. As to *mens rea*, the latter result may be caused by the perpetrator even negligently. However, the offence is only punishable if the BaFin has issued a warning as to violations of risk-management rules and ordered their remedy.

As can be inferred from the above analysis, the offence of *Untreue* offers broad but not boundless possibilities of prosecution of managers' wrongful behaviour. The judgments issued in recent years, in particular the 2010 sentence of the BVerfG, have curbed an over-extensive interpretation of the offence definition. In particular the concept of risk-damage has been restrained by requiring a quantifiable decrease in value. Also, if the requirement of 'severity' as to the breach of duty remains, it will significantly limit the possibility of punishing those who commit minor breaches of those duties. Both restrictions will influence also the requirements of *mens rea*.

On the other hand, the terms used in order to limit the scope of the offence are of general and imprecise nature, and are open to question from the point of view of

legal certainty. This results in continued pleas for the reform of the offence.[547] Moreover, even if the stricter approach does not permit boundless criminalisation of any kind of mismanagement, the use of these broad terms may give the offence a wide scope from the procedural perspective and allow every dubious business decision or practice to result in opening a criminal investigation.[548]

Due to its novelty, it is very difficult to make any sensible conclusions as regards the special offences for senior managers in the banking and insurance industry. It remains to be seen whether they will shape the practice of risk-management within the sectors concerned and what the interplay between the scope of criminalisation of these offences and *Untreue*, will be.

[547] Schramm, 'Untreue, § 266 StGB' (note 8) marginal number 27.
[548] Seier, 'Untreue' (note 5) marginal number 21.

Chapter V. COMPARATIVE ANALYSIS

1. Introduction

The three previous chapters presented how excessive risk-taking is criminalised in the three selected legal systems. The aim of this chapter is to compare the solutions analysed in the previous ones in order to verify whether the systems represent models of criminalising excessive risk-taking and what are the model building elements, thereby answering the first research question of this study.

This chapter will present differences and similarities between the solutions in the three legal orders as well as present the detected positives and negatives. It will serve also as an interim conclusion for the following chapter, the aim of which is to answer the other research questions: whether the solutions in the three legal systems are justified and proportionate and how to formulate a provision with these characteristics, provided that it is at all justified and proportionate to incriminate excessive risk-taking by managers. Hence, the critical remarks presented in this chapter are based on the shortcomings detected within the analysed systems. The critical analysis of these solutions in view of the social and legal problem of excessive risk-taking will be performed in chapter VII (3.) and will be based on a thorough study of if and how it should be criminalised (chapter VI).

The analysis will be performed according to the following methodology. The chapter will focus on the offences that have been selected in the national chapters as those, which may punish managers exposing their companies to excessive risk of loss. The historical motivation and context of introducing the relevant provisions (2.1. Historical context of the offence) and the legal interests protected by them (2.2. Legal interest deserving criminal law protection) will be comparatively analysed in the first place. This will be followed by a comparative analysis of the available offences divided according to the basic structure of the offence: perpetrator (2.3. Managers as possible perpetrators), criminal conduct (2.4. Exposing to excessive risk as criminal conduct) and *mens rea* (2.5. *Mens rea*). A brief comparison of the punishments provided by the respective laws will conclude this part of the analysis (2.6. Punishment).

Two of the studied legal systems – England and Germany – introduced special sectorial provisions aiming at punishing senior managers in the banking industry (and insurance industry for Germany). Both provisions have been introduced very recently and there seems to be no practice at all. Moreover they present various problems, which allow doubting whether they will become widely applicable.[1] For these reasons analysing them together with the other offences presented for the three legal systems would blur the image of the system. Therefore their comparison will be presented in a separate section (2.7. Special provisions for banking and insurance executives). This will be followed by comparative analysis of the solutions to the five model cases presented in the introduction (2.8. Comparison of the results of the 5 cases). The final conclusions will summarise the chapter and sketch out the crucial features of the three national models of criminalising excessive risk-taking by managers (3. Conclusions - models of criminalisation of excessive risk-taking).

In view of the fact that this analysis is based on the thorough study of each national legal system performed in the previous chapters, throughout this chapter reference will be made to concepts defined and described in the previous chapters, without however providing full explanation of the concepts presented there. References will also be limited to those necessary.

2. Comparative analysis of the offences

2.1. Historical context of the offence

Criminalising managerial misbehaviour linked to damaging company assets has a long history in each of the three legal systems.

The French and the German offences, the abuse of company assets and *Untreue* respectively, date back to the 1930s. Both offences were introduced in response to the financial crisis of this period, however they remained in constant use after the time of crisis, although they might tend to receive more attention in times of financial difficulties.

[1] See Chapter II: 7. Offence of reckless misconduct in the management of a bank and Chapter IV: 7. Special provisions for banking and insurance executives.

None of these offences expressly targeted excessive risk. Nonetheless excessive risk was introduced through the interpretation of the elements of these offences. One of the modalities of committing the French abuse of company assets consisting in acting against the company interests was exposing it to abnormal risk. This interpretation was confirmed by the jurisprudence. The introduction of excessive risk to the definition of the German *Untreue* was done also by jurisprudence, which transplanted the concept of risk-damage, developed for the offence of fraud. While this concept has a long history in the German law, dating back to the 19th century, the modern understanding of this concept in the context of *Untreue* has been developed in the last 15 years. These developments were *inter alia* influenced by criticism formulated over the years in the doctrine and the need to give boundaries to allegedly too vague terms used by the offence.

The English law had until 2006 no provision targeting excessive risk-taking as such. The traditional common law offence of conspiracy to defraud could have been used for this purpose, but there is no abundant jurisprudence demonstrating its intense use in order to combat misdealing in form of excessively risky management. However the three major judgements were indeed issued in application of this offence (*Sinclair*, *Allsop* and *Wai Yu-Tsang*). Since the introduction of the Fraud Act 2006 the application of the common law conspiracy to defraud is supposed to be exceptional and this Act, in particular fraud by abuse of position provided by Section 4, should be the main offence for such cases. While no major judgments occurred so far, the formulation of Section 4 clearly indicates that it may be used to punish managers exposing their companies to excessive risk, together with a handful of other offences, which will be indicated below.

In addition, the English and the German legal orders introduced new offences, which target excessively risky management of banks (respectively Section 36 Financial Services (Banking Reform) Act 2013 and Section 54a KWG) and also insurance companies as regards Germany (Section 142 VAG). While clearly inspired by the need to address managerial shortcomings highlighted by the financial crisis, they contain various drawbacks, which will arguably limit their application. These will be analysed in detail below.

2.2. Legal interest deserving criminal law protection

The legal systems studied mainly aim at protecting the property of the company or the relationship of confidence between the agent and the principal. This approach grants mostly protection to the shareholders and to some extent to the stakeholders. The attention to the latter group depends largely on the extent to which the consent of shareholders can influence the scope of what is permissible to the managers. None of the analysed offences – the French abuse of company assets, the German *Untreue* or the offences provided by the English Fraud Act 2006 or conspiracy to defraud – aim at protecting the economic system or society as a whole. One may however say that while the offence grants protection to the assets entrusted by the shareholders to the management, the economic system is protected at large. This claim is based on the following argument. The economic system, which is based to a large extent on limited companies, where the principle is division between ownership and management, has an interest in that these companies function well and that the management make proper use of the entrusted assets. Therefore by protecting the interests of the shareholders, the offence indirectly protects the economic system. This can be seen for instance in the motivation of the French legislator who wanted to win back the confidence of investors in the companies in order to foster economic recovery after the crisis.

While safeguarding economic interests is not the express purpose of none of the above-mentioned offences, the latter consideration is directly addressed by the new English and German offences targeting excessively risky management of banks (and also the insurance companies as regards Germany).

The English offence of fraud by abuse of position is aimed mainly at defending the property of the company, but also that of the shareholders and the stakeholders.[2] As to the latter category, the offence does not seem to take a firm stance, as the consent of the shareholders would justify the act. Moreover, it has been pointed out that trust within the relationship between the person entrusting the assets to the manager and the latter is also the reason for criminalisation, in particular the

[2] *Wai Yu-Tsang Appelant v R* [1992] 1 AC 269, 269.

belief that the person receiving the assets will use it for the benefit of the owner (the company and the shareholders in this case).[3]

The German offence of *Untreue* is aimed at protecting the legal interest of property (*Vermögen*).[4] Through that it protects the assets of the company and of the shareholders. Only the shareholders can give consent to acts, which would normally be considered excessively risky,[5] as well as act as aggrieved party within the criminal procedure.[6] The validity of consent is however limited, according to the dominant view, excluding acts which endanger the existence of the company (in economic terms).[7] In view of that, while the offence protect mainly the interests of the shareholders, the latter rule gives indirect consideration to the interests of other stakeholders.

The French offence of abuse of company assets sanctions such acts of management, which are contrary to the interest of the company and done for personal purpose. By punishing such acts the offence certainly protects the assets of the company. However, several authors pointed out that the focus is placed on abuses of management and on the duty of loyalty towards the company, since the offence does not require a proof of a result (i.e. a loss).[8] Even a positive outcome of the manager's decision does not exclude criminal liability, if the act exposed the company to excessive risk. The offence protects the company's own interest and only indirectly those of the shareholders. If the interests of the shareholders are in conflict with the

[3] Simon Farrell, Nicholas Yeo, Guy Ladenburg, *Blackstone's Guide to The Fraud Act 2006* (Oxford University Press, 2007) p. 31f.

[4] Alfred Dierlamm, '§ 266 Untreue', in: Roland Hefendehl, Olaf Hohmann (eds.), Münchener Kommentar zum Strafgesetzbuch, Band 5, §§ 263 - 358 StGB, 2nd edition (München: C. H. Beck, 2014) marginal number 1; Urs Kindhäuser, '§ 266 Untreue', in: Urs Kindhäuser, Ulfrid Neumann, Hans-Ullrich Paeffgen (eds.), *Strafgesetzbuch*, 4th edition (Baden-Baden: Nomos, 2013) marginal number 1; Walter Perron, '§ 266 Untreue', in: Adolf Schönke, Horst Schröder, Albin Eser et al. (eds.), *Strafgesetzbuch Kommentar*, 29th edition (München: C. H. Beck, 2014) marginal number 1; Edward Schramm, 'Untreue, § 266 StGB', in: Carsten Momsen, Thomas Grützner, *Wirtschaftsstrafrecht. Handbuch für die Unternehmens- und Anwaltspraxis* (München: C.H. Beck, 2013) marginal number 2; Jürgen Seier, 'Untreue', in: Hans Achenbach, Andreas Ransiek (eds.), *Handbuch Wirtschaftsstrafrecht*, 3rd edition (Heidelberg, München, Landsberg, Frechen, Hamburg: C. F. Müller, 2012) marginal number 10; BVerfG (23.06.2010) NJW 2010, 3209-3221, 3212.

[5] Seier, 'Untreue' (note 4) marginal number 12.

[6] Kindhäuser, '§ 266 Untreue' (note 4) marginal number 129; Seier, 'Untreue' (note 4) marginal number 13.

[7] Kindhäuser, '§ 266 Untreue' (note 4) marginal number 71; Schramm, 'Untreue, § 266 StGB§' (note 4) marginal number 85.

[8] Didier Rebut, *Abus de biens sociaux*, Répertoire de droit pénal et de procédure pénale, Dalloz, janvier 2010 (dernière mise à jour : juin 2011), para 10; Yvonne Muller, 'L'abus réprimé : la correction par le juge', *Gazette du Palais* (19 December 2009), n° 353, pp. 30ff, 30.

company's prosperity, the latter is given priority, which is reflected in criminalisation of abuses committed by managers who are only shareholders of their companies or in companies run as family businesses as well as in lack of exculpatory effect of the shareholders' consent. Moreover, by focusing on the interest of the company and understanding them as independent of the interests of the shareholders the offence takes into account the interest of other stakeholders, which are linked to the general well-being of the company.

In conclusion, the English and the German offences protect mainly the assets of the company. They give most consideration to the interests of the shareholders. Within the German system the interests of the stakeholders are also taken into account, but only indirectly, through limitation to the validity of consent by which the shareholders may agree to managers' acts exposing the company to a risk, which is above the normal level. The French model focuses more on the company as an independent entity, thus protecting not only the shareholders' interests, but also those of other actors of the economic system, who might be interested in the company's well-functioning. While none of the legal orders concentrates on the protection of the economic system or the society, the existence of these offences, which *inter alia* protect limited companies, adds to the security of the system based on the existence of these types of entities.

This problem is interestingly linked with a procedural question as to who may be considered as aggrieved party for the purposes of criminal procedure. The German system considers the company and the shareholders of GmbH and AG, which is a consequence of the approach described above.[9] The French system restricts this circle even more and limits it only to the company. The stakeholders, as well as the shareholders as such, are excluded.[10] The shareholder used to be admitted in this role until the judgment of 2000 put an end to this practice.[11] They may, however, be allowed to represent the company in the procedure.[12] The English system does not

[9] Kindhäuser, '§ 266 Untreue' (note 4) marginal number 129; Seier, 'Untreue' (note 4) marginal number 13.
[10] Alain Dekeuwer, 'Les intérêts protégées en cas d'abus de biens sociaux', *La Semaine Juridique Entreprise et Affaires* (26 October 1995), n° 43, pp. 500ff., para 15; Rebut, *Abus de biens sociaux* (note 8) para 257ff.
[11] Rebut, *Abus de biens sociaux* (note 8) para 262-263; Cass. crim., 13.12.2000, Bull. crim., n° 373, p. 1135.
[12] Rebut, *Abus de biens sociaux* (note 8) para 254ff.

know the institution of aggrieved party in the sense as for example in the French system (*partie civile*).[13] While the victim may start a private prosecution for the offence, the practical modalities limit the application of this possibility.[14]

In view of the detrimental effects of excessively risky management in banks, which triggered the last financial crisis, the expectation to address the security of the economic systems emerged. As it was mentioned above, the provisions analysed *supra* do not protect the economic system or the interests of the society as such and cannot be used for that purpose. While their existence and use may be beneficial to the economic system, they are focused on the agent-principal relationship and mainly on protecting the entrusted assets. Moreover many companies which are protected by the above offences, as well as many possible misuses which are penalised by those offences, do not carry the systemic risk.

In order to respond to the expectation of safeguarding the economic systems, the English and the German legislator created new criminal offences specifically targeting failures in risk management of banks (or insurance companies in the latter legal system) focusing on the possibly detrimental results these failures may have to the economic system as a whole. Contrary to the other offences analysed in this study, these crimes are very new (the English offence will enter into force only in 2016) and there is so far no practice. Therefore it is very difficult to predict how much they will be used, as the analysis of their requirements performed in the respective national chapters concludes that their practical application might be limited. In view of that it is difficult to predict whether they will constitute together with the other offences a common system of criminalisation of excessively risky management. In view of that and their very different objective as regards the protected legal interests, analysing them together with the other above-mentioned offences would risk blurring the image of legal reality. Therefore further analysis will omit references to them and a separate section will be devoted to these offences (2.7. Special provisions for banking and insurance executives).

[13] John Spencer, 'The victim and the prosecutor', in: Anthony Bottoms, Julian V. Roberts (eds.), *Hearing the Victim. Adversarial justice, crime victims and the State* (Cullompton: Willan Publishing, 2010), p. 143.
[14] For a thorough analysis of this right see: John Spencer, 'The victim and the prosecutor' (note 13) p. 145ff.

2.3. Managers as possible perpetrators

As far as the company managers are concerned the scope of perpetrators can vary as regards the hierarchy (vertically) and as to the time.

As it was explained in the introductory chapter, the manager is understood here functionally, i.e. as a person who has some decision power (alone or with others) as regards the assets of the company. As to the vertical limitation of the scope, while all the analysed provisions will include the top-management, they vary as regards criminalisation of acts committed by middle and low-level management. The legislative technique used to describe the person of the potential perpetrator is also relevant to this problem

The main question is why certain groups of them would be excluded from criminal liability or subjected to a less strict regime. While the reason may be that certain groups of persons, in particular top management, may be considered primarily responsible for the wellbeing of the company and for the decisions they take, lower level managers may have important influence on the company's actions and a possibility to take excessively risky decisions, which may result in highly detrimental consequences. Including all types of managers seems to be a more just approach, which can be combined with evaluating the guilt of the manager (which might be linked to the position within the hierarchy) and reflect it in the level of punishment. This question will be studied in a more systematic way in the following chapter.

While the English and German provisions include all types of managers, the French provision of abuse of company assets restricts the scope to top-level managers. The latter limitation can only be overcome by the use of the offence of breach of trust. Since it is not applied to cases of excessive risk-taking, it practically excludes all the managers, who do not fall into the scope of the abuse of company assets, from criminal liability. Another way of circumventing this problem is to prosecute these managers for complicity, which however requires that a top-level manager was involved anyway.

Within the English system the most relevant provision, Section 4 of the Fraud Act 2006 containing the offence of fraud by abuse of position, describes the possible perpetrator as a person who "occupies a position in which he is expected to safeguard,

or not to act against, the financial interests of another person". This definition allows for very broad interpretation. It includes not only persons who are given access to the principal's assets by virtue of a legal relationship, but also these persons, whose access is granted by virtue of a legal basis, which turned out to be invalid or is no longer valid, provided that it can be proved that they were expected to safeguard, or not to act against, the financial interests of another person.[15] All kind of managers can be included in the scope of this offence, including the most low-level ones.

Other offences analysed in Chapter II do not present any requirement as to the person of the perpetrator, with the exception of Section 3 on fraud by failing to disclose information, where the duty to make such disclosures must be established. Therefore the common law offence of conspiracy to defraud as well as fraud by false representation (Section 2) can be applied to any person. It is similar as regards the inchoate offences criminalising possessing, making or supplying articles or use in committing the offences as well as encouraging and assisting crime and the statutory conspiracy to commit fraud. This broadly designed circle of perpetrators may potentially allow the incrimination of conduct not only of all kinds of managers, but also of other persons helping them in these acts (employees of the company or external to it, e.g. external advisors).

The French provision restricts the application of the offence of abuse of company assets to a limited circle of perpetrators. This limitation comes in two forms. Firstly, the application of the offence is provided only for certain enumerated types of companies. These are in general limited liability companies, as the criminal liability of managers is considered one of the elements compensating for lack of full liability.[16] Liability is in particular provided for the limited liability company (*société à responsabilité limitée* – SARL) and the public limited company (*société anonyme* – SA). The second limitation concerns the managers within the companies concerned, as liability for abuse of company assets is provided only for a restricted circle of enumerated types of functions within the company. These functions can be grouped in two categories: leading company managers (e.g. *gérants* in the SARL, managing director or members of the executive board in the SA) and members of the

[15] *Montgomery and Ormerod on Fraud* (note 19) p. D-2108
[16] Agathe Lepage, Patrick Maistre du Chambon, Renaud Salomon, *Droit pénal des affaires*, 2nd edition, (Paris: LexiNexis Litec, 2010) p. 314.

supervisory body, if it is established (*conseil de surveillance*). This circle is however extended by the rules providing that any person who exercises one of these factions *de facto* without being appointed, is subject to the same criminal liability provisions.

Persons who are left out of the scope of the offence of abuse of company assets, in particular managers, may nonetheless be subject to criminal liability according to two possibilities. Firstly, they could be subject to the offence of breach of trust, which restricts the circle of potential perpetrators to person to whom assets of another person had been handed over before the commission of the offence upon the condition of returning them or using them in a specified way. Company managers will generally fulfil this condition, which could potentially be used especially if they acted alone or without participation of a person from the circle of the perpetrator of abuse of company assets. However, limited applicability of this provision to cases of excessive risk-taking is due to other requirements of this offence, namely the requirements of conduct and result, which will be analysed in the following section. Secondly, managers, as well as other persons, could be liable according to the rules of complicity, if they provide help to a person who fulfils the definition of the perpetrator of the abuse of company assets in the commission of this offence or instigate such a person to commit this offence. This possibility will necessarily be restricted by the requirements of criminal liability for complicity.

As far as the German offence of *Untreue* is concerned, it is applicable to persons who have the duty to safeguard the financial interests of another person. The duty is defined by three conjunctive requirements: the perpetrator must be acting, at least partially, in the interests of another person, safeguarding someone else's interests must be the core of his relation with the principal and while acting, he should be granted some discretion. The duty should be embedded in at least one of the four enumerated sources: a statute, a commission of a public authority, a legal transition or a fiduciary relationship. This definition allows including into the scope of the offence all categories of managers, namely top level management (*Geschäftsführer* in the GmbH and members of the *Vorstand* in the AG as well as their deputies), members of supervisory boards (*Aufsichtrat* in the AG), persons executing these functions *de facto* as well as lower level managers provided that in the act in question it was possible for

them to exercise some discretion.[17] Persons who are not managers and do not have otherwise the duty towards the company, may be held liable according to the rules on secondary participation, since the commission of these modalities does not require having such a duty.[18]

Another question as regards the scope of application of the offence concerns the temporal aspect of the circle of perpetrators. A manager might still be *de facto* exercising his duties, while formally not being anymore appointed to this function or not having the duty described in the general definition. A similar question is whether a manager can be held liable if the basis of his relationship is invalid. In all examples of general definition the validity of the relationship is not requested, if the manager exercised effectively his functions. As to the latter problem, the French abuse of company assets can also be applicable, if the nomination is invalid, by means of the rules involving liability for *de facto* managers.

The last aspect, which can be analysed as regards the scope of possible perpetrators, concerns the question whether persons who are not managers could be liable for participating in excessively risky acts of management. All three systems offer the possibility to incur criminal liability by means of rules of complicity. Moreover in the English and the French systems these persons could fall into the scope of the offence through the rules on conspiracy or as perpetrators of the English common law offence of conspiracy to defraud. While all these possibilities require the involvement of more than one person, the English regulation extends criminal liability to certain inchoate acts, committed alone.

These three national models differ as regards the legislative technique used to delimitate the circle of possible offenders. Managers' ability to take excessively risky decisions requires access to the assets of the company. Depending on whether the offence is designed more specifically to cover this type of relationship or relations more generally, in which one person is entrusted with the assets of another person or power to act on another's behalf or if a general offence is used, the way the scope of possible perpetrators is defined will differ – with significant consequences.

[17] BVerfG (23.06.2010) NJW 2010, 3209-3221 at [108]; BGH (11.02.1982) NStZ 1982, 201; BGH (14.01.1986) StV 1986, 203-204.
[18] Seier, 'Untreue' (note 4) marginal number 62; Kindhäuser, '§ 266 Untreue' (note 4) marginal number 127; Perron, '§ 266 Untreue' (note 4) marginal number 52.

It is possible to use a general offence, which would in no way restrict its scope of application, therefore allowing all types of managers and persons cooperating with them to be possible perpetrators of the offence. The verification of whether these persons committed the offence would be entirely focused on the conduct (and result) element as well as on *mens rea*. The common law offence of conspiracy to defraud is an example of such an approach. It is necessary to bear in mind that this offence is generally reluctantly used at present and the preference is given to statutory offences.

In view of the analysis of the three legal systems, it is more common that the offence particularly targets situations where the perpetrator is granted access to another's assets. There can be two principal methods of delimitating the circle of perpetrators: by enumerating concrete functions the perpetrator may be fulfilling (e.g. member of the board of director) or by an abstract definition.

The first method would have the benefit of providing more legal certainty as it would normally be immediately verifiable whether a particular person could be subject to criminal liability for the offence or not. However, it would bear the risk of excluding persons who might be considered as deserving to be included into the scope of criminal liability as much as those included, which is normally linked with such casuistic technique. Moreover persons foreseeing the risk of criminal liability may preclude criminal liability by avoiding occupying functions enumerated by the criminal provision. It could be remedied by additional rules extending the circle (e.g. the inclusion of those who execute the function *de facto*). This approach is used in the French offence of abuse of company assets.

The abstract definition method may focus on access to one's assets or empowerment to make binding decision (agreements) in another person's name or on the duty to safeguard the interests of another or not to act against these interests. The definition can also combine all of these aspects. Such definition would normally include persons who are considered managers in this study, regardless of their level in the management. Most of the analysed offences use this method: the English fraud by abuse of position, the German *Untreue* and finally the French breach of trust.

The technique used is closely interlinked with the scope of possible perpetrators. While the enumeration of functions will necessarily define a more limited group of persons (otherwise it would become either extremely casuistic or

effectively a general definition), the general definition will involve a rather larger circle of possible perpetrators. The decision on the scope of this offence will of course be the result of criminal policy choices and the choice of legislative technique will follow this choice.

The problem of the general definition is that it may become very broad and include types of relationships that may not necessarily deserve criminal law reaction, as it was pointed out within the analysed legal systems, in particular as regards the English offence of fraud. It will mainly depend on what criteria are chosen for the definition and what sources can be the background of the relationship between the perpetrator and the person whose assets are entrusted to him or whom he represents.

The English definition of the circle of perpetrators has been criticised for being too broad and including all trivial civil law disputes to be subject to the offence of fraud by abuse of position.[19] The German definition in *Untreue* is relatively complex, which is also linked to the debates around the relationship between the *Missbrauch* and the *Treubruch* modalities of the offence and the exact understanding of the duty to safeguard the financial interests of another, which the definition accommodated. However, there is no doubt that both of them will allow including all levels of managerial hierarchy into its scope, in particular as regards the limited liability companies (private limited company and *GmbH*) and the public limited companies (public limited company and *AG*). In England all managers might also fall into the scope of the common law conspiracy to defraud (provided that at least one more person, not necessarily a manager, was involved) and of fraud by false representation. All of these offences may involve excessive risk-taking.

In contrast, the French approach is much more restricted and limits the scope to the top management (for both types of limited liability companies: SARL and SA). As a rule, managers who are at the lower level of the company hierarchy will not be liable for excessive risk-taking, unless they are accomplices to the offence of abuse of

[19] Clare Montgomery, David Ormerod (eds.), *Montgomery and Ormerod on Fraud. Criminal Law and Procedure*, Release 9, December 2012 (Oxford University Press, 2012) p. D-2106.

company assets committed by one of the top managers.[20] The implications of this limitation will be analysed further in the following section.

2.4. Exposing to excessive risk as criminal conduct

Each of the analysed criminal law systems provides for an offence, which incriminates under various conditions excessive risk-taking. However the English system offers a variety of other offences, which might also be of application to certain acts related to taking excessively risky decisions. The French law, which limits the scope of application of the offence of abuse of company assets, provides for the offence of breach of trust, which punishes acts of managerial misconduct, although according to the current state of the jurisprudence is not applicable to excessive risk-taking. The model of criminalisation offered by these two systems would be incomplete without taking into account these additional offences. However analysing them together with the offence, which most adequately targets excessively risky managerial decisions would blur the image of the system. Therefore, while the analysis of the main available offences will be performed first (2.4.1. Standard offence), the analysis of these additional offences will be conducted in a separate section (2.4.2. Additional offences). In all three systems persons who do not commit the offence, but participate in the act consisting in taking excessively risky business decisions may also potentially be punished for their involvement in this act. The criminalisation of these acts within the three systems will be compared in the third section (2.4.3. Criminalisation of secondary participation).

2.4.1. Standard offence

Within the English legal system the main offence, which the manager taking an excessively risky decision could commit, is fraud by abuse of position. The manager commits it if he dishonestly abuses the position in which he is expected to safeguard, or to not act against, the financial interests of another person. The manager dishonestly abusing his position of a person managing entrusted assets of the

[20] In one case the court convicted for the breach of trust by excessive risk taking. However this case seems to be exceptional. See: Cass. crim., 03.07.1997, Bull. crim. n° 265, p. 905.

company (and indirectly of the shareholders) clearly falls into the scope of this provision. In this system two questions will be pertinent in deciding whether what the manager did could be considered abuse of company assets: if the excessive risk-taking was an abuse and if it was dishonest.

Within the French legal system two offences could punish mismanagement of company assets committed by managers: the offence of abuse of company assets (*largo sensu*, i.e. comprising also abusing its credit and the manager's powers), which however has limited application, since it is limited to top management. The alternative offence of breach of trust, applicable to all types of managers, remains however mostly inapplicable to cases of excessive risk taking. As it was seen in the previous section, the exclusion of the application of breach of trust results in the fact that liability for excessive risk-taking will be limited only to the top management (*de iure* or *de facto*), with an exception made for the rules of complicity. The main question of this offence as regards the course of conduct is whether the perpetrator's act was contrary to the company's interest.

For the German offence of *Untreue* the requirement of the perpetrator's act of the offence of *Untreue* is composed of three elements: the conduct – breach of duty to safeguard another person's financial interests, the result – damage or risk-damage, and the link of causality between them. The provision provides for two modalities of committing the offence, one being the general breach of duty and the second a special case of that breach, consisting in abusing the right of the perpetrator to make binding agreements in the name of the victim. The latter is therefore limited only to situations, in which the perpetrator concludes a valid transaction or makes a legally binding statement in the name of the company, but surpassing the limits of the acts he was authorised to perform.[21] The liability for both possibilities is not differentiated as regards punishment and is linked more with the historical evolution of the offence's interpretation. In view of that, in certain judgments, the courts even omitted to clarify according to which modality the perpetrator's responsibility was analysed.[22]

[21] Kindhäuser, '§ 266 Untreue' (note 4) marginal number 86; Petra Wittig, *Wirtschafsstrafrecht*, (München: C. H. Beck, 2010) chapter: § 20 Untreue, marginal number 33.
[22] E.g. BGH (27.02.1975) NJW 1975, 1234-1236; BGH (21.12.2005) NJW 2006, 522-531; BGH (22.11.2005) NJW 2006, 453-456.

2.4.1.1. Defining the criminal conduct

The first major difference between the three legal systems as regards the criminal conduct consist in the way it is defined, which has important consequences for the scope of application of each of the offences.

Two models of defining criminal conduct result from the analysis of the three legal systems. The first one represented by the German offence of *Untreue* criminalises breaches of duties referring to other branches of law for description of these duties as well as for criteria when the duty is effectively breached.[23] The second model represented by the English and the French offences provide for an autonomous understanding of when the act becomes criminal. Neither model is, however, absolute in these approaches.

As to the second model, the French offence considers that it is contrary to the company interests to expose it to risk, to which it should not be exposed. In order to establish whether the risk was one which the manager was not allowed to take, the judge must evaluate the scope of competencies of the manager and the particularities of the business he pursues, possibly by calling experts. Although he will not have to point out a concrete rule, he will have to explain why the act in question was excessively risky. This will not be the case for the English system, where the jury deciding whether the manager dishonestly abused his position will not have to justify his position. However, the prosecution will have to convince the jury that the manager was indeed dishonest, which might be done by showing that he disrespected some of his duties.[24] However, it is likely that the prosecution will not engage in complicated elaborations of details of company law.

On the other hand, the requirement of a severe breach of duty might grant more autonomy to the German criminal judge, who, once having established that the duty was breached according to the non-criminal law standard, may decide that the breach was not sufficient for the purposes of *Untreue*.

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[23] See also Klaus Lüderssen, 'Primäre oder sekundäre Zuständigkeit des Strafrechts?' in: *Menschengerechtes Strafrecht, Festschrift für Albin Eser* (München, C. H. Beck, 2005) pp. 163-180, 177ff.

[24] Fraud is an offence which is 'triable either way', meaning that it can be tried either in a magistrates' court or in the Crown Court. However the text will refer to the jury, as its involvement will be much more decisive for the interpretation of the offence (especially the requirement of dishonesty) and the big cases are tried in the Crown Court.

The first model may appear to guarantee more legal certainty than the second. However, the German system has been criticised for not being sufficiently clear as to which rule establishes the duty and which not, with different approaches present in the doctrine and the jurisprudence. The English system relies on the decision of the jury on dishonesty, which necessarily cannot be considered certain. However the will to allow laymen to assess the manager's act according to the standards of normal (reasonable and honest) people, and not fellow managers, prevails in the English system. Among the three systems, the French approach appears to be the least problematic, entrusting the criminal judge with the task of assessing whether an act was contrary to company interests.

All three systems provide criminalisation for all possible types of managerial acts, whether these are binding legal acts or only physical use of the entrusted assets, including omissions.

The English provision describes the conduct as abuse of position, which can be considered dishonest. Abuse should be understood here as an ordinary English word and the legislator has not provided any definition of it.[25] It is therefore a very broad notion, certainly not limited to breaches of fiduciary duties. It is also not limited to acts creating obligations vis-à-vis third parties.[26] It can also be committed by omission, the sole indication already provided by the provision. The word 'to abuse', which, according to its dictionary definition, means 'to use wrongly or improperly', comprises also such use that exposes the entrusted assets to excessive risk. While this category would comprise a large variety of acts of mismanagement, the mere improper use of the assets is not enough, as the second requirement – dishonesty – would play the crucial role in curbing the scope of criminalisation of excessive risk-taking.

The problem of dishonesty, which will eventually be decisive to criminal liability for excessive risk taking, is mainly presented as a problem of *mens rea*. However, this element, which is for the jury to decide, will also influence the way the conduct is understood and thus pertain also to the analysis of the *actus reus*.

[25] Home Office, Explanatory Notes Fraud Act 2006, 8 November 2006, Recital 21.
[26] Antje du Bois-Pedain, 'Die Strafbarkeit untreueartigen Verhaltens im englischen Recht: „Fraud by abuse of position" und andere einschlägige Strafvorschriften', *Zeitschrift für die gesamte Strafrechtswissenschaft,* 122, (2010), Heft 2, pp. 325-353, 344.

According to the standard test of dishonesty, which was provided in the judgment in *Ghosh,*[27] the jury needs to consider whether the perpetrator's act was dishonest according to the ordinary standards of reasonable and honest people. The law does not provide guidance as to how to understand this requirement. However it is certain that it cannot be considered equal to the question of normality of the transaction, which was excluded in the case of *Sinclair*.[28] Although it seems fair to assume that by claiming that the transaction was normal (according to applicable business standards) the manager might convince the jury that it was also honest, the Court of Appeal highlighted that these two standards should not be confused.

Although another formulation of the latter judgement might suggest that by demonstrating that the manager acted too riskily there should be no problem to convince the jury that he was dishonest,[29] it seems however that the jury might not find it sufficient. Dishonesty must be inferred from evidence, so there must be a way to convince the jury that the manager acted without integrity. This might be proved by demonstrating how the manager profited from the transaction. Dishonesty would be more likely established if it can be shown that the only purpose of the perpetrator was to increase his commission. Otherwise, it would also be more convincing if it can be demonstrated that the manager did something wrong in the process of taking the risky decision (e.g. shredding documents, concealing information). What would make it more dishonest is that, for example, acts of false accounting were also committed, but the prosecution might opt to use an applicable offence targeting this act rather than fraud (e.g. Article 17 of the Theft Act 1968). Finally, a complex process of decision taking may blur the image of who was responsible for what and therefore make it more complicated to convince the jury that what the perpetrator did was dishonest. For all the above reasons the prosecution may abstain from proceeding with a case, where certain elements allowing to build a strong argumentation of dishonesty are lacking.

The criminal conduct targeted by the French offence of abuse of company assets consists of using the company assets, credit or the manager's powers in a way which is contrary to the company's interests. All these terms are generally broadly

[27] *R v Ghosh*, [1982] QB 1053.
[28] *Sinclair* [1968] 1 WLR 1246, 1251.
[29] "it is fraudulent to take a risk to the prejudice of another's rights, which risk is known to be one which there is no right to take." *Sinclair* [1968] 1 WLR 1246, 1251.

understood. Any property can constitute assets, including also real and intellectual property, rights,[30] claims[31] or lists of clients,[32] and the use of it can consist in a legal transaction or in factual use of the assets. Only as regards the protection of property resulting from a criminal offence is the question still to be decided.[33] The use of credit refers to using the company's ability to assume new financial obligations[34] and the use of powers to all the rights that the law or the articles of association confer on the manager.[35] While the delimitation between these three elements is difficult and it may be in various cases difficult to decide which of the modalities is fulfilled, the French law does not require that only one, precise modality is chosen.[36] In result, the use of all these three elements allows including a broad scope of acts of use of different possibilities that the function of top managers grants to the potential perpetrator, including omissions (e.g. non-termination of a detrimental contract when possible).

The use will become abuse according to the French system if it can be proved that it was contrary to the interests of the company, which can be understood, *inter alia*, as exposing it to abnormal risk or in other words, to a risk to which it should not be exposed. While generally the notion of risk concerns here the risk of financial loss, the risk may refer also to a consequence, which does not consist in immediate financial damage, for instance risk of criminal or fiscal sanctions, although it would normally also have influence on the company's financial situation.[37] The company interests are understood here independently from the interests of the shareholders, as the offence takes into consideration also the interests of the stakeholders.[38]

There are certain cases, in which the act is always considered contrary to the company interests, namely when it is criminally or fiscally unlawful, since it exposes the company to risk of being subject to applicable sanctions. Moreover, a rebuttable

[30] Rebut, *Abus de biens sociaux* (note 8) para 115.
[31] Eva Joly, Caroline Joly-Baumgartner, *L'abus de biens sociaux. Á l'épreuve de la pratique* (Paris: Economica, 2002) p. 68; Cass. crim., 15.03.1972, Bull. crim., n° 107 p. 260.
[32] Wilfrid Jeandidier, *Abus des biens, du crédit, des pouvoirs ou des voix*, JurisClasseur Pénal des Affaires, Date du fascicule : 1er Avril 2011, Date de la dernière mise à jour : 18 Mars 2014, para 12 ; Cass. crim., 6.05.2009, N° de pourvoi: 08-86378.
[33] This judgment favours extending the protection also to these assets: Cass. crim., 03.10.2007, N° de pourvoi: 07-81603.
[34] Annie Médina, *Abus de biens sociaux. Prévention – Détection – Poursuite* (Paris: Dalloz, 2001) pp. 43ff.
[35] Lepage, Maistre du Chambon, Salomon, *Droit pénal des affaires* (note 16) p. 319, Jeandidier, *Abus des biens…* (note 32) para 15, Rebut, *Abus de biens sociaux* (note 8) para 121.
[36] Médina, *Abus de biens sociaux…* (note 34) p. 52.
[37] The French Penal Code provides for criminal liability of legal persons – Article 121-2 CP.
[38] Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 31) p. 93

presumption provides that, if the act in question is outside the scope of the company's foreseen activity, it is presumed contrary to its interests, unless the defence proves otherwise.

The criminal conduct of the German offence of *Untreue* consists of breaching the duty to safeguard another person's financial interests. The provision enumerates four sources of this duty, namely statute, commission of a public authority, legal transaction and fiduciary relationship. Managers of different levels in both GmbH and AG are subject to this duty by legal transaction (their contract), which may also be combined with statute, where the latter describes certain duties (in particular as regards top level managers). Moreover, if their relationship with the company is based on an invalid legal act, but they execute their function anyway, they are still subject to the duty because of the fiduciary relationship.

The question of the scope of the duty and of its breach is evaluated according to the standards applicable to this duty, in particular by those enshrined in company law. It requires identifying a concrete legal source and applying the criteria provided for this concrete type of duty. Not all duties that managers might have are suitable to constitute the duty required by the offence of *Untreue*. Only those duties that concern the relationship between the manager and the entrusted assets, and whose aim is to protect the entrusted property, are considered.[39] Therefore, in principle, those duties that describe the managers' obligations but whose aims are other than the protection of entrusted assets cannot be the base for the offence of *Untreue*. However, more recent jurisprudence admitted the breach of duties whose aim was only indirectly linked to the prevention of damage to entrusted assets.[40] Certainly, if a norm does not aim, at least indirectly, at protecting these assets, its breach is irrelevant to liability for *Untreue*.[41]

An example of a concrete duty is the bank's obligation to gather client information for significant loans (Section 18 of the Banking Act - *Gesetz über das Kreditwesen*, *KWG*). However it may refer to more general duties, as the breach of duty may consist in not fulfilling a certain applicable standard of care. In particular, in

[39] Dierlamm, '§ 266 Untreue' (note 4) marginal number 185; Kindhäuser, '§ 266 Untreue' (note 4) marginal number 63.
[40] "*wenigstens auch, und sei es mittelbar*" – BGH (13.09.2010) NJW 2011, 88-96, 91. See also: BVerfG (23.06.2010) NJW 2010, 3209-3221, 3218f.
[41] Seier, 'Untreue' (note 4) marginal number 208; BVerfG (23.06.2010) NJW 2010, 3209-3221, 3218.

the case of limited companies, it will be the standard of 'care of a prudent businessman' (*Sorgfalt eines ordentlichen Geschäftsmanns*)[42] or of 'care of a prudent and conscientious manager' (*die Sorgfalt eines ordentlichen und gewissenhaften Geschäftsleiters*)[43]. The evaluation of these standards and whether the perpetrator fulfilled them or not should be done according to the interpretation provided within the doctrine and jurisprudence of these provisions. However the assessment has to be done in an ample and comprehensive way, since a breach of only one concrete rule need not lead to liability for *Untreue*. This approach was confirmed in judgments relating to the above-mentioned Article 18 KWG: that the requirement of breach of duty is not fulfilled if the assessment lacks information which was supposed to be gathered, but replaces it by a different information of equivalent value.[44]

Moreover, the fact that the assessment of the scope of duty and its breach should be done according to the applicable domain of law does not mean that a breach according to these standards must automatically result in liability for *Untreue*. The BGH considered in various cases that the breach of duty must be 'severe', which results in an asymmetrical relation between civil and company law versus criminal law and grant criminal judges a certain autonomy to decide whether a breach of duty in the sense of the former domains of law was a breach of duty in the sense of the latter. While this solution caused controversy in the German jurisprudence and doctrine, it was confirmed by the recent fundamental judgment of the Federal Constitutional Court.[45]

2.4.1.2. Criminalisation of exposing to risk within the definition of the offence

Although risk-taking is the core of this research, none of the provisions focuses on risk in its definition. It is linked to the fact, as explained in the section on protected legal interests (2.2.), that these provisions aim at protecting the entrusted property against loss, so they tend to focus more on damage. However, all of them

[42] § 43 Abs. 1 GmbHG.
[43] § 93 Abs. 1 AktG.
[44] BGH (15.11.2001) NJW 2002, 1211-1216, 1214.
[45] BVerfG (23.06.2010) NJW 2010, 3209-3221, 3215 at [112].

include exposing to excessive risk as a form of committing these offences – although they differ in the way this is done.

There are three ways of including exposing the company (or its assets) to excessive risk into the definition of the offence: within the definition of conduct, as a requirement of result or within the *mens rea*. This section will analyse different modalities of how risk is included in the definitions of conduct of the main offences in the three systems. Only the German provision contains the requirement of result, which will be analysed in the following section. The English system also makes separate reference to exposing to risk as one of the modalities of special intention, which will be addressed in the relevant part of the analysis of *mens rea*.

The English offence of abuse of position may be committed by exposing the company to excessive risk (provided that it was dishonest). The examples of abuse given by the CPS (Crown Prosecution Service) do not resemble those which are of interest for this study.[46] The Home Office Explanatory Notes however provide an example of abuse which consists of investing entrusted money into highly risky business (although not in a corporate context, but when caring for elderly or disabled people and done for private purpose).[47] Whilst it can be considered that abuse of position may consist in exposing the company to excessive risk, the mere fact of knowingly acting too risky will be insufficient for conviction for fraud by abuse of position, since, as explained above, additional elements will most probably be necessary to prove that the manager was dishonest.

The French offence does not mention the problem of risk, but the doctrine understood the formulation "contrary to the company interest" as either absence of adequate compensation or exposed to an abnormal risk, or a risk to which it should not be exposed.[48]

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[46] Crown Prosecution Service, The Fraud Act 2006: Legal Guidance; (available at: http://www.cps.gov.uk/legal/d_to_g/fraud_act/ consulted on: 10.10.2015).
[47] Home Office, Explanatory Notes Fraud Act 2006, 8 November 2006, Recital 23.
[48] Cass. crim., 16.01.1964, Bull. crim. 1964 n° 16, p. 27 (abuse of company assets); Cass. crim., 10.11.1964, Bull. crim. n° 291, (abuse of credit); Cass. crim., 03.05.1967, Bull. crim. n° 148, p. 350 (abuse of assets, credit and powers); Cass. crim., 07.03.1968, Bull. crim. n° 80, p. 189 (abuse of powers and abuse of assets in case of a cooperative), Cass. crim., 24.03.1969, Bull crim. n° 130, p. 319 (abuse of assets); Cass. crim., 16.03.1970, Bull. crim. n° 107, p. 245 (abuse of credit); Cass. Crim. 16.12.1975, Bull Crim. n° 279, p. 735 (abuse of company assets); Cass. Crim 19.11.1979, Bull Crim. n° 325, p. 887 (abuse of powers); Cass Crim 16.01.1989, Bull Crim. n° 17, p. 45 (abuse of powers); Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 31) p. 98.

The German jurisprudence and doctrine regarding the offence of *Untreue* specifically addresses the question of criminalisation of excessively risky decisions through the offence of *Untreue* under the topic of so-called *Risikogeschäfte* (risky or speculative transactions). The question of the breach of duty is interlinked with the question of how much risk the person is allowed to take. It will depend in the first place on the instructions given by the shareholders, limited by the rules on consent (i.e. especially not putting the life of the company in danger). If such instructions have not been given, the level of risk should be established according to the purpose of the business and standards of care typical for this type of business activities.[49] These standards are therefore different for example as regards institutions (whether it is a savings bank or an aggressive investment fund) and as to the concrete transactions (e.g. credit for a well-functioning company or a loan granted in order to help an enterprise in difficulty to recover, which might allow the bank to recover previous credits).

2.4.1.3. Requirement of result

There is substantial difference between offences which require proof of result and those which describe the wrongdoing only in the definition of the conduct. The result in question may be a loss, but more interesting for this study is a situation of concrete endangerment to the company assets. By requiring a proof of result, the offence makes it necessary that the prosecution prove that a situation occurred in which the company assets were endangered, as well as connect this situation with the conduct of the perpetrator by means of applicable rules of causality. Since risk is an inherent element of business, such endangerment must necessarily be defined in a way which limits it to situations where the risk is abnormal. This requirement places the focus not only on how the perpetrator acted (tackled by the description of conduct), but also what was the eventual result of this conduct. Therefore the objective reality created by the perpetrator becomes part of the assessment of his guilt.

The situation is different if the offence does not contain the requirement of result and only concentrates on the conduct. It is focused on the moment the manager

[49] Perron, '§ 266 Untreue' (note 4) marginal number 20.

took the excessively risky decision and verify, if in that moment the decision was of such a nature that it exposed the company to abnormal risk, regardless of whether that was really the case (or avoided due to fortunate events). This is the approach represented by the French system. While the latter does not require proof of any result (not even concrete endangerment of the company), it might be used in order to prove that the use was contrary to the company interests. However, this aspect of the use must be determined from the point of view of the moment of the perpetrator's act,[50] which demonstrates clearly that the offence aims at punishing managers who (knowingly) take decisions against company interests.[51] If a decision, which can be considered contrary to the company interests, by chance brings positive results, it can still be prosecuted, [52] while disastrous results of a decision, which involved only normal risk, would not make it a crime.[53]

The lack of requirement of result may also allow a more flexible approach, as in the English system, where the prosecution can focus on the detrimental results of the manager's act, but also on the fact the his conduct exposed the company to excessive risk, depending on which argument can be used to convince the jury about the dishonesty of the manager.

The necessity to prove these elements – risk-damage and causality –, in particular according to the new approach to risk-damage, results in a major difference of the German offence compared to the English and the French ones, as the former is the only legal system, out of the three analysed, which contains the requirement of result as a separate element of the *actus reus*. The offence of *Untreue* requires proof of result, which may be a loss, but more importantly here, also so-called risk-damage.[54] The latter notion extended the understanding of damage to situations, where that actual loss has not yet materialised. At first used more broadly, the

[50] Cass. crim., 02.12.1991, N° de pourvoi: 90-87563.
[51] Jacques-Henri Robert, Haritini Matsopoulou, *Traité de droit pénal des affaires* (Presses Universitaires de France, 2004) p. 477 ; Frédéric Stasiak, *Droit pénal des affaires,* 2nd edition (Paris: L.G.D.J., 2009) p. 242 ; Cass. crim., 27.10.1997 , Bull. crim., n° 352, p. 1169 (so called *Carignon* affaire).
[52] Rebut, *Abus de biens sociaux* (note 8) para 64; Cass. crim.,16.01.1989, Bull. crim., n° 17, p. 45.
[53] Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 31) p. 101.
[54] For more details on this notion see: Chapter IV, 3.5.3. "*schadensgleiche Vermögensgefährdung*" – "endangerment equal to damage" and "*Gefährdungsschaden*", which could be translated as 'risk-damage'; Schramm, 'Untreue, § 266 StGB§' (note 4) marginal number 136.

importance of this notion appears to have shrunk in view of the newest jurisprudential interpretation.

The approach represented in older jurisprudence, in particular in the context of *Risikogeschäfte,* associated damage with excessive risk-taking which allowed to assume that if the risk taken by the manager was higher than the permitted level then not only did the manger breach his duty to safeguard the owner's financial interests, but the requirement of result was also fulfilled in the form of risk-damage.[55] Normative formulas were used in order to describe what risk-damage is, such as "behaving like a gambler" ("deliberately and against the rules of professional diligence accepts highly increased risk of loss only in hope of a highly dubious gain").[56] Moreover risk-damage would be considered, if the company could seriously expect the loss to materialise.[57] While the concept extended to different areas of application of the offence (e.g. improper bookkeeping, granting loans or creating slush funds), it was also criticised by the doctrine for extending the scope of *Untreue* beyond its literal meaning.[58] One of the main points of this criticism was that attempted *Untreue* is not criminalised: thus by using this notion, which effectively diluted the requirement of result, the courts introduce penalisation of attempt through the back door.

These reservations led to a stricter approach to the concept, which requires concrete endangerment of the assets in a way that is reflected in its value.[59] The situation of risk must influence the economic situation of the company and diminish the value of its assets.[60] This is in particular linked with the accountancy rules and the requirement of including foreseeable risk and the costs, which may be associated with the depreciation of the value of the assets exposed to this risk.[61] According to this

[55] Seier, 'Untreue' (note 4) marginal number 386; Andreas Ransiek, 'Risiko als Problem des Untreuetatbestandes', *ZStW* 116 (2004), volume 3, pp. 634-679, 658-659.
[56] BGH (27.02.1975) NJW 1975, 1234-1236, 1236: "*Ein Vermögensschaden ist dann anzunehmen, wenn der Täter nur nach Art eines Spielers bewußt und entgegen den Regeln kaufmännischer Sorgfalt eine aufs äußerste gesteigerte Verlustgefahr auf sich nimmt, nur um eine höchst zweifelhafte Gewinnaussicht zu Erlangen*".
[57] BGH (09.07.1987) NJW 1987, 3144-3145, 3145;
[58] Dierlamm, '§ 266 Untreue' (note 4) marginal number, 212ff.; Martin Paul Waßmer, '§ 266 Untreue' in: Jürgen Peter Graf, Markus Jäger, Petra Wittig (eds.), *Wirtschafts- und Steuerstrafrecht* (München: C.H. Beck, 2011) marginal number 184.
[59] Dierlamm, '§ 266 Untreue' (note 4) marginal number 212.
[60] BVerfG (23.06.2010) NJW 2010, 3209-3221, 3218 [137].
[61] See e.g. Section 253 I and IV HGB (Handelsgesetzbuch Commercial Code); BVerfG (23.06.2010) NJW 2010, 3209-3221, 3219 [141].

approach, which has been confirmed in the above-mentioned judgment of the Federal Constitutional Court, the effect of risk must be quantifiable according to recognised methods, if necessary by an expert witness. The value of the loss, which the company would suffer, if the risk materialises, does not represent the value of the risk-damage, but it is the impact of the risk that must be calculated.[62] If establishing even a minimal value of the impact of risk on the assets is impossible, than the requirement of risk-damage is not fulfilled and the perpetrator must be acquitted.[63] One can also note that in some jurisprudence regarding capital investment or credit transactions, mere exposure to risk can be considered as actual damage.[64]

The result in the form of risk-damage must be causally connected to the breach of duty.[65] The test consists of two elements: causality and objective ascription.[66] The first element verifies whether the breach of duty was effectively part of the causal chain that led to the result, i.e. that the result would not have happened without this breach.[67] According to the second part of the test the connection is not established if the result would have occurred even if the perpetrator did not commit the breach of duty.[68] The required probability of this alternative scenario is subject to debate. The dominant view considers it sufficient that it is impossible to exclude it based on significant elements of the case (in other words it must be certain that the harm would not have occurred, had the perpetrator acted according to the rules).[69]

2.4.1.4. Consent and the approach to the company

The approach of the three legal systems to the consent of the shareholders reveals the general understanding of the legislator (at least in the context of the analysed offences) as to whether the company is to be understood as a separate entity

[62] BVerfG (23.06.2010) NJW 2010, 3209-3221, 3219 [142].
[63] BVerfG (23.06.2010) NJW 2010, 3209-3221, 3220 [151].
[64] BGH (20.03.2008) NJW 2008, 2451-2455, 2451f.
[65] Hans-Heinrich Jescheck, Thomas Weigend, *Lehrbuch des Strafrechts* (Berlin: Duncker & Humblot, 1996) p. 277; Wolfgang Schmid, '§31 Treupflichtverletzungen', in: Christian Müller-Gugenberger, Klaus Bieneck, *Wirtschaftsstrafrecht. Handbuch des Wirtschaftsstraf- und –ordnungswidrigkeitenrechts*, 5th edition (Köln: Dr. Otto Schmidt, 2011) marginal number 175; BGH (06.04.2000) NJW 2000, 2364-2366, 2365.
[66] Jescheck, Weigend, *Lehrbuch des Strafrechts* (note 65) p. 277ff..
[67] Frank Saliger, '§ 266 Untreue', in: Helmut Satzger, Wilhelm Schluckebier, Gunter Widmaier (eds.), *StGB Strafgesetzbuch Kommentar*, 2nd edition (Carl Heymanns Verlag, 2014) marginal number 78.
[68] Saliger, '§ 266 Untreue' (note 67) marginal number 81.
[69] Saliger, '§ 266 Untreue' (note 67) marginal number 81.

with its own interests or only a function of the interests of its economic owners, i.e. the shareholders. The question here is whether consent granted by the shareholders to a decision of the manager, which in normal circumstances should be considered excessively risky, exclude criminal liability for the offence. If the company is to be understood as a separate entity with its own interests, separate from those of the shareholders, consent to such acts should not have exculpatory effect. This is the case of the French offence of abuse of company assets.[70]

By contrast, in the German system the scope of duty, in particular the level of risk that may be taken by the manager, may be influenced by the valid consent of the shareholders. For its validity it is necessary that it is granted before the act and that the shareholders had enough understanding of the situation, with the exception of presumed consent, which might also be applicable in certain circumstances.[71] Moreover according to some authors consent is invalid if it authorises the performance of an illegal act (e.g. corruption).[72] The shareholders must also be entitled to decide upon the matter in question (the matter has not been reserved for another body). According to the dominant view consent is also invalid if it concerns an act, which would put the existence of the company in danger.

Although there is no jurisprudence to corroborate this statement, the English system will most likely accept consent, since it would be difficult to claim that the manager acted dishonestly or abused his position, if he acted with the consent of the shareholders, provided that they had sufficient information to assess the context and the content of their decision.

The question of the validity of consent is also linked to the problem of whose interests are protected by the offence. While exculpatory effect of consent highlight the prevalence of the interests of the shareholders, limits to its validity grants more protection to the stakeholders, who have interests in the correct functioning of the company ensured by the managers, in spite of the decisions of the shareholders. Hence, the French offence takes into account the interests of the stakeholders,

[70] Cass. crim., 08.03.1967, Bull. crim. n° 94; Rebut, *Abus de biens sociaux* (note 8) para 35f.; Jeandidier, *Abus des biens…* (note 32) para 37; Jean Larguier, Philippe Conte, *Droit pénal des affaires*, 11th edition (Armand Colin: 2004) pp. 342f.
[71] Michael Bohlander, *Principles of German Criminal Law* (Oxford and Portland, Oregon: Hart, 2009) p. 88.
[72] Schramm, 'Untreue, § 266 StGB§' (note 4) marginal number 80.

contrary to the English offence of fraud. As to the German offence of *Untreue*, the approach described above favours the shareholders vis-à-vis the stakeholders, although their interests are protected to a certain extent by limiting the validity of consent, in particular as regards any acts which might cause danger to the company's existence or affect its nominal capital.

2.4.1.5. Superior orders/expert opinions

The analysis of the national chapters inquired also about the possibility to acquit managers who took excessive risk in cases where they acted upon the orders of their superiors or were informed by expert opinion. There may be various possibilities as to what would be the place of such a factor within the structure of the offence, if admitted. While the orders of the superiors will have only limited influence on the assessment of criminal liability (potentially with the exception of England), the fact that an expert opinion shaped the decision of the manager may be crucial for his innocence.

The possibility of situations where the perpetrator of the French abuse of company assets acted upon superior orders is rather limited as the managers who may be subject to criminal liability for this offence are already at the top of the managerial hierarchy. Such orders will have rather little influence on the liability of a manager in the German legal system, if he breached his duty and fulfilled the *mens rea* requirement. Its impact would be practically limited only to situation where such an order convinced the lower level manager about the correctness of the decision or about the impossibility of detrimental consequences for the company, thus excluding the *mens rea*. As to England, the question will be part of the assessment of dishonesty, so it will be necessary to evaluate in concrete cases whether the fact that the manager was instructed by the superior can exculpate his act.

Expert opinions may play a role as regards criminal liability in all three countries. In the German legal system, whilst members of the decisive bodies must perform their duties according to applicable standards, they may rely on the expert opinions unless there are reasons to doubt these opinions (diversity of opinions between experts or particularly high risk). Similarly in England, a manager would

arguably not be dishonest, if he based his decision on expert opinions or superior orders, unless he had strong reasons to doubt the correctness of the advice or orders. As to France, an expert opinion might exclude the *mens rea* requirement of knowing that the act is contrary to the company interest, if there were no reasons to doubt that the opinion was accurate, although there is no certainty that the court would do so.[73]

2.4.1.6. Criminalisation of attempt

The problem of criminalising attempts to commit offences analysed here is very much linked to the general approach to attempts in the analysed legal systems, but at the same time may potentially have important influence on the scope of the offence and reflects the choices as to how far protection of property against exposing it to risk should be stretched. Depending on how the offence is designed, by making attempts to commit it punishable, the legislator may add criminalisation of excessive risk (if the offence focuses only on loss) or criminalise attempting to expose the company to a risk of loss (if risk is already included in the offence), thus stretching the protection of property very far.

While provisions in both systems, as it was seen above, contain also criminalisation of risk, neither the French[74] nor the German[75] system provide for criminalisation of attempting to commit the offences described above. Therefore in the French system, it is required that the manager effectively perform an act contrary to the company interests, and in the German one, the manager must effectively create a situation of risk-damage.

By contrast, attempts to commit the offence of fraud by abuse of position (or any other of its modalities), except if it is the case of omission,[76] are also criminalised by the Criminal Attempts Act 1981. In view of lack of the requirement of result in the

[73] See also: Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 31) p. 152.
[74] Rebut, *Abus de biens sociaux* (note 8) para 269. See also: Cass. crim, 7.04.1998, N° de pourvoi: 97-83801.
[75] Wittig, *Wirtschafsstrafrecht* (note 21) marginal number 14; Bernd Schünemann, '§ 266 Untreue', in: Heinrich Wilhelm Laufhütte, Ruth Rissing-van Saan, Klaus Tiedemann (eds.), *Strafgesetzbuch. Leipziger Kommentar*, Volume 9/1, §§ 263-266b, 12th edition (Berlin: de Gruyter, 2012) marginal number 206.
[76] A. P. Simester, J. R. Spencer, G. R. Sullivan, G. J. Virgo, *Simester and Sullivan's Criminal Law. Theory and Doctrine*, 5th edition (Oxford and Portland: Hart Publishing, 2013) p. 344.

definition of the offence and its general broad design, the role of criminalisation of attempt is limited. It may however be applicable if the manager prepared a contract which would result in exposing the company to excessive risk, and was on the verge of signing it.

2.4.2. Additional offences

While taking, preparing or enforcing excessively risky acts of management, the managers might possibly commit offences which do not target the mismanagement as such and are aimed at protecting interests other than that described in section 2.2. of this chapter, e.g. false accounting or corruption. However these offences are excluded from the scope of this study, and will not be analysed here. The purpose of this section is to analyse the offences which may punish managerial mismanagement and have similar goals to the offences described above, although their application to cases of excessive risk-taking might be limited. While they might not be the first choice of the prosecution, the latter might find reasons to use them. As will be seen below, there is great disparity between the English and the two other legal systems, since most of these additional offences are offered only in the former legal system. Therefore a symmetrical comparison is impossible. However, omitting these offences would not do justice to the national models.

While Germany offers only one offence, which tackles mismanagement committed by any possible manager, the French legal system allows punishing all those managers to whom the offence of abuse of company asset is not applicable by using the offence of breach of trust. It has however very limited application to cases of excessive risk taking, as it requires that the perpetrators misappropriated the funds. Only an extensive understanding of misappropriation (which is considered in the French jurisprudence to be equal to behaving, at least momentarily, as the rightful owner of the assets[77]) would include excessive risk-taking into its scope. So far the jurisprudence does not go into this direction, with one notable exception.[78] Limited possibilities of using this offence would exist, if it can be proved that the perpetrator

[77] Cass. crim., 13.02.1984, Bull crim. n° 49.
[78] Cass. crim., 03.07.1997, Bull. crim. n° 265, p. 905.

intentionally behaves as an owner of the asset.[79] In other words, that he was using the entrusted assets for his own purpose.[80] This might be the case, if he invests the assets not in accordance with the company policy, but for a personal endeavour. This offence requires proof of result, but its extensive interpretation includes potential result (i.e. risk of loss)[81] and also moral prejudice. Hence, if the criteria of misappropriation can be met, this requirement will rather not limit the application of the offence.

The English system offers an abundance of other offences, which might potentially be applicable to punish managers exposing their company to excessive risk. A manager who asked for approval of his decision by the shareholder and furnished them with inaccurate information might be liable for fraud by false representation (Section 2 of the Fraud Act 2006), regardless of whether the representation is expressed or implied and whether it is untrue or only misleading. If the manager has the duty to disclose information and he fails to do so, he may be liable for fraud by failing to disclose information (Section 3 of the Fraud Act 2006). This obligation to disclose must be a legal duty and can come from different sources: statutory, contractual, be deduced from the fiduciary relationship or be part of general practices or customary rules.[82] To this list one can add also the offence of theft (Section 1 of the Theft Act 1968), which provides an additional ground for punishing too risky management of company assets due to its extensive definition.

For all of these offences dishonesty must be proved, and it is understood in the same way as for the main offence of fraud by abuse of position as explained above. Beside its *mens rea* aspect, it is also necessary that the jury decide, as required by the *Ghosh* test, that according to the ordinary standards of reasonable and honest people the manager's act was dishonest, thus influencing also its *actus reus* aspect. Therefore the remarks formulated above as regards dishonesty in abuse of position will also apply as regards these alternative offences, and the possible application of the offence

[79] Wilfrid Jeandidier, *Abus de confiance*, JurisClasseur Pénal Code Code > Art. 314-1 à 314-4 Date du fascicule : 25 Février 2012, Date de la dernière mise à jour : 31 Décembre 2013, para 52; Cass. crim., 13.02.1984, Bull crim. n° 49, Cass. crim., 16.06.2011, N° de pourvoi: 10-83.758.
[80] Robert, Matsopoulou, *Traité de droit pénal des affaires* (note 51) pp. 101f; Corinne Mascala, *Abus de confiance*, Répertoire de droit pénal et de procédure pénale, Dalloz, octobre 2003, para 62-65 ; Jeandidier, *Abus de confiance…* (note 79) para 52f.
[81] Cass. crim., 03.12.2003 Bull. crim. n° 232, p. 935.
[82] Home Office, Explanatory Notes Fraud Act 2006, 8 November 2006, Recital 18.

to cases of interest for this study will be more limited than it might appear from the reading of the wording of the offence.

The English Fraud Act 2006 extends criminalisation much further by providing for two inchoate offences criminalising possession of articles for use in frauds[83] and making, adopting, supplying or offering any article[84] (provided that the perpetrator either knows that it is designed or adapted for use in the course of or in connection with fraud, or intends it to be used to commit, or assist in the commission of, fraud). It does not seem that while designing these offences, the legislator wanted to specifically target excessively risky transactions. It is rather more likely that these offences are supposed to be primarily used to penalise persons preparing or helping in committing the classical fraud by false representation. However the law might be used for punishing managers who were caught in the moment of preparing the excessively risky decision or preparing documents meant to hide shortcomings in the process of preparing such decisions.

In view of the restrictions on the application of the offence of fraud due to the requirement of dishonesty, and the remarks on the main focus of these two inchoate offences, their use is rather limited and there is no available case-law so far. However, if abuse of position (foreseen or committed) is very evident, this law may find its application in punishing the managers or their helping staff.

Another extension of the scope of criminalisation comes from two types of conspiracy provided by the English law, namely the general statutory conspiracy[85] and the common law offence of conspiracy to defraud.[86] Neither require that the effective fraud occur, although it is necessary that more than one person be involved. The broadening effect comes not only from the fact that it extends criminal liability to those who do not have the required position, which will be addressed in the next section, but also because they enable punishment for mere agreement to commit fraud, without requiring that the offence be attempted or any preparatory acts committed.

[83] Section 6 of the Fraud Act 2006.
[84] Section 7 of the Fraud Act 2006.
[85] Section 1 of the Criminal Law Act 1977.
[86] *Scott v Metropolitan Police Commissioner*, [1975] AC 819.

Conspiring to perform an act which exposes the company to excessive risk, even if the perpetrators expected an eventual profit for the company, can be punished by these two offences. Both require proof of dishonesty, including the caveats made above. From the *actus reus* perspective, it must be possible to consider that what they agreed to can be considered dishonest by reasonable and honest people.

The common law conspiracy allows even the person from outside of the conspirators' circle to perform it, while the statutory one requires that the main perpetrator is one of them. Criminal liability of a conspirator who withdrew from a conspiracy is not excluded. It may only influence the level of punishment.[87]

The agreement in the common law conspiracy need not refer to a concrete statutory offence, and may only be aimed at injuring some proprietary rights of another person.[88] However, the use of this offence of conspiracy to defraud must be justified, by demonstrating good reasons for using it instead of a statutory offence and certain reluctance on the side of the judges may be observed. It is used in particular for complicated configurations, for example where various perpetrators are involved. It is considered in particular that using conspiracy to defraud allows the prosecution to demonstrate more clearly what happened and the wrongdoing in question to the jury. It will be in particular useful, if there are more perpetrators involved, but it is impossible or problematic to prove fraud by abuse of position regarding some of them.

2.4.3. Criminalisation of secondary participation

Finally in all three legal systems persons who did not take the excessively risky business decision, but were somehow involved in it may also be punished. It is not the aim of this analysis to compare different regimes of complicity in the three legal systems and it would by far exceed the scope of this study.[89] This section points out only the major features of criminalisation of persons involved in excessively risky

[87] *Blackstone's Guide to The Fraud Act 2006* (note 3) p. 206; Andrew Ashworth, *Principles of Criminal Law*, 6th edition (Oxford University Press, 2009) p. 453.
[88] *Scott v Metropolitan Police Commissioner* [1975] AC 819, 840; *Blackstone's Guide to The Fraud Act 2006* (note 3) p. 206.
[89] For comparison of these regimes see in particular: Johannes Keiler, *Actus reus and participation in European criminal law* (Intersentia, 2013) pp. 153ff.

decisions. The relevance of this section to presenting the models of criminalisation of excessive risk-taking is the following. Persons who are subject to punishment in view of the rules presented below can be managers or other persons (employees or external to the company). Managers might be liable for aiding or abetting other managers in the commission of acts of excessive risk-taking, while not committing these acts themselves. It is also possible that managers are assisted or encouraged by persons who are not managers, for instance their assistants or external advisors.

Whereas the French and the German systems allow for the punishment of secondary participants on the condition that the main perpetrator committed the offence (although he need not be convicted of it) the English system opens much vaster possibilities of criminal liability. Not only does it punish certain preparatory acts but also assisting and encouraging, without requiring any effect on the main perpetrator, along with mere agreement to carry out the offence. Moreover it provides for a modality, which could punish assistance or encouragement provided to a person who would not fulfil the *mens rea* requirements.

The English and the French systems provide for modalities sanctioning managers who did not take the excessively risky decision themselves, but did not prevent another manager from taking it. The English system requires that such managers have the duty to prevent such a decision being taken or by his inaction encourages the perpetrator.[90] The French system also formulates two alternative requirements: preventing the abuse has to be within a manager's competences or be his duty.[91]

In English law, managers or other persons who do not perform acts of exposing the company to excessive risk, but who aid, abet, counsel or procure the commission of such acts amounting to fraud can be liable as principals in view of the rules of criminal liability for secondary participation. The main offence must be committed[92] and the act of complicity must be connected with the commission of the principal's offence.[93] This modality presents also the possibility to punish a manager who has either the legal duty to prevent or the power of control over another

[90] *Simester and Sullivan's Criminal Law* (note 76) p. 217.
[91] Cass. crim., 20.03.1997, N° de pourvoi: 96-81361.
[92] *Simester and Sullivan's Criminal Law* (note 76) p. 204.
[93] *Simester and Sullivan's Criminal Law* (note 76) pp. 213ff.

manager's act and who does not prevent the latter from exposing the company to excessive risk in a way constituting abuse of company assets (or another modality of fraud).[94] Lack of reaction of another manager, even without him having the legal duty to prevent or power of control, can amount to secondary participation, if it can be considered that his inaction encouraged the main perpetrator (and provided that that was his intention).[95]

The scope of criminalisation may be further extended through the inchoate offence of encouraging and assisting crime, provided in a separate statute (the Serious Crime Act 2007) and applicable also as regards the offence of fraud. This offence provides punishment for persons (including other managers) for helping managers either actively (e.g. providing expert analysis inaccurately demonstrating that risk is lower than in reality) or by omission (lack of proper control), whether this help comes from inside or outside the company. For example, it could be applied to senior managers who encourage lower level managers to take excessively risky decisions, possibly even through omission, if their silence could be clearly interpreted as encouragement.

The broadening effect on the scope of criminalisation of this offence results from its three aspects. Firstly, there is no need for the act to effectively encourage or assist the principal perpetrator; it is enough that it is capable of having this effect. Secondly, there is no requirement that fraud effectively occur. The liability for encouraging and assisting is fully independent vis-à-vis the main offence. Thirdly, although it is a *mens rea* issue, it is important to signal here that this provision allows for the criminalisation of encouraging or assisting in the commission of an abuse of position without requiring that the person effectively performing this act do so dishonestly or with the necessary intention, if this *mens rea* element can be proved in the person assisting or encouraging.

Moreover, the two inchoate offences provided by the Fraud Act criminalising possession of articles for use in frauds and making, adopting, supplying or offering any article would also provide for punishment, without having recourse to the

[94] *Simester and Sullivan's Criminal Law* (note 76) p. 217.
[95] *Simester and Sullivan's Criminal Law* (note 76) p. 217. The mere non-preventing the commission of an offence without encouraging its commission does not constitute secondary participation, as it was decided in: *R. v Clarkson* (1971) 55 Cr App R 445.

regulation on complicity, for those who help in the process of preparing such a decision, if it takes the form of acts described in the definition of these two offences. In addition, persons who collaborated with the manager in view of an agreement made between them beforehand can be held liable for both types of conspiracies mentioned in the previous section.

In the two other legal systems, the possibilities of convicting secondary participants are not so vast. In France, if a manager effectively committed the abuse of company assets (even without being punished for it), a person who helped him or instigated him to commit this offence can also be punished as an accomplice.[96] This modality opens criminalisation to persons (including lower level managers) who do not fulfil the criteria of the perpetrator of the offence. Help may consist in providing the principal perpetrator with necessary tools or providing help during the commission of the offence.[97] Instigation can consist in giving instructions to the principal perpetrator or provoking him to commit it by means of a gift, promise, threat order or an abuse of authority of powers.[98] A highly relevant example of complicity is a situation, when a manager does not prevent another from committing an abuse if it was within his competences to prevent it or if it was his duty, while being aware of this abuse.[99]

Secondary participation in the commission of *Untreue* is also punishable in Germany. If an aider or an instigator is subject to a duty to safeguard the company's financial interests, which the main perpetrator breached, he will be liable as principal, due to the *Einheitstäterbegriff* (lack of distinction between principals and participants), and if not as secondary participant, which has consequences as to the scope of applicable punishment. The liability for secondary participation depends on the actual commission of the offence by the principal, although the latter does not need to be sentenced.[100] Instigation may be committed by using different means, such

[96] Rebut, *Abus de biens sociaux* (note 8) para 218; Frédéric Desportes, Francis Le Gunehec, *Droit Pénal Général*, 14th edition (Paris: Economica, 2007) p. 504.
[97] Desportes, Le Gunehec, *Droit Pénal Général* (note 96) p. 497.
[98] Article 121-7 CP, Desportes, Le Gunehec, *Droit Pénal Général* (note 96) p. 502.
[99] Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 31) pp. 60f., 242-243; Jeandidier, *Abus des biens…* (note 32) para 25. See also: Cass. crim., 20.03.1997, N° de pourvoi: 96-81361; Cass. crim., 07.09.2005, N° de pourvoi: 05-80163.
[100] For example due to a valid defence; Jescheck, Weigend, *Lehrbuch des Strafrechts* (note 65) p. 685ff.; Bohlander, *Principles of German Criminal Law* (note 71) p. 168.

as gifts, promises, use of influence or reputation, or threats.[101] The instigation does not need to be the only factor influencing the perpetrator, but criminal liability is excluded if the principal had already decided to commit the offence.[102] Similarly, aiding must effectively help the main perpetrator, although it may be only one of the factors that facilitated the crime.[103] Help must be provided at the latest during the commission of the offence, and can include psychological help.[104]

2.5. *Mens rea*

All the offences described in the previous section require that the conduct was committed intentionally. The requirement of *mens rea* is shaped by general rules of *mens rea* in each of the analysed systems and it is not the objective of this study to compare these rules.[105] However, the application of the offences analysed in these chapters and the scope of protection granted by them depend to a large extent on the *mens rea* requirements. These requirements vary among the three legal systems, in particular because of additional elements, such as dishonesty or personal interest. Therefore it is possible that while an act is criminalised in one system, the same act, although meeting the requirements of the *actus reus,* might not be punishable because such an additional requirement is not met, e.g. the manager did not act in his personal interest.

The comparative analysis of the *mens rea* requirements for offences provided by the three legal systems will follow the same structure as the section on the criminal conduct. Analysing the *mens rea* of the main and the additional offences together risks blurring the image of the models and impeding a proper comparison of the systems, as additional offences are offered only in two of the analysed systems and most of them in English law.

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[101] Jescheck, Weigend, *Lehrbuch des Strafrechts* (note 65) p. 687.
[102] Bohlander, *Principles of German Criminal Law* (note 71) p. 168.
[103] Wolfgang Joecks, '§ 27 Beihilfe' in: Bernd von Heintschel-Heinegg (ed.), Münchener Kommentar zum Strafgesetzbuch, Band 1: §§ 1-37 StGB, 2nd edition, (München, C. H. Beck, 2011) marignal number 23ff.
[104] The latter can be understood as reinforcing the perpetrator's decision to act, including by promising help; this promise need not materialise eventually; Jescheck, Weigend, *Lehrbuch des Strafrechts* (note 65) p. 692.
[105] For comparative analysis of *mens rea* requirements in general see in particular: Jeroen Blomsma, *Mens rea and defences in European criminal law* (Intersentia, 2012), pp. 39ff.

2.5.1. Standard offence

The offence of fraud by abuse of position, as well as the two other modalities of fraud (fraud by false representation and by failing to disclose information) contains three *mens rea* requirements: knowledge about dishonesty of the act, knowledge about the abuse and special intention. Out of the three it is knowledge about dishonesty (together with the *actus reus* aspect of dishonesty, as explained above) that will mostly influence the scope of criminalisation in the English legal system.

The means rea of the French offence of abuse of company assets (including all its modalities) is composed of two elements. Firstly, the perpetrator, at the moment of the commission of the act, must know and be willing to act against his company's interests (*dol général*). Secondly, he must do so because of personal interest broadly construed, which is understood as personal interest (material or moral), or as interest of a company or undertaking in which he is directly or indirectly involved (*dol spécial*).[106]

The German offence of *Untreue* contains a classic requirement of intention composed of the cognitive and volitional aspect and includes the possibility to be committed with *dolus eventualis*.[107]

The analysis will be divided in three parts. The first two parts will examine the cognitive and volitional aspect of *mens rea*, which refers to the requirement of knowledge and intent as regards the conduct described in the *actus reus.* The third part will analyse the requirement of special intention, i.e. intention that goes beyond what is contained by the *actus reus*. It is in particular relevant whether the offence requires the manager to act in his own interest.

[106] Mirelle Delmas-Marty, Geneviève Giudicelli-Delage (eds.), *Droit pénal des affaires*, 4th edition (Paris : Pr. Univ. de France, 2000) p. 352.
[107] This terminology according to Blomsma, *Mens rea and defences* (note 105) p. 60.

2.5.1.1. Cognitive aspect

All three offences require that while committing the act, the perpetrator is aware of certain aspects of what he is doing. These cognitive requirements correspond generally with the requirements of criminal conduct already analysed above.

While all three systems require that the manager be aware that his particular position entails a duty to safeguard the interests of the company, it is the German system that makes this request more specific, although the degree of knowledge required is subject to debate. Similarly, the three systems require that the perpetrator be aware of the negative aspect of his act. However the three systems differ fundamentally as to the criteria for assessment of this negative feature and its standards.

The manager exposing the company to excessive risk in the English legal system must be aware of the fact that what he is doing can be regarded as dishonest by the standards of reasonable and honest people.[108] It is therefore not a question whether he considered his act dishonest, but whether he was aware that other (reasonable and honest) people would perceive it to be so.[109] Such an approach does not allow the manager to justify his act by saying that in his perception the act was honest, if he was aware that other people would not share his view.[110] Moreover, managers should not get away with their acts by saying that "everybody does that".[111] However it does not save the test from the risk of having to acquit a person, who manages to convince the jury that had been so detached from the standards of reasonable and honest people that he had been convinced that "everybody does that". This might be highly relevant for cases where excessive risk-taking was part of the office culture, backed and encouraged by the superiors.

The English law of fraud is very laconic as regards other elements of the cognitive aspect of intention. However, it seems that it might be presumed that the manager needs to be at least aware that he is abusing his position.[112] While it is

[108] *R v Ghosh*, [1982] QB 1053, 1064.
[109] *Blackstone's Guide to The Fraud Act 2006* (note 3) p. 15/2.05-2.07, Jacques Parry, Anthony Arlidge, Joanne Hacking, Josepha Jacobson, *Arlidge and Parry on Fraud*, 3rd edition (London: Sweet & Maxwell, 2007) p. 9/2-013
[110] *Blackstone's Guide to The Fraud Act 2006* (note 3) p. 15/2.06
[111] *Simester and Sullivan's Criminal Law* (note 76) p. 549.
[112] *B v Dpp* [2000] 2 AC 428; *R v K* (Crown Prosecution Service v K) [2002] 1 AC 462.

unclear whether special proof of that would be required, it can be assumed that the lack thereof would make it difficult to prove that he was dishonest and aware of it.

Within the French system, the perpetrator must be aware that what he does is against the company interest, i.e. that it exposes the company to abnormal risk of loss.[113] The lack of knowledge of the manager as to the excessively risky character of the act will not exclude his liability, if it is due to faults, for which he is responsible.[114]

It has been pointed out in the French doctrine that courts are not always scrupulous in proving all the elements of the *mens rea*, but imply the existence of *dol général* from other elements of the offence. The Court of Cassation confirmed in one judgment that some elements of the offence might be indicated implicitly.[115] Intention could then be deduced from material elements of the offence, in particular, from the lack of transparency in the manager's acts[116] or because of the application of some accountancy tricks.[117] The courts have also sometimes the tendency to infer it from the presence of the requirement of special intention, i.e. the personal interest. [118] There is however a limit to the use of this technique, as judgments, where the reasoning was limited to a presentation of fact did not pass the scrutiny of the Court of Cassation.[119]

For criminal liability for *Untreue* the perpetrator needs to be aware of the fact that he has the duty to safeguard the company's financial interests as well as that what he is doing breaches this duty. The main debate concerns the first part of this pair.

There is no agreement within the German jurisprudence and doctrine as to how the problem of lack of awareness of the duty to safeguard the company's financial interest should be solved. The problem of awareness as regards the duty is composed of two aspects: the factual background of the duty and its legal interpretation. While mistakes as to all these aspects might be considered mistakes on the facts and exclude

[113] Médina, *Abus de biens sociaux…* (note 34) p. 208.
[114] Cour d'Appel Angers, 22.01.2008 : JurisData n° 2008-362347, cited after: Jeandidier, *Abus des biens…* (note 32) para 70.
[115] Rebut, *Abus de biens sociaux* (note 8) para 139; Cass. crim., 16.03.1970, Bull. crim. n° 107 p. 245.
[116] Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 31) p. 154.
[117] Stasiak, *Droit pénal des affaires* (note 51) p. 246. Other examples, see Médina, *Abus de biens sociaux…* (note 34) p. 211.
[118] Rebut, *Abus de biens sociaux* (note 8) para 142; Cass. crim., 5.11.1976, Bull. crim. n° 315, p. 803; Cass. crim., 19.06.1978, Bull. crim. n° 202 p. 525.
[119] Rebut, *Abus de biens sociaux* (note 8) para 143; Cass. crim., 16.02.1987, Bull. crim. n° 72, p. 194.

intention and therefore criminal liability,[120] an adverse theory considers only mistakes as to the factual background to have this consequence and associates the legal misinterpretation with the mistake of law (excluding criminal liability only if it was unavoidable).[121] A compromise theory proposes that for acting intentionally the perpetrator should have at least some understanding of the normative consequences of the underlying facts.[122]

The perpetrator must at least be aware of the fact that it is possible that his excessively risky decision breaches the above duty and proceed with it anyway. In particular he will not be liable, if he considered (mistakenly) that the shareholders consented to the act.[123] The manager's hope that they would consent is insufficient,[124] except if the requirements for presumed consent are fulfilled.[125]

Regarding the standard of assessment of the manager's knowledge of the negative aspect of his act, the French system is the least strict and allows even for the implication of knowledge from other aspects of the offence. Even a clear lack of this knowledge cannot excuse the manager, if he was responsible for mistakes that led to it. The German system on the contrary requires proof of the manager's knowledge, although liability for *Untreue* cannot be excluded if the perpetrator was not fully aware of the legal consequences of the duty according to the strictest of competing theories in the German doctrine. In the strictest out of the three English approaches, the jurors must be convinced that the dishonest aspect of the manager's act was known to him.

As to the criteria, according to which this negative aspect of the manager's act is assessed, the manager is required also to have different insights depending on the national system. For criminal liability for the French abuse of company assets it is sufficient that the manager know that the risk he is undertaking is abnormal in the given circumstances. The manager in the German system must have the understanding

[120] Dierlamm, '§ 266 Untreue' (note 4) marginal number 282.
[121] Kindhäuser, '§ 266 Untreue' (note 4) marginal number 122. See also Schünemann, '§ 266 Untreue' (note 75) marginal numbers 192-197.
[122] Perron, '§ 266 Untreue' (note 4) marginal number 49.
[123] Schramm, 'Untreue, § 266 StGB§' (note 4) marginal number 153; Kindhäuser, '§ 266 Untreue' (note 4) marginal number 122; Dierlamm, '§ 266 Untreue' (note 4) marginal number 282.
[124] Seier, 'Untreue' (note 4) marginal number 83.
[125] On presumed consent see: Dierlamm, '§ 266 Untreue' (note 4) marginal number 145; Schramm, 'Untreue, § 266 StGB§' (note 4) marginal number 81ff.

that by taking excessive risk he is breaching a duty. While these two approaches may be presented as very different, with one requiring factual insights and the other more legal ones, the difference between them does not seem so vast. In order to assess that the risk taken is abnormal, the manager in the French system needs to understand not only the economic aspects of his decision, but also the scope of discretion in which he is allowed to exercise his powers. In the German system, whereas one theory requires the acquittal of a manager who did not understand the legal aspects of his duty, the other theory is satisfied enough to convict where he has some understanding of it, as long as he has insight into the factual aspect, which would lead to the breach of duty.

The truly different solution is provided by the English requirement of dishonesty, which does not focus on the manager's perception of legal or factual problems of his decision, but on what reasonable and honest people would think of it. Different aspects may influence the jury's decision on the dishonesty of the manager, including the one as to whether the manager was aware that he was in breach of some of his duties or that his decision was excessively risky. It must be proved that the manager was aware that other people would regard the decision taken as being dishonest, which might be more difficult to achieve, if the defendant can plausible claim that he was justifiably unaware of the standards he was breaching.

2.5.1.2. Volitional aspect

The three offences vary to an important extent as regards the volitional requirements of the offence. The English offence of fraud does not formulate it at all and *mens rea* is satisfied with the proof of knowledge and special intention. The French offence of abuse of company assets contains a requirement that the manager act intentionally, while knowing that the act is contrary to company interests (i.e. exposes the company to abnormal risk of loss). This system does not attach great importance to the proof of this requirement. It is implied from the fact that the perpetrator knew that the risk was excessive and he acted anyway. This requirement may also be inferred from the other aspects of the offence, in particular special intention.

This requirement is of the greatest importance to the offence of *Untreue*, which contains the requirement of result and therefore the perpetrator must have intention to cause this result. Since *Untreue* can be committed also with *dolus eventualis*, this grade of intention should be sufficient in relation to result. As regards risk-damage it is however unclear whether the perpetrator needs to at least consider possible and accept the actual loss to occur (although without intending to create it) or if it would be sufficient that he only considered it possible, and accepted, that as a result of his act a situation of concrete endangerment fulfilling the criteria of risk-damage would occur.[126] While the latter solution is more natural, since it keeps the parallel connection between *actus reus* and *mens rea*, a judgment of the BGH required that the perpetrator actually accept the possibility of causing effective loss.[127] This judgment stirred a debate between various senates of the German BGH – which issued judgments representing both approaches – and in the doctrine.[128] While the theory requiring acceptance of the possibility that actual loss may materialise is motivated by the will to curb over-extensive interpretation of the offence due to the concept of risk-damage,[129] it might create a paradoxical result, namely that a manager who accepted the occurrence of damage but only created risk-damage would be criminally liable, whereas a manager who only accepted the possibility of risk-damage, but in fact created a loss, would be acquitted. Such solution would attach much more importance to the *mens rea* aspect of the offence and therefore make it more similar to the English and the French approach, where the decisive factors are to a large extent placed on the *mens rea* requirements. However, the reasoning of this interpretation can be relatively easily challenged. It is namely quite difficult to claim that a person who accepted that he would create a risk to the company did not accept that the harm actually occurs.

So far there is no certainty as to the direction in which further jurisprudence will go. The Federal Constitutional Court of Germany in its already evoked judgment accepted the possibility to commit *Untreue* with *dolus eventualis* and did not repeat the requirement of accepting the actual loss.[130] In any case, while the prosecution in England and France may neglect the volitional aspect of the case, the case of *Untreue* must establish that the perpetrator intended to breach his duty and cause the result.

[126] BGH (06.04.2000) NJW 2000, 2364-2366, 2366; BGH (15.11.2001) NJW 2002, 1211-1216, 1216.
[127] BGH (18.10.2006) NJW 2007, 1760-1767, 1766.
[128] See Chapter IV. 3.6. *Mens rea*.
[129] Seier, 'Untreue' (note 4) marginal numbers 186-188.
[130] BVerfG (23.06.2010) NJW 2010, 3209-3221, 3214 [105].

One more characteristic of the offence as regards the volitional aspect of *mens rea* is the importance of the manager's hope or intention that despite excessive risk, the company will eventually profit from his act. In all three legal systems such hopes are without relevance for criminal liability.[131]

2.5.1.3. Special intention

The three legal systems also vary significantly as regards the special intention requirement of the offence. There are two relevant aspects of special intention. Firstly, it is a technically different category to ("normal") intention as it goes beyond what is described by the *actus reus*. Therefore it may be included for reasons of legislative technique, as is the case for England, while in reality not adding a requirement which would drastically change the scope of the offence. Secondly, the requirement of special intention may indeed add an element, which significantly limits the scope of application of the offence, and possibly also change the image of the wrongdoing addressed by the offence. This will be mainly the case of the French offence of abuse of company assets, where the requirement of personal interest will be a decisive factor for criminal liability, but also in England, where it will potentially play a crucial role in proving dishonesty. It is this second aspect which will be more relevant for the functional comparison and will be given more attention below. The understanding of personal interest will be explained more in detail below in the context of each of the two systems.

The German system does not contain such a requirement at all. It is therefore without relevance whether the perpetrator performs his act in view of his personal benefit, a benefit of another person or without any such motivation.[132]

The English system defines three possible purposes why the perpetrator would dishonestly abuse his position. It must be proved that the perpetrator intended, by means of the abuse of position (or other modalities of fraud) to make a gain for himself or another, or to cause loss to another or to expose another to a risk of loss.

[131] England: *Alridge and Parry on Fraud* (note 109) p. 13/2-024; France: Stasiak, *Droit pénal des affaires* (note 51) p. 246; Germany: BGH (06.05.1986) NStZ 1986, 455-456; Perron, '§ 266 Untreue' (note 4) marginal number 49.
[132] Schünemann, '§ 266 Untreue' (note 75) marginal number; 189; Perron, '§ 266 Untreue' (note 4) marginal number 49.

Such formulation includes a vast scope of different motivations the manager may have when exposing the company to excessive risk. Moreover, it is not necessary that he have direct intention that one of these scenarios materialise, since it is sufficient that he hold it for virtually certain that his act will cause one of them.[133] In view of how broadly this requirement is formulated, it will have very little influence on the scope of the offence.

On the other hand, proof of personal interest, without formally being part of the definition of the offence, may in practice influence the assessment of the perpetrator's dishonesty. Therefore, it can be considered part of the design of the offence as one of the alternative ways supporting the proof of dishonesty.

At the other end of the spectrum will be the French system, where the requirement of broadly-designed personal interest will be crucial to determining the perpetrator's criminal liability. It will eliminate from the scope of the offence all of those situations where the perpetrator exposed the company to excessive risk, but did not seek any personal gain or was not acting in the interest of another person or an undertaking in which he has an interest. In particular this requirement will eliminate situations where the risk deliberately taken was excessive, but the manager acted solely for the benefit of the company.

The requirement of personal interest is formulated very broadly. It can be material, immaterial, for oneself, or for another. It can be an interest in a company or undertaking, in which he is involved and which is meant to profit from his act, although the profit need not materialise. The involvement in this entity may be of variable nature, e.g. as shareholder, creditor, supplier,[134] as well as through friendship or a family connection.[135]

The interpretation of this requirement given by the French courts includes very different motivations, such as seeking renown or advancement of career[136] and recognition from other persons (e.g. those who profited from the abuse),[137] honing

[133] *Woollin*, [1998] AC 82 (83) – the formulation here after *Blackstone's Guide to The Fraud Act 2006* (note 3) p. 19.
[134] Delmas-Marty, Giudicelli-Delage, *Droit pénal des affaires* (note 106) p. 352.
[135] Delmas-Marty, Giudicelli-Delage, *Droit pénal des affaires* (note 106) p. 352.
[136] Cass. crim., 20 mars 1997, N° de pourvoi 96-81.361.
[137] Cass. crim., 07.03.1968, Bull. crim. n° 80.

personal business relationships,[138] or caring for family reputation.[139] Such a broad reading of the requirement comprises almost any human motivation. If understood in this way, the importance of this requirement would significantly diminish, especially given that the personal interest need not be the only motivation; although it ought to prevail.[140] Such a reading would render the difference between the French and the German or English systems almost non-existent, as one can assume that perpetrators in these systems would present similar types of motivations.

However, the 'diluted' personal interest – such as seeking prestige, career advancement or strengthening of position within the company – is rarely sufficient in cases where the aspect of being contrary to the company interests results from the fact that it exposes the company to excessive risk. Out of the two crucial elements of the offence (acting contrary to company interests, and personal interests), at least one must be strongly convincing. Hence, it is necessary that either effective loss occurred or the personal interest was of a more evident nature.[141] Therefore in order to punish the taking of excessive risk, it is necessary that the manager was acting for personal interests amounting to more than merely his own ambition or willingness to please other (more important) persons.[142] It would be necessary to prove that for example he intended to directly profit from the act, or provide benefits for his relatives or undertakings. Although it cannot be excluded that the courts would accept the 'diluted' personal interest in cases of mere excessive risk-taking, so far it should be considered that it is in practice not criminalised.

Another aspect, which would heighten the probability of the perpetrator's conviction, would be if he performs clandestine operations with company funds.

[138] Cass. crim., 09.05.1973, Bull. crim. n° 216, p. 511; Cass. crim., 19.06.1978, Bull. crim. n° 202 p. 525; Cass. crim., 15.09.1999, N° de pourvoi 98-83.237.
[139] Cass. crim., 03.05.1967, Bull. crim. n° 148.
[140] Quentin Urban, 'De la difficulté pour le juge de caractériser l'abus de biens sociaux', *La semaine juridique – édition générale*, (14 septembre 2005), no 37, pp. 1619-1623, 1621.
[141] These cases are examples of the broad interpretation of the requirement of personal interest, but in all of them the company suffered a loss: Cass. crim., 08.12.1971, Bull. crim. n° 346, p. 869; Cass. crim., 19.06.1978, Bull. crim. n° 202, p. 525; Cass. crim., 20.03.1997, N° de pourvoi: 96-81361; Cass. crim., 15.09.1999, N° de pourvoi 98-83.237

[142] Cass. crim., 16.01.1964, Bull. crim. 1964 n° 16, p. 27 (abuse of company assets); Cass. crim., 10.11.1964, Bull. crim. n° 291 (abuse of credit); Cass. crim., 24.03.1969, Bull crim. n° 130, p. 319 (abuse of assets); Cass. crim., 16.03.1970, Bull. crim. n° 107, p. 245 (abuse of credit).

According to the Court of Cassation in such case the presence of personal interest can be presumed, and the defendant must prove that this was not the case.[143]

2.5.2. Additional offences

Contrary to the abuse of company assets, the French offence of breach of trust contains no requirement of special intention, but only classic requirements of intention. It is therefore necessary to know that the assets were entrusted conditionally (which is normally the case for managers) and that the perpetrator had the intention of misappropriating them. As it was pointed out above, the *actus reus* requirement of misappropriation excludes the application of this offence to cases of excessive risk-taking, with the exception of very limited jurisprudence. It is therefore the problem of the interpretation of misappropriation and not the *mens rea*, which will mostly limit the application of this offence to excessive risk taking by managers. If however the court admits that by exposing the company to excessive risk of loss the manager misappropriated the assets, the *mens rea* requirement of intention to misappropriate will have to be analysed in view of this understanding of the term.

As to the additional offences available in the English legal system, they are all intentional, although they vary as to the details of the *mens rea* requirements. As to the two alternative modalities of fraud, they contain the same requirements of knowledge that the act is dishonest and the special intention. As already mentioned, the special intention, being very broadly designed will have very limited influence on the scope of the offence, while dishonesty will significantly shape its boundaries. Furthermore, each of the offences would presumably contain an additional cognitive requirement. As to fraud by false representation the person making the representation would need to know that it is, or might be, untrue or misleading.[144] As to fraud by failing to disclose information, it might be presumed that the perpetrator would need

[143] Cass. crim., 11.01.1996, Bull. crim. n° 21, p. 51. See also: Joly, Joly-Baumgartner, *L'abus de biens sociaux…* (note 31) p. 146 (and the judgments cited there, which confirm this line).
[144] *Simester and Sullivan's Criminal Law* (note 76) p. 620.

to know about the duty to disclose such information,[145] although the CPS in its guidelines considered the offence to be of strict liability in this regard.[146]

In the case of the inchoate offence of possession of articles for use in fraud the perpetrator must intend to use those articles in the course of or in connection with fraud, or that another do so.[147] As to the inchoate offence of making or supplying such articles, the perpetrator must either know "that it is designed or adapted for use in the course of or in connection with fraud" or intend "it to be used to commit or assist in the commission of fraud".[148] The latter modality could be applied to an assistant who prepared documents for an excessively risky transaction, knowing about its nature and about the principal's dishonesty, but without the intention that such an act be committed. For both offences, no proof of dishonesty is required.

Regarding statutory conspiracy, one of the conspirators must in view of the plan fulfil at one point the *mens rea* requirements (of the foreseen offence). It is not necessary for the other conspirators to fulfil them. They only need to be aware of the plan, and intend that it be carried out. This means that there would be no need to prove that the co-conspirators of a manager exposing the company to excessive risk were dishonest and had special intention, although it seems that by conspiring with a dishonest manager, they could probably also be found dishonest with the intention of exposing the company to a risk of loss.

Concerning the common law conspiracy to defraud, it contains two *mens rea* requirements: dishonesty and intention to defraud. The latter requirement means intention to prejudice another and can also be associated with putting another's property at risk, and the fact that the risk does not eventually materialise or that the victim (here: the company) even ultimately benefits from it does not preclude criminal liability.[149] Nor is it relevant that the overall motive of the perpetrator is that the

[145] *Simester and Sullivan's Criminal Law* (note 76) p. 623; *Montgomery and Ormerod on Fraud* (note 19) p. D-2101.
[146] Crown Prosecution Service, The Fraud Act 2006: Legal Guidance, heading: Failure to disclose information (available at: http://www.cps.gov.uk/legal/d_to_g/fraud_act/ consulted on: 10.10.2015).
[147] Crown Prosecution Service, The Fraud Act 2006: Legal Guidance, heading : Possession of articles for use in fraud (Section 6) (available at: http://www.cps.gov.uk/legal/d_to_g/fraud_act/ consulted on: 10.10.2015).
[148] Section 7 (1) of the Fraud Act 2006.
[149] David Ormerod, David Huw Williams, *Smith's Law of Theft*, 9th edition (Oxford University Press, 2007) p. 210.

company profit, if he intentionally exposes it to a risk to which it should not have been exposed.[150]

As to the first one – dishonesty – it presents the same problems as described above and it is subject to the same test, namely that set out in *Ghosh* judgement. Keeping in mind the reservations formulated above, it is worth noting the view of Ormerod and Williams on this issue: "[if D knows] that no 'ordinary decent company director' would take the risk in question, then he knows that the risk is an unjustifiable one and it is dishonest for him to take it". "If *no* director could have believed the risk was justified, it follows that the defendant did not."[151]

2.5.3. Criminalisation of secondary participation

As with the *actus reus* aspect of secondary participation, it goes beyond the scope of this study to compare the *mens rea* aspects of the regimes of liability for complicity in the three legal orders studied here and only the features relevant for this study will be pointed out. Generally, the secondary participant must act intentionally. The crucial points, which will be decisive for criminal liability as regards the *mens rea*, are what such a participant needs to know as regards the main perpetrator's (the manager's) act and what his intention is in this respect.

The English system offers various possibilities to convict persons helping or inciting managers to expose their companies to excessive risk of loss. For liability as an accomplice, the perpetrator must have intention to make his contribution to the commission of the offence (aiding, abetting, counselling or procuring) and be aware or foresee the "essential matters"[152] of the offence committed by the main perpetrator.[153] Hence, there is no need that the accomplice intend that the principal commit the offence, with the exception of procuring.[154]

As mentioned in the previous section, the offence of possession etc. of articles for use in frauds requires the intention that the article be used in the course of or in

[150] *R. v Allsop* [1977] 64 Cr App R 29; *Wai Yu-Tsang Appelant v R* [1992] 1 AC 269.
[151] Ormerod, Williams, *Smith's Law of Theft* (note 149) p. 208.
[152] *Johnson v. Youden* [1950] 1 KB 544, 546.
[153] *Simester and Sullivan's Criminal Law* (note 76) p. 218.
[154] *Simester and Sullivan's Criminal Law* (note 76) p. 219.

connection with fraud, while the offence of making or supplying articles for use in frauds requires "knowing that it is designed or adapted for use in the course of or in connection with fraud, or […] intending it to be used to commit, or assist in the commission of, fraud."[155]

The most interesting of all of these offences will be the possibility to convict a person who aids or abets in the commission of the offence of an inchoate offence of assisting and encouraging crime. This would enable the punishment of a person who helps or incites a manager to expose the company to excessive risk, while the manager is unaware of this aspect or does not act dishonestly, provided that the person assisting or encouraging fulfils these *mens rea* requirements.

Liability for secondary participation in the French legal system will require knowledge as to the main offence and the intention to participate in its commission as an accomplice. More importantly, the proof of personal interest will be unnecessary in cases of complicity in the commission of abuse of company assets. The accomplice must intend to participate in this offence and know that the main perpetrator is acting for personal interest, although he need not himself pursue his own personal goals.[156] Therefore a lower level manager or an assistant who deliberately helps in an excessively risky transaction, knowing that the principal would get a bonus linked to the company turnover, but who is motivated by personal ambition only (he wants to please the hierarchical superior or improve his position in the company) might be held liable for complicity.

For aiding and instigating the German legal system requires so-called double intention, i.e. the intention that *Untreue* be committed and the intention to aid or abet.[157] For both types of complicity *mens rea* in form of *dolus eventualis* is sufficient.[158] A person must not only intentionally incite or help, but also know (or at least take it to be possible) that the person is a duty holder and at least be aware that the excessively risky act which he incites or aids to undertake may constitute a breach of duty of the main perpetrator and result in risk-damage (or actual loss) and accept

[155] Section 7 of the Fraud Act 2006.
[156] Desportes, Le Gunehec, *Droit Pénal Général* (note 96) p. 502.
[157] Kindhäuser, *Strafrecht. Allgemeiner Teil* (note 104) pp. 351, 362.
[158] Jescheck, Weigend, *Lehrbuch des Strafrechts* (note 65) pp. 687, 695.

that possibility. There is however no need in order for criminal liability to arise that the secondary participant know all of the details of the main offence.[159]

In view of the above, it can be concluded that all three legal systems provide for a punishment for complicity in the commission of offences consisting in the exposure of a company to excessive risk. In all three systems secondary participation requires intention to make one's contribution as an accomplice. They vary however as regards the attitude towards the commission of the main offence. Whereas mere knowledge concerning the foreseen main offence will suffice in England and France, in the German legal system the secondary participant must intend also that the main offence be committed. This aspect of the English and French systems eliminates the crucial requirements limiting liability for the main offence. Namely, the accomplice to the French offence of abuse of company assets need not have personal intention and the accomplice to the English fraud need not act dishonestly. Moreover, the English legal system extends criminal liability to persons assisting and encouraging a manager to expose the company to excessive risk even where that offence not fully realised, and where the main perpetrator would be lacking the *mens rea*, if it can be proved that the person assisting or encouraging the manager fulfilled that requirement instead.

2.6. Punishment

All three legal systems provide for penalties of imprisonment and fines in relation to the standard offence. While for the French abuse of company assets and the German *Untreue* maximum terms of imprisonment are limited to five years, the English law provides for fraud a maximum sentence of ten years. However, on summary conviction, the maximum penalty is of 12 months. The German offence of *Untreue* may also be punished with imprisonment of up to ten years, if it can be classified as causing a major financial loss. It is subject to debate whether risk-damage can fulfil this requirement.[160] If it could be included, the suggested value of risk-damage should be 100 000 €.[161] The punishment for the French offence of abuse can also be aggravated (to seven years of imprisonment) if the offence was conducted

[159] Bohlander, *Principles of German Criminal Law* (note 71) pp. 169, 173.
[160] Schramm, 'Untreue, § 266 StGB§' (note 4) marginal number 161; Against: Seier, 'Untreue' (note 4) marginal number 35.
[161] BGH (02.12.2008) NJW 2009, 528-534, 532.

or facilitated using either accounts or contracts opened or subscribed with entities established abroad or by interposition of natural or legal persons or any organization, trust or comparable institution established abroad.

As regards alternative possibilities of conviction, the English system provides for the same level of punishment as for fraud, with the exception of possession etc. of articles for use in frauds (Section 6 of the Fraud Act 2006), which limits imprisonment to 5 years. The maximum sentence provided for the French offence of the breach of trust is three years.

2.7. Special provisions for banking and insurance executives

The English and the German systems contain provisions expressly punishing excessively risky management of banks (Section 36 Financial Services (Banking Reform) Act 2013 and Section 54a KWG). The German system contains also an analogous offence applicable to the insurance industry (Section 142 VAG). Both offences are a reaction to the financial crisis and the deficiencies in risk management which led to it. As explained above (2.2. Legal interest deserving criminal law protection, *in fine*), the existing offence, which focused on the relationship between the principal (the company, shareholders) and the agent was unsuitable to address the need to protect the economic system from the dangers of excessively risky management of systemically important companies. These new offences, while protecting the banks (and insurance companies respectively) from failure, mainly aim at protecting the economic system and society from its consequences.

The provisions limit their scope of application to senior managers, which effectively means in both legal orders only top-level management.

The analysis below will briefly point out major similarities and differences of the English and German approaches. However, the reader must be warned of several features of these pieces of legislation. They are both very new law, with no jurisprudence at the time of writing. The available doctrine is also limited, in particular as regards the English law. Furthermore, the English provision will enter into force on 7 March 2016, which further postpones the possibility to verify what its

practical implications will be.[162] Finally, analysis of the provision leads to the conclusion that the applicability of these offences is likely to be limited in view their relatively complicated definitions which run the risk of existing more as law in the books than in the courts.

The German provision is fairly precise in describing what act is forbidden as the conduct consists in that one of the enumerated risk-preventive measures fails to be implemented. Moreover it requires that the failure be first detected by the national Financial Supervisory Authority (BaFin), which issues an order requiring that the failure be remedied. Only the contravention of this order fulfils the *actus reus* requirement. The English Section 36 is more abstract in this description, requiring that the manager's conduct in relation to the taking of the decision by or on behalf of the financial institution as to the way in which its business is to be carried out, encompassing a failure to take steps to prevent such a decision, fall far below what could reasonably be expected of a person in the manager's position. While the terms are general, the threshold set by this offence seems very high and difficult to argue in front of a jury.

For criminal liability for both offences it is necessary that the manager's failures lead to a detrimental result for the financial institution. As to the German provision, it requires that the institution, as a result of the manager's failure, find itself in a state of concrete danger to its existence. In contrast, the English law requires that the implementation of the manager's decision cause the failure of the group institution.

Under the English offence of Section 36, the manager must be aware that the implementation of the decision he took or failed to prevent carries a risk of causing the failure of the institution. The German offence does not require that the manager foresee such a consequence of his act, as he may be negligent regarding the result. He must however have acted intentionally as regards the violation of the risk-management rule.

Both offences set their requirements in such a way that it will be arguably very difficult to secure a conviction, in particular knowing that the defendant will by

[162] Statutory Instrument, 2015 No. 490 (C. 27) Banks and Banking, The Financial Services (Banking Reform) Act 2013 (Commencement No. 9) Order 2015, 4th March 2015.

definition be a high profile manager with a potent defence team. As to the German law, the requirement that the BaFin first give a warning limits the possibility of the commission of the offence itself. Furthermore, it may not be so straightforward to prove that the concrete danger to the existence of the institution occurred due to the manager's decision. Regarding the English provision, it is submitted here that the combination of the requirements that it be the manager's decision that caused the failure of the group institution and that his conduct fall far below what could reasonably be expected of a person in his position, in addition to the further requirement that he was aware that the implementation of the decision may lead to a failure of the institution results in very low likelihood of conviction.

In view of these reservations these provisions remain only law on paper until the first successful conviction is secured and it is difficult to predict whether this will indeed ever come to pass.

The punishment provided for the offences is imprisonment and a fine. The maximum level of imprisonment in the German law is of five years, two years if the result was caused negligently. The English law provides for imprisonment up to 7 years on conviction on indictment.

2.8. Comparison of the results of the five cases

All the national systems have been examined in view of the five sample cases presented in Chapter I. While they present simplified situations (in comparison to real life cases), they examine how the analysed jurisdictions respond to different configurations of excessively risky management. In other words they should bring more life to the otherwise relatively abstract comparison. However they do not present fully elaborated case studies. The analysis below will compare the solutions reached in the national chapters and allow it to be demonstrated in more concrete terms how the elements of the offence, which were subject to more detailed comparison above, would shape criminal liability in the five situations.

The first requirement, which needs to be verified, concerns the position of the perpetrator and the problem whether it fulfils the requirement of perpetrator as foreseen by the offence. While this requirement is sufficiently broadly defined by the

English offence of fraud by abuse of position and the German *Untreue* to include managers at different levels of corporate hierarchy, the French offence of abuse of company assets limits significantly the scope of potential perpetrators. Therefore the solutions to the cases given below as regards this offence will be applicable only on the condition that the perpetrator belongs to the top management as required by this offence.

The first two cases present a typical example of transactions, which are detrimental to the company, because they bear excessive risk or because the risk taken is not sufficiently compensated. The difference between case 1 and 2 consists in that whilst in the former the manager is taking the decision himself, in the latter he only directs his subordinates to act in that way.

The conviction of a manager in the situation described in case 1 is the most likely within the German system. Granting a loan without sufficient guarantee is a typical example of a breach of duty by the responsible manager and the court is likely to consider the requirement of risk-damage as fulfilled as well, since such a loan has lower value than one granted under normal conditions. The *actus reus* of the French offence of abuse of company assets will also be fulfilled, since granting credit under such detrimental conditions is against the company interests. However, the manager must also have acted in his personal interest. While a 'diluted' personal interest, such as the hope of being promoted, might not be enough, an expectation of a bonus for the contract already increases the chances of conviction. If the manager granted the credit to a family member under such conditions, the requirement of personal interests will most likely be considered fulfilled. If such strong element of personal interest would be present, it would be also possible to argue that the manager used the funds as if they were his own thus committed misappropriation in terms of the offence of breach of trust. That would allow punishing managers who do not fulfil the criteria to become perpetrators of the abuse of company assets.

Liability for the English offence of fraud by abuse of position will depend on whether the act of the manager is considered dishonest by the jury. The sole fact of granting insufficiently secured credit is not likely to convince the jury. It is more likely to be admitted if some other elements could be added, for example if the manager was clearly acting outside of the scope of his discretion or acting motivated

only by his personal interest. Hence, he would be considered dishonest if the breach of the rules of granting credits was evident or he granted the credit for a member of his family or did so only in order to get the commission directly linked to authorising the loan. The latter aspect, despite not being included in the wording of the offence, renders the solution similar to the French offence.

The manager in case 2 will be convicted for *Untreue* for the same reasons as in case 1 and without having recourse to different rules on participation in the commission of the offence, as by giving the order he already breaches his duty. As to the English system, the solution given above will also be applicable here, since abuse of position can be proved and the element of dishonesty present the most significant difficulty. As to the French system, the solution is also similar as in case 2, but the personal interest is much more evident as the manager expected a bonus, so the probability of conviction would be high.

For senior managers also the special banking provisions could be considered, provided that various conditions prescribed by these offences are fulfilled, for which there is no indication in the facts of the case.

The situation presented in case 3 illustrates management of company assets, which is certainly very risky, since the manager invests on the stock exchange in an aggressive way. Moreover, he exposes the company to an abnormal risk, because the company's activity is construction. The manager is not acting in his direct interest, as he is intending to keep the eventual profit from the investment for the company.

This case is may be considered fraud by abuse of position according to the English law, since all limbs seem to be fulfilled, on the condition that investing the money on the stock exchange was outside of the scope of business of the company (in view of the Articles of Association or other relevant documents). It is likely that such investment would be considered dishonest as the manager's act is in clear breach of diligent management. The offence of theft could also be applicable in this case, if he was not permitted to invest the money in this way or if he retained the gains made from the investment.

Conviction will be less likely in the two other legal systems, unless additional circumstances occur. In the German law if investing on the stock exchange is not part

of the company's activities, then by doing that, the perpetrator commits a breach of duty. The difficulty will be in determining the value of risk-damage. It is necessary to verify how the value of assets endangered through investment into risky securities diminished. This might be difficult to establish and in fact depend on the ultimate outcome of the investment. If the investment turns out to be profitable, then there is no *Untreue*.

The issue in the French law would be the requirement of personal interest. The investment as such exposes the company to abnormal risk, so the requirement of acting against company interest of the offence of abuse of company assets would be met. It is however necessary to demonstrate that the manager had some personal interest in the investment. This would of course be without problem, if he wanted to keep the gain for himself, a condition that would also make the conviction for the breach of trust very likely. However, if the manager acted only in order for the company to profit, only the abuse of company assets could come into play and only provided that the court would be satisfied with a 'diluted' personal interest. This cannot be excluded, since one can argue that high risk taken by the manager and potentially very detrimental results make his conduct sufficiently evident to accept even personal interest in such form. If this line of thought was rejected, the conviction would to a large extent depend on the final outcome of the investment. If it turns out to bring loss to the company there is a strong likelihood that personal interest would be admitted even in its weaker form. Also the offence of breach of trust might be applied in such a case.

Case 4 presents a scenario where a technical internal decision leads to a situation of exposing the company to a risk of loss. The chances of conviction will be limited in all the legal systems. For the German offence of *Untreue* it will be necessary in the first place to point out a concrete legal basis for a duty that the manager breached by allowing the car to be declared ready or by not disclosing the problems. It is necessary that such a provision aim principally at protecting the assets of the company. If that can be established, the crucial question becomes whether the requirement of risk-damage has been fulfilled and if it can be quantified. On the one hand it could be estimated, e.g. by assessing how much the value of the investment is diminished by the risk of repairs necessary. On the other hand, the damage from repairs is less immediate than the costs of postponing the presentation and

reprogramming the electronics. The question how the perpetrator perceived his act would be crucial to the question of *mens rea*. On the one hand he foresaw the costs of repairs and accepted that the company may suffer loss because of them. On the other hand, if he acted as to diminish the most immediate costs (which would result from postponing the presentation and reprogramming), which he considered more significant, than his intention is excluded.

It will be much more difficult to convict a person in the English or the French legal system. The prosecution in the English system will be rather reluctant to proceed with the case under these circumstances as the probability that the manager would be considered dishonest is low. It might be a misjudgement on the side of the director to clear the car for production or not to inform the other executives, but it will most probably not be considered dishonest. The case would be different if the director did something that would compromise his integrity, such as shredding documents related to the issue or if he was acting mainly for the commission he was in line to receive for the new model.

The probability of conviction is very law in the French legal system as regards both available offences. Already the conduct element would be difficult to prove for both offences in question (especially for the breach of trust). Even if this element is considered to be fulfilled as regards the abuse of company assets, the problem would be, yet again, with the proof of personal interest. If the case goes to trial after the real loss occurred, it is likely that the judges would admit 'diluted' personal interest, if present. However, before the eventual loss occurs, conviction would be possible only on the condition that there was a concrete personal interest, e.g. in the form of a commission.

The situation presented in case 5 is in the first place a case of bribery. Regardless of criminal liability for this offence, it may present a situation of exposing the company, for whose benefit the manager acts, to a risk of being sanctioned. Such cases are known to the French legal system and present an evident case of abuse of company assets. The reason for using this offence is the possibility to postpone the starting point of the limitation period, which in result becomes longer than that which applies to corruption. For such cases the jurisprudence accepts even "diluted" personal interest. If the manager does not belong to the head management as required

by the offence of abuse of company assets, the offence of breach of trust might also be of application, at the condition, however, that the perpetrator himself decided to use the assets of the company for this purpose and not that he received them from his superiors in order to commit corruption.

Within the German system, cases of *Untreue* involving corruption are also known. However, the breach of duty has so far been found not in the act of corruption but in creating slush funds for these purposes. By transferring funds to such a fund, the manager breaches his accounting duties. The jurisprudence found damage in that because of the transfer the company lost control over these assets. The manager would also be liable for *Untreue* if he uses the funds for bribery without the owner's consent. Some authors consider that shareholders' consent to illegal acts, including bribery, is always invalid.[163]

The English jurisprudence does not know of cases of using fraud or similar types of offences to tackle the problem of managers corrupting public officials in order to obtain contracts for their companies. The limitation period is not a problem as the English system provides none for the offence of bribery. Moreover in view of the remoteness of the risk of loss and the fact that the manager acts for the benefit of the company, it is unlikely that he would be found dishonest. This does not exclude the manager's liability for bribery or theft as regards misapplication of company's funds for this purpose.

As regards the negligent version of the cases, none of the analysed legal systems offers a possibility of conviction.

3. Conclusions – models of criminalisation of excessive risk-taking

The above comparative analysis examined three models of criminal liability of managers for excessively risky decisions. These models can be summarised as follows.

All three systems contain offences, which can be used in order to punish managerial decisions endangering the assets of the company, without requiring that

[163] Schramm, 'Untreue, § 266 StGB§' (note 4) marginal number 80.

the eventual loss occur. The main focus of these provisions is the relationship between the principal (the company and the shareholders) and the agent (the manager). Thus the offences protect mainly the company's interests and those of its economic owners. To some extent the interest of stakeholders, such as creditors or employees, are taken into account by the French offence of abuse of company assets and the German *Untreue* due to the limited influence of shareholders' consent on managers' criminal liability. The analysed offences do not directly protect the economic system. However, Germany and England have introduced offences, which incriminate excessively risky management of systemically important banking (and in the case of Germany insurance) institutions.

Besides the common approach as regards protected legal interests, the three models of incrimination present various similarities in the design of the offences. All these offences incriminate misdealing in the management of the company assets. Not only excessively risky management leading to an effective loss, but also merely endangering the assets of the company may lead to criminal liability. In all three legal systems the act must be committed intentionally (including *dolus eventualis*) and liability for advertent or inadvertent negligence is excluded. In general it will be sufficient that the intention of the perpetrator be directed at exposing the company to excessive risk. Hence, it will not be indispensable that the perpetrator intended to cause loss or foresaw such a possibility. The three legal systems also concur in including indiscriminately the senior management into their scope.

However, the three models differ as regards key requirements which shape the scope of liability and will be ultimately decisive for the focus of the prosecution. They also reflect the policy choices as well as criminal law traditions of each system.

The distinctive feature of the English model, which is constructed around the offence of fraud by abuse of position and the common law offence of conspiracy to defraud, is its reliance on the concept of dishonesty. It is a notion that has long been present in the English law and been used in definitions of various offences related to the protection of property or white-collar crime (e.g. theft, conspiracy to defraud, false accounting and until recently in the cartel offence). Dishonesty will define the conduct from the point of view of *actus reus* and the *mens rea*, since it is necessary that the conduct of the manager be considered dishonest (according to the standard of honest

and reasonable people) and that he be aware that it is so according to these standards. Therefore it is not so much a breach of particular rules or the detrimental results of the perpetrator's act, but this negative feature of his deeds will be crucial for criminal liability. Since it will be assessed by a jury of laymen giving no reasons for their decision, it will depend on concrete cases how the prosecution can best convince the jurors that the manager's act was dishonest. The mere fact that the manager handled the entrusted assets in an excessively risky manner will most probably be insufficient for that purpose. The case will certainly be more convincing if the manager gravely breached the standard of conduct or acted in personal interest, which will create a parallel between the English system and the German and the French systems respectively. However, presence of these elements is neither an obligatory requirement nor a guarantee of conviction.

The French system based on the offence of abuse of company assets is shaped by two requirements that will be decisive for criminal liability and will significantly curb the possibilities to punish managers taking excessively risky decisions. First of all, contrary to the two other systems, the French one restricts liability to head management. Secondly, the manager must act in personal interest. Although this concept is relatively broad, including acting in the interest of a person or persons related to the manager or companies, in which he might be interested, it excludes all the acts, even extremely risky, which were performed only in the interest of the company (according to the perception of the manager) or only due to such motivations as a desire for prestige, the will to strengthen his position within the company or to please important persons ('diluted' personal interest). While the latter motivation was admitted as personal interest in terms of the offence of abuse of company assets, this was only so in the context of effective loss to the company. Hence, if the abnormally risky decision results in a loss, the importance of the requirement of personal interest diminishes. Moreover, it cannot be excluded that the courts will decide to apply the concept of 'diluted' personal interest to cases of risk.

The distinctive feature of the German model based on the offence of *Untreue* is that it requires establishing that the manager breached a concrete rule defining his conduct and that this rule was aimed at protecting the financial interest of the company. The question whether the rule was breached needs to be answered according to the standards of the domain, to which the rule pertains (e.g. company

law). There seems to be no agreement in the German law on whether the breach of this rule must be severe or if a simple breach is sufficient. The consideration of whether the manager breached such a rule would not be surprising in the case against the manager in England or France, it is only in the German system, however, that it is an imperative.

The second element defining the German system is the requirement of a concrete result, which needs to be a situation, separate from the conduct, in which the assets are endangered in a way that lowers their value in such a manner that it is possible to quantify. While in many cases it will be possible (e.g. an improperly secured loan is worth less than a loan subject to adequate guarantees), if the risk cannot be assessed in this way, the judge must acquit the manager.

Whilst the above presentation of the French and the German models is based on dominant jurisprudence, it is also important to note that certain ways of understanding the relevant offences, represented by few judgements and remaining so far at the fringe of dominant interpretation, might change the image of the models, if they gain wider acceptance. In this respect, two aspects in particular deserve attention. Firstly, the French offence of breach of trust, which requires that the person misappropriate the entrusted property, has so far been interpreted in such a way as to preclude the construal of endangerment of those assets as a modality of the commission of the offence (unless the assets are used for personal purpose). However, one judgement has admitted such an interpretation.[164] If such an understanding were to gain acceptance in the jurisprudence, this would extend the application of this offence to all the managers who cannot be perpetrators of the offence of abuse of company assets, i.e. middle- and lower-level management and who expose their companies to excessive risk.

Secondly, as regards the *mens rea* of the German *Untreue*, a minority line of jurisprudence interpreted the requirement of intention in the form of *dolus eventualis* in such a way as to exclude situations wherein the manager was aware that his act was exposing the company to excessive risk (in form of risk-damage) and accepted it, but did not accept the eventual damage.[165] If such an interpretation were to be admitted, it

[164] Cass. crim., 03.07.1997, Bull. crim. n° 265 p. 905.
[165] BGH (18.10.2006) NJW 2007, 1760-1767, 1766.

would exclude from the scope of the offence situations, where the manager was acting whilst convinced that the company would not be damaged by his act, or at least not accepted that it occur, although aware of the excessively risky nature of his decision.

The image of the three models is complemented by the possibility, offered in all three legal systems, to punish persons assisting or encouraging managers to take excessively risky decisions, whether these persons are other managers or only assistants or externals. Whereas the German and the French systems require that the main perpetrator effectively commit the offence, the English model allows for the punishment of the relevant actors even where this is not the case. It also includes possibilities to convict such persons for conspiring to commit the offence or for assisting where the main perpetrator has no required *mens rea* as the *mens rea* of the assisting person may supplant it.

Finally, two of the above models – the English and the German ones – recently introduced provisions punishing excessively risky management of systemically important banking (and insurance) institutions. Since there is no jurisprudence in this respect (indeed, the English provision has not yet entered into force) and given their complex requirements, it is difficult to foresee how the new provisions will effectively influence the above models of criminalising excessive risk-taking by mangers. Certainly their application will be limited to the head management of systemically important companies of selected sectors. They will, however, include mismanagement committed by recklessness. What is certain so far is that these offences cannot be used to punish managers for mere excessive risk-taking *per se*, since both require the effective collapse of the institution. Therefore these offences will rather be a reaction to effectively occurred failure and not to excessively risky management detected at an earlier stage.

Chapter VI. CRIMINALISATION OF EXCESSIVE RISK-TAKING BY MANAGERS?

1. Introduction

The objective of this chapter is to analyse whether it is justified and legitimate to criminalise excessive risk-taking by managers in companies and, if yes, to examine the conditions and boundaries of such criminal liability. The chapter will be divided into two parts having analogous structure. The first one will present the normative framework, i.e. criteria justifying the use of criminal law and principles limiting its use. Against this background the second part will analyse the problems with criminalisation of excessive risk-taking. The outcome of this investigation should in turn allow the following chapter to formulate model criminalisation and examine the three national systems studied in the previous chapters.

While justifying a criminal provision, two perspectives need to be taken into account:

- Should the course of conduct be criminalised?
- Does the legislator have the right to do so?

The first question asks for the "in-principle justification" for criminalisation, which is based on criminal policy considerations. The second focuses on the limits of state power to issue criminal provisions (or to intervene at all) within a concrete system and in particular under constitutional law.[1] In other words, the first question concerns legitimacy of a solution, the second one its legality.[2] The analysis provided in this chapter and the model criminalisation presented in the following one, will not be limited to concrete legal orders. Therefore only the first perspective can be analysed in this chapter, since the second perspective is necessarily embedded in a concrete system. The aim of this analysis is to look for reasons and justifications for criminalising excessive risk-taking or refraining from doing so. The three legal orders

[1] A. P. Simester, Andreas von Hirsch, *Crimes, Harms, and Wrongs* (Oxford and Portland, Oregon: Hart 2014) pp. 31-32.
[2] See also the explanation of the term legality provided above in Chapter I. Introduction under 2.2. Terminological clarifications.

analysed in the previous chapters will serve as inspiration, but the analysis will not be conducted only within the remits of these systems. This chapter's aim is to prepare a panorama of arguments for a responsible legislator[3] to decide whether and how to criminalise excessive risk-taking, be it a national legislator or potentially also the European one, if tackling managerial misconduct or countering excessively risky management proves "essential to ensure the effective implementation of a Union policy" (Article 83 (2) TFEU).[4] However, the chapter will not examine whether it is desirable to regulate the problem of risk-taking, in particular by stipulating criminal sanctions, at the EU level. This would only be possible by analysing several aspects of the EU legal system and would thus go beyond the scope of this study.

The starting point of an analysis on whether a certain type of conduct should be criminalised is that criminal law should be used with parsimony and that "offences should be created only when absolutely necessary".[5] Criminal law is a tool, which has very strong regulatory power, but implies also significant drawbacks, because of the limitations to personal liberties it may cause, both by the prohibitions it stipulates and the methods of enforcement it uses.[6] It is the most intrusive of tools, which are available to the legislator.[7]

Criminal law, and in particular punishment, are generally justified by reference to a "deserved response to culpable wrongdoing and as a necessary institution to deter such wrongdoing"[8] as well as by reference to its communicative function.[9] Subjecting

[3] It has been argued in the literature that in a liberal state there exists a kind of right not to be punished, which means that the justification for criminalisation must be provided by the legislator; see: Douglas Husak, *Overcriminalization. The Limits of the Criminal Law* (Oxford University Press, 2008) pp. 122ff.; Andrew Ashworth, *Principles of Criminal Law*, 6th edition (Oxford University Press, 2009) p. 22.

[4] Markus Kotzur, 'TFEU Article 83' in: Rudolf Geiger, Daniel-Erasmus Khan, Markus Kotzur, *European Union Treaties. A Commentary*, (Munich, Oxford, Portland: C.H. Beck – Hart, 2015) p. 450; Paul Craig, Gráinne de Búrca, *EU Law. Text, Cases, and Materials*, 5th edition (Oxford University Press, 2011), pp. 941-942. See also: Katalin Ligeti, 'Approximation of Substantive Criminal Law and the Establishment of the European Public Prosecutor's Office', in: Francesca Galli, Anne Weyembergh, *Approximation of substantive criminal law in the EU: The way forward*, (Editions de l'Université de Bruxelles, 2013) pp. 73-83; John A. E. Vervaele, 'The European Union and Harmonization of the Criminal Law Enforcement of Union Policies: in Search of a Criminal Law Policy?', in: Magnus Ulväng, Iain Cameron, *Essays on criminalization and sanction* (Iustus, 2014) pp. 185-225.

[5] "*Per* Lord Williams of Mostyn, HL Deb., bol 602, col. WA 58; June 18, 1999" – cited after A. P. Simester, J. R. Spencer, G. R. Sullivan, G. J. Virgo, *Simester and Sullivan's Criminal Law. Theory and Doctrine*, 5th edition, (Oxford and Portland: Hart Publishing, 2013) p. 643.

[6] Simester, von Hirsch, *Crimes, Harms, and Wrongs* (note 1) p. 18.

[7] *Simester and Sullivan's Criminal Law* (note 5) p. 643.

[8] Ashworth, *Principles…* (note 3) p. 17.

a certain course of conduct to criminal sanction has two main features: preventive and deontological.[10] The preventive function consists of keeping people away from performing the forbidden act by means of fear of criminal sanction or through incapacitation resulting from the imposed sanction (deprivation of liberty, professional prohibitions). As to the deontological aspect, it formulates a duty that persons concerned should abstain from the criminalised conduct. The breach of this duty justifies the response in form of punishment.

Moreover, there is something special in declaring a course of conduct (or the causing of a particular result) to be criminal. This particular aspect lies first of all in primary criminalisation, where labelling something a criminal offence carries a message that it is wrong. Furthermore this message is reinforced by secondary criminalisation, through the triggering of criminal procedure and the stigmatising effect of sentencing and of punishment.[11]

Therefore an investigation of whether it is legitimate to criminalise certain courses of conduct should establish what is the moral wrong it should reprobate as well as what is the goal the particular criminalisation should achieve. This analysis will start with the question of moral wrongfulness. It will be followed by the examination of the two key theories of justification for criminalisation: the Harm Theory and the Theory of *Rechtsgut* (Theory of Legal Goods), which constitute the most theoretically sophisticated justification theories developed in modern criminal law. The former stems from the common law, whereas the second continues to inspire criminal law of continental tradition.[12]

Furthermore, since criminal law is the tool, which limits personal liberty the most as well as potentially triggers the use of very coercive powers, it must fulfil the requirements guaranteeing that it is used with parsimony, among which the crucial one is formulated by the Principle of Proportionality. Even if moral wrongfulness can be demonstrated and there exists legitimate justification for subjecting certain conduct to a criminal section, there may still be reasons not to criminalise certain conduct.

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[9] Klaus Günther, 'Criminal Law, Crime and Punishment as Communication' in: A. P. Simester, Anthe du Bois-Pedain, Ulfrid Neumann, *Liberal Criminal Theory. Essays for Andreas von Hirsch*, (Oxford and Portland: Hart Publishing 2014) pp. 123-139, p. 126f.
[10] Simester, von Hirsch, *Crimes, Harms, and Wrongs* (note 1) p. 18.
[11] Simester, von Hirsch, *Crimes, Harms, and Wrongs* (note 1) p. 5.
[12] See below fn 55.

Moreover, since criminal law is based on the assumption of citizens as rational agents capable of controlling their behaviour in order to avoid criminal sanction, it must also formulate its prohibitions in a way, which allows them to understand what conduct they should abstain from in order to direct their actions accordingly.[13] In view of these considerations, the reasons justifying the use of criminal law will be supplemented by an analysis of the principles limiting its use.

It is not the purpose of this chapter to present all possible principles of criminal law, but the analysis is limited to those that should influence the reasoning on criminalisation for excessive risk-taking by managers in companies: the *Ultima ratio* Principle and the Principle of Proportionality as well as the Legality Principle and the Fair Warning Principle.

Before embarking on this analysis, one last introductory remark should be made. The principles and criteria chosen for this examination are commonly accepted in different criminal law traditions. However none of them is able to give a precise answer to the question whether certain courses of conduct ought to be criminalised. The final answer is to be given by the legislator in view of the policy that the state wants to pursue. In the context of companies, it is not only the criminal policy, but mainly the economic policy, which will be decisive. The rules and principles analysed here are indicative parameters as to the boundaries of criminal law intervention. They may also form a sort of common language to debate its use and form intelligible arguments, without however giving a precise answer as to the correct scope of criminalisation. Ultimately it is the legislator who will have to make a decision, within the boundaries indicated by these rules and principles, on how to balance the interests at stake. This decision will necessarily take into account "a number of conflicting social, political, and historical factors."[14] Since this analysis is not embedded in a concrete legal system, it is impossible to describe and analyse all such factors, which may determine the legislator's choices as to criminal as well as economic policy and the enforcement of the latter through criminal law. Therefore the analysis below will aim at setting these boundaries outside a concrete legal system, showing within which limits the legislator should be operating as to excessive risk-taking and what may be

[13] Hans-Heinrich Jescheck, Thomas Weigend, *Lehrbuch des Strafrechts* (Berlin: Duncker & Humblot, 1996) pp. 128ff, 137.
[14] Ashworth, *Principles…* (note 3) p. 17.

the consequences of his choices. If this analysis is to be used, it needs to be adapted to concrete legal culture as well as to concrete economic and criminal policy.

2. Justification for the use of criminal law and limits

2.1. Moral wrongfulness

"A system of law that imposed punishment on people who were not at fault, or did so in a way that was disproportionate to their fault, would be unjust."[15] This view is particularly relevant for the retributivist approach to the criminal law, core of which, regardless of its version, provides that punishment is deserved when offenders are morally at fault.[16] However, the requirement of moral fault is not limited to retributivism. The utilitarian approach (whether oriented towards individual prevention, thus seeking incapacitation or general prevention, seeking deterrence) still requires a justification for using criminalisation (instead or together with the use of other legal or non-legal tools). These perspectives converge as many legal systems and most of the contemporary scholars follow a mixed approach, which combines the utilitarian function of the punishment and retribution.[17]

In the words of Simester and von Hirsch: "[B]y criminalising the activity of ϕing, the state declares that ϕing is morally wrongful; it instructs citizens not to ϕ; it warns them that, if they ϕ, they are liable to be convicted and punished within specified ranges (the levels of which signal the seriousness with which ϕing is regarded); and, further, the state *undertakes* that, on proof of D's ϕing, it will impose an appropriate measure of punishment, within the specified range, that reflects the blameworthiness of D's conduct."[18] Jareborg formulates a similar idea in the following way: "the threat of punishment is not only a conditional threat of a painful

[15] Stuart P. Green, *Lying, Cheating, and Stealing. A Moral Theory of White-Collar Crime* (Oxford University Press, 2006/2010) p. 22.
[16] Green, *Lying, Cheating, and Stealing* (note 15) p. 21f.
[17] *Simester and Sullivan's Criminal Law* (note 5) pp. 14-16; Jescheck, Weigend, *Lehrbuch des Strafrechts* (note 13) pp. 78-79; Jean Pradel, *Droit pénal général*, 15th edition (Paris: Editions Cujas, 2004) pp. 506-508. Differently Roxin whose theory focuses on deterrence (general and special prevention), Claus Roxin, *Strafrecht. Allgemeiner Teil*, Volume 1, 4th edition, (München: C.H. Beck, 2006) pp. 88-96. For 'pure' retributivism see for example: Michael S. Moore, *Placing Blame. A General Theory of Criminal Law* (Oxford University Press, 2010). See also: H.L.A. Hart, Punishment and Responsibility (Oxford University Press, 1968).
[18] Simester, von Hirsch, *Crimes, Harms, and Wrongs* (note 1) p. 6. The Greek symbol ϕ (phi) is used by these authors as a symbol of any kind of action.

sanction. It is also an expression of *how* negatively different kinds of action or omission are judged".[19] Weigend in his introductory chapter to the commentary to StGB expresses a very similar idea.[20]

Therefore, criminal law has a specific communicative function.[21] This aspect of criminal law is clearly visible in comparison to civil law. Whereas criminal law convictions and sanctions speak "with a distinctively moral voice",[22] civil law does not convey this aspect. "[Criminal law] does not only coerce; it also makes a moral appeal to citizens to desist. Its sanctions are not merely instrumental; they also express disapproval of the offender's conduct."[23]

This paradigm is more obvious as regards the classic offences (murder, rape, theft) as they have the "moral resonance" typically associated with criminal law.[24] They were traditionally called *malum in se* offences. The counterpart category is formed by *malum prohibitum* offences, which do not present such obvious negative moral content. As to this category, the wrong should be found in the breach of rule as such, provided that this rule is justified and created for good reasons. The rule must form part of a strategy aiming at preventing harm or safeguarding interests and for this reason it must not be violated.[25] However this division encountered criticism[26] and is particularly difficult to apply as regards white-collar criminality, where the wrongfulness may be even less evident then in traditional areas of criminal law. For

[19] Nils Jareborg, 'The Coherence of the Penal System' in his *Essays in Criminal Law* (Uppsala: Iustus Förlag, 1988) pp. 105-121, p. 112 (emphasis in original).
[20] Thomas Weigend, 'Einleitung', in: Heinrich Wilhelm Laufhütte, Ruth Rissing-van Saan, Klaus Tiedemann, *Strafgesetzbuch. Leipziger Kommentar*, Volume 1, Einleitung; §§ 1 bis 31, 12th edition (Berlin, New York: De Gruyter, 2007) marginal number 1.
[21] Günther, 'Criminal Law, Crime and Punishment as Communication' (note 9) pp. 123-139.
[22] Simester, von Hirsch, *Crimes, Harms, and Wrongs* (note 1) p. 4.
[23] Simester, von Hirsch, *Crimes, Harms, and Wrongs* (note 1) p. 212.
[24] Simester, von Hirsch, *Crimes, Harms, and Wrongs* (note 1) p. 7.
[25] Simester, von Hirsch, *Crimes, Harms, and Wrongs* (note 1) p. 26-27. There exist different approaches as to this problem among those scholars, who consider that criminalisation requires that the prohibited conduct is wrongful. For example Douglas Husak requires that the conduct is wrongful independently of the legal regulation, while Simester and von Hirsch claim that it can be assessed "all things considered". The normative gap between criminalisation and punishment in their view does not exist, since "at the stage of punishment, the reasons not to ϕ are to be assessed post-legally, not pre-legally." Simester, von Hirsch, *Crimes, Harms, and Wrongs* (note 1) p. 27.
[26] For the critical approach see: Klaus Lüderssen, 'Soziale Marktwirtschaft, Finanzmarktkrise und Wirtschaftsstrafrecht', in: Eberhard Kempf, Klaus Lüderssen, Klaus Volk, *Die Handlungsfreiheit des Unternehmers* (De Gruyter, 2009) pp. 21-26, 21.

instance, what for one may be only cunning marketing, for another may already constitute a fraud.[27]

The use of moral reasoning is not to be confused with the adherence to legal moralism.[28] The perspective taken here considers that for criminalisation there is not only a requirement of achieving certain goals (prevention of harm or protection of legal interests), but also that the conduct must be morally wrong (i.e. reprehensible).[29] At the same time, this analysis is not a contribution to moral philosophy, but its focus is criminal law, thus what is relevant is moral wrong that has an impact on another person(s) and not a vice, which is a sign of potentially bad character (such as greed or lust).[30]

2.2. Harm Principle

The Anglo-Saxon debate on reasons for criminalisation focuses around several principles out of which the Harm Principle is always the starting point.[31] This principle, which is enshrined in the liberalist approach as to the function of the state, was first formulated by John Stuart Mill in "On Liberty" where he famously says[32]: "The principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action on any of their number is self-protection. That the only purpose for which power can rightfully be exercised over any member of a civilised community against his will is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant."[33]

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[27] Charlotte Schmitt-Leonardy, *Unternehmenskriminalität ohne Strafrecht?* (Heidelberg et al.: C. F. Müller, 2013) pp. 26f.
[28] On that see e.g. R. A. Duff, 'Towards a Modest Legal Moralism', in: Ulväng, Cameron, *Essays on criminalization…* (note 4) pp. 39-67.
[29] Luigi Ferrajoli, *Derecho y razón, Teoría del garantismo penal*, Editorial Trotta, Madrid 1995, p. 459; Green, *Lying, Cheating, and Stealing* (note 15) p. 44.
[30] On the relationship between law and morality in the context of criminal law, also in historical perspective, see: Ferrajoli, *Derecho y razón* (note 29) pp. 218ff, 459ff.
[31] Ashworth, *Principles…* (note 3) p. 27. Although the Harm Theory is criticised for its over-inclusiveness as well as for being under-inclusive, it remains the main tool to discuss the justification for criminalisation in the common law criminal law. See also: R. A. Duff, *Answering for Crime. Responsibility and Liability in the Criminal Law* (Oxford and Portland: Hart Publishing 2007) p. 126ff. See also: Tatjana Hörnle, '"Rights of Others" in Criminalisation Theory', in: Simester, du Bois-Pedain, Neumann, *Liberal Criminal Theory. Essays…* (note 9) pp. 169-185, 170ff.
[32] Simester, von Hirsch, *Crimes, Harms, and Wrongs* (note 1) p. 35.
[33] John Stuart Mill, *On Liberty*, 3rd edition (London: Longman, Green, Longman, Roberts & Green, 1864), p. 22.

This negative version of the Harm Principle provides for a criterion to decide when the legislator is not entitled to regulate.[34] The contemporary version of that principle formulated by Feinberg presents it in the form of a positive, although not sufficient, requirement for criminalisation: "It is always a good reason in support of penal legislation that it would be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) *and* there is no other means that is equally effective at no greater cost to other values."[35] The difference in the approach results in that whereas for Mill the Harm Principle was the only one legitimising the use of repressive intervention of the state, for Feinberg other legitimate reasons might also exist.[36]

Feinberg analyses further principles, which could potentially justify limiting liberty through criminalisation, in particular the Offence Principle and Legal Paternalism. According to the former, criminalisation may be justified, if it is to prevent "serious offence to persons other than the actor and would probably be an effective means to that end if enacted".[37] Legal Paternalism would consider justified "a prohibition that […] is probably necessary to prevent harm (physical, psychological, or economic) to the actor himself".[38]

The application of these principles as justification is subject to debate, as is their precise scope, including attempts to justify certain cases which Feinberg analyses under Legal Paternalism by means of the Harm Principle.[39] Nonetheless these debates will be less relevant here, since the problem of excessive risk-taking as approached in this study will not be criminalised for reasons such as that it constitutes "an affront to the senses" or "sensibilities" or because it produces repugnance although some managerial misconduct might evoke such feelings, which would trigger the application of the Offence Principle.[40] Neither will it be punished in order

[34] Simester, von Hirsch, *Crimes, Harms, and Wrongs* (note 1) p. 35.
[35] Joel Feinberg, *The Moral Limits of Criminal Law*, Volume I: *Harm to Others* (Oxford University Press, 1984) p. 26.
[36] Nina Peršak, *Criminalising Harmful Conduct. The Harm Principle, its Limits and Continental Counterparts* (Springer, 2007) p. 13
[37] Feinberg, *Harm to Others* (note 35) p. 26.
[38] Feinberg, *Harm to Others* (note 35) pp. 26-27. See also Nina Peršak, 'Paternalistic Interventions Through the Law on Regulatory Violations', in: Ulväng, Cameron, *Essays on criminalization…* (note 4) pp. 125-142.
[39] Simester, von Hirsch, *Crimes, Harms, and Wrongs* (note 1) pp. 161ff.
[40] Joel Feinberg, *The Moral Limits of Criminal Law*, Volume II: *Offense to Others* (Oxford University Press, 1985) pp. 14ff.

to prevent the manager from inflicting harm on himself. The analysis will concern risk of damage inflicted on property of other persons, and should thus be resolved by application of the Harm Principle and further analysis will be limited to that principle.[41] As to the fragment of the principle concerning a lack of other equally effective means, this aspect will be analysed under the *Ultima ratio* Principle.

Within the Harm Principle, harms are understood as "setbacks to interests".[42] As Feinberg explains: "These interests, or perhaps more accurately, the things these interests are *in*, are distinguishable components of a person's well-being: he flourishes or languishes as they flourish or languish. What promotes them is to his advantage or *in his interest*; what thwarts them is to his detriment or *against his interest*."[43] Thus in order to verify if harm occurred it is necessary to verify if that interest "is in a worse condition than it would otherwise have been in had the invasion not occurred at all."[44]

In both approaches – by Mill and by Feinberg – it is considered sufficient for the justification of criminalisation that harm is "likely" to occur.[45] It is thus legitimate that the state prohibits conduct, which causes harm or "the unreasonable risk of such harm", in other words that criminalisation is justified not only by prevention of harm but also in order to avoid "the unreasonable risk of such harm".[46] This approach resulted in a debate on the extension of the principle in order to avoid its excessively far-reaching use.[47]

An important part of this debate relates to the analysis of remote harms, which concerns legislative decisions to criminalise acts based on generalisations about risky situations likely to cause harm based (ideally) on empirical evidence.[48] Classic examples of this discussion concern criminalisation of possession of different possibly

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[41] Further on Offence Principle see for example: Feinberg, *Offense to Others* (note 40); Simester, von Hirsch, *Crimes, Harms, and Wrongs* (note 1) pp. 91ff. On Legal Paternalism see: Joel Feinberg, *The Moral Limits of Criminal Law*, Volume III: *Harm to Self* (Oxford University Press 1989); Simester, von Hirsch, *Crimes, Harms, and Wrongs* (note 1) pp. 141ff.
[42] Feinberg, *Harm to Others* (note 35) pp. 31ff.
[43] Feinberg, *Harm to Others* (note 35) p. 34.
[44] Feinberg, *Harm to Others* (note 35) p. 34.
[45] Peršak, *Criminalising Harmful Conduct* (note 36) p. 41.
[46] Feinberg, *Harm to Others* (note 35) p. 11; Andrew von Hirsch, 'Der Rechtsgutsbegriff und das „Harm Principle"' in: Roland Hefendehl, Andrew von Hirsch, Wolfgang Wohlers (eds.), *Die Rechtgutstheorie: Legitimationsbasis des Strafrechts oder dogmatisches Glasperlenspiel?* (Baden-Baden, Nomos 2003) pp. 13-25, p. 15.
[47] Peršak, *Criminalising Harmful Conduct* (note 36) p. 44; Simester, von Hirsch, *Crimes, Harms, and Wrongs* (note 1) p. 53; Husak, *Overcriminalization* (note 3) p. 38.
[48] Feinberg, *Harm to Others* (note 35) p. 190.

harmful items, for example weapons (without required permission), driving under the influence of alcohol or surpassing speed limits.[49] All these types of behaviour do not necessarily cause harm and on many occasions would remain harmless. Their criminalisation is based on the assessment of the gravity of dangers (that a weapon is used by a person who is inapt to use it and another person is shot or that a grave traffic accident occurs), which they pose and the likelihood of its materialisation.[50] In order to verify whether criminal legislation should be introduced in order to address a particular instance of remote harm Andreas von Hirsch proposed the Standard Harms Analysis.[51] According to this three-step test it is first necessary to analyse the gravity and the likelihood of the harm to occur; secondly, it is necessary to compare this analysis with the social value of the act, which would be criminalised, and the degree of limitation of liberty caused by such prohibition; thirdly, other side-constraints (side-effects) should be observed.[52]

Excessively risky decisions present certain qualities similar to remote harm. Being too daring in business decisions is in a sense akin to driving too dangerously and setting a limit to it must take into account the same considerations, namely not to prevent economic activities from happening at all, similarly as it is necessary to allow effective traffic. In the same time, excessive risk, as will be demonstrated below, has aspects which approach it much closer to actual harm. It is thus possible to analyse the situations in this study under both categories: as actual materialised harm (including concrete risk of its occurrence) and the situations of remote harm. One can imagine the legislator punishing for creating concrete danger to property as well as prohibiting certain acts, which, based on empirical generalisations, may be considered too risky and forbidden, including subject to criminal punishment.

[49] Simester, von Hirsch, *Crimes, Harms, and Wrongs* (note 1) pp. 53ff; Feinberg, *Harm to Others* (note 35) p. 191.
[50] Feinberg, *Harm to Others* (note 35) p. 216. For discussion on problems related to overextension of the principle see for example: Peršak, *Criminalising Harmful Conduct* (note 36) pp. 41ff.
[51] Simester, von Hirsch, *Crimes, Harms, and Wrongs* (note 1) p. 54; Andrew von Hirsch, 'Extending the Harm Principle: "Remote" Harms and Fair Imputation', in: A.P. Simester and A.T.H Smith (eds.), *Harm and Culpability* (Oxford: Clarendon Press, 1996) pp. 259-276, p. 261.
[52] Simester, von Hirsch, *Crimes, Harms, and Wrongs* (note 1) p. 55.

2.3. Theory of Legal Good (*Rechtsgut*)

The continental counterpart of the Anglo-Saxon theories is the Theory of *Rechtsgut* (legal good).[53] The theory's beginnings are associated with the German 19th century scholar Johann Michael Franz Birnbaum and it was developed further by Karl Binding and generations of German scholars.[54] This theory spread into various countries whose penal systems developed under the influence of the German doctrine, for example into Spain, Poland as well as the Netherlands.[55] The account of the Theory of Legal Good is presented here according to the German scholarship.

The Theory of *Rechtsgut* is embedded in the theory of social contract and individual freedom.[56] According to this view it is assumed that certain organs have the obligation to watch over the coexistence of members of a given society, the obligation granted by all members of this society by virtue of a contract (not in an historical but a conceptual sense). Their intervention should be limited to what is necessary to guarantee the positive coexistence of these members and respect their fundamental rights. Within this vision the task of the criminal law is protecting legal goods.[57]

Whilst the German doctrine is generally holding this to be the essential aim of criminal law, practically every other aspect of the theory is subject to debate, in particular the meaning of the term "legal good".[58] As to the understanding of this term

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[53] The translation of the term *Rechtsgut* is problematic (Carl Constantin Lauterwein, *The Limits of Criminal Law* (Ashgate, 2010) p. 6). The most common translation of this notion is "legal good", while "legal interest" or "good-in-law" (Claus Roxin, 'The Legislation Critical Concept of Goods-in-law under Scrutiny', *European Criminal Law Review*, 3 (2013), Volume 1, pp. 3-25) can also be found in the literature. This study will use the expression "legal good" when referring to the German concept of *Rechtsgut* and the expression "legal interest" will be used when the analysis does not specifically refer to the German theory.
For comparison of the two notions: 'harm' and 'legal goods', see e.g. Winfried Hassemer, 'The Harm Principle and the Protection of "Legal Goods" (Rechtsgüterschutz): a German Perspective', in: Simester, du Bois-Pedain, Neumann, *Liberal Criminal Theory. Essays…* (note 9) pp. 187-204.
[54] Markus Dirk Dubber, 'Theories of Crime and Punishment in German Criminal law', The American Journal of Comparative Law, 53 (2005), No. 3, pp. 679-707, 686f.
[55] Santiago Mir Puig, *Derecho Penal. Parte General*, 9th edition (Barcelona: Editorial Reppertor, 2011) pp. 119ff.; Włodzimierz Wróbel, Andrzej Zoll, *Polskie Prawo Karne. Część Ogólne* (Kraków: Znak, 2010) p. 40; Constantijn Kelk, Ferry de Jong, *Studieboek materieel strafrecht*, 5th edition (Deventer: Kluwer, 2013) pp. 17ff. See also the analysis in Ferrajoli, *Derecho y razón* (note 29) pp. 464ff.
[56] Roxin, *Strafrecht. Allgemeiner Teil* (note 17) pp. 16f.
[57] Roxin, *Strafrecht. Allgemeiner Teil* (note 17) p. 16f.; see also Jescheck, Weigend, *Lehrbuch des Strafrechts* (note 13) p. 7.
[58] Jescheck, Weigend, *Lehrbuch des Strafrechts* (note 13) p. 7, Roxin, *Strafrecht. Allgemeiner Teil* (note 17) pp. 14, 53; Lauterwein, *The Limits of Criminal Law* (note 53) p. 5; Dubber, 'Theories of Crime and Punishment in German Criminal law' (note 54) p. 683. See also: Armin Kaufmann, *Die Aufgabe des Strafrechts* (Westdeutscher Verlag, 1983) pp. 5-21. For critical analysis of the common approach to legal goods see: Roxin, *Strafrecht. Allgemeiner Teil* (note 17) pp. 47ff.; Günther Jakobs,

two main approaches can be distinguished, which are represented by two leading textbooks of German penal law: the positivist or descriptively-oriented approach, and the normative or critical approach.[59]

The positivist (or descriptively-oriented) approach represented by the textbook of Jescheck and Weigend formulates the task of criminal law – protecting legal goods –, and enumerates various of them, for instance: human life, bodily integrity, personal freedom of action and movement, but also property, assets, security of traffic, incorruptibility of public officials etc.[60] The authors do not venture into providing a definition of legal good.

The normative (or critical) approach is represented by Roxin.[61] Although he gives examples of legal goods, he also provides a definition of the term: "Legal goods are conditions or chosen ends, which are essential either to the free development of the individual, the realisation of his fundamental rights and the functioning of the state system based on these objectives."[62]

The main difference between the two approaches concerns the source of existence and knowledge about the legal goods. The positivist approach deduces it from criminal law text, while the normative approach looks for this source outside the criminal law text, for example in the constitution (the German Basic Law).[63]

This differentiation results in an unequal critical potential of the analysis of legal good(s) protected by concrete offences. The legal good extracted from the legal norm does not have any normative value in the sense that it cannot give any direction as to what criminalisation should be directed at, since it only deduces the intention of

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Strafrecht. Allgemeiner Teil, 2nd edition (Berlin, New York: Walter de Gruyter, 1993) pp. 35ff.; A thourough summary of the current discussion around the notion of legal good has been provided in: Gerhard Seher, 'Prinzipiengestützte Strafnormlegitimation und der Rechtsgutsbegriff', in: Hefendehl, von Hirsch, Wohlers, *Die Rechtgutstheorie…* (note 46) pp. 39-56.

[59] This differentiation after: Dubber, 'Theories of Crime and Punishment in German Criminal law' (note 54) pp. 684f, 688; Peršak, *Criminalising Harmful Conduct* (note 36) pp. 107f.

[60] Jescheck, Weigend, *Lehrbuch des Strafrechts* (note 13) p. 7.

[61] Dubber, 'Theories of Crime and Punishment in German Criminal law' (note 54) p. 684.

[62] "*…sind unter Rechtsgütern alle Gegebenheiten oder Zwecksetzungen zu verstehen, die für die freie Entfaltung des Einzelnen, die Verwirklichung seiner Grundrechte und das Funktionieren eines auf dieser Zielvorstellung aufbauenden staatlichen Systems notwendig sind.*" – Roxin, *Strafrecht. Allgemeiner Teil* (note 17) p. 16

[63] Dubber, 'Theories of Crime and Punishment in German Criminal law' (note 54) p. 688.

the legislator. Its application is limited to teleological interpretation of the norm[64] and to limited critical analysis of existing provisions. The latter analysis is based on the deduction, which legal good is protected by a given offence, and examine whether the offence is well designed to protect this legal good (e.g. if it is not too broad or the criminalised conduct is not sufficiently connected to the legal good it is supposed to protect) together with respecting other principles of criminal law (e.g. *Ultima ratio* Principle).[65]

The approach of the normative school seems to offer more critical potential in this regard since it allows examining criminal law provisions from a perspective of legal goods enshrined outside the criminal law text. However this perspective also encounters difficulties. Since the source of legal goods should be outside the criminal law, the main problem is where to look for them. If this is the constitution, then there may be a tendency to go beyond the text and look for them in its "spirit" or similar less concrete concepts.[66] This might result in interpreting them from the law in general, thus limiting the critical potential of the notion.[67] Looking for *Rechtsgüter* in texts like the constitution or international human rights treaties carries the risk that some important legal goods are omitted in these sources and that changes in social situation or perception are not incorporated therein as they emerge.[68]

Although it is the dominant view that the goal of criminal law is protecting legal goods, one of the greatest proponents of the *Rechtsgut* Theory admits that their followers are on the defensive and that a general fatigue about this theory seems to be the overriding feeling.[69] Some authors prefer to speak about protected interests (*Interessen*) as more concrete, contrary to excessively abstract legal goods.[70] Also the German Federal Constitutional Court, while examining the constitutionality of offences, prefers to concentrate on the Principle of Proportionality instead of

[64] Peršak, *Criminalising Harmful Conduct* (note 36) p. 107; Roxin, *Strafrecht. Allgemeiner Teil* (note 17) p. 15.
[65] Dubber, 'Theories of Crime and Punishment in German Criminal law' (note 54) pp. 691f.
[66] Peršak, *Criminalising Harmful Conduct* (note 36) p. 108, who refers also to the criticism formulated in: Claes Lernestedt, *Kriminalisering – Problem och Principer* (Criminalisation – problems and principles), (Uppsala: Iustus Förlag, 2003), p. 362 (cited after Peršak).
[67] Peršak, *Criminalising Harmful Conduct* (note 36) p. 108.
[68] Peršak, *Criminalising Harmful Conduct* (note 36) p. 109.
[69] Roxin, *Strafrecht. Allgemeiner Teil* (note 17) p. 53.
[70] Weigend, 'Einleitung' (note 20) marginal numbers 1-4, 7-8.

analysing the protection of legal goods.[71] The problems of this theory were memorably summarised by Jareborg: "Personally, I see the doctrines concerning *Rechtsgüter* as a blind alley; something must be wrong when almost 200 years of intensive intellectual activity seem to have resulted in more confusion than clarity".[72]

Despite these reservations, the Theory of Legal Goods remains the main tool for the analysis and justification of criminalisation in Germany and other legal orders, which developed their penal law under this influence. Even if it cannot be treated as an apparatus that could solve all the problems of criminalisation, it still remains, depending on the approach adopted, a common platform to discuss the justification for using criminal law provisions, the scope of criminalisation or the interpretation of concrete provisions.[73]

Indeed, the theory is commonly used to interpret criminal provisions. The notion of legal good within the German doctrine is not only used to analyse the purposes of criminalisation, but also for analysing *inter alia* the following issues: interpretation of the scope of the offence, the problem of consent, self-defence, and the defence of necessity as justification.[74] Thus the determination of the protected legal good has important consequences when defining the scope of liability for the offence. As to consent, it will determine whether it will have any effect on the criminal liability and who can grant it. For instance, if it is determined that the offence protects property, the owner may consent to acts detrimental to it. If however assets are protected (exclusively or also) for other reasons, as is the case regarding the offence of forgery (Section 267 StGB), which aims at protecting a general (and not individual) legal good of purity of circulation of (documentary) evidence (*Reinheit des Beweisverkehrs*), the sole "victim" of such an offence cannot give consent, which would exculpate the perpetrator.[75] The choice of legal good also has procedural consequences as to the determination of who is the victim and thus of who is entitled to participate in the process as an aggrieved party.

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[71] Roxin, *Strafrecht. Allgemeiner Teil* (note 17) p. 40; Lauterwein, *The Limits of Criminal Law* (note 53) p. 21.
[72] Nils Jareborg, 'Criminalization as Last Resort (*Ultima Ratio*)', *Ohio State Journal of Criminal Law*, 2 (2005), pp. 521-534, 524.
[73] Lauterwein, *The Limits of Criminal Law* (note 53) pp. 38ff.; Dubber, 'Theories of Crime and Punishment in German Criminal law' (note 54) pp. 694f.
[74] Lauterwein, *The Limits of Criminal Law* (note 53) pp. 30ff.
[75] Roxin, *Strafrecht. Allgemeiner Teil* (note 17) p. 556.

Rechtsgüter can be divided into individual (*Individualrechtsgüter*) and universal (*Universalrechtsgüter*) or collective legal goods (*Kollektivrechtsgüter*).[76] Property is included into the first category.[77] The problem of this category is how far the protection of individual legal goods should go. As to collective legal goods, the category, to which for instance the stability of the financial system would fall, the question whether legal goods can serve as limitations to excessive criminalisation is linked to the problem of the vagueness of said legal goods.[78] Roxin exemplifies this problem referring to legal goods such as public health (*Volksgesundheit*) in cases of possession of drugs for private consumption and the efficiency of the insurance industry (*Leistungsfähigkeit des Versicherungswesens*) in cases of handing over of one's property with the intention of declaring it as stolen.[79] In fact by one act of light drug consumption or because of one case of hiding property for the purposes of insurance abuse, neither public health nor the efficiency of the insurance industry is damaged or even endangered. Only a multitude of such acts can have this effect. Thus some authors proposed a category of *Kumulationsdelikte*, which would encompass criminalisation of acts, which when perpetrated on a larger scale, would affect the legal good.[80] This concept can be however criticised for it criminalises acts "*ex iniuria tertii*".[81]

In view of the goal of penal law, which is according to this theory, safeguarding legal goods, a criminal provision may aim at punishing conduct that infringes certain legal good(s). It is also in agreement with this theory, when the offence punishes only endangerment of a legal good. In this regard, there are two options. Either the offence punishes (concrete) endangerment of a legal good (*konkrete Gefährdungsdelikte*) or certain courses of conduct considered dangerous are

[76] Jescheck, Weigend, *Lehrbuch des Strafrechts* (note 13) p. 259; See also Roxin, *Strafrecht. Allgemeiner Teil* (note 17) pp. 28ff.
[77] Jescheck, Weigend, *Lehrbuch des Strafrechts* (note 13) p. 259.
[78] Roxin, *Strafrecht. Allgemeiner Teil* (note 17) p. 37. One of the authors speak about "Dematerialisation of legal goods tendency" – Matthias Krüger, *Die Entmaterialisierungstendenz beim* Rechtsgut*sbegriff* (Berlin: Duncker & Humblot, 2000).
[79] Roxin, *Strafrecht. Allgemeiner Teil* (note 17) p. 37.
[80] Lothar Kuhlen, 'Der Handlungserfolg der strafbaren Gewässerverunreinigung (§ 324 StGB)', *Goltdammer's Archiv für Strafrecht*, (1986), pp. 389-408; Wolfgang Wohlers, *Deliktstypen des Präventionsstrafrechts - zur Dogmatik „moderner" Gefährdungsdelikte*, (Berlin: Duncker und Humblot, 2000), in particular p. 318. See also: Roland Hefendehl, Das Rechtsgut als materialer Angelpunkt einer Strafnorm, in: Hefendehl, von Hirsch, Wohlers, *Die Rechtgutstheorie…* (note 46) pp. 119-132, 126 and Roland Hefendehl, *Kollektive Rechtsgüter im Strafrecht* (Köln, Berlin, Bonn, München: Carl Heymanns Verlag, 2002).
[81] Roxin, *Strafrecht. Allgemeiner Teil* (note 17) p. 39.

forbidden although they do not mention the protected legal good, which stays in the background of criminalisation (*abstrakte Gefährdungsdelikte)*.[82] This raises the question of how far the legislator can go in the criminal law protection of legal goods.

The discussion has related mainly to offences of abstract endangerment, where the nature of the protected legal good is not as such sharply formulated.[83] In certain constellations the prohibited conduct may stay far from effectively attacking or endangering the protected legal good, as in the case of a drug dealer who promises to sell drugs but is unable to find a provider. In the opinion of Roxin such use may not be justified in view of Legal Good Theory,[84] as it is also the case for courses of conduct criminalised in order to overcome difficulties of proof.[85]

New inspiration to the discussion came through the concept of "Risk society", analysed in particular by Ulrich Beck in his seminal work "*Risikogesellschaft*".[86] Within the criminal law this concept translated into the question of the extent to which the risk coming from different activities created by man (e.g. ecological, economic) can be prevented (or sanctioned) by means of criminal law. Some scholars claimed that it is difficult to combine prevention of such risks with the modern liberal criminal law based on the rule of law and it is rather more important to eliminate sources of risk.[87] While this might not always be possible it is necessary to limit criminal law intervention to situations where the decision upon creation of a state of affairs, which entails the risk, can be attributed to an individual.[88] A more intense reaction to this phenomenon came from the scholars of the so-called Frankfurt school of criminal law, who suggested limiting the intervention of criminal law to the traditional core offences (focused on protecting individual legal interests) and leaving other problems

[82] Roxin, *Strafrecht. Allgemeiner Teil* (note 17) pp. 34f.
[83] Roxin, *Strafrecht. Allgemeiner Teil* (note 17) p. 35. The discussion is related in these two paragraphs according to Roxin's account.
[84] Roxin, *Strafrecht. Allgemeiner Teil* (note 17) p. 35.
[85] Thomas Weigend, 'Bewältigung von Beweisschwierigkeiten durch Ausdehnung des materiellen Strafrechts?' in: Kurt Schmoller (ed.), *Festschrift für Otto Triffterer* (Wien, New York: Springer, 1996) 695-712.
[86] Ulrich Beck, *Risikogesellschaft. Auf dem Weg in eine andere Moderne* (Frankfurt: Suhrkamp, 1986), English version: *Risk Society. Towards a New Modernity* (Sage, 1992).
[87] Roxin, *Strafrecht. Allgemeiner Teil* (note 17) p. 36.
[88] Cornelius Prittwitz, *Strafrecht und Risiko*, (Frankfurt am Mein: Vittorio Klostermann, 1993) p. 384. One can imagine liability of the legal person if such individualisation is impossible, provided that the latter is not required in order to hold the company liable. As to the German law, see: Klaus Tiedemann, *Wirtschaftstrafrecht. Einführung und Allgemeiner Teil mit wichtigen Rechtstexten*, 3rd edition (Carl Heymanns Verlag, 2010) pp. 105ff.

to administrative or civil law.[89] This view was criticised from within the Frankfurt school in particular by Lüderssen, who objected to the above suggestions since it would create a true class criminal law ("*Klassensstrafrecht*"), where offenders of classic crimes as for instance theft would be punished by means of criminal law and white-collar offences or crimes against the environment would be treated by less intrusive means.[90]

As part of the above-mentioned debate some authors belonging to the Frankfurt school questioned the use of criminal law in particular as regards white-collar offences.[91] Other authors, in particular Klaus Tiedemann and his circle, have defended the use of criminal law for this type of offences.[92] For two reasons this study takes the need to use criminal law for granted. Firstly, it would require a whole different study to analyse the pros and cons of using criminal law and including the analysis of the problems evoked in the above-mentioned debate. While the existence of a law does not prove its necessity, the existence of offences criminalising excessive-risk as well as of a plethora of other offences demonstrates a vast tendency to use criminal law in business. It is not the tendency, which will be put under scrutiny here, but the criminalisation of excessive risk-taking within a context that assumes such a use of criminal law. Furthermore, this study aims at addressing, in the context of its topic, some queries formulated in this debate. One of the points of criticism concerned the diminishing role of the *Ultima ratio* Principle and criminal law becoming prima or sola ratio as well as reducing the requirements as regards the

[89] See for instance: Winfried Hassemer, 'Kennzeichen und Krisen des modernen Strafrechts', *Zeitschrift für Rechtspolitik* (ZRP), (1992), pp. 378-383, 381ff.; Peter-Alexis Albrecht, 'Erosionen des rechtstaatlichen Strafrechts', *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* (KritV), (1993), issue 2, pp. 163-182, 180-182. See also: Wolfgang Naucke, 'Schwerpunktverlagerung im Strafrecht', *KritV* (1993), pp. 135-162.

[90] Klaus Lüderssen, *Abschaffen des Strafens?* (Frankfurt a. M.: Suhrkamp 1995) p. 11. See also: Roxin, *Strafrecht. Allgemeiner Teil* (note 17) p. 37.

[91] Michael Lindemann, *Voraussetzungen und Grenzen legitimen Wirtschaftsstrafrechts* (Tübingen: Mohr Siebeck, 2012) pp. 19ff.; Roxin, *Strafrecht. Allgemeiner Teil* (note 17) pp. 36-37; Hassemer, 'Kennzeichen und Krisen...' (note 89) pp. 378-383.

[92] See for instance: Tiedemann, *Wirtschaftstrafrecht. Einführung*... (note 88) pp. 17-18; Gerhard Dannecker, 'Der strafrechtliche Schutz des Wettbewerbs: Notwendigkeit und Grenzen einer Kriminalisierung von Kartellrechtsverstößen', pp. 789-815 and Joachim Vogel, '»Vergabestrafrecht«: Zur straf- und bußgeldrechtlichen Verantwortlichkeit öffentlicher Auftraggeber bei Verletzung des Vergaberechts', pp. 817-836, both in: Ulrich Sieber, Gerhard, Dannecker, Urs Kindhäuser, Joachim Vogel, Tonio Walter, *Strafrecht und Wirtschaftsstrafrecht - Dogmatik, Rechtsvergleich, Rechtstatsachen - Festschrift für Klaus Tiedemann zum 70. Geburtstag*, (Köln: Carl Heymanns Verlag: 2008).

precision of the law (*Bestimmtheitsgebot*, *nullum crimen sine lege certa*).[93] The reflection in this study embraces these requirements.

2.4. Limits to the use of criminal law

2.4.1. The Ultima ratio Principle and the Principle of Proportionality

The Principle of *Ultima ratio* (known also as *ultimum remedium* or Last Resort Principle[94]) requires that, since among the tools that the legislator disposes criminal sanction is the toughest one, criminalisation should be used as the last resort in order to protect certain legal values or prevent certain conduct.[95] It is one of the most "classic" principles evoked abundantly in the textbooks and other criminal law literature,[96] although mainly of continental tradition.[97] It is also connected to other aspects of criminal law, namely its subsidiarity – it should play only a subsidiary role in protecting legal interests ceding priority to other branches of law (civil or administrative)[98] – and its "fragmentary character", meaning that protection granted by criminal law is selective, sanctioning only gravest infringements towards the protected legal interests.[99] It should lead to efficient and parsimonious use of criminal law in order to avoid its excessiveness but also that its impact does not suffer through inflation of criminal sanctions.[100] Its roots can be found in tendencies to make criminal law more humane and in utilitarianism.[101]

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[93] Hassemer, 'Kennzeichen und Krisen...' (note 89) pp. 378-383, 381-382.
[94] Ashworth, *Principles…* (note 3) p. 32.
[95] Weigend, 'Einleitung' (note 20) marginal numbers 1; Nils Jareborg, Criminalization and the *ultima ratio* principle, in: Ulväng, Cameron, *Essays on criminalization…* (note 4) pp. 23-38, 25.
[96] Nils Jareborg, Criminalization and the *Ultima Ratio* principle, in: Ulväng, Cameron, *Essays on criminalization…* (note 4) pp. 23-38, 26 (see abundant bibliographical references in footnote 3 of this article); Peršak, *Criminalising Harmful Conduct* (note 36) p. 121; Weigend, 'Einleitung' (note 20) marginal numbers 1; Georges Levasseur, 'Le problème de la dépénalisation', *Archives de politique criminelle*, (1983), n° 6, pp. 53-69, 53f.
[97] Douglas Husak, Applying *Ultima Ratio*: A Skeptical Assessment, *Ohio State Journal of Criminal Law*, 2 (2005), pp. 535-545, 535.
[98] Roxin, *Strafrecht. Allgemeiner Teil* (note 17) p. 45
[99] Jescheck, Weigend, *Lehrbuch des Strafrechts* (note 13) p. 52; Jareborg, 'Criminalization as Last Resort…' (note 72) p. 525.
[100] Weigend, 'Einleitung' (note 20) marginal numbers 1.
[101] Samuel Pufendorf, *De Jure Naturae et Gentium Libri Octo*, Translation of the Edition of 1688 by C. H. Oldfather and W. A. Oldfather (New York: Oceana Publications, 1964), Book Eight, Chapter III: On the power of supreme sovereignty over the lives and fortunes of citizens, which arises by reason of their crimes, pp.1158-1228 (marginal numbers 790-838), in particular pp. 1188ff (marginal numbers

In some legal systems the principle is interpreted from the rules of the constitution (Germany),[102] in some others it can be found in the criminal codes (Slovenia, Croatia).[103] It can also be found in the jurisprudence of the European Court of Human Rights.[104] The addressee of the principle is the legislator and it can be named: "principle of legislative ethics".[105] The principle is also known in the common law tradition, although it is much less recognised.[106]

According to Ashworth, other mechanisms of social control - "morality, social convention, and peer pressure" – and within the law civil liability and administrative regulation should be prioritised before using criminal sanctions.[107] In Jareborg's view the point of departure is a presumption that the state should not intervene. If such intervention is considered necessary, it must first take the form of "aid, support, care, insurance and license arrangements" followed, only where necessary by coercive measures prioritising private law sanction, administrative sanctions and ultimately by

811ff); Cesare Beccaria, *Über Verbrechen und Strafen* (Leipzig, Verlag von Wilhelm Engelmann, 1905) p. 67f.; Voltaire, *Commentaire sur le Livre des Délits et des Peines* (Genève, 1767) e.g. Chapter XIX ('Du Suicide'); Voltaire, *Prix de la Justice et de l'humanité* (London, 1777) e.g. Article 1; Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (University of London The Athlone Press, 1970) chapter XIII (Cases Unmeet for Punishment), pp. 158-164. See also: Ferrajoli, *Derecho y razón* (note 29) p. 465ff., who talks about the principle of necessity "*principio de necesidad*"; Arthur Kaufmann, 'Subsidiaritätsprinzip und Strafrecht', in: Claux Roxin et al. (eds.), *Grundfragen der Gesamten Strafrechtswissenschaft, Festschrift für Heinrich Henkel* (Berlin, New York: Walter de Gruyter, 1974) pp. 89-107; Cornelius Prittwitz, Die deutsche Strafrecht: Fragmentarisch? Subsidiär? Ultima ratio?, in: Institut für Kriminalwissenschaften Frankfurt a. M. (eds), *Vom unmöglichen Zustand des Strafrechts*, (Frankfurt am Mein et al.: Peter Lang 1995), pp. 387-405.

[102] BVerfGE (15.12.1965) NJW 1966, 243-245; Mike Wienbracke, 'Der Verhältnismäßigkeitsgrundsatz', *Zeitschrift für das Juristische Studium* (ZJS), (2003), pp. 148-155, 148.

[103] Peršak, *Criminalising Harmful Conduct* (note 36) p. 121. See also Article VIII of the Declaration of the Rights of Man and of the Citizen (*Déclaration des Droits de l'Homme et du Citoyen*, 1789): "*La Loi ne doit établir que des peines* ***strictement et évidemment nécessaires****, et nul ne peut être puni qu'en vertu d'une Loi établie et promulguée antérieurement au délit, et légalement appliquée.*" (emphasis: S.T.)

[104] Peršak, *Criminalising Harmful Conduct* (note 36) p. 122.

[105] Jareborg, 'Criminalization as Last Resort…' (note 72) p. 521. The Manifesto on European Criminal Policy also recognised it as one of the principles that should govern the criminal law legislation of the European Union. European Criminal Policy Initiative, 'A Manifesto on European Criminal Policy', *Zeitschrift für Internationale Strafrechtsdogmatik* (ZIS), (2009), pp. 707-716, p. 707.

[106] A. Ashworth is one of the main supporters of the principle (within proposed by him "minimalist approach"), see Ashworth, *Principles…* (note 3) pp. 31ff. Sometimes its requirements are incorporated without making reference to it as to a "principle", as e.g. in *Simester and Sullivan's Criminal Law* (note 5) pp. 658ff.

[107] Ashworth, *Principles…* (note 3) p. 32.

using criminal sanctions.[108] In fact such an approach to *Ultima ratio* raises it to a general principle of legislation.[109]

Within the German legal system, the Federal Constitutional Court recognises the Principle of Proportionality (*Verhältnismäßigkeitprinzip*),[110] which is not only used to analyse the constitutionality of criminal law legislation, but of any legislation. Since it is a constitutional principle, the Federal Constitutional Court can annul laws which do not fulfil its criteria.[111] The idea behind this principle is that the state should not use its power in an "unlimited and arbitrary" manner.[112] The principle is rooted in the Rule of Law (*Rechtsstaatsprinzip*) interpreted from various provisions of the German constitution (the Basic Law).[113]

This principle is composed of four elements:

a) The aim and the means must be lawful (*Zweck und Mittel mussen legitim sein*). This means that neither the aim pursued by the legislator nor the means used to achieve it may breach constitutional norms.[114]

b) Principle of Suitability (*Grundsatz der Geeignetheit*). According to this principle the means chosen by the legislator must be suitable to achieve the aims of the law.[115] This principle, which translates into criminal law by asking whether criminalisation used is suitable to protect the legal good in question, has a restrained limiting effect since the Federal Constitutional Court grants rather wide margin of discretion in this regard.[116]

c) Principle of Necessity (*Prinzip der Erforderlichkeit*) requires that in order to achieve the goal of the legislation the mildest possible means should be used.[117] Within this principle it ought to be verified if criminal legislation is necessary in order to protect the legal good in question (whether it is not possible to grant enough

[108] Jareborg, 'Criminalization as Last Resort…' (note 72) p. 524.
[109] Peršak, *Criminalising Harmful Conduct* (note 36) p. 123.
[110] BVerfGE (15.12.1965) NJW 1966, 243-245.
[111] Roxin, *Strafrecht. Allgemeiner Teil* (note 17) p. 47.
[112] Grzeszick, 'Art. 20' (note 112) marginal number 107.
[113] Wienbracke, 'Der Verhältnismäßigkeitsgrundsatz' (note 102) p. 148; Michael Bohlander, *Principles of German Criminal Law* (Oxford and Portland, Oregon: Hart, 2009) p. 24.
[114] Wienbracke, 'Der Verhältnismäßigkeitsgrundsatz' (note 102) pp. 149f.
[115] Grzeszick, 'Art. 20' (note 112) marginal number 112.
[116] Volker Krey, Robert Esser, *Deutsche Strafrecht. Allgemeiner Teil*, 4th edition (Stuttgart: Verlag W. Kohlhammer, 2011) p. 7. BVerfGE (09.03.1994) NJW 1994, 1577-1590, 1578f.
[117] Grzeszick, 'Art. 20' (note 112) marginal number 113.

protection through civil or administrative law or other means), in other words, whether the infringements of legal goods, which the legislator wants to criminalise are punishable (worth punishment – *strafwürdig*).[118] Through this principle the *Ultima ratio* aspect of criminal law is incorporated into the Principle of Proportionality. Criminal law is thus only a subsidiary to protect legal goods and should enter into play only if other tools cannot achieve enough protection.[119]

d) Principle of Adequacy (*Grundsatz der Angemessenheit*), also known as proportionality *stricto sensu* (*Verhältnismäßigkeit im engeren Sinne*) or prohibition of excess (*Übermaßverbot*).[120] In view of this principle the chosen mean should be proportionate to the goal aimed at by the legislator, which means that the criminalisation ought to be proportionate to the legal good and the gravity of the infringement thereof.[121] In other words the legislator should not "use a canon to shoot a sparrow".[122]

Despite this elaborate test, many authors consider that the Principle of Proportionality plays a rather limited role in restraining the legislator's leeway to enact criminal provisions.[123] This scepticism has been reinforced after the judgment of the Federal Constitutional Court confirming the constitutionality of the criminalisation of incest between siblings.[124] This feeling has been expressed by Prittwitz: "The *Ultima ratio* character of criminal law is equally often *normatively* adjured by criminal law theory as it is *empirically* refuted by the criminal policy".[125]

In contrast with the continental tradition, in the common law countries *Ultima ratio* does not have the value of principle and it is also not put into criminalisation in

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[118] Krey, Esser, *Deutsche Strafrecht. Allgemeiner Teil* (note 116) pp. 7f.
[119] Roxin, *Strafrecht. Allgemeiner Teil* (note 17) p. 97.
[120] Grzeszick, 'Art. 20' (note 112) marginal number 117.
[121] Grzeszick, 'Art. 20' (note 112) marginal number 117.
[122] Krey, Esser, *Deutsche Strafrecht. Allgemeiner Teil* (note 116) p. 6.
[123] Roxin, *Strafrecht. Allgemeiner Teil* (note 17) p. 46f.
[124] Wolfgang Joecks, 'Einleitung' in: Bernd von Heintschel-Heinegg (ed.), *Münchener Kommentar zum Strafgesetzbuch*, Band 1, §§ 1–37 StGB, 2nd edition (C. H. Beck: 2011) marginal number 22; Bettina Noltenius**,** 'Grenzenloser Spielraum des Gesetzesgebers im Strafrecht? Kritische Bemerkungen zur Inzestentscheidung des Bundesverfassungsgerichts vom 26. Februar 2008', *Zeitschrift für das Juristische Studium* (ZJS), (2009), pp. 15-21.
[125] Cornelius Prittwitz, 'Strafrecht als Propria Ratio', in: Manfred Heinrich, Christian Jäger, Bernd Schünemann et al. (eds.), *Strafrecht als Scientia Universalis Festschrift für Claus Roxin zum 80. Geburtstag am 15. Mai 2011* (De Gruyter, 2011) pp. 23-38, p. 23: "*Der* Ultima Ratio-*Charakter des Strafrechts ist ebenso oft von der Strafrechtswissensschaft* normativ *beschworen wie von der Kriminalpolitik* empirisch *widerlegt worden*." (emphasis in original)

practice.[126] Criminal law is used not only for the gravest attacks on values or interests, but also for relatively minor infringements.[127] Critics point to at least two main reasons for denying the criminal law the status of *Ultima ratio* and preferring (or adding) criminalisation to other methods of state intervention (e.g. administrative). Firstly, criminal law has the stigmatisation aspect, which other branches of law do not provide (or at least not to the same degree). While this is often seen as an argument in favour of granting the criminal law the status of *Ultima ratio*, one could argue that the legislator may deem stigmatisation necessary for regulating certain conduct, which only criminal law can provide.[128] Secondly, in view of the enforcement through public agencies or prosecution offices, it may be more practicable to use criminal law for example in cases where material damages may be too small for the victim to afford the costs of a civil procedure or in view of lack of concrete victims or in cases of a large number of them.[129]

2.4.2. The Legality Principle and the Fair Warning Principle

The Principle of Legality provides that no course of conduct can be declared criminal or no punishment may be pronounced without a legal basis. It is expressed by the Latin sentence *nullum crimen sine lege* and is considered "the most basic, the most classical, the most elementary criminal legal principle on the Continent".[130] It is enshrined in Article 7 of the ECHR with abundant jurisprudence of the ECtHR.[131] The principle is composed of several requirements, *nullum crimen sine lege scripta*,

[126] Husak, 'Applying *Ultima Ratio*: A Skeptical Assessment' (note 97) p. 535; Simester, von Hirsch, *Crimes, Harms, and Wrongs* (note 1) p. 18. For criticism of the principle in the German literature see for instance: Bernhard Haffke, 'Symbolische Gesetzgebung? Das Wirtschaftsstrafrecht in der Bundesrepublik Deutschland', *KritV*, (1991), pp. 165-176 and 439-440.
[127] Ashworth, *Principles…* (note 3) p. 17.
[128] Husak, 'Applying *Ultima Ratio*: A Skeptical Assessment' (note 97) p. 538.
[129] Simester, von Hirsch, *Crimes, Harms, and Wrongs* (note 1) pp. 197f.
[130] Peršak, *Criminalising Harmful Conduct* (note 36) p. 119. See also Gerhard Dannecker, 'Nullum crimen, nulla poena sine lege und seine Geltung im Allgemeinen Teil des Strafrechts', in: Gerhard Dannecker (et al.), *Festschrift für Harro Otto* (Köln, Berlin, München: Carl Heymanns Verlag, 2007) pp. 25-40, p. 25. and Ferrajoli, *Derecho y razón* (note 29) pp. 34, 93, 373. The latter author points out that the law should not be formulated in such elastic and open way that it would allow to broadly interpret it in a way to attribute liability to any kind of act, which would demonstrate the perpetrator's 'bad character' (p. 376); See also Markus Dirk Dubber, 'Comparative Criminal Law', in: Mathias Reimann, Reinhard Zimmermann, *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006) pp. 1287-1325, p. 1313-1318.
[131] Christoph Grabenwarter, *European Convention on Human Rights. Commentary*, (C. H. Beck, Hart, Nomos, Helbing Lichtenhahn Verlag, 2014) p. 171ff.

stricta, *preavia*, *certa* and *nulla poena sine lege*,[132] out of which the requirement of certainty will be the most relevant for the purposes of this chapter.

In view of the jurisprudence on Article 7 (1) ECHR the "*nullum crimen sine lege certa*" requirement entails that: "an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable."[133] It means that the precision of the provision is assessed also taking into account the relevant case-law.[134] "Furthermore, a law may still satisfy the requirement of 'foreseeability' where the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."[135] This interpretation has been recently repeated in the case Contrada v. Italy.[136] In view of Article 7 (1) ECHR, criminal law provisions are to be "understandable, predictable and not vague".[137]

The principle is recognised by the legal orders of the countries which are party to the ECHR.[138] It is enshrined, as part of the Principle of Legality in Article 103 (2) of the German Basic Law and §1 StGB (*Bestimmtheitsgebot*)[139] and follows from Articles 34 and 37 of the French Constitution together with Article VIII of the Declaration of the Rights of Man and of the Citizen (1789) and Article 111-3 of the Penal Code.[140] In the Anglo-Saxon tradition it is known as the Principle of Maximum

[132] Peršak, *Criminalising Harmful Conduct* (note 36) p. 119.
[133] *Kokkinakis v. Greece*, Application no. 14307/88, ECtHR Judgment of 25 May 1993, para 52.
[134] Similar approach can be also find in national legal orders, as for example in Germany, see: Gerhard Dannecker, '§1 Keine Strafe ohne Gesetz' in: Heinrich Wilhelm Laufhütte, Ruth Rissing-van Saan, Klaus Tiedemann, *Strafgesetzbuch. Leipziger Kommentar*, Volume 1, Einleitung; §§ 1 bis 31, 12th edition (Berlin, New York: De Gruyter, 2007) marginal number 201; Volker Krey, *Keine Strafe ohne Gesetz* (Berlin, New York: De Gruyter, 1983) p. 126ff.
[135] *Kafkaris v. Cyprus*, Application no. 21906/04, ECtHR Judgment of 12 February 2008, para 140.
[136] *Contrada v. Italy (No 3)*, Application no. 66655/13, ECtHR Judgment of 14 April 2015, para 60.
[137] Simester, von Hirsch, *Crimes, Harms, and Wrongs* (note 1) p. 199.
[138] Similarly to the *Ultima Ratio* Principle, the Manifesto on European Criminal Policy recommends also that the criminal law legislation of the European Union fulfil the requirement of legal certainty in a way that "criminal law provisions must define offences in a strict and unambiguous way" – 'A Manifesto on European Criminal Policy' (note 105) p. 708.
[139] Roxin, *Strafrecht. Allgemeiner Teil* (note 17) p. 139.
[140] Pradel, *Droit pénal général* (note 17) p. 128.

Certainty[141] or as the rule of "fair warning" (these terms will be used interchangeably).[142]

There are several reasons for the importance of this principle. Firstly, it should guarantee that every individual is able to foresee what kind of conduct may lead to punishment and direct his behaviour in such a manner as to avoid criminal liability.[143] This necessarily implies that the legislator treats citizens as rational and autonomous individuals capable of steering their behaviour.[144] Secondly, it prevents law enforcement agencies from having too much discretion in interpreting the law and thus from having excessive power in enforcing criminal law.[145] It follows also from the rules of the separation of powers and the Principle of Democracy, since it is the task of the legislative branch to enact criminal law provisions.[146]

The requirement of legal certainty concerns the limbs of *actus reus* as well as those of *mens rea*.[147] It is not absolute and requires the maximum possible precision, but a certain degree of imprecision may be necessary in order for the law to be workable.[148] It is sometimes necessary that the law use abstract terms. Otherwise it would become too casuistic and potentially unable to both cover all kinds of behaviour targeted and adapt to changing conditions.[149] It would also result in provisions being very complicated, cumbersome and difficult to understand.[150] Technical or open-ended terms although not sufficiently clear for the average citizen may be clear for persons whom the offence targets, for example as regards white-

[141] Ashworth, *Principles…* (note 3) p. 63.
[142] Simester, von Hirsch, *Crimes, Harms, and Wrongs* (note 1) p. 198; *Simester and Sullivan's Criminal Law* (note 5) p. 26. The rule is also known in the United States: US Supreme Court, *Kolender v. Lawson*, 461 U.S. 352 (1983) and in Canada: The Supreme Court of Canada, *re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123. See also US Supreme Court, *Connally v General Construction Co*, 269 US 385 (1926), 391: "… a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." These three cases and the quotation mentioned also in: Ashworth, *Principles…* (note 3) pp. 63, 66.
[143] Jescheck, Weigend, *Lehrbuch des Strafrechts* (note 13) p. 137, BVerfG (15.03.1978) NJW 1978, 1423-1424, 1423.
[144] Ashworth, *Principles…* (note 3) p. 65.
[145] Ashworth, *Principles…* (note 3) p. 65.
[146] Krey, Esser, *Deutsche Strafrecht. Allgemeiner Teil* (note 116) p. 41.
[147] Dannecker, '§1 Keine Strafe ohne Gesetz' (note 134) marginal number 197.
[148] Dannecker, '§1 Keine Strafe ohne Gesetz' (note 134) marginal number 183; Grabenwarter, *European Convention on Human Rights. Commentary* (note 131) p. 180; Simester, von Hirsch, *Crimes, Harms, and Wrongs* (note 1) p. 201.
[149] *Kokkinakis v. Greece*, Application no. 14307/88, ECtHR Judgment of 25 May 1993, para 40.
[150] Ashworth, *Principles…* (note 3) p. 66.

collar offences.[151] As to the use of evaluative terms (e.g. "reasonable", "dishonest" etc.), the legislator should use them with moderation and avoid doing so whenever possible.[152] It is in particular acceptable, where the term is merely part of a definition of an offence comprising several other sufficiently defining elements.[153] It does not mean however that such terms have no meaning, since they also provide certain indications as to the expected behaviour.[154]

A principle linked with the requirement of maximum certainty or fair warning is the requirement of fair labelling, which is demanded sometimes in the scholarship.[155] It consists in expecting from the legislator that the law reflect the differences in harms and wrongs and the type of wrongdoing according to general perceptions.[156] On the one hand proper labelling and dividing into categories should allow for the provision of gradual punishment reflecting the degree of law-breaking.[157] On the other, it is important in connection with the communicative function of criminal law. Namely, if criminal law is to deliver the message, both to the offender and to the public, of "what is wrong", this message ought to reflect precisely what it is that is wrong about a concrete course of conduct. This goal should be achieved also by differentiating between various types of criminal conduct and avoiding overly-broad or all-encompassing provisions, where the prohibited wrong would not be clearly identifiable.[158]

3. Criminalisation of excessive risk-taking by managers?

The following subchapter will examine criminalisation of excessive risk-taking by managers in companies in view of the normative framework presented in the previous subchapter. It will start by presenting the basic features showing the context, as defined in this study (see I. Introduction), in which the excessively risky

[151] Grabenwarter, *European Convention on Human Rights. Commentary* (note 131) p. 180f. *Soros v. France*, Application no. 50425/06, ECtHR Judgment of 6 October 2011, para [53] and [59].
[152] Simester, von Hirsch, *Crimes, Harms, and Wrongs* (note 1) p. 200.
[153] *Hashman and Harrup v. The United Kingdom*, Application no. 25594/94, ECtHR Judgment of 25 November 1999, para 39.
[154] Simester, von Hirsch, *Crimes, Harms, and Wrongs* (note 1) p. 200.
[155] Ashworth, *Principles…* (note 3) p. 78.
[156] Ashworth, *Principles…* (note 3) p. 78.
[157] Ashworth, *Principles…* (note 3) p. 78.
[158] Simester, von Hirsch, *Crimes, Harms, and Wrongs* (note 1) p. 202.

behaviour may occur. The subchapter will then examine what are possible moral wrongs, which can justify the use of criminal sanctioning,[159] as well as what are possible harms that should be prevented and possible interests worth protecting. This analysis should provide reasons for the use of criminal law as regards excessive risk-taking and shape the scope of its use. Finally the issue will be examined in view of the two principles limiting the use of criminal law: the *Ultima ratio* Principle and the Principle of Proportionality as well as the Legality Principle and the Fair Warning Principle. The scope of criminalisation may be further shaped and possibly curtailed in order to respect both principles. The outcome of this analysis will be summarised in the last section, which should allow designing the boundaries of the use of criminal law for excessive risk-taking. Against this backdrop, Chapter VII will propose a model for criminalisation and examine the three national legal systems analysed in the previous chapters.

3.1. Basic features and interests

The starting point of the analysis is that limited companies have their own assets, which belong to them and not to the shareholders. The original founders of the company equipped the company with certain property and capital, which is further developed (or lost) over the course of the life of the company. The property of the company is no longer the property of the shareholders, whose ownership is limited to the shares they have and the rights enjoyed through those shares. This is linked with a basic feature of modern companies: the division of management and ownership. Contrary to partnerships, which tend to be more a form of cooperation between two or more persons in pursuing their activities, companies are managed by professional managers, with the investors as shareholders not having direct influence on the daily management, except the rights executed at general meetings. It is not excluded that shareholders take functions in the management, but even in such cases, they manage the assets of the company and not their own.

[159] Moral wrongulness is understood here as a necessary, but not sufficient, condition of criminal liability. Only when harm should be prevented or legal intersts needs to be protected, criminal liability might be introduced, under other conditions.

Moreover the liability of a company is necessarily limited to its assets and its members (shareholders) are limited to their investment. This means that creditors of every kind have an interest in its sound functioning, since, if it collapses, they can recover their debts only to a limited extent. The liability of shareholders is limited to their shares, but they may lose their investment in the event of bad management.

So the first element of the picture is that companies are legal persons with their own assets, which are entrusted to the management.

The counterpart of the fact that these assets are entrusted is that management has a duty to use these assets for the benefit of the company. The assets of the company and the rights to make use of them (in legal terms or making 'physical' use) as well as making binding agreements in the name of the company is given to them so that they use it for the company to profit.

The task of running the company is necessarily not limited to the head management, usually described by the provisions of company law. Their powers are delegated to other employees, who use the assets of the company in order to achieve its objectives. Some of these employees make only determined use, e.g. operating a machine. Others are given a certain discretion/liberty within which they can use the assets or make binding agreements for the company. They are middle or lower level managers, although they are not directly concerned by the rules of company law.

In all decisions these managers take, they should have the prosperity of the company in mind. In order to make the company profit, they need to take decisions as to the use of the assets and agreements they make in the name of the company, which necessarily entail a lower or higher element of risk as to success.[160] Before taking such decisions a more or less complicated risk assessment must be carried out, depending on the type and context of the decision.[161] This quality of decisions will

[160] In company law, if the manager's decision turns out to be disadvantageous for the company, but was taken in its interest and according to certain standards, they are protected by the Business Judgment Rule. See also in this context: Markus Adick, *Organuntreue (§ 266 StGB) und Business Judgment. Die strafrechtliche Bewertung unternehmerischen Handelns unter Berücksichtigung von Verfahrensregeln*, (Peter Lang, 2010) in particular pp. 70-127.

[161] On risk management, see for instance: Brian Coyle, *Risk Awareness and Corporate Governance* (Financial World Publishing, 2002); Paul Hopkin, *Fundamentals of Risk Management*, Institute of Risk Management (London, Philadelphia, New Delhi: Kogan Page Limited, 2010); Oliviero Roggi, Edward Altman (eds.), *Managing and Measuring Risk. Emerging Global Standards and Regulation After the Financial Crisis*, (Singapore: World Scientific Publishing, 2013).

depend on many more or less measureable factors, including the capacities and talents of the manager.

Another aspect of the fact that managers can take decisions, which have an impact on the assets of the company, is that they have the ability to abuse such powers. Therefore there is a potential conflict between the discretion/liberty the manager needs to be able to make the company thrive and the possibilities to misuse this discretion/liberty against the interests of the company. Furthermore, the manager may also disregard rules of due diligence or otherwise unintentionally expose the company to excessive risk.

There are two aspects of an excessively risky decision, which may influence the decision on criminal liability. Firstly, it is necessary to find criteria, which determine whether a decision is indeed excessively risky. These will be laid down outside criminal law, in legal acts describing the manager's duties, standards, practices or any other sources applicable to determine how the manager should perform his duties. The second aspect concerns whether the manager actually knew that the decision was too risky, or was aware that it might be so.

Furthermore, an excessively risky decision may have an impact, besides the company, on different types of persons more or less connected with the company. These persons may be shareholders or stakeholders (creditors, employees, the state as the tax collector, clients). Finally, excessively risky decision(s) leading to a failure of a company at the greatest scale may even have an impact on the economy as a whole, even on a global scale.

All these aspects may possibly influence the choice and details of different legal tools used to regulate the duties and powers of managers and their relationship towards the company and the stakeholders, from soft law and self-regulation to the use of the most serious, which is criminal law. It results also that different legal interests are at stake: individual (of the shareholders and the stakeholders) or collective (of the community in which the company operates, of the state or the interest in the well functioning economic system). Against this background, the following sections will analyse the features, which will determine the scope of possible criminal liability in the context described above and on basis of which such criminalisation will be proposed in the concluding chapter.

3.2. Moral wrongfulness

3.2.1. Applicable wrongs

This section is based on the very inspiring analysis of moral wrongfulness[162] in white-collar offences done by Stuart P. Green.[163] Although the categorisation used here comes from Green's book, the author remains fully responsible for the details of the ensuing analysis. Green tackles the question of moral wrong from a non-consequentialist or deontological perspective, i.e. looking for some violation of a moral duty as such, and not regarded merely by its consequences.[164] Among the moral wrongs he enumerates, the following seem to be the most relevant when discussing excessive risk-taking: cheating, disloyalty and the breaking of promises.[165]

Green understands cheating in the following way: "in order […] to say that X has cheated, X must (1) violate a fair and fairly enforced rule, (2) with the intent to obtain an advantage over a party with whom he is in a cooperative, rule-bound relationship".[166] Rules should be fair, prescriptive (not merely depicting reality), mandatory, and part of a "cooperative rule-governed relationship", whilst their breach must be intentional.[167]

This approach does not require that X acted covertly or with deception. Green rightly points out that one might cheat overtly, i.e. in a way that others can see that one is cheating. As to deception, concerning which he uses an example with a car driver who, instead of waiting in the line in traffic, uses the emergency lane, thus openly cheating the other drivers who wait according to the rules.[168] Whereas this argument is convincing as regards lack of secrecy, it might be doubted as regards deception. One might claim that the law-abiding drivers are deceived – in a sense misled, made to believe something which is not true –, insofar as they believe that all other drivers will also obey the rule. Understood this way, cheating always involves

[162] Wrongfulness is understood here as comprising both the conduct (and sometimes its result) and the perpetrator's state of mind. The problem of individual blameworthiness is not analysed here.
[163] Green, *Lying, Cheating, and Stealing* (note 15).
[164] Green, *Lying, Cheating, and Stealing* (note 15) p. 39.
[165] The other being: deception, stealing, coercion, exploitation and disobedience.
[166] Green, *Lying, Cheating, and Stealing* (note 15) p. 57.
[167] Green, *Lying, Cheating, and Stealing* (note 15) pp. 63ff.
[168] Green, *Lying, Cheating, and Stealing* (note 15) p. 57.

an element of deception. Hence, bearing this in mind, there is no need to change the above definition.

In order to verify if the problem of cheating applies to the cases of excessive risk-taking by managers in companies, three questions need to be asked. First, which kind of rule would they need to break in order to be considered cheats? Second, with whom are they in a "cooperative rule-governed relationship"? And third, against whom do they want to gain an advantage?

As to the first question, the assumption of cheating is a situation of interaction between two or more actors who are also engaged in some form of competition with each other. In this sense, two sportsmen compete for one prize. But this competition need not take the form of a win-lose situation. Students compete for good marks, but the fact that one received it often does not diminish the other's chances. However, both should observe the rules of the exams and if one disregards them, he cheats. Similarly in a contract, two sides can make a fairly good bargain. In all these situations the rules they observe are supposed to give them a common ground of equal chances of success and curb, if necessary, tendencies to unbalance this relationship. The relationship between the managers and the company or the shareholders presents these features only to a certain extent. The managers do not compete with the company in the above sense, but they are supposed to act for its benefit. At the same time however, the corporate environment provides opportunities to abuse such positions held by managers as regards the assets of the company, at the expense of the company, shareholders and stakeholders, and there are rules that should limit these tendencies.

As to the second question, the managers are at the same time in the stated relationship with different stakeholders: the company, shareholders, employees, creditors, the state etc. With all these groups their relationships are different, as are the possibilities of cheating. The question of managing the entrusted assets in a way which represents the interests of those by whom those assets were entrusted, and in particular does not expose them to excessive danger, is a question of the relationship with the company and its shareholders. Here, different rules on the duties of managers as regards the shareholders and the company, including their fiduciary duties and standards of care, prescribe how the former ought to act. When they start using the

assets of the company against these rules and to their own benefit, they start to cheat the company and the shareholders. Besides these stakeholders, one can claim, that by entering the economic system, managers subscribe also to certain rules, which are supposed to guarantee the correct functioning of this system.

The third question, besides considerations of the previous paragraph, requires reflecting whether cheating concerns also cheating for the benefit of the company or shareholders. Examples of such behaviour were already seen in the context of the national legal orders analysed in the previous chapters. The question here would be what is morally wrong in, for example, bribing a public official in order to get a contract for the company or avoiding taxes. Firstly, it is rather unlikely that such acts are carried out without any private interest of the manager (salary increase, bonus, position within the company). On the contrary, if a person is pressured to perform such acts against his will, although up to a certain point it may be considered neglect of duties towards the company for convenience (e.g. not losing the job), heightened levels of duress may diminish (or negate entirely) that person's liability. Secondly, even if the company (and possibly the shareholders) is meant to profit, it is still exposed by such acts to risk to which it should not be exposed. If this is the case, then even by bringing profit to the company, the managers are breaking their duties of care, since the managers are expected to make the company thrive according to the rules, without exposing it to abnormal risk, which, if materialised, may bring much graver consequences than the expected benefit (in terms of sanctions, loss or reputation etc.). Therefore they are still gaining advantage at the expense of the company.

Another type of moral wrong, which could be examined in the context of this study, is disloyalty. Although it might be tempting to present disloyalty as a general feature of white-collar crime, it is to be understood in a particular context where someone (principal) entrusts (partly) to another (agent) his assets in the pursuit of his interests.[169] This situation results in a duty of loyalty, which "creates in one a prima facie obligation to act *in the best interests* of a particular person or cause, even when doing so would be against one's own self-interest."[170] Loyalty can be also described

[169] Susan P. Shapiro, 'Collaring the Crime, not the Criminal: Reconsidering the Concept of White-Collar Crime', *American Sociological Review*, 55 (1990), Issue 3, pp. 346-365, 350.
[170] Green, *Lying, Cheating, and Stealing* (note 15) p. 99.

as a "rejection of alternatives that undermine the principal bond".[171] Disloyalty is thus when one neglects the interests of the principal by pursuing the self-interest in choosing alternatives which are not in accordance with the principal bond.

A typical case of agent-principal relationship is the situation of managers, to whom the assets of the companies, and indirectly the investment of the shareholders, are entrusted. The trust, which is allocated to the person of the manager, is equalled by his duty of loyalty towards the company in the sense that he must pursue the goal of the company and not his own, while managing the interests of the company. Loyalty demands that even if a golden opportunity arises, he must abstain from pursuing it if it is at the cost of the companies' interests.

The problem of acting contrary to the interests of the company may be analysed also under the moral issue of promise-breaking, since the manager would normally be bound by a contractual relationship with the company stipulating that he has to act to the company's favour and to avoid harm. This relationship seems however to be sufficiently and better addressed by the problem of disloyalty. Simple promise-breaking might arguably be considered less morally wrong than disloyalty.[172]

The exact definition and delimitation of these moral categories of wrongdoing may be subject to debate. In this regard two points need to be made. On one hand it might be tempting to reduce certain or all categories of moral wrong to one, for example stealing or exploitation, which may however blur the image of wrongdoing, and prevent a proper assessment of the gravity of wrong and lose the subtleties of such an assessment.[173] On the other hand, the exact naming of certain categories of moral wrong is less relevant than grasping its core '*malum*'. And the above analysis points out two major elements: the breaking of a rule and making one's interests prevail over those of others.

One more issue which may be raised in the context of such analysis is whether not obeying the law is as such immoral. However solving this complex issue cannot bring forward the analysis here for the following reasons. To consider that there is no moral obligation to obey the law would in any case result in the need to look for a

[171] George P. Fletcher, *Loyalty: An Essay on the Morality of Relationships* (New York: Oxford University Press, 1993) p. 8.
[172] Green, *Lying, Cheating, and Stealing* (note 15) p. 110.
[173] Green, *Lying, Cheating, and Stealing* (note 15) pp. 127-128.

moral justification for criminalisation among other potential premises. If it is to be considered that a breach of law is as such immoral, it cannot give guidance to the scope of criminalisation, since it would lead to a conclusion that every breach of law ought to be a criminal offence. If, as it is assumed here, criminal law should contain a certain moral reprobation, it must go beyond simple breach of a legal rule.

In this context, it might be useful to examine the five cases, which were presented in the introductory chapter and studied within the national systems. The first two cases consist in disrespecting the rules according to which the loans should be granted. In both cases the wrongfulness consists in disloyalty towards the bank, since instead of acting in the best interests of the bank, the perpetrator grants the credit contrary to the rules. The fact that he hopes that it would eventually turn out to be beneficial for the bank is irrelevant inasmuch as he knows that the conditions of the loan are detrimental for the bank. In addition, in the way it is formulated in the second case, he pursues his own interest (a bonus), which aggravates the disloyalty and may also present a form of cheating.

Similarly, cases 3 and 4 will also constitute a form of disloyalty. The perpetrator is not acting in pursuit of (evident) personal interest. However he is not acting in the best interests of the company, which he is supposed to do. In both cases he exposes the company to a risk of loss, to which it should not be exposed, either by using the money in an abnormal way (for this type of company) or by allowing a situation, in which the company may suffer the costs of being forced to call back the cars for repairs.

As to the fifth case, it includes an act of bribery, which may be wrongful as such, the analysis of moral wrongfulness of corruption remains however outwith the topic of this study. Although the perpetrator's act of corruption is meant to bring benefit to the company, it exposes it to an unnecessary risk of negative consequences if discovered, thereby constituting yet another case of disloyalty. It might also be a case of cheating, if the perpetrator acted in order to be rewarded for bringing a new contract to the company, if one could say that the rule is that managers should gain new contracts in legal ways and for that they are rewarded. In this case he breaches this rule in order to obtain his reward.

3.2.2. Digression: wrongfulness in the analysed offences

The analysis in the previous section demonstrated that two types of moral wrongfulness would be relevant for the topic of this study: cheating and disloyalty. Both of these aspects are reflected in the offences analysed in the chapters on national legal orders. Already the names of the offences reflect the moral wrongs, which underlie the criminalisation provided in these systems. Interestingly, the English system includes the offence of (fraud by) abuse of position into the Fraud Act, which could be considered unusual from the point of view of the continental tradition, where fraud and abuse of trust tend to be separated (Germany, France, and also Poland, Spain). However these two names reflect in fact the double moral nature of the offence. Fraud reveals an aspect of cheating and whereas its most classic form (fraud by false representation) involves presenting untrue or misleading facts (so deception), other sections (Section 3 and Section 4) do not require that element. Section 4 requires that the person abuse the position: that he use this position in breach of certain rules stipulating how the position should be used and that he do so for his benefit. The problem concerns what is morally wrong with misusing the position of trust in order to cause loss or expose to the risk of loss, since the element of self-interest is less present. The answer is not in cheating (although certain scenarios would probably also allow admitting this), but in disloyalty. The position required in Section 4 creates a relationship of trust, which is defined at its minimum by the act: "to safeguard, or not to act against, the financial interests of another person". Thus a person is committing a moral wrong of disloyalty, when he acts in breach of this obligation, regardless of whether he is motivated by self-interest or wants to damage the principal or expose his assets to a risk of loss.

Similarly to the definition of cheating presented above, the definition of fraud by abuse of position in the Fraud Act does not require a formal element of deception or that the person acted covertly, in spite of proposals to include such requirements.[174]

The French offence of abuse of company assets also combines both perspectives. On the one hand misusing the company assets, i.e. using them in a wrong way, means that the use is against certain rules, broken intentionally and for

[174] See the discussion in: Law Commission, Consultation Paper No 155, Legislating the Criminal Code. Fraud and Deception, 1999; Law Commission, Law Com. No. 276, Fraud. Report on a reference under section 3(1)(e) of the Law Commissions Act 1965, July 2002.

the purpose of private interests, which the managers enumerated in the relevant provisions pursue by breaching the rules (abusing the assets, the position or the credit of the company). On the other hand, although the relevant provisions do not mention the relationship, but name the categories of managers, these managers listed there are in an agent-principal relationship, which requires loyalty, in the sense of using the assets properly and for the benefit of the company, thus rejecting opportunities which would undermine this relationship.

While in both previous offences the provisions concentrate on the act and its motivation, the German provision requires a situation of trust, i.e. of duty of loyalty, a breach of such duty in form of a breach of a rule governing (an aspect of) this relationship, which resulted in negative consequences, either in the form of a loss or exposure to risk, which can be qualified as such. Although it can often be deduced from the facts of the case, there is no formal requirement that the person acted in his personal interest. The word denoting the offence is *Untreue*, meaning abuse of trust or unfaithfulness (in fact, the same word signifies marital infidelity), and the core of the offence is disloyalty, on the condition, however, that it brings detrimental results (attempt is not criminalised). What defines the moral value of the perpetrator's wrongdoing, is the fact that he broke one of the rules that define his relationship with the principal that was supposed to define the agent's room for manoeuvre and which was supposed to protect the principal. At the same time the agent intended or accepted that as a consequence the principal would suffer a loss.

One can also ask what is the moral wrongfulness in offences described in Section 36 of the Financial Services (Banking Reform) Act 2013 (see subchapter 7. in chapter II) and Section 54a of the German Banking Act (see subchapter 7. in chapter IV). Both offences require that the manager bring about a state, which is either of concrete endangerment to the existence of the institution or its failure. This is combined with his breaching of certain rules on how to manage such an institution. The German provision requires that these rules be broken intentionally (including *dolus eventualis*), but that the perpetrator may be negligent as to the result of such intentional rule-breaking. The English provision requires awareness of the risk, while it seems not to require awareness that the management is below the required standard. Although these provisions do not fall into the categories proposed above, this does not

mean, all the same, that they do not contain an element of moral wrong worth reprehending.

The starting point of the analysis may be that it is morally wrong to behave in a way which brings a risk of the collapse of the institution one is entrusted to manage, while knowing that the way one acts may bring about such a risk or knowingly neglecting the duties which are supposed to prevent such risk from occurring. Not only does this form a case of disloyalty to one's institution and, if an element of personal intent is present, a case of cheating. One may also build an argumentation that leading an institution, whose collapse may have grave consequences both for the stakeholders and for the economic system, implies a moral duty to strive for its survival, whilst also avoiding acting in a way which may imperil the existence of the institution.

3.2.3. Wrongfulness in excessive risk-taking

Let us analyse the question of moral wrong in the excessive risk-taking of managers from both the deontological and consequentialist perspectives

When it comes to management in the corporate environment, as noted above, it is unavoidable that the company is exposed to risk. To consider that to expose the company to risk should be forbidden (or even criminal) would mean that managers should take only the most obvious decisions concerning day-to-day affairs, if at all, and cannot venture not only into any more ambitious endeavour, but even possibly into activities, which are the main business of their companies. For instance, banks would need to stop giving loans; the result would be absurd.

Now the question is whether exposing the company to excessive risk can be considered morally wrong. Two approaches are possible. One is consequentialist and would consider the wrong to consist in causing the excessive risk. The excessiveness of risk would be defined, as already done above, as being higher than normally expected in this situation by any kind of standard applicable to the situation. Such an approach would need to take into account any kind of exposure to excessive risk, for which the manager is somehow responsible, thus including all kinds of intention and also reckless and even negligent cases. Whilst this would give extensive grounds for

criminalisation, its scope may be further curtailed by other rules, in particular *Ultima ratio*. Moreover, it could be completed by the reasoning presented above as regards Section 36 of the Financial Services (Banking Reform) Act 2013 and Section 54a of the German Banking Act. This would formulate stronger duties as regards conduct which may lead to the collapse of an institution based on the impact which the collapse may have on the different groups of stakeholders, and potentially on the economic system.

The other approach to defining the moral wrongfulness in excessive risk-taking is deontological and requires that there be some moral wrong intrinsic to what the manager has done, irrespective of the consequence as such. The basis of the relationship between the manager and the company is trust. The manager is obliged to be loyal to the company in the sense that he should act for its benefit and not against its interests. Therefore privileging personal interests over the interests of the company is morally wrong. However, this type of relationship is not modelled as a strict martyr-like bond, where a person must forsake all their interests for the benefit of the superior goal. The scope of obedience required is described by rules defining the relationship between the company and the manager. Certainly breaching these rules and pursuing one's interests against the company's is a case of disloyalty. However, if one finds a situation in which it is possible to both stay within the given rules *and* act to the detriment of the company, one is also disloyal. So in fact the moral wrongfulness in such a relationship is in accepting to act to the detriment of the company, or in accepting that a course of action may be detrimental to the company – and pursuing that course of action. It follows that one ought not to place too much emphasis on the element of seeking personal interest, since disloyalty already resides in the fact that one acts in a way which may result in a loss to the company.

Yet another approach hinted at above requires an analysis of whether there may be moral wrong in a breach of one of the relevant rules, leading to exposure to excessive risk. The German approach in *Untreue* requires a breach of duty in the form of a breach of a rule, which is designed to protect the owner of the assets (the company) from loss. The question is, what kind of moral wrong there is in committing such a breach. One answer could be that a manager does so for some personal benefit, which is wrong not only since it breaches the rule, but also for favouring one's own interest and thus constituting cheating according to the terminology adopted above. If

there is no personal interest at stake, than the only possible reason would be a certain type of carelessness, which can be understood as a form of disloyalty: instead of making efforts to act in the best interests of the company, a manager allows himself to disregard some of his duties. This could mean that every breach of such rules should be criminalised, whether committed intentionally (e.g. disregard of the rule because of laziness or bravado), recklessly or negligently, resulting in the criminalisation of any kind of mismanagement regardless of the type of *mens rea*. The need for criminalisation may be further nuanced, in view of the *Ultima ratio Principle*, since different breaches may present various degrees of moral wrongfulness and also in view of different *mens rea*, using also the level of punishment to reflect these differences.

It is submitted here that exposing the company to excessive risk combines two elements of moral wrongfulness: cheating and disloyalty. The act of the manager constitutes cheating in view of the following reasoning. The manager is expected to be acting for the benefit of the company. Not only is this subject to certain rules (with or without legal consequences), but also the mere imperative of acting for the company's benefit is a general rule that should govern the manager's behaviour and which is expected by the other actors in this relationship (this important aspect will come back below). Thus by intentionally breaking this rule in order to pursue his own interest, the manager acts immorally. The picture is supplemented by the rules on conflicts of interest, which, if followed, also ensure the avoidance of wrongdoing where the manager is unable to pursue this imperative.

The manager exposing the company to excessive risk is acting disloyally according to the following logic. By accepting the position of a manager, thus having been entrusted with assets and power in order to act in the name of the company, the manager commits to pursuing the interests of the company. He also undertakes to abstain from pursuing his own interests at the expense of those of the company. As regards the use of the company's assets and representing its interests, the manager must do so in a way which (in his view) best serves the company. Therefore he ought to abstain from exploiting opportunities which would be beneficial for him, but which would hamper the company. In theory, a use of the company's assets for the benefit of the manager which would neither impact negatively on the company, nor bring it any benefit is morally neutral. Nonetheless it would be necessary to carefully assess

whether this is really the case. For example, taking funds belonging to the company in order to help the manager pay an urgent debt puts the company at abnormal risk that the manager would not be able to repay them.

It becomes problematic where the manager acts without intention to cause harm or expose to excessive risk, but only in a careless way. Here it is possible to distinguish two types of situations. On the one hand the manager may neglect his duties purposely. For example in the process of verifying creditworthiness, a person may omit to verify certain aspects (knowing that they should be verified) not necessarily because of some vested interest (the client is the manager's brother or the manager needs to improve his statistics), but because for example of laziness. This is certainly not cheating (to succumb to one's vice, is not yet pursuing one's interest), but disloyalty, in the sense of a duty to make best efforts to pursue the company's interests and failing to fulfil it. It is disloyalty also, if the manager performs the creditworthiness check in a sloppy way and because of that he misses an important point, which results in granting an excessively risky loan or according to the rules, which would apply for less risky clients (e.g. with lower interest rates). By accepting the position the manager accepts to act according to a certain level of care and if he knowingly disregards it, he is disloyal to the company. However, one cannot say that it is disloyal to the company to fail to perform certain acts of care if he did not know that he was supposed to do that. He might be an incompetent manager, but not an immoral one. Similarly, one cannot say that the manager is immoral, if he is not able to meet a certain standard of care due to other conditions, which are not dependent on him, in particular if those conditions have been created by the company itself (e.g. all the elements of creditworthiness cannot be verified because the amount of applications to be dealt with within a certain space of time is too high). One could expect such a manager to raise the red flag and inform that the duties cannot be performed. A work environment that would prevent the manager from doing so (e.g. expectations that the managers perform the way they can, and/or a risk that the manager would suffer negative consequences if complaining) could serve as another justification for the manager's conduct, with the moral responsibility for the situation falling thus on those who had set up such a scheme.

Another question to be analysed is whether it can be considered immoral according to the standards adopted above to expose the company to excessive risk

where managers act only for the benefit of the company. In other words, the manager acts in a way, which he knows is against the rules and in a way that makes the probability of loss higher than it should be or causes an abnormal risk (e.g. of criminal, if applicable, or administrative sanctions), but he hopes that the risk does not materialise and that eventually the company benefits. This might be considered cheating, if the manager were to pursue a personal interest alongside those of the company, e.g. in the form of a bonus or promotion. If he has no personal interest of this type however, the only possible moral wrongdoing to be considered is disloyalty. By being entrusted the company's assets the manager promises also to abide by certain rules and standards of care, which the person entrusting the assets trusts the manager will do. In other words, the assets are given to the manager in order that he manage them in a way which would not be considered excessively dangerous according to certain applicable standards. By intentionally disregarding these standards, the manager is disloyal to the person who entrusted the assets. One could also extend this reasoning to duties beyond the principal-agent relationship, as pointed out above, in particular as regards stakeholders who may also rightly expect that the company is managed in a more or less correct way, as well as to duties of avoiding the risk of collapse of the whole institution.

The moral wrongfulness of disloyalty does not explain the wrong in the setback to the interests of the stakeholders as well as other actors, such as members of the society, if systemic interests are at stake. It was already demonstrated above that a consequentialist approach would bring forward the reason for blaming acts detrimental to the interests of these actors. Within the deontological approach, the notion of cheating would be applicable. The other stakeholders enter the (cooperative) relationship with the company and its managers in hope that the latter abide by the rules relevant for this relationship (including correct management of the company) and while knowingly exposing the company to excessive risk (against what the stakeholders expect), the manager may intend to gain advantage over the party in the sense, that he intent to profit from the act (or make the company profit) whilst the stakeholder might be put at (higher than normal) risk of loss. Similar reasoning can be made for the systemic interests of the economic system, where the members of the society (participants in the economic system) function within it expecting that other

actors do not breach rules in a way, which would put at risk the functioning of the whole system.

3.3. Possible harms

After having established possible moral wrongs linked with excessively risky decisions, it is necessary to reflect on the harm in which such decisions result or may result. Harm is understood as a setback to interests. Harm can be analysed as harm to others and harm to self, however the latter perspective, linked with Legal Paternalism, was already excluded above (see 2.2. Harm Principle).

The first question is what kind of harms are to be analysed. Managers, by using the company property in an excessively risky manner, can potentially cause harm to or endanger very different interests, not only including property, but also life, health, the environment, and so on. However, as this study is restricted to financial interests, only this perspective will be further analysed (see Chapter I. section 2.3. Scope of the research). A decision, which is excessively risky, may obviously finish in the materialisation of risk - a negative consequence. This loss may be of different natures: pecuniary, but also loss of opportunity, damage to reputation. In the context of the company these other consequences translate also into economic consequences. Thus in the context of the company harm is understood as a negative consequence for the economic situation of the company either in the form of a loss or lack of gain. The question, for example, of whether companies have some kind of dignity which ought to be protected will be left out. Similarly, the psychological consequences of losing one's job will not be taken as a factor in the analysis below.

Secondly, the question is to whom the harm is done. Firstly, it may be done to the company and its shareholders. The second circle is constituted by stakeholders: employees, creditors, clients, the state as tax collector etc. The third circle contains persons, who may be affected by the deterioration of the company, but do not belong to the two first circles. For example, a closure of one of the company's sites may affect the region where it is situated. Finally, the economic system as such may also be harmed in certain circumstances.

The question whether exposing the company to a risk of loss would fulfil the criteria of the Harm Principle can be answered in two ways.

Firstly, the Harm Principle allows that a criminal provision punishes not only situations where harm occurs, but also where there is an unreasonable risk of harm.[175] Excessive risk, as it is understood in this study, is a risk, which is above the standards admitted in a given situation.[176] Such risk is unreasonable by the applicable standards and it would be admissible to use criminal law to prevent and punish such risk.

Secondly, under certain conditions, exposing the company to a risk of loss has an impact on the assets of the company in view of the accounting rules. A risk of loss may require that it be recognised as foreseeable loss, which influences the credit side of the balance and lowers the value of the assets.[177]

In conclusion, the criminalisation of exposing a company to excessive risk can fulfil the requirements of the Harm Principle because it may prevent harm to the company's property from occurring. Moreover, excessively dangerous management may lead to the deterioration of the company's condition (and eventually its collapse), which could lead to consequences for other circles of affected actors enumerated above (employees, creditors, the state or participants in the economic systems). This will be treated in greater detail in the following section.

Besides these reasons, the legislature may wish also to prevent such harm by criminalising acts which do not necessarily create harm, but are generalisations of risky situations likely to cause such harm based on empirical evidence.[178] Such criminalisation may punish the use of certain concrete techniques which, although considered excessively risky, do not as such always create unreasonable risk (or any risk) or do not necessarily lead to a loss. For instance, it might be forbidden for a certain type of companies to invest in certain types of securities and the question would be whether a manager who violates this prohibition should be also held criminally liable. This is an example of a scenario of remote harm and in order to verify whether such acts should be subject to criminal sanction it is necessary, for

[175] Feinberg, *Harm to Others* (note 35) pp. 11, 105.
[176] See: Chapter I. Introduction, 2.2. Terminological clarifications.
[177] See e.g. Section 253 I and IV HGB (*Handelsgesetzbuch* - German Commercial Code), BVerfG (23.06.2010) NJW 2010, 3209-3221, 3219 [141].
[178] Feinberg, *Harm to Others* (note 35) p. 190.

each abstract type of act in question, to perform the Standard Harm Analysis. The latter is composed of an analysis of the gravity of the risk, the likelihood of it occurring, the balance to be struck between the social value protected and the degree of limitation of liberty, and a consideration of other aspects such as the practicability of such prohibition.[179]

From this analysis results a question as regards what is better to use: a general criminalisation or the remote harm criminalisation, in other words punishing situations of concrete endangerment or providing for abstract endangerment offences. The added value of the first one is that it encompasses only situations in which the actual harm occurred or a situation where excessive risk came into being. However, this approach can be criticised for it requires a constant judgment (by the manager) as to the dangerousness of the decisions, which may be difficult in a dynamic situation. This shortcoming would be however curtailed by the *mens rea* requirement, if the offence is to be only intentional. On the other hand, concrete prohibitions (i.e. offences of abstract endangerment) may provide clearer indications as to required behaviour. In traffic offences, it is more practicable to say: 'do not drive above 90km/h', although driving above such a limit may in a concrete situation not be dangerous, than saying: 'do not drive dangerously'. The approach of the general prohibition may be defended by saying that managers are in any case required to assess the risks attached to their decisions - whether this obligation is reinforced by a criminal sanction or not. Moreover, the rules in the business environment seem to be much more dynamic and impossible to codify in contrast to the rules of road traffic. Finally, nothing precludes the use of both techniques, if they are well combined and justified in view of relevant considerations.

3.4. Possible interests worth protecting

Another question to be asked is what kind of interest can and should be protected by criminalising excessive risk-taking, which corresponds to the question of what legal good is protected by means of criminalisation. The Theory of Legal Goods requires however that the legal good be somehow embedded in the law, either within

[179] Simester, von Hirsch, *Crimes, Harms, and Wrongs* (note 1) p. 54.

criminal provisions or in a legal source outside criminal law, e.g. the constitution. Since this chapter analyses the question irrespective of any single legal order, it will not refer to concrete legal goods, as perceived in the German doctrine, but to possible legal interests, which may be taken into account.

The interests which may be taken into account can be divided into the following categories:

- interests of the company,
- interests of the shareholders,
- interests of the stakeholders (employees, creditors, clients, the state as tax collector etc.),
- interests of persons who may be affected by the deterioration of the company, but do not belong to any of the above categories,
- systemic interests.[180]

As already explained in the previous section, the nature of interests may be different (life, health, environment etc.). However, in this study only economic interests are taken into account, so the further analysis will be limited to them.

Firstly, the interests to be taken into account are those of the company, namely its property. The company has an interest in ensuring that its assets are maintained and used for its benefit. This feature has two sides: on the one hand the company has an interest in its assets being used in the least risky way possible, so that it does not suffer loss. On the other hand, it also has an interest in these assets being used for endeavours which can bring profit to it, which necessarily exposes these assets to a risk of loss.

Secondly, shareholders have in principle a similar interest in the company's survival and prosperity. Another interest that could be protected by an offence is shareholders' trust, since shareholders entrust the assets of the company, and by that their investment in the company, to the managers. The problem with this legal interest is that it is questionable to claim that by establishing a criminal sanction the trust of shareholders in the correct execution of managerial duties can be maintained or protected, similarly to other relationships of trust as legal goods such as "trust in

[180] Compare also: Tiedemann, *Wirtschaftstrafrecht. Einführung...* (note 88) p. 9.

proper functioning of…" e.g. "trust in non-corruptibility of public officials".[181] Trust is a type of bond, which exists between the shareholders and the management (or any other two or more persons) not because of the existence of a criminal law provision, but because the shareholders have sufficient reasons to believe that the managers will fulfil their duties. This belief is not reinforced by a criminal sanction, but by (correct or incorrect) impressions of the personal and professional capacities of the managers. The function of criminal law is only to intervene if it turns out that the person in whom trust was vested has failed to fulfil expectations (e.g. not to mismanage, embezzle etc.) and not in order to reinforce that trust.

The shareholders may differ as to how they see the development of the company. In spite of individual differences, certain patterns have been observed. In particular there is generally a difference in the approach between concentrated and dispersed shareholders.[182] In general the blockowners (shareholders owning a large part of shares) tend to be more risk-averse whereas small shareholders tend to accept more risk.[183] Against this backdrop it is impossible to define the generally acceptable level of risk a manager should not surpass. The interest of the company may be a better criterion, in order to render the competition among different interests more objective. A criterion, which would set the limit by saying for instance "no more than…" might not include the interests of shareholders who favour a riskier business strategy. A criminal provision aiming at protecting the interests of the shareholders by prohibiting taking excessive risks may result in a paradoxical situation, in which managers would avoid risk and, for precaution, choose less risky strategies. Managers, whose wealth is mainly dependant on the company's success, tend to be more risk averse than diversified shareholders.[184] A criminal law provision fostering risk aversion would thus promote the interests of managers, while neglecting those of (at least one category of) shareholders. It seems to be an incorrect result that a criminal provision aiming to protect shareholders' property from being exposed to excessive risk results in *de facto* prohibiting the use they might be searching for. Of course this does not exclude entirely excessive risk as a negative outcome of managers' acts,

[181] Roxin, *Strafrecht. Allgemeiner Teil* (note 17) p. 39.
[182] Marcelo Donelli, Borja Larrain, Francisco Urzúa, 'Ownership Dynamics with Large Shareholders: An Empirical Analysis', *Journal of Financial and Quantitative Analysis*, Volume 48 (2013), Issue 02, pp. 579-609.
[183] Peter O. Mülbert, 'Corporate Governance of Banks', in: Abol Jalivand, A. G. Malliaris (eds.), *Risk Management and Corporate Governance* (New York, London: Routledge, 2012) pp. 243-281, 251ff.
[184] Mülbert, 'Corporate Governance of Banks' (note 183) p. 252.

against which shareholders ought to be protected. Their interests do not seem however to be the best criterion in order to determine the scope of this protection.

Thirdly, deterioration of the company's condition may also infringe the interests of other stakeholders, in particular creditors, employees, the state (as the collector of taxes) etc., which may therefore have an interest in that it not be exposed to excessive risk. These interests may differ among these categories of actors. For example whereas employees may tend to be more risk-averse in order to keep their jobs, they may be more risk-favourable if their salary is connected to the company's results.

Fourthly, deterioration of the company's condition may also affect different groups of persons who although not formally linked to the company may be affected by its economic condition. For instance a larger group of persons (town, district etc.) together with entities operating within this community may have an interest in the well-being of the company affecting this community (because it is an important employer and contractor). These groups have an interest in the survival of the company (i.e. it should not risk its existence), but also in that it thrives (i.e. it must take the necessary risk). Similarly as it is the case among the shareholders, the level of risk, which is in the best interest of the stakeholders and other actors may be different.

A different category of interests is linked to the economic system as such and its correct functioning. There might be systemic interests in that (certain) companies do not take too much risk or certain types of risk, because this may have an adverse influence on the market. This approach looks at the problem from a different angle. Here the question is not whether the excessive risk is harmful for the company or other persons linked to it, but whether it is generally harmful to the economy as such, which may affect society as a whole, i.e. all actors of an economic system. At the same time, there is undoubtedly a societal interest in companies venturing into innovation and enterprises that sometimes bear a significant degree of risk. At this level as well the question is how to balance these two aspects.

Because of this balancing act, all these interests may be in conflict. It is possible to draw lines of divergences between the groups of involved actors taking into account the interests they may have. In the first place the company as an entity with legal personality has its own interests, from which results a desired policy on

risk-taking. The managers may be required to adjust their policy according to these abstract interests of the company, i.e. in order to seek the best for the company, or according to the wishes of the shareholders. Moreover, the interests of other stakeholders and other actors may be divergent among themselves and with the interests of the shareholders or the company as a separate entity. Finally, all these interests may be in conflict with what the state perceives as a desirable risk-taking policy.

As to the interests of the company, shareholders, stakeholders and other interested actors, the common denominator, which appear to strike the balance between them is the interest of the company, as the satisfaction of the interests of all these groups of actors is linked with the well-being of the company, which includes avoiding excessive risk. Moreover stakeholders do not have the direct bond with the management in the sense that they do not influence the selection of the management and do not entrust their assets into their hands directly, but to the company. If the company functions correctly, their interests in general should be assured.

While focusing on company interests may constitute a fair compromise between different interests, it may contradict in particular the interest of the shareholders – the ultimate owners of the company – to decide what to do with their company and its property. The basic line of conflict would be then between the interests of the company and the freedom of shareholders to use their property as they please. The solution to this problem is a question of economic policy. The legislator wishing to protect different categories of stakeholders and the companies in general should prioritise the interests of the company. To the contrary the legislator may want to give more attention to the property of the shareholders be it for political or philosophical reason or in order to allow them to freely use their assets, potentially venturing into innovative business but also potentially leading to bravado and failure. In this case the legislation should focus on the interests of the shareholders. As regards criminal liability that choice will in particular translate into the rules on consent. The shareholders should be protected against misuses committed by managers and a criminal law provision safeguarding the interests of the company would in principle protect their interests. By admitting exculpatory consent and the depending on scope of its application, the legislator may take more or less into

account the interests of shareholders who wish to allow the managers to take risks beyond the level which would normally be allowed.

A general criminal provision cannot include all the nuances of the differences between various interests and has to concentrate on preserving the interests of the shareholders or of the company thus safeguarding the "averaged" interests of all the actors. It may be done however by other legal tools, as for example protection of minority shareholders in company law, or balancing of interests between different groups of creditors by insolvency law. These nuances may also be safeguarded by means of criminal provisions targeting specific acts which infringe the interests of certain groups, if a need for such a provision can be demonstrated (e.g. criminal provision as regards insolvency).

Although the state should protect the relevant actors against abuses of their property, it would be absurd to expect it to guarantee that all economic endeavours will finish in success. However, two considerations are called for here. Firstly, exposing the company to excessive risk does not have to necessarily lead to its collapse. Moreover even if the company collapses, this does not necessarily harm the economy (on the state or global level, whichever perspective is taken) in most cases, unless the company is particularly important to the economic system. Yet, such a phenomenon, when occurring on a large scale, can have systemic relevance, thus presenting the feature of what the Theory of Harm calls conjunctive harm.[185] In other words, if everybody is doing the same (in this case managing the company in an excessively risky way) it could pose a danger for the functioning of the economic system (e.g. investing in securities based on sub-prime mortgages).[186] This approach presents similarity with pollution. Although one polluting enterprise may not create smog, several ones combined may create it.[187] The second argument is that although exposing the average company to a risk of loss, or even collapse, may not have relevance for the economic system, the collapse of certain companies ("too big to fail") or even their exposure to excessive risk may have a negative impact on the economy. For these reasons there may be a systemic interest in limiting certain types

[185] Simester, von Hirsch, *Crimes, Harms, and Wrongs* (note 1) p. 59. See also a more general discussion of this problem in: Robert Nozick, *Anarchy, State, and Utopia* (Oxford, UK, Cambridge, USA: Blackwell, Basic Books, 1974), pp. 73-78 (subchapter 'Risk').
[186] Simester, von Hirsch, *Crimes, Harms, and Wrongs* (note 1) p. 85f.
[187] Simester, von Hirsch, *Crimes, Harms, and Wrongs* (note 1) p. 87.

of risk taken by companies in general or by certain type of companies deemed particularly systemically important.

All these aspects will have to be taken into account by the legislator and will be directly linked with criminal and mainly economic policy. On one hand the shareholders and management should have the freedom to decide upon how to pursue their business. The company belongs to the shareholders and they should be allowed to make use of it according to their wish. On the other hand, a company is interconnected with other actors, and its policy affects their interests. Finally, there might be systemic reasons to require that certain levels of risk are not exceeded or that certain protective measures are taken.

In order to protect these different, possibly conflicting interests a plethora of tools can be applied, from soft law,[188] self-regulation, and economic incentives, to legal tools of different degrees of intrusion: civil law, e.g. contractual or tort liability or administrative law, e.g. concessions or administrative sanctions. According to the *Ultima ratio* Principle, criminal sanctions should be used only for those types of acts which cannot be effectively dealt with by the former tools. Since the purpose of this study is to verify how criminal law may and should be used to contain excessive risk taking, the following analysis will elaborate on factors that limit such use.

3.5. Limits to the use of criminal law

3.5.1. The Ultima ratio Principle and the Principle of proportionality

The analysis in the previous sections demonstrated that there are reasons to curb excessive risk-taking committed by company management, possibly by means of criminal law intervention, in consideration of the interests of different groups of relevant actors and in order to avoid harm or unreasonable risk of harm to these interests. Two areas of protection have been distinguished. The first one concerns protection of the financial interests of the company (thus protecting different groups of interested actors), where, depending on policy choices, the protection of the

[188] See for example: Marloes van Rijsbergen, 'On the Enforceability of EU Agencies' Soft Law at the National Level: The Case of the European Securities and Markets Authority', *Utrecht Law Review*, 10 (2014), Issue 5, pp. 116-131.

shareholders' interests is either equalled with the protection of the interests of other actors or given prevalence. The second area is linked to the protection against risks, which would endanger the economic system.

Criminal law is not the main tool to shape economic policy of the state. It must be used with caution and only as the last resort. First of all, the criminal judge cannot be expected to act as an arbiter, neither to assess the quality of management nor to solve conflicts between different economic actors. Conflicts in this area should mainly be solved by civil law methods and not in a criminal court. Secondly, steering different aspects of the economy generally takes place through economic incentives and administrative law. As for economic incentives, these certainly are less intrusive tools than criminal procedure. On the other hand the administrative regulation can be more effective in directing managers because it is easier to enforce such regulation and it is more flexible in adapting to changing circumstances. Opening criminal procedure for breach of every rule would be extremely burdensome and costly for the justice system; for the managers and their companies, thereby suffocating the economy. Thirdly, taking risk is at the core of the business activity. Therefore criminal law intervention should not reach the point where business activities are no longer possible or become excessively unattractive. With this in mind criminal law should only be used to counteract the gravest infringements, ones which the legislator deems cannot be dealt with better or at least equally efficiently by other tools of social control. Finally and as it was already shown, criminal law also contains an element of moral reprobation Thus it should be limited to situations, where it is possible to say that the perpetrator committed a moral wrong.

The major question in this regard is whether criminal law is suitable, necessary and adequate to effectively protect the interests described above or whether other tools should be used. Before embarking on answering this question, two remarks have to be made. Firstly, this section will omit the general problem of the effectiveness of criminal law as a tool of social control and will limit itself only to problems relative to the topic of excessive risk-taking. Secondly, the problem of proportionality of criminal law interventions is also linked with the choice of punishment (its type and level). This study will abstain from proposing the penalty, since these choices are too deeply embedded in concrete legal systems to arrive at a reasonable conclusion. It is however worth recalling that while imprisonment, especially long term, could be

considered in many cases disproportionate to the wrongdoing, fines and professional prohibitions might be equally or even more efficient in particular cases.

The first area to be analysed concerns the protection of financial interests of the company. These financial interests may be infringed by acts, which are against the interests of the company and result in exposing the company to excessive risk, but obviously also in a loss. While the need to legally tackle the latter may be more evident, the above analysis of the moral wrong, possible harms and legal interests demonstrated that there are strong reasons to extend the scope of protection also taking into account excessive risk-taking. The process that the manager starts by his act or omission may immediately lead to a loss or may pass through a stage, where the company is exposed to excessive risk of such loss. The essence of the manager's wrongdoing is in the decision, which exposes the company to excessive risk of loss, regardless whether this risk materialises in the effective loss or not. It may be a question of sheer luck, whether the loss occurs or not. If the same act may lead to loss or remain at the level of excessive risk, it does not seem fair to punish the unlucky manager who causes the loss, and leave unpunished the one who committed the same act, but was more fortunate.

In view of the above interlink between excessive risk and loss, the arguments for and against the use of criminal law will in some instances be valid for using criminal law against both loss and excessive risk and in other instances will be risk specific only.

In order to build up this argumentation, one more preliminary remark must be made. While from the perspective of harm and endangered or infringed legal interests the mental attitude of the manager while acting against the interests of the company is less relevant, it is crucial from the point of view of the act's wrongfulness (blameworthiness). This aspect is also highly important from the point of view of *ultima ratio*. In this regard, three general categories can be distinguished. They all consist in using the assets of the company or the powers granted to the managers in a way, which exposes the company to excessive risk of loss (or causes that loss) and differ only as regards the manager's perception of the act, which will translate into the

mens rea requirement.[189] The first category encompasses managers who either intentionally expose the company to excessive risk or know that what they are doing may expose the company to excessive risk and accept this possibility (intentional mismanagement or misuse of the company). The second category comprises managers who know that their act breaches certain rules or standards they should observe and that it might expose the company to excessive risk, however they are convinced that it will not be the case (reckless mismanagement). Finally the third category encompasses managers who are not aware that by their act they are exposing the company to excessive risk. They are not aware of the fact that they are breaching some rule or standard (protecting the company against excessive risk), but they could and should have known that or they are not aware of the rule or standard, but they could and should have been aware of it (negligent mismanagement).[190] While all these categories have to be taken into account in the analysis, the differences between them will translate into a different need to punish managers for excessive risk-taking.

The property of the company (in economic terms owned by the shareholders) is entrusted to the managers who have certain discretion in using it. Since the possibility of controlling that use is limited, the managers have the ability to abuse their rights to use the assets of the company. They can do it by representing the company in a way which is contrary to its interests, and possibly by using those assets for their own private purpose or any other which is not in accordance with the prosperity of the company and the interests of the shareholders. Hence, there is a need to create legal instruments compensating for that loss of control.

Abuses of the company cannot be fully contained by guidelines, soft law, ethics rules or peer pressure. Human nature, imperfect as it is, provides enough examples that among persons having access to assets, of high or low value, there are those who cannot contain themselves from making use of these assets contrary to the original purpose. The above analysis of moral wrong inherent in such conduct shows that criminal punishment with its stigmatising effect may be the necessary reaction to such acts and more appropriate than, for example, administrative sanctions.

[189] This abstract differentiation should not be understood in light of the doctrine on different categories of *mens rea* in any national system.
[190] What has been omitted from this list is the possibility to introduce criminal liability for breaching a concrete rule aimed at preventing excessive risk in form of strict liability. This form of liability used in certain legal systems (e.g. England and Wales) is not accepted in others for not respecting the *nullum crimen sine culpa* principle (e.g. Germany).

Naturally there exist also civil law remedies, which will be in use in such cases. However those remedies alone may not be sufficient for the following reasons. Firstly, imposing them does not involve stigmatisation of the perpetrator's wrongdoing. This is linked to the different purposes of civil and criminal justice. Secondly, if the assets were eventually lost (at least partially) they cannot be (at least fully) recovered and therefore civil law might not be able to offer a valuable remedy nor a meaningful consequence of one's act. Thirdly, the enforcement of civil law is generally left in the hands of the interested parties, whereas the enforcement of criminal law is in general entrusted in the state. Hence there are major reasons to opt for criminal law enforcement. Shareholders, in particular the small ones, may be in a weaker position than managers. Moreover, they may not have access to all information, if the managers withhold it and, even where the managers are obliged to disclose the information, they may still manipulate access to information and the information as such. For these same reasons the shareholders may not even know that abuses are taking or have taken place. Criminal law works, in principle, irrespective of the victim's reaction, in contrast to tort law.[191] Moreover, where there is no effective loss, there may be no grounds to grant compensation for tort.[192] Hence criminal justice with its instrumentarium can be more effective in investigating the misuses of entrusted assets and criminal law prohibition can be more effective in preventing abuses of which the shareholders may not be aware.

The reasoning concerning the criminal justice apparatus acquires an additional element, since the possibility to start investigations and discover abuses committed by management before the loss effectively happens is obviously beneficial for shareholders and all other stakeholders involved. Lack of criminalisation of excessive risk-taking (combined with no liability for attempts) would leave the investigative authority without grounds to open an investigation. While it has been claimed that some offences, for which courts rarely convict perpetrators, are provided for mainly in order to allow the investigating authorities to open criminal procedure and potentially find more evidence of the commission of more serious offences, mismanagement

[191] Simester, von Hirsch, *Crimes, Harms, and Wrongs* (note 1) p. 17.
[192] Simester, von Hirsch, *Crimes, Harms, and Wrongs* (note 1) p. 17 – footnote 35.

would not be one of such offences, as the harmfulness of the act which gives the reason to open investigation has already been demonstrated.[193]

Another argument in favour of criminalising abuses of company assets, entrusted to the managers by the shareholders, is of a practical nature and focuses on situations where abuses are committed for a manager's benefit. Its point of departure is the trust which the shareholders should have in the managers so that the latter may execute their functions in a system where management and ownership are divided. One of the arguments in favour of promoting trustworthiness is that it reduces costs.[194] In the case of managers, the more they can be trusted, the less instruments of control need to be implemented.[195] The necessary trust required between the agent (manager) and the owner of entrusted assets (the company and indirectly its shareholders) would need to assume that the manager would always take decisions that are (at least in their perception and according to their capacities) best for the company.[196] The question is whether such decisions would indeed have been taken even if "golden opportunities arise for the decision maker to improve his own welfare at the trusting party's expense".[197] Any theory of a rational agent responding to external incentives would struggle to explain how a rational manager, when presented with golden opportunities, could not pursue his own interest over the interest of the company.[198] Criminal law, at least if justified by general prevention, is based on the assumption that people make choices under the influence of disincentives in the form of the prospect of being subject to criminal sanctions. In this model, the possibility of a criminal sanction, together with other probable consequences of breaching trust, should balance the potential benefits of such golden opportunities with possible costs, which include criminal sanctions.

The communicative function of criminal law also speaks in favour of its use. . While the harmfulness of loss is more evident, the harmfulness of excessive risk can

[193] On the problem of so-called "*Türöffner*" (door opening) offences see e.g.: Michael Lindemann, *Vorasussetzungen und Grenzen legitimen Wirtschaftsstrafrechts* (Tübingen: Mohr Siebeck, 2012) p. 21.
[194] Shapiro, 'Collaring the Crime…' (note 169) p. 348.
[195] Within this argument trust is not understood in moral terms, but rather in economic ones. A criminal law provision cannot enhance the shareholders' trust in another person's good will, but can enhance their trust in that the circumstances discourage the managers from abusing their position.
[196] David C. Rose, *The Moral Foundation of Economic Behavior* (Oxford University Press, 2011) p. 165f.
[197] Rose, *The Moral Foundation of Economic Behavior* (note 196) p. 166.
[198] Rose, *The Moral Foundation of Economic Behavior* (note 196) p. 166.

be less apparent. By deciding that the exposure of company assets to excessive risk by its managers should be an offence subject to punishment, the legislature sends a communication that such conduct is wrong and should be avoided. Exposing the company to excessive risk does not need to be separated from causing loss, but if there is a reference to such an exposure and if the offence is properly named, criminal law can perform its communicative function.

Another element, which the criminalisation should take into account, is that it should not be counter-productive. This means that while criminalising abuses, the outcome should not lead to a situation in which managers avoid taking risks at all for fear of criminal prosecution. Such an outcome would effectively paralyse business activity, which necessarily involves an element of risk, lower or higher depending on the type of activity. This is a strong argument against criminalising what was called above negligent mismanagement. It would effectively lead to a system where the criminal judge becomes the ultimate arbiter of the quality of management. Not only would that be problematic for the development of the economy, if practically any wrong decision could be checked and potentially sentenced by a criminal judge should he find that the manager acted negligently. It would also create the risk of saturating the criminal justice system. Eventually any decision which somehow creates doubts as to its correctness could trigger opening of criminal procedure with all its weighty instruments. Moreover, there is less of a need to stigmatise a negligent manager as he is not failing at fulfilling his duty of loyalty to the company, but instead he fails at being sufficiently diligent. While such diligence can certainly be required from a manager it is also strongly linked to his talents and competencies, something, which should stay outside of criminal justice assessment. The latter should be used for those who deliberately disregard the duty of loyalty.

In this regard the case of reckless mismanagement is a borderline situation. A manager acting only for the company benefit (as perceived by him) who however exposes the company to excessive risk and who knows that his decision breaches an applicable rule or standard, but is truly convinced that the company is not put at risk by his act is solely an excessively daring manager. His acts may certainly be dangerous for the company, but the force, which drives him, is also precious to the company. It seems much more reasonable to contain its excesses by other tools, such as mechanisms of internal control than to create a danger for such a manger that his

too bold decision, taken with good intentions, would lead him to a criminal investigation or trial. Furthermore, the argument of overly intense involvement of criminal law in business and oversaturation of criminal justice can be repeated. At the same time it would create a climate, which would incline the managers to pursue very secure policy for fear of triggering prosecution.

The assessment of a reckless manager should be different, if he is motivated by some personal benefits (be it for him or for another person). In such a scenario he is disloyal to the company in that he does not fulfil his duty not because of too optimistic interpretation of the situation, but by deliberately disregarding an applicable rule or standard in order to realise a personal interest. In order for these cases to be truly wrongful, it is necessary to take the requirement of personal benefit seriously. It is therefore insufficient for it to be fulfilled that the manager wanted to appear as a successful manager or wanted to realise his ambitions. These are the typical motivations of managers, which push them to achieve remarkable results for their companies. On the other hand, the requirement would be fulfilled if the manager wanted to receive a bonus linked with the transaction or acted in the interest of his close relative or friend.

In sum, the above analysis based on a combination of principled (moral) and practical arguments demonstrates that it is legitimate and proportionate to provide for a general offence criminalising intentional mismanagement as well as reckless mismanagement, according to the above definitions, provided that the latter is committed for personal interest. The latter modality will constitute a borderline situation and it would be a policy decision whether it should be criminalised or left unpunished and tolerated.

It should however not be forgotten that the managers' behaviour can also be steered by other, including non-legal, tools. Research institutes and universities can issue guidelines or propose standards. Regulatory institutions can also issue similar documents. Those standards and guidelines can provide information on what is too risky or how to correctly assess the prospects of success. Peer pressure or market forces can be the instruments to enforce the guidelines as well as high standards of management. Moreover by making it known that certain policies are risky, it would be harder to claim that a manager was not aware of their dangerousness. Hence, if there

is a lot of information suggesting that certain securities are extremely risky, even if many banks are investing in them, one cannot convincingly claim that it was not known that they were unsafe. Another technique which could be used is a system of obligations to inform. If a certain type of investment, deemed particularly risky, is being made, the company would have the obligation to make it public, giving the shareholders or (perhaps) stakeholders a possibility to react.

These actors: regulators, competent administrative enforcement agencies, academic institutions, the press etc. are responsible for providing information on what is risky or too risky and how to assess it. Obviously, in view of the dynamic nature of the market, not everything can be known and even by applying these methods, there will be space left for the managers' competence, intuition and talent. Inasmuch as only these factors are in place, but the due diligence has been applied and standards respected, there can be no place for other sanctioning than dismissal.

On the other hand, the enforcement of detailed rules aiming at avoiding risk in concrete situations or providing techniques of risk assessment and avoidance ought to be mainly promoted by non-legal tools and enforced through administrative, company and civil law measures. Business is not like medicine, which should – except as regards experimental therapies – work according to detailed rules. There must be space for innovation, creativity and venturing. An offence, which would generally sanction the non-observance of such rules, could be counterproductive or useless. However, there may be reasons to consider that one of such rules is of particular importance because according to empirical generalisations, they often lead to grave consequences, which could potentially affect the economy as a whole.

The latter consideration leads to the second area of protection, which concerns the protection of systemic interests. It has been established that it may be justified (from the point of view of the harm analysis and the need to protect the legal interests) to either provide for offences curbing excessive risk-taking within companies which are systemically important or alternatively to enforce, through criminal law, certain concrete rules aiming at avoiding excessive risk. This results in two, not mutually exclusive, possibilities: establishing a general offence punishing for excessive risk taken by managers of systemically important companies or/and providing for an

offence punishing infringement of a concrete rule, which aims at preventing the excessive risk.

As to the first possibility, the justification for such an offence has already been elaborated above. Moreover, the question whether the risk was excessive or not will be answered in the context of a concrete company or a transaction in question, so it may be that the threshold to consider the risk as too elevated is set fairly low, depending on the type of the company. The need for a general offence was denied in case of negligence or recklessness without personal interest. Hence, the question is whether it would be justified to extend criminalisation to those types of mental attitudes (translating into the *mens rea* requirements) in case of systemically important companies. It appears however that the same argumentation against criminalisation of negligence and recklessness without personal interest could be repeated here. In brief, if the managers of systemically important companies would risk criminal investigation and criminal sentence even for decision, where they were not even aware of potential risks involved, it would make the criminal judge a potential arbiter of the quality of any managerial decision within systemically important companies, it would create danger of paralysing the functioning of the companies and it would also be highly burdensome for criminal justice. The problem of how to avoid collapses of systemically important company must be achieved in the first place by means of other instruments, such as the Basel Accords in the banking industry.[199]

The other possibility concerns an offence (or offences) punishing for infringing a concrete rule (or rules). Such a rule would aim at preventing acts or require certain type of action, which, if not respected, could lead to excessive risk or loss of such gravity that it would endanger the economic system. Its justification would be based on empirical generalisation, which could demonstrate that, although the breach of such a rule does not always lead to excessive risk or to a loss, it may bring about this results if the rule is breached in many companies or in one or more systemically relevant companies and thus may endanger the functioning of the economic system. An offence punishing for infringement of such rules would need to be justified by showing that the potential consequences are so grave that it is necessary to enforce the rule through criminal law and that the possible drawbacks of

[199] Uwe Blaurock, 'Regelbildung und Grenzen des Rechts – Das Beispiel der Finanzkrise', *JuristenZeitung* (JZ), (2012), issue 5, pp. 226-234.

criminalisation are lesser than the need to enforce the rule in this way. Such criminal offence could also include liability even for negligence, if it proves necessary to combat breaches by perpetrators with this state of mind. The dangers of over extensive influence of criminal law would be limited in this case, as it concerns a concrete rule that the managers should know they have to especially abide by.

3.5.2. The Legality Principle and the Fair Warning Principle

The Principles of Legal Certainty and the Fair Warning Principle play a double role. Firstly the legal certainty imperative would require that, if the legislator decides to criminalise excessive risk-taking, this should be stated in the definition of the offence in such a way as to allow the potential perpetrator to steer his behaviour in order to avoid committing such an offence. In this regard, the undesirable outcome would be that judges demonstrate a tendency to overextend the elements of the offence so that excessive risk is punished, because they consider that it would be unjust to leave it out.

Moreover, the definition should not be so wide as to encompass such a large number of acts that many of them can be deemed unnecessary to prosecute, resulting in prosecuting authorities not initiating cases where the Opportunity Principle allows them to do so, or looking for ways to dispose of them in the Legality Principle system. Indeed, a further likely drawback to a broadly-worded offence would be the saturation of the justice system due to a high volume of cases.

The Principle of Legal Certainty requires the provision to be as precise as possible and, in particular, to clearly state what the targeted wrongdoing is. The provision may also refer to other legal acts or sources of duties, the breach of which can be part of the definition of the offence.

When criminalising excessive risk-taking by managers four elements must be described precisely enough:

- who is the perpetrator,
- what course of conduct is criminalised,
- is there any requirement of result and if yes, what it is,

- what must be the perpetrator's state of mind so that he fulfils the *mens rea* requirement.

The problem of the definition of the perpetrator presents the same dilemmas as regards both types of offences: the general offence of excessive risk-taking and the offence(s) punishing for infringing a concrete rule (protecting against excessive risk).

As to the perpetrator, generally two techniques are possible: enumerating functions which the potential perpetrator would fulfil (e.g. the CEO, member of the management board etc.) and which would be described by other legal acts, or providing an abstract definition of the position which would make the person a suitable perpetrator (e.g. a person supposed to safeguard the interests of another person).

Prima facie the first option grants maximum legal certainty, however at the cost of not encompassing persons who may commit equally harmful and wrong acts with entrusted assets and remain unpunished. Criminal liability would depend here on a nomination, and could thus be deflected or avoided by formally nominating an individual (a "straw man" in the German usage, or a "fall guy" in colloquial English), through whom management is officially carried out, but who in reality is subject to the authority of another person or other persons: the *de facto* management. This result would not do justice. Therefore the risk of applying this technique is that there may be a need to supplement it by adding certain categories of perpetrators, which would be considered equally responsible as the formally nominated individual, if their position can be aligned to the one required by the definition of the offence. In this way, however, some of the benefit of certainty is lost, without guaranteeing in return the equal treatment of all perpetrators deserving punishment. It is necessarily linked with how the additional categories are formulated. For these reasons the second technique seems more reasonable. It guarantees (at least to a greater extent) a more just application of the offence. It depends on the criteria which are chosen to describe the perpetrator, and in particular on how precise the definition will be. It will also be the role of jurisprudence to decide on whether the definition is fulfilled in borderline cases.

The analysis of the three other elements: conduct, result and *mens rea* will be carried out separately for the two types of offences and it will start with the general offence.

As to the conduct, it can be described also by using two techniques, either by some general terms like abusing or misusing the position of a person entrusted with the assets and the rights to represent the company or by reference to a set of rules describing the execution of duties related to this position, be those rules of a statutory or regulatory nature, or featuring in the manager's employment contract, where the breach of one or more of these rules exposes the company to excessive risk. The first technique gives more autonomy to the criminal judge, who will have to interpret the provision, while the second requires him to verify whether the manager broke one of the rules stipulated outside criminal law. The difference between both approaches may be less significant in practice for two reasons. In the first approach the judge may tend to be inspired by the rules applicable to the execution of the managerial function in order to verify the abuse. This will depend on how autonomously this concept is interpreted. Within the second approach certain general provisions requiring the manager to execute certain levels of diligence will also give the judge scope for appreciation. However if these terms are borrowed from and rooted in e.g. company law, they will have to be interpreted according to the understanding given in this field.

Both approaches need to encompass exposing the company to excessive risk. The first one would need to focus the breach of rules not only on losses but also on excessive risk in defining the scope of the rules and the potential (or real) consequences of the breaches. The second one would require that abuse be understood not only as leading to a loss, but also as exposing the company to excessive risk of loss.

The two approaches have their own shortcomings as regards legal certainty. The first one gives less concrete indication as to what it means to misuse the assets because it refers to rules prescribed elsewhere; it can however be supplemented through explanations given by the law or jurisprudence. As to the second approach, it may be difficult to describe precisely which rules may lead to criminal liability. Moreover criminal law ought not to be the way to enforce all the rules governing the execution of managerial activities. Not all the rules applicable to the management of a

company necessarily aim at protecting its financial interests, so a lack of clarity in this regard may add uncertainty as to the scope of criminalisation. In any case, the offence should give precise enough indication, which rules or at least which types of rules are concerned, so that the managers can steer their conduct in a way as to avoid criminal liability.

The legislator may wish to limit the scope of criminalisation by requesting a proof of result, which would take the form of a situation where the company is exposed to excessive risk. The use of such a concept is not new to criminal law, at least in the criminal law systems influenced by the German approach, and is called concrete endangerment. The issue of the point at which a situation amounts to the concrete endangerment of the assets may be subject to some additional explanation by the legislator and interpretation in the doctrine. From the perspective of legal certainty, it is important that the offence clearly states whether it requires a proof of result and what kind of result fulfils its requirements.

The important difference between a definition requiring proof of result and a definition not requiring such a proof is the perspective from which the exposure to excessive risk is assessed. The requirement of a result would entail that a situation of concrete excessive risk to the assets of the company is created at one point of time and that it can be connected, according to the rules of ascription of results in a concrete system of criminal law, to the act of the perpetrator. If there is no need for proof of result, then the exposure to excessive risk must necessarily be assessed *in abstracto* from the point of time when the act happened. In other words, did the perpetrator's actions lead, in a normal course of action, to exposing the company to excessive risk?

The remaining element of the definition of the offence is *mens rea*. The definition of the offence should precisely specify what kinds of *mens rea* requirements are necessary for criminal liability. This can be done in the definition of the offence or by means of general rules of criminal liability, depending on the national legal system. In the previous section, three categories of the perpetrator mental attitude towards the offence have been distinguished: intention, recklessness and negligence. These categories have to be translated into the particularities of a concrete legal system and the legislator should sufficiently clearly provide for the respective requirements.

The *mens rea* requirement for the offence with or without the requirement of result will differ only subtly. Whereas in the latter option, the requirement would need to focus on the perpetrator's knowledge and intention as to the normal consequences of the act, in the former the *mens rea* would focus on the foreseen consequences of the act he was undertaking. The *mens rea* for the offence without the requirement of result would be as follows: the manager knew that what he was doing normally exposes the company to excessive risk and wanted to proceed with this act (*dolus directus*) or he knew that his act was such that in normal circumstances it exposes the company to excessive risk and accepted this possibility (*dolus eventualis*). For recklessness the perpetrator would need to have the same degree of knowledge as for the latter form of *dolus*, but he was convinced that the act would not be such as to expose, in normal circumstances, the company to excessive risk.

As regards intention for the offence containing the requirement of result, it would translate into requiring that the manager wanted that his act exposes the company to excessive risk (*dolus directus*), knew that what he was doing would for sure expose the company to excessive risk (*dolus indirectus*) or knew that it might expose the company to excessive risk and accepted that possibility (*dolus eventualis*). As to recklessness, it would require the same degree of knowledge as for *dolus eventualis*, but the perpetrator did not want the company to be exposed to excessive risk and was convinced that it would not be exposed.

While the difference between the two approaches is theoretically relevant, it might in practice play a limited role. The requirement of *mens rea* will differ to a large extent depending whether the legislator choses to define the conduct by general terms, such as abuse or misuse, or by requiring a breach of one or more rules. If the latter is the case, it is necessary also to define the degree of the required knowledge of the perpetrator as to the content of the rule and the details of its breach.

The definition of the offence should also be precise about the additional *mens rea* requirement of personal interest, if the legislator wishes to add it. According to the above analysis, it should form part of the liability for reckless mismanagement. While it has been argued that the requirement be taken seriously, the definition should assure that the courts do not interpret it over-extensively by admitting any kind of motivation as its fulfilment.

Furthermore, the requirement of *mens rea* may play a certain role in adding certainty to the definition of the offence and remedy to some extent the shortcomings pointed out in the previous paragraphs as to the definition of the conduct. As noted above, both approaches to the description of the conduct present problems as to certainty, either in relation to the understanding of the abuse or to the rules that were broken. If the definition of conduct uses a reference to breach of rules, the perpetrator needs to have (at lest some) knowledge about the rules in question and most importantly about the consequences of their breach. If the definition does not refer to the breach of rules, it still requires that the perpetrator understands the potential consequences of his act. The danger that the offence does not give him enough indication about what is wrong in his act is limited, as it requires him to understand that his act may (or will) expose the company to excessive risk.

The benefits of using *mens rea* to compensate for the lack of certainty may turn out to be limited by practical problems in proving the *mens rea*, namely how to prove that the perpetrator knew or was aware or foresaw that the act exposed the company to excessive risk. Unless the manager is willing to admit it, the court would need to deduce his state of mind from other evidence (for instance e-mails, witnesses etc.). In case such evidence is insufficient or unavailable, the judge may, depending on other aspects of a particular case, find it hard to believe that the manager was not aware of this aspect of his deeds. The particularities of the concrete legal systems will decide what needs to be proved in such cases. This aspect demonstrates the importance of raising awareness as to the dangerousness of certain types of investments, which was already mentioned in the previous section. If it is widely known that something is extremely risky, one may encounter difficulties in convincing the judge that it did not cross one's mind. In any case, if it is not possible to establish that the requirement of *mens rea* was fulfilled in a particular case according to the standards of the legal system in question, the manager should have the benefit of the doubt according to the maxim *in dubio pro reo*.

As to criminalising the infringement of particular rules, if the rule and its breach are properly described, the fulfilment of the Principles of Certainty and Fair Warning should be less problematic than in the case of a general offence of excessive risk-taking analysed above. The legislator must ensure clarity as to the scope of persons who can be liable for the offence and what kind of *mens rea* is required.

4. Outcome

The above analysis of whether criminalising excessive risk-taking by managers in companies is legitimate and proportionate can be summarised in the following points:

Since criminal law is also a tool of moral reprobation, an analysis of possible moral wrongdoing has been conducted, which led to the conclusion that excessive risk-taking by managers may present the features of cheating and disloyalty. In particular the latter aspect can be especially present, since by exposing the company to excessive risk the manager breaches his duty of loyalty to the company and the shareholders, which is the counterpart of the fact that the care of the company's assets has been entrusted to him. Disloyalty is a characteristic of acts undertaken wilfully, but also of an act where the manager is aware of his duties and does not perform them correctly or neglects required acts of diligence. There is no need that the perpetrator acts in his personal interest, although the act is more wrongful if he does. As to cheating, it applies to the relationship with the stakeholders, who enter into the relationship with the company reasonably expecting that its managers act in the interest of this company and not against it and to the relationship with the participants of the economic system who may reasonably expect that managers do not undertake acts, which would put this system in danger. Cheating requires that the perpetrator wants to get an advantage, which can be a benefit for himself or the company (if he acts convinced that the risk would not materialise and the company would profit).

From the point of view of the Harm Principle, excessive risk-taking by managers may be criminalised for several reasons.[200] Firstly, according to this principle, a criminal offence should aim at preventing harm or unreasonable risk of harm. Excessive risk of loss represents in fact both aspects. On the one hand excessive risk is unreasonable. On the other hand, excessive risk may create an effective setback to the company interests due to book-keeping rules requiring the inclusion of foreseeable risk and costs related to the depreciation of the value of the endangered

[200] The analysis has been limited to economic harm and infringement of financial interest (for explanation see: 3.3. Possible harms in this chapter and 2.3. Scope of the research in Chapter I. Introduction).

assets resulting in an actual lowering of the value of company's assets. The harm or unreasonable risk of harm affects not only the company, but also the shareholders, stakeholders and other actors involved. Moreover, a prohibition of certain types of acts may fulfil the requirements of the Harm Principle according to the concept of remote harm if it can be established that although those acts do not necessarily lead to a loss in every case, their consequences, if occurring in a large number of companies or in systemically important companies, may be so grave, that they could endanger the whole economic system thus justifying limiting, by means of criminal law, the liberty of managers to pursue business in that manner.

There may be a variety of interests worth protecting, which may be infringed by exposing the company to excessive risk. Firstly, there are inherent interests of the company as an entity, which has legal personality and its own property, as well as the interests of the shareholders. Secondly, stakeholders and other groups of actors also have interests in the prosperity of the company. The analysis has demonstrated that the interests as to the level of permitted risk can be very different between these groups or even between the shareholders. The interests of the company seem to be the best common denominator of the stakes of these actors as it can be assumed that they will all benefit from the company prosperity. However, the legislator may give more prevalence to the interests of the shareholders through the rules of consent to acts of the management, which without such consent would be considered criminal. Thirdly, the protection of systemic interests in the well-functioning economy may require that certain acts, which may result in endangering the functioning of the economic system, should be prohibited and this prohibition may need to be enforced by means of criminal law. This concerns acts, which although as such do not always expose companies to excessive risk (or cause loss), but if the risk materialises in a large number of companies or in systemically important companies, may lead to endangering the correct functioning of the economic system.

The analysis of the problem in view of the Principle of *Ultima ratio* and the Principle of Proportionality demonstrated that while generally other tools – legal tools of civil, administrative or company law nature, or the extra-legal ones – should be used in the first place in order to contain excessive risk-taking, there is a variety of arguments in favour of using criminal law to sanction acts that expose the companies to such risk. It results that it is legitimate and proportionate to provide for a general

offence of intentional mismanagement as well as reckless mismanagement, if the latter is committed for personal interests (general offence of mismanagement punishing for exposing the company to excessive risk or causing a loss). However, it would be excessive to criminalise reckless mismanagement not perpetrated for such interest or negligent mismanagement. Moreover, it was demonstrated that certain particular rules which are intended to prevent the exposure of the company to excessive risk (or prevent the loss) may be deemed so important, and their breach so grave in terms of possible consequences for the economic system, that their breaches may be separately criminalised - even if committed negligently (offence(s) enforcing concrete risk-preventing rules). In each case, it must be verified whether other tools would not suffice to contain the breaches in question.

As to legal certainty and fair warning, if excessive risk-taking is to be criminalised, it must be made clear in a way that managers can avoid criminal liability by abstaining from what is prohibited. It has been concluded that the description of the circle of potential perpetrators by enumeration of potential functions those actors may fulfil does not necessarily add certainty. Indeed, this technique may turn out to be less just, and hence an abstract definition is to be preferred.

With regard to the first area of protection (interests of the company, including interests of the shareholders and stakeholders), as to the description of criminal conduct within general offence of mismanagement, two techniques are possible: either by using general descriptions such as abusing or misusing the company assets or one's position (as a manager) or by referring to the breach of certain rules. The first technique would give more autonomy to the criminal judge than the second and both present shortcomings as to legal certainty. In particular the definition making reference to a set of rules should make it as precise as possible to which rules it refers and what kind of breach is sufficient for triggering criminal liability. By adding the requirement of result the legislator may limit criminalisation to acts, which effectively lead to concrete (excessive) endangerment of the company. It has been already pointed out before that introducing this requirement may lead to unjust consequences as it could be a question of sheer luck if an act, which in normal circumstances should expose the company to excessive risk, and thus be avoided, in a concrete case does not do so. It remains however a policy question whether to include this requirement into the definition of the offence or not. If the former is chosen, then the offence

should be clear about it. By including the requirement of result the focus of the assessment of the manager's act changes, while without it the manager's act (abuse of the company) needs to be such that in normal circumstances it exposes the company to excessive risk. As to *mens rea*, the requirement would differ only slightly between the versions containing the requirement of result or omitting it. More important difference would result if the offence makes reference to a set of rules. In this case it needs to be clarified how detailed the knowledge of the perpetrator as to these rules and its breach must be. Moreover the offence should be precise in defining the requirement of personal interest, which is recommended for reckless mismanagement.

As to the second area of protection (systemic interests), criminalising breaches of concrete rules should present fewer difficulties with respect to legal certainty, provided that the rule and its breaches are properly described and the offence includes precise indication as to the required *mens rea*.

Chapter VII. CONCLUSIONS

1. Introduction

The previous chapter demonstrated that it is legitimate to criminalise excessive risk-taking by managers in companies and examined the conditions determining the scope of such criminalisation. It has been concluded that two types of criminal offences are legitimate and proportionate:

1) a general offence of mismanagement punishing for exposing the company to excessive risk (or causing a loss),
2) offence(s) enforcing concrete risk-preventing rules.

As to the first type of offence, it proved to be proportionate to criminalise mismanagement, if it was committed intentionally or recklessly, provided for the latter form that the perpetrator acted with personal interests. Its aim is to protect the interests of the company together with the interests of the shareholders as well as stakeholders. The question whether the interests of the shareholders (as owners of the company) should be given priority is a policy issue, which will mainly be reflected through the rules on the validity of consent to acts exposing the company to excessive risk. The second type of offences aims at protecting interests of the economic system. Depending on the concrete rule in question, the gravity of potential consequences of its breach and other considerations that might be necessary as regards the rule in question, it may be legitimate to criminalise the breaches even if committed negligently.

The objective of this chapter is to answer the third research questions. Firstly, based on the outcome of the analysis in the previous chapter as well as on inspiration stemming from the study of the three national regulations this chapter will examine how what should be the conditions and boundaries of criminalisation of excessive risk-taking, which variables the legislator may use in defining it, and what may be the consequences of particular choices. It will also verify the outcome of the five model cases in view of the proposed criminalisation. (2. How to criminalise excessive risk-taking by managers?). Secondly, in view of these findings, the three national

regulations will then be examined as regards whether they fulfil the criteria of criminalisation elaborated in this study. (3. Evaluation of the three national legal systems). The chapter will close with the final conclusions of the study (4. Final conclusion).

2. How to criminalise excessive risk-taking by managers?

The problem of excessive risk-taking by managers in companies cannot be tackled by criminal law alone. On the contrary, it primarily depends on the decisions as to what corporate and business culture should be promoted and expected, what kind of extra-legal tools the legislator can rely on and how self-regulation and civil, company and administrative law instruments are used. In accordance with the Principle of *Ultima ratio* criminal law should only complement the rules set in these other domains. Even if one rejects this principle, from a practical point of view it remains reasonable that the criminal justice apparatus cannot be used in order to correct every aspect of the market economy. Therefore the question to be answered in this subchapter could also be formulated as: what can be the place of criminal law as a tool when dealing with that problem?

The aim of the analysis performed in the previous chapter and the conclusions, which will be presented here, is to examine criminalisation of excessive risk-taking in general and not in a way, which would be embedded in a concrete legal system. Some basic assumptions as to the features of such systems are made, as for instance a liberal approach to criminal law (e.g. criminal law as *ultima ratio*), the rule of law and the market economy, but otherwise none of the analysed systems or similar is borne in mind here. Such an approach has three consequences.

Firstly, each legal tradition is embedded in a certain legal terminology, which encompasses certain legal traditions and the use of terms set by the legislator and by the jurisprudence. Therefore the use of certain terms must be accorded with this terminology for systemic coherence. In view of that, this analysis necessarily uses the terms out of such context. Therefore it concentrates on the sense of the elements of which an offence definition is composed and not on connotations, which particular expressions may have in different languages in view of traditions using these

languages, in particular as to the English or common law tradition. This chapter will only provide elements of such a definition; these elements can be expressed differently in different traditions.

Secondly, a concrete system of criminal law provides for a large set of rules, which in the continental tradition is described as the general part, e.g. rules on attempt or cooperation in the commission of the offence. Similarly, criminalisation in a concrete legal system takes into account the rules of criminal procedure and the organisation of the justice system. This analysis necessarily remains outside that context and cannot take into account such particularities. It will therefore not enter into details related to such aspects which would need to be clarified in view of a concrete system. For instance, the analysis will suggest the scope of criminalisation, which in a concrete system could be achieved by describing the conduct in the definition of the offence or by rules of attempt. In other words, the analysis below gives an indication of what is crucial in the criminalisation of excessive risk-taking, what is the core wrongdoing, without translating it into a concrete legal text which would need to be adapted to the relevant legal tradition and context.

Thirdly, in view of the remarks on the Principle of *Ultima ratio*, an offence criminalising excessive risk-taking would necessarily be placed in a context of certain regulation encompassing different branches of law and extra-legal tools. It would be placed within a concrete economic and criminal policy. It is assumed here that criminal law is not the tool by which economic policy is decided. It is merely an auxiliary tool, which may help, in respecting its basic principles, to achieve the goal of this policy. Therefore, this study, which focuses on criminal law, cannot give general recommendations as to that policy. This proposal demonstrates what kinds of acts may deserve criminal punishment and what the reasons are to consider punishing them. However, the precise scope of criminalisation depends on choices linked mainly to economic policy and other social, political and historical factors.[1] Ultimately it will also be the choice of the legislator what it considers necessary to subject to criminal punishment. Therefore the proposal will show different variables the legislator may use to achieve its goals, and the possible consequences.

[1] Andrew Ashworth, *Principles of Criminal Law*, 6th edition (Oxford University Press, 2009) p. 17.

The two types of proposed offences – general offence of mismanagement and offence(s) enforcing concrete risk-preventing rules – will be analysed in turn. As both present the same dilemmas as to the definition of the perpetrator, this aspect will be analysed jointly. The ensuing analysis will study the possible scope of the general offence in the following order: definition of the perpetrator, conduct, result, and *mens rea*. Then the problems of defining the second type of offence will be discussed. The results of this analysis will be summarised and followed by some remarks on general aspects of criminal liability in the context of these offences. Finally the analysis will close with an examination of the five model cases in light of the proposed scope and modalities of criminal liability.

2.1. Definition of the perpetrator

The analysis performed above resulted in the conclusion that for reasons of certainty as well as in order to encompass all the necessary categories of potential perpetrators, it is preferable to define them by using an abstract definition. There is no need for the offence to be limited to companies or to the business context. It can very well encompass all types of situations where assets of other persons were entrusted to somebody. However the analysis below will be limited to companies, as other categories of potential perpetrators (e.g. lawyers) would require a separate study.

Since the general provision criminalising excessive risk-taking should compensate for the loss of control of the assets by the owners, understood here as both the company and the shareholders, the perpetrator has to be a person to whom the assets were entrusted giving him certain powers to make use of them for the benefit of the owner, thereby creating a duty of care. Moreover, it is better that the definition encompass the power to make binding decisions in the name of the company in order not to allow the exclusion of decisions that would not concern transfer of property. Such decisions would necessarily have a potential impact on the assets. The power to make use of the assets or represent the company's interests can come from different legal sources, be those a statute, a contract, or both combined, as well as decisions of competent organs (e.g. in case of insolvency procedure). Finally, the definition should also guarantee that if the legal basis for entrusting the assets is void or has terminated, but the perpetrator is executing the above rights, he can also be criminally liable. This

would also allow the provision to encompass persons who execute these powers *de facto*, but hide behind persons executing these functions only on paper. Contrary to the situation of punishing *de facto* managers in a system which limits criminalisation to certain categories of enumerated persons, a system which encompasses all categories of persons who manage the assets of the company sends a clear message that abuses of such rights are considered criminal, regardless of the category of persons.

Of course, there are types of decisions, which the manager cannot take alone, but the validity of which depends on that two or more individuals concur. If the decision is invalid (e.g. only one of the managers agrees to the excessively risky decision and the other refuses to concur with him), the company is not exposed to risk. The criminalisation of the act of the manager who agreed to the decision will be a policy decision and also largely depend on the approach to attempts in a concrete legal system.

A manager will usually be afforded some margin of discretion while using these powers. However assets of the company can also be handed out to a person without allowing them any margin of discretion as regards how to manage them, but in order to keep them or make certain use(s) thereof. An abuse of such assets is usually penalised by offences of misappropriation. Generally these situations are characterised by more control over the use of the assets, whereas the managers in situations analysed in this study normally have much more discretion.

The main problem with using these offences is that the conceptual wrongdoing in question concerns mainly a person who is given something in order to use it in a certain, predetermined way and then uses it differently. The conceptual wrongdoing is different in the sense that in this offence the perpetrator usurps the rights of the owner (to decide how to use the entrusted assets), while the situations discussed in this study concern a perpetrator who is granted the right to decide, within certain remits. The former scenario is not studied here, although usually criminalised in different legal order (e.g. the French *abus de confiance*). It is a policy question whether to differentiate the gravity of these offences, e.g. by different level of punishment. The argument in favour would be that the element of discretion brings more possibilities to

abuse the entrusted assets and less control over its use, which needs to be compensated by a stronger criminal law reaction.

This issue is linked to the problem of the scope of perpetrators of the offence to be decided here. If the scope of criminalisation is limited only to certain categories of managers (e.g. the most senior ones), there is a risk that other offences, in particular misappropriation might be used, potentially resulting in overly broad interpretation and unjust legal solutions.

On the other hand, one may consider whether certain categories of managers should not be subject to stricter regulation, for example CEOs. As to the general provision the main problem is that it would need to be justified why such individuals should be treated more exigently and how to define the respective requirements. The differentiation could also be made on the level of punishment. Companies may differ as to their structure, in particular as to the practical aspects, and it is not necessarily the case that those at the top of the managerial hierarchy take the most relevant decisions, although the level of duties they have is the highest. Encompassing all categories of managers ensures the protection of companies without allowing some persons, despite their being able to take decisions that expose the company to excessive risk (or cause loss), to escape criminal liability or to be punished less severely than others purely for reasons of company's structure, without there being any difference in their wrongdoing. Such gaps in the law could lead to impunity for certain categories of managers.

In sum, it has been argued here that the definition of the perpetrator should be done using abstract terms referring to his position of a person to whom company assets were entrusted, powers to make binding agreements in the name of the company were vested or who is obliged not to act against the company interests. Certain margin of discretion should be presupposed. These rights and obligations can come from different sources and the provision should also allow punishing managers who executed their function *de facto* (e.g. after the relationship has terminated). It remains however a policy question whether all categories of mangers should be subject to criminal liability and whether all categories should be punished equally. Such decisions may however result in overly broad interpretation of other provision. Equal criminalisation of all types of managers is in particular recommended as to the

general offence. This however does not exclude the possibility to differentiate the punishment among the managers taking into account their different powers and influence on the detrimental decision.

As to the special provisions punishing infringements of concrete risk-management rules, the scope of perpetrators will depend on the type of rule in question and on who is responsible for enforcing it. While the scope of perpetrators may be as wide as for the general offence, it is also conceivable that certain categories of persons, e.g. the CEO, the management board etc., are made responsible for ensuring that certain concrete rules are observed and that failures to meet this obligation are subject to criminal sanction.

2.2. General offence of mismanagement

2.2.1. Conduct

As mentioned in the analysis above, while designing a general provision criminalising mismanagement including excessive risk-taking, the legislator may choose one of the two methods of describing the criminal conduct. The first one consists of making direct reference to a breach of specified rules which aim to protect the company's assets and prosperity, which breach may expose the company to excessive risk, and are embedded in one or more (or even all) of the following sources: statutes or other legal acts, administrative or judicial decisions, the manager's contract and its annexes, any other applicable guidelines and standards. The second technique would use such terms as abusing or misusing the company's assets or the rights to make binding statements in the name of the company, misrepresenting the company's interests or acting against them, or breaching duties of loyalty or care. While the first technique makes criminal law rely more on the analysis of non-criminal law rules, the second would favour criminal law autonomy.

It has been demonstrated that paradoxically the reference to the concrete rules does not provide legal certainty, but may create confusion as to which rules trigger criminal liability and which do not. This problem is also linked to the question of the extent to which a rule must be broken. A breach of rule may be of lesser importance and insufficient to justify criminal liability. However, in view of the first technique it

would trigger criminal liability while the second approach might not qualify it as an abuse. Moreover, it may also result in a situation where criminal law is used to enforce civil liability. This problem may result in a tendency to add some qualifying terms to the breach, as was attempted in Germany by adding the term "*gravierend*" (approx. meaning: severely). Such a solution would not necessarily enhance legal certainty. On the other hand, there may be situations where the manager misuses his powers and while not in breach of any rules defining criminal liability, is nonetheless in breach of his duty of care, although for some reasons not inscribed in the catalogue of rules, but in the case at hand undoubtedly applicable. The question of whether this problem may occur depends on the catalogue of the applicable sources of rules. Unless these problems can be remedied in a satisfying manner, preference should be given to the second method.

Describing the conduct by using the second method is also not flawless from the point of view of legal certainty as it uses general terms such as abuse or misuse. The shortcoming of this technique can be however remedied and it can be in conformity with the ECtHR's take on the limitations set out in art. 7 ECHR, in particular if the case-law clarifies the doubts, which are left by the abstract language of the provision.[2] The decision on the choice of technique will however be linked to the legislator's view as to how autonomous a criminal judge ought to be in analysing the acts detrimental to the company. It will also be linked to the approach to subsidiarity in a concrete legal system, i.e. whether it is required that the perpetrator's act is unlawful in view of others than criminal law provisions. If the legislator opts for the first method, the deficiencies described above should be also remedied. In particular, it should be made clear which breaches of which rules trigger criminal liability i.e. whether every breach would trigger such liability or if there should be some qualifying threshold.

Whichever of the two methods is chosen, it must be ensured that various different types of acts which managers may perform and that would excessively endanger the company (or cause loss) are covered, including: legal acts – making binding agreements (those transferring the company's property as well as those creating obligations for the company) and factual uses of the company's assets or acts,

[2] See Chapter VI 2.4.2. The Legality Principle and the Fair Warning Principle.

which may trigger consequences as to the company's interests (e.g. bribing a public official with private money but in order to get a contract for the company). It should include decisions which have immediate influence on the company's interests as well as strategic decisions which will influence the company's interests only once implemented by other employees. As to legal acts, it ought to include both acts which are valid and those that are void (since the manager had no right to perform them, or no longer had the right to perform them due to rules of procedure having been violated) but may have some influence on the company's interests (e.g. are valid as to the third party involved).

The last aspect to be considered when designing the criminal conduct of the offence of mismanagement concerns the justificatory effect of consent to managers' acts given by the shareholders. Necessarily consent can be envisaged only in the context of 'intentional' and 'reckless mismanagement', since the specific offence would protect systemic interests and not those of the company or shareholders. The problem and its solution are deeply embedded in the approach as to what is a company in a concrete system and as regards the position of the manager as a person managing the entrusted assets. As to the first aspect, the company may be seen primarily as ownership of its shareholders, which primarily serves their interest or as a legal entity having its own interests independent from shareholders' caprices. The first approach will naturally favour the interests of the shareholders, while the second approach would safeguard also the interests of the stakeholders and gives preference to them, in case the shareholders wish to allow an act, which expose the company to excessive risk. The choice as to which interests should prevail will impact on the question of the function of the consent of the shareholders. The exculpating function of consent can be supported by the following arguments. The shareholders own their company and they have the right to make use of their property as they see fit. Moreover the interests of other stakeholders should be safeguarded in different ways, since mismanagement is mainly about loyalty to the company, thus to the shareholders. However this reasoning is contradicted if the company is considered an independent entity, with its own interests (making a profit, being prosperous etc.) and if the legislator wants to grant also here more protection to stakeholders and other interested actors as well as to systemic interests in the correct functioning of companies, thus limiting shareholders' potential influence. In such a configuration,

the managers' duty of loyalty would be strictly referred to the company as such and not to the shareholders. All these choices are to be made within company law and criminal law should be applied accordingly in a subsidiary way.

Depending on these decisions, there are three possible outcomes as to the impact of consent on liability for criminal mismanagement. It may have no impact at all, or it may fully exculpate the managers, but the legislator may also provide that consent exculpates the managers to a certain extent, e.g. excluding the exculpatory effect of consent if the decision may endanger the existence of the company. If full or limited consent is accepted, the rules for valid consent should also be clarified, which is also linked to the problem of the protection of minority shareholders.

2.2.2. Result

The detrimental aspects of the conduct will be described by its result, either potential or real.

The result (exposing the company to excessive risk of loss) may appear in different forms in the definition of the offence. There are three possibilities of including result into the definition of the offence. According to the first model it is required as potential result. According to this model, it must be verified, if what the perpetrator did could cause the required result, so the result is part of the conduct description. The second model requires a proof of actual result as it occurred. In this model the result must be proved independently of the conduct and then connected with the latter (e.g. according to the rules of objective ascription). The third model concentrates on the intended result, so it is placed within the analysis of *mens rea*. The first two models – potential result and effective result – require of course also that the result be reflected in the *mens rea*. The third model would in fact differ in comparison to the two others in that it would include situations, where the conduct was completely harmless, although performed with bad intentions. It is a question of particular legal systems, if this type of conduct is criminalised (e.g. *untauglicher Versuch*) and can be achieved also through the law on attempts. The ensuing analysis will concentrate on the first two models.

The relevant result here consists in exposure to excessive risk of loss. It should of course also include an effective loss. The main difference between the first and the second model, out of the three enumerated above, is the moment at which the detrimental result will be assessed. According to the model of potential result, the conduct will be considered detrimental because it potentially causes a loss or exposes the company to excessive risk of loss. In this model it is not necessary to verify whether such loss occurred, or whether a concrete situation of exposure to excessive risk (concrete endangerment) has been created, but whether the conduct as such was of such a nature that in the normal course of action it would lead to such a result.

According to the model of effective result, it must be proved that the conduct effectively caused a result: a loss, or a state in which the company is exposed to excessive risk (concrete endangerment). Except those situations in which it can be claimed that the exposure to risk constitutes a loss (according to the bookkeeping rules), it is necessary that the legislator expressly provide that criminalisation includes a result in form of mere exposure to excessive risk. It is also possible to criminalise the exposure to excessive risk through attempt.

It is submitted here that exposure to excessive risk may be a detrimental consequence of the manager's act, which should be criminalised as such together with causing a loss. According to the reasoning presented in the previous chapters and here, it is the manager's act, which is more relevant than its eventual consequences. Naturally the occurrence of result may have influence on the evidentiary process. However the manager should abstain from decisions exposing the company to risk, to which it should not be exposed or at the level, which should not be reached. By taking such a decision he breaches his duty of loyalty or care and such acts are worthy of criminal punishment, regardless of whether the company is effectively exposed to risk or loss eventually occurs. The consequences are to a certain extent a question of luck, in particular in such a dynamic, fast-changing environment as business activities may be. The margin of risk that the manager is allowed to take may be wide, but in any case, he should stay within these margins. If a manager gambles with the assets of the company ('*nach Art eines Spielers*')[3], what is criminal is not so much the fact that the assets are eventually lost, but that he manages them improperly. It is not a just result

[3] BGH (27.02.1975) NJW 1975, 1234-1236, 1236.

that by performing the same act of mismanagement, one manager incurs criminal liability and another not because of factors they cannot control. Such injustice may result in attempts to extend the understanding of loss in order to look for ways to penalise courses of conduct, which are deemed worthy of punishment. This does not mean that the punishment may not reflect the difference in harm caused by these acts. Another aspect, which reinforces this claim, refers to the *mens rea* and will be explained in the following section.

The question of choosing one of the methods of including result (potential or effectively occurred) will depend on which aspects the legislator decides to focus on, and also on the tradition as to criminalisation of attempts. By using the method of effective result, it is necessary that the legislator expressly provide that creating a state of concrete excessive endangerment is criminalised. Otherwise, there is a risk of over-extensive interpretation. Moreover, the question of criminal liability should not be dependent only on bookkeeping rules, which might be the case were the exposure to excessive risk to be interpreted through the concept of loss. The problem which may be difficult to solve according to this method is at what point of time the state of excessive risk is to be assessed. It requires the verification of possibly complex chains of causality. The choice of method to reflect the result will also have to be reflected in the *mens rea* requirements.

The main difference in scope of criminalisation resulting from use of the technique of potential result is that it can also encompass situations, which in a normal course of action should expose the company to excessive risk of loss (or cause a loss), but where due to an abnormal course of events a state of endangerment did not emerge. According to the philosophy presented here, even such acts ought to be criminalised, since it is the excessively risky decision which should be sanctioned and not the detrimental result, which failed to occur due to reasons beyond the control of the manager. For all these reasons the technique of potential loss is preferred here.

Irrespective of the preferred method of including risk into the definition of the offence, the risk must be excessive according to the standards applicable in a given situation. Its excessiveness may come from the fact that the company must not be exposed to certain types of risk or that its level is too high. As to the first one, it is for example abnormal to expose the company to a risk of criminal or administrative

sanctions (if applicable) for bribing a public official in order to get a benefit for the company. Similarly, for certain types of companies it will be abnormal to invest in highly risky derivatives, while it may be in the normal course of business for others. As to the second possibility, it is normal for banks to be exposed to risk that a client will be unable to repay a loan. The risk becomes abnormal, if the guarantees for the loan do not meet the standard applicable in the case.

Criminal law should not become a tool of sanctioning of minor infringements in managing the company's assets, but of serious breaches of one's duties of loyalty and care. Therefore such cases as for example granting a loan where guarantees are only very slightly insufficient should not be penalised. This can be ensured either by prosecutorial discretion and possibly correctly formulated guidelines, or by setting a threshold, which would exclude criminalisation, if risk is minimally excessive.

2.2.3. Mens rea

2.2.3.1. Categories

Neither exposure to risk, even excessive, nor causing loss is abnormal in business activities and as such should not lead *per se* to criminal liability. The defining element is the perpetrator's mind-set, which will differentiate an act of simple mismanagement, which is due to the manager's bad luck, lack of intuition, incompetence etc., from criminal mismanagement, which consists in the breach of his relationship of trust and duty of care. Whereas the first category of conduct may trigger different types of reaction, from dismissal to civil liability, it is justified that the second leads to criminal conviction. Therefore it is to a large extent the *mens rea* which will transform the act of 'simple' mismanagement into criminal mismanagement.

Already in the previous chapter three general types of mental attitude of the perpetrator towards his act have been differentiated: 'intentional mismanagement or misuse of the company', 'reckless mismanagement' and 'negligent mismanagement' (See 3.5.1. The *Ultima ratio* Principle and the Principle of proportionality). The purpose of this section is to analyse how these categories would translate into more concrete *mens rea* requirements. The terms used in this chapter may evoke different

concepts in concrete legal systems, so they should be taken here only in the meaning described below.[4]

There are the following general possibilities to analyse *mens rea*:[5]

a) *Dolus directus* (direct intention) – the perpetrator wants to bring about a certain result or perform an act of certain qualities

b) *Dolus indirectus* (indirect intention) – the perpetrator does not want to bring about the result or to perform an act of certain qualities, but is 100 % or almost sure that what he is doing will do so.

c) *Dolus eventualis* – the perpetrator does not want to bring about the result or to perform an act of certain qualities, but is aware that that this may be the case and accepts this possibility.

d) Recklessness (or conscious negligence) – the perpetrator is aware that what he is doing may bring about the result or may be an act of certain qualities; however he is convinced that it would not be the case.

e) Negligence – the perpetrator does not foresee that what he is doing may bring about the result or be an act of certain qualities; however it was possible for him to foresee it, a reasonable person would have done it and he was supposed to do so (and act accordingly).

In the context analysed here, the result may be a situation of exposure of the company to excessive risk of loss (concrete endangerment) or a loss. As to the act of certain qualities, it is an act which in normal circumstances exposes the company to excessive risk or causes a loss.

The analysis in the previous chapter proved that it is justified to provide for the offence punishing mismanagement if committed intentionally or recklessly, provided that in the latter case the manager was motivated by personal interests. These two modalities of *mens rea* – intention and recklessness with personal interest – will be

[4] See for example the analysis of differences in understanding the terms 'recklessness', 'conscious negligence' and 'luxuria' in Jeroen Blomsma, *Mens rea and defences in European criminal law* (Intersentia, 2012) pp. 134ff.

[5] Since national system differ as to details of these categories (e.g. how to differentiate between recklessness and *dolus* eventualis), their understanding is defined here for the purpose of this analysis. Compare Blomsma, *Mens rea and defences…* (note 4) pp. 60ff.

analysed in turn. Then the study will further elaborate on the findings of the previous chapter, which demonstrated that it is not proportionate to criminalise mismanagement when committed negligently.

2.2.3.2. 'Intentional mismanagement'

Depending on which of the ways to describe the criminal conduct is chosen, the intention can be directed at different aspects of the offence: the potential detrimental results of the act (exposure to excessive risk or loss), the effective results of the act as well as also on the breach of the rules or standards (to variable extent), if such breach is included in the definition of the offence. The consequences of making the choices as to the definition of the conduct for the definition of the *mens rea* as regards all three forms of *dolus* and their formulations have been sketched out in the previous chapter (3.5.2. The Legality Principle and the Fair Warning Principle). It is a question of legal tradition how the *mens rea* will be formulated, especially in relation to the general part of criminal law, if the system in question provides for one. Taking into account that the offence will encompass both possibilities – exposing to excessive risk of loss as well as an effective loss – when designing it, the following reasoning may be taken into consideration.

Defining the *mens rea* as *dolus eventualis* towards exposing the company to a loss may be seen as equivalent to describing it as *dolus eventualis* towards exposing the company to an effective loss. If a manager of a bank deciding on a loan grants it knowing that it may not be sufficiently guaranteed (e.g. because he has doubts as to the value of the house given in mortgage, although he does not check it), which would expose the company to an abnormal risk of loss, but hoping that the debtor would repay the credit, he in fact accepts the possibility of loss (*dolus eventualis* towards a loss). It does not matter that he hopes that even if the guarantee is insufficient, the client will be able to repay the loan anyway. Hence, an offence criminalising *dolus eventualis* towards an effective loss does not need to refer to excessive risk.

The *mens rea* of 'intentional mismanagement' will be constituted by two pairs: The first pair consists of intention (direct and indirect) and *dolus eventualis* towards bringing about a loss to the company. The second pair consists of intention (direct and

indirect) and *dolus eventualis* to expose the company to excessive risk of such loss. The latter alternative does not mean that the perpetrator must intend the risk to be excessive, but he must want to create a certain situation which he knows may or will excessively endanger the company. The intention does not need to refer to all the details of the act in question, but it is necessary for the manager to know that the act in normal circumstances or in these concrete circumstances will lead to a situation of excessive risk to the company.

2.2.3.3. 'Reckless mismanagement'

As it is understood here, recklessness (advertent or conscious negligence) is distinguishable from intentional mismanagement in that the perpetrator would not want to cause loss to the company, nor would he accept the possibility that the company is exposed to excessive risk of loss. However, the perpetrator would know that his act may be such that in normal circumstances it exposes the company to excessive risk of loss or know that it might expose the company to such risk (depending whether the offence is defined without or with the requirement of result), but he was convinced that it would not be the case. For example, while granting a loan the manager does not perform a correct analysis of the creditworthiness of the client allowing him to foresee that it may be insufficient (or suspecting that it is so), but believing that the client will be able to repay the loan. He is not aware of the fact, which would normally lead him to believe that the creditworthiness is insufficient, but he is generally aware that a lack of proper analysis may lead to the granting of credit to a person to whom it should not be granted, thereby exposing the bank to excessive risk that the credit would not be paid back.

As was demonstrated above, the criminal law should not be used as a tool to discipline sloppy managers. It would both render impossible pursuing business activities and saturate the criminal justice system, if the prosecution services and criminal judges were responsible for verifying and sanctioning breaches of all possible rules applicable to managers. However, the legislator may choose to criminalise such behaviour if it constitutes disloyalty to the company, which is where managers behave carelessly because they are pursuing personal interests. It could not only protect the interests of the company and the shareholders, but also of

stakeholders and other parties who have an interest in the company being run correctly (i.e. that managers care about its good standing and do not favour their own interests) and also act with the expectation that it will be run correctly.

However, liability for reckless mismanagement should not be declared too easily. It should comprise situations where the manager places his own interests ahead of the interests of the company. This does not mean that in cases which were qualified as intentional mismanagement, the managers may not pursue a personal agenda. On the contrary, in most cases they would do so. However it was proved unnecessary to demonstrate this in order to justify criminalisation of that behaviour. Reckless mismanagement would become criminal only because managers disregard some rules or standards, which they know they should observe, in order to attempt to obtain some personal advantage. They foresee that by disregarding these rules or standards they may create a situation which might turn out to be excessively risky for the company, but they hope that it will not materialise (neither the situation, nor the risk).

On the other hand, if the manager knowingly breaches the rule or the standard, but considers that he is acting for the benefit of the company and hopes that the company will actually benefit, without seeking personal benefit (except perhaps the realisation of some personal ambition), criminalisation seems an excessive response. Such acts would come very close to situations of managerial creativity, which as such, must not be thwarted by the prospect of criminal sanctions. The sole fact of breaching a rule, even whilst foreseeing that it may endanger the company, can best be remedied by other legal or extra-legal methods. Engaging the criminal justice apparatus in assessing in fact only whether the perpetrator knowingly breached the rule or the standard and foresaw its potential detrimental consequences may result in the criminal process focusing only on aspects of civil, company, administrative law or other applicable sources, and transform the criminal judge into the arbiter of management quality. There would be moreover no clear wrongdoing, which could be blamed by the criminal conviction. This wrongfulness lies in the fact that the manager pursued his own interest at the expense of the company.

In order to guarantee that such an offence would not criminalise all cases of careless management, the requirement of personal interest should be taken seriously and be strictly interpreted. This requirement is not about punishing vice. Personal

ambitions or (even) covetousness are natural motivators in the business world, and it might be counterproductive to inhibit them. Moreover this requirement ought not to be understood in such a way as to render it obsolete. To accept as personal intent such motivations as not losing one's job, strengthening one's position within the company or seeking prestige might result in the requirement being fulfilled in all imaginable cases.

This requirement of personal intent should ensure that criminalisation is limited to situations in which managers, instead of acting in the interest of the company, start using it as a vehicle to achieve their own goals. These goals may concern them directly, e.g. higher remuneration, obtaining a bonus or making a gain through another company, which benefits at the expense of the company in question. The requirement would also be fulfilled where a person seeks to increase his bonus through short-term gains, while the excessive risk taken might materialise in a longer perspective. Managers often have shares in the company they manage, so they profit when the shares value increases. Seeking to increase the value of these shares should be deemed to fulfil the requirement of personal interest only in cases where the manager acts mainly in order to fulfil this goal (e.g. achieve short-term hike) whilst disregarding the interests of the company.

The personal interest does not need to be directly linked to the perpetrator. It may concern his family, friends, business partners, or companies in which he has an interest.

2.2.3.4. Excluding negligent mismanagement

According to the same philosophy of not using criminal law to sanction careless or sloppy managers, criminal liability for negligence as regards the general criminalisation of excessive risk-taking should be excluded (see in particular 3.5.1. The *Ultima ratio* Principle and the Principle of proportionality).

In view of the possibilities to design the offence elaborated above, the manager could be negligent in the four following forms: he might not know that his act would be such that in normal circumstances it would expose the company to excessive risk, but he could have and should have foreseen that (modality of abuse without result); he

would not foresee that his act would expose the company to excessive risk, but he could have and should have foreseen that (modality requiring a result); he would not foresee that his act would breach some applicable rule or standard or he did not know about the rule or the standards, but he could have and should have known that; the breach of the rule or the standard would be such that in normal circumstances it would expose the company to excessive risk (modality of breach of rules without result) or it effectively expose the company to excessive risk (modality of breach of rules requiring a result). However it all these situations he was unaware of potential detrimental results of his acts.

The argumentation against general liability for negligent mismanagement would be very similar to the reasoning as stated above in respect of recklessness without seeking personal interests. Although one can say that the manager's negligence is wrong in the sense that he knew that he is supposed to abide by certain rules it or he knew that he is supposed to acquaint himself with a set of rules and he disregarded these obligations, but the wrongdoing is less significant in comparison to a situation where the manager acts knowing that what he is doing may be against the company interests. The need to stigmatise such behaviour is much less significant. Moreover such criminalisation may be counterproductive as it risks paralysing business affaires. It would make the judge a general arbiter of the quality of business decision and an adjudicator of all possible breaches of applicable rules or standards. Whether this might be justified for some particularly important rules with systemic relevance, it is disproportionate in general. It might create a climate of very conservative management.

It could be conceivable to criminalise negligent mismanagement as described above adding the requirement of personal interest. It would encompass situations, in which the perpetrator breached a rule or standard, without even foreseeing that it might expose the company to excessive risk, but in order to satisfy some personal goal. The wrongdoing of such act is more significant as it would encompass behaviour where the manager uses the company for his own purposes, but completely ignoring potentially detrimental consequences. Although there may be moral grounds for blaming such a manager, as he is cheating the shareholders (and other actors) by breaching the rules he is expected to respect and he is doing so for his personal interest, such an act is certainly less wrongful than in all previous situations, where

the manager was acting at least with an awareness of the detrimental character of this act.

If the manager is convinced that the company cannot be harmed or exposed to abnormal risk by his act, it is impossible to say that he is trying to attain his personal goals at the expense of the company. These two objectives are not irreconcilable. It is normal that the company profit from the manager's energy to attain personal goals, for example by linking his bonus to performance through his ownership of parts of the company's shares. Managers may differ as to their attitude towards risk, however in general they are rather risk-favourable persons. Looking for innovation and finding new ways of dealing with problems or new concepts are values that the companies profit from. Such an attitude may lead them to breach some rules of conduct, which they are supposed to safeguard. If necessary, this can be dealt with by civil or administrative law, through best practices or guidelines. Adding criminal liability may unnecessary thwart their initiative as well as unnecessarily burden the criminal justice system, or otherwise leave such a provision a dead letter.

In particular, criminal law should not be made a tool, which would serve to cure all damages done after certain practices turn out to be detrimental or more risky than expected, e.g. after a financial crisis bursts and reveals these aspects. If the manager was convinced that certain decisions are beneficial for the company because they are widespread and considered a normal tool of pursuing certain business activities, he cannot be criminally blamed if these decisions are later revealed to have been detrimental to company interests. Naturally the question of whether such a manager truly ignored the excessive risk of such activity must be answered. This aspect is linked to what was described above as a crucial function of actors in business environments whose goal is to propagate knowledge, which on the one hand will allow managers to avoid excessively risky policies, and on the other deprive them of excuses and make it easier to prove the fact that they foresaw the excessive risk.

In response it is possible to add the following to the argumentation presented above. There is not and there cannot be a guarantee of success in business activities. The main arbiter of managers' success is the market. Other branches of law may deal with breaches of rules, if that is necessary according to their standards and values. The comparison with road traffic offences or medical malpractice highlights the different

character of business activity. First of all, it is *par excellence* about innovation, whereas medical practice should primarily follow the rules, and only exceptionally consist in experimenting, which is subject to certain conditions. As to road traffic, innovation does not play a role. Moreover, the protected interests at stake are different. While health and life are the main concern in road traffic offences and medical malpractice, mismanagement concerns safeguarding financial interests. Not only are health and life more important interests to protect, but damages to them may often be irremediable. The case may be similar with environmental catastrophes. This does not mean that damages to property may not have a grave impact on victims' interests. However the protection they require need not be as intense as in the case of the former interests.

2.3. Offence(s) enforcing concrete risk-preventing rules

A part of the general criminalisation of excessive risk-taking analysed above, it was demonstrated that it may be legitimate to criminalise breaches of concrete rules, which may, according to empirical generalisations, expose companies to excessive risk of loss. The legislator may decide to single out particular rules or groups of rules, which are deemed of such relevance (in one, several or all business areas) that their breach needs to be criminalised. The justification of this offence(s) would be that it should prevent potentially dramatic results for the economic system as a whole. It is necessary for each such rule to demonstrate that the potential detrimental results and the probability of its occurrence justify the need to enforce it by means of criminal law.

As to the description of conduct, it should describe the breach of the rule in question as well as the breaches triggering criminal liability in the most precise possible way. As to the requirement of result, there will be none. This type of provision criminalises abstract endangerment of assets, i.e. the breach of that (or those) rule(s) may cause detrimental results but it is not always the case. The justification of the offence is based only on hypothetical result: if the risk materialises in a great number of companies or in a systemically important company, the economic system might be in danger.

While such breaches will naturally be penalised if committed intentionally, it is conceivable that the legislator find it necessary to punish even negligent breaches of some of these rules, if there are strong reasons for such a solution, in particular taking into account the relevance of observing such rules or the detrimental consequences their breach may cause. For example it may require that in certain cases there is a need to maintain a reserve of a certain amount of money. If deemed of such crucial importance, the legislator may sanction managers who were responsible for maintaining such a reserve, even if they did not know that it was not maintained, but were able to verify the state of the reserve and were aware of their responsibility to do so.

2.4. Summing-up

The above analysis provided that the following two categories of offences are legitimate and proportionate:

A. A general offence of mismanagement punishing for exposing the company to excessive risk (or causing a loss) in form of:

a) 'Intentional mismanagement', which would be an offence committed by a manager who intentionally performs an act, which in the normal course of action causes a loss to his company or exposes it to excessive risk of such loss or an act which effectively leads to one of these results. Depending on the decision of the legislator, it may require a breach of defined applicable rules of standards and relevant *mens rea* towards it. This offence would aim at protecting mainly the company's interests, and this way also the general interests of shareholders, stakeholders and other actors' interests in the correct functioning of the company. The offence would not aim directly at protecting the interests of the economic system and the society as a whole, but it would be generally beneficial for the economic system and the society that managers abstain from such acts. The legislator may give more or less importance to the interests of the shareholder or the stakeholders, depending on the rules on justificatory shareholders' consent.

b) 'Reckless mismanagement', which would be an offence committed by a manager who knows that what he is doing may be such an act that in normal circumstances it

exposes the company to excessive risk or cause a loss or may effectively expose the company to excessive risk or cause a loss, but is convinced that it would not be the case. Similarly as above, it may require a breach of defined applicable rules of standards and relevant *mens rea* towards it. Moreover it is required that the perpetrator acted in personal interest. As to the protection of legal interests, it would protect the same ones as 'intentional mismanagement'.

A general offence of negligently exposing the company to excessive risk proved not to be legitimate.

B. offence(s) enforcing concrete risk-preventing rules.

c) Specific provisions, which consist in breaking particular rules, if it can be proved (by the legislator) that they are of such grave importance, in view of their relevance for the economic system that their enforcement ought to be reinforced by criminal sanction and other regulatory tools cannot be equally efficient. The breach could be penalised not only as intentional, but also if committed recklessly or negligently. The aim of this offence would be mainly to protect the interests of the economic system and of society. Naturally, it would protect also companies, shareholders and other interested actors, but this would not be the main aim.

As to the relationship between proposed offences while applied to the same conduct, the offences under point a) and b) are mutually exclusive, since the perpetrator's *mens rea* will be of one or the other nature. As to the relationship of these two offences ('intentional' and 'reckless mismanagement') and the specific offence, it may be more complicated and would need verification depending on how the specific offence is designed and on the rules solving these types of conflicts. In any case, their relationship does not need to be the one of *lex generalis* and *lex specialis*, since they follow different aims as regards protected interests. Thus the application of both to one conduct could be possible, unless it is not allowed in a concrete legal system.

Three additional remarks need to be made.

Firstly, it should be ensured that these offences are not used in cases of a minor nature. This follows from the reflection on the *ultima ratio* aspect of criminalisation, i.e. that criminal law should not be used to solve any conflict the company may have with the manager or to tackle any breach of its interests. For example, it might be claimed that by smashing his smartphone against the wall, the manager exposes the company to excessive risk that it would suffer the loss of its value, or even causes this loss, depending on the power of the throw. Although the manager might be obliged to reimburse the value of the phone, it would be excessive to prosecute him. Elimination of minor cases can be achieved in different ways, depending on the tools available in a concrete legal system. For example in the system based on the opportunity principle, it can be achieved by issuing prosecutorial guidelines (and in general trusting the choices made by the prosecutors). Systems based on legality may need to add a formal threshold, for example of a certain value of loss or potential loss if the risk materialises, of a sufficient level to eliminate negligible cases.

Secondly, the model offences proposed above have been designed outside of the context of a concrete legal system and while translating these findings into concrete law, the legislator must include all the particularities of that system, as explained in the introduction to this subchapter. In view of this, the legislator may decide to use different available variables to narrow or broaden criminal liability according to what can be achieved through other available tools and to the goals of its economic policy. These variables can be the definition of the perpetrator (broader or narrower circle), the description of the conduct (whether it is limited to criminalising particular rules or uses a general clause) and the requirement of result (focusing on the act analysed in its potential harmfulness or on the actual endangerment or harm). Finally, the legislator may decide to limit criminal liability to intentional mismanagement or enlarge it to negligence. Depending on these choices and in combination with other regulatory tools, the legislator will set the legal framework for more or less space for risk in business decisions and therefore for more or less innovative management combined with more or less security and prevention of the risk of harm.

Finally, the question of choice of penalty also depends largely on the traditions of the legal system in question and therefore is not debated in this analysis. However,

in view of the paradigm of restrained use of criminal law, which stems from the rules described above, it must be borne in mind that prison sentences do not need to be the only response to criminal misconduct. Such sanctions as fines or professional disqualification can be equally or more efficient and deemed more adequate to at least some of the types of wrongdoing described in this chapter.

2.5. General aspects of criminal liability

This section will address general issues of criminal liability, including attempt, cooperation in the commission of the offence and reasons excluding criminal liability in the context of the offence proposed above. Necessarily these aspects will be deeply embedded in the rules of national systems, so the remarks below will only be limited to presenting the problems related to these issues and consequences of possible legislative choices in this regard.

As to liability for attempts to commit offences proposed in the previous section, the decision on their penalisation depends rather on choices of concrete legal systems concerning the punishment of attempts in general along with the criminal enforcement of economic policy. As to the first issue, whereas in some legal systems attempts are traditionally penalised in general (e.g. Poland), in other jurisdictions attempts are punished only in cases, where it is provided for a concrete offence (e.g. Germany, France). In countries where attempts are criminalised only for enumerated offences, the legislator would need to decide whether to add the offences described above to the list of such offences, which is closely linked to the second factor, namely choices as to how much criminal law should be the tool to implement the economic policy of the country. Depending on the criteria determining when the perpetrator's act amounts to an attempt, it may involve criminalising situations where the detrimental act is about to be undertaken (as exposing to loss is already included in the offence). By criminalising such attempts the legislator gives the investigating authorities a ground to start investigating at a much earlier stage, which may be an unnecessary burden on companies, in particular in cases where the risk of loss implied by the decision is not straightforward. On the other hand it may also give more protection to companies, by allowing for the punishment of decisions, which may have detrimental results for those companies, although undertaking them was stopped

or the exposure to risk was prevented (if the legislator opted for including result into the definition of the offence).

Similarly, the solution to the issue of how extensively cooperation in the offences of mismanagement should be criminalised will depend on the general rules on different forms of participation in the offence provided by concrete legal systems. Since mismanagement is an offence with a limited circle of potential perpetrators, the main question of policy is whether persons who do not fulfil the criteria for liability as principal offenders, could be held liable as accomplices of a different type if they participate in, help or encourage the commission of these offences. Moreover the legislator must decide if it is necessary to criminalise certain acts of general encouragement to take excessively risky decisions knowing that they may be detrimental to companies. Such a prohibition may be in conflict with freedom of speech and would require a separate study to verify if it is at all legitimate.

The question of what factors may justify or provide a defence to managers will also be embedded in concrete legal systems providing grounds for excluding criminal liability, so only limited remarks may be made here. In the chapters on national legal systems, three possible factors, which might exclude the liability of managers, were examined (not necessarily technically justifications or defences). As to situations where the decision of the perpetrator was based on an expert opinion to the effect that the decision to be taken does not exceed permissible levels of risk, it may preclude the fulfilment of the *mens rea* requirement of knowing that the decision may be too dangerous. However, if the decision is based on a dubious opinion or the manager is normally supposed to gather more information and advice and if he is aware of the fact that the insufficiency of this process may expose the company to excessive risk, he cannot defend himself this way. As to orders of superiors, they may have the same effect as expert opinions, unless the perpetrator (a junior manager) is aware of the detrimental character of the decision. Whether such a manager has to carry out the order or refuse to execute it must be decided by company law and other sources describing duties of the managers. If the manager behaves according to such rules, his criminal liability must be excluded. The third exculpatory reason is shareholders' consent, which was already discussed within the design of the criminal conduct.

2.6. Model cases

The above model criminalisation will be tested in this section in view of the five cases that were studied in relation to each of the legal systems analysed.

As it was specified above, two types of offences can come into play: mismanagement (intentional or reckless) and one or more specific offences aiming at preventing and punishing breaches of concrete excessive-risk-preventing rules. Whether the second category could be applied depends on concrete rules, which were not elaborated, since they depend on the economic and criminal policy of the concrete legal system in question. Therefore the following analysis will concentrate on the offence of mismanagement.

The first question to be asked is whether a person in all these cases can be considered a manager. It would necessarily depend on the system adopted out of the two proposed above. It was demonstrated that preference should be given to the model of abstract definition, which makes reference to having been entrusted assets of the company and the right to make decisions in the name of the company. The perpetrators in all five cases should meet such a definition, in particular since they have a certain independence in deciding how they are going to use the entrusted assets and should do it according to the company's interests.

The perpetrator's conduct in the proposed offence of 'intentional mismanagement' consists in intentionally performing an act, which in the normal course of action causes a loss to his company or exposes it to excessive risk of such loss or effectively causes one of these results (depending on the chosen model). The definition of the offence may also contain the requirement of breaching a standard or a rule. As these will necessarily be embedded in concrete legal systems, their analysis has to be omitted here.

For all of the five cases, this definition will be fulfilled.

Granting credit which is not sufficiently secured exposes the company to excessive risk of loss, since the company should either be compensated for taking more risk (e.g. by higher interest rates) or should not grant credit in such circumstances. It will be similar in the second case and there should normally be no need to have recourse to rules of e.g. principals by proxy, since the act of instructing

the lower-tier managers to grant the credit under such circumstances fulfils the definition of the offence.

A decision to gamble on the stock exchange with the assets of the company, if this is not part of the normal activities of the company, and especially with the assets which the company will need for its vital interests, certainly constitutes an act exposing the company to unnecessary risk of loss. Of course the result would be different if the nature of the company were such that gambling on the stock exchange is its normal business, thus the risk would not be unnecessary.

The act of the perpetrator in the fourth case consists in concealing the information about technical problems of the new car model. Although allowing production of the new car does not immediately bring the risk of damage, the probability is higher than normal that at one point the cars will be returned by disappointed buyers and eventually the company will have to call back the whole series and perform necessary repairs. The act of confirming the car as ready for production, which (in this case) was the responsibility of the perpetrator, was taken under circumstances which exposed the company to unnecessary risk of loss in form of the costs of repairs. It was so because by not disclosing the problems he did not allow the company to calculate these costs. Had he informed the other managers, the overall costs might have been calculated taking into account possible claims and the decision on introducing the car to the market could perhaps have been considered normal (bearing normal risk), depending on various circumstances.

As to the fifth case, the perpetrator's act would normally lead to liability for corruption. It would be a question of criminal policy whether liability for the act detrimental to the company should also be considered. If yes, the rules on multiple qualifications would decide how it would be treated. If the company may be subject to negative consequences, e.g. in the form of criminal or administrative sanctions, due to the fact that it obtained the contract through an act of corruption, the risk of such sanctions may be considered abnormal and therefore excessive.

If the legislator choses to require a proof of result, it would be necessary in all these cases to demonstrate that a state of concrete endangerment to company assets occurred, which should not be problematic at stages when: the credit has been granted, the money has been invested on the stock exchange, the car was allowed for

production and sale, the bribe was paid or promised. If the result is not required, it needs to be demonstrated that the perpetrator's act was of such a character that in the normal course of action it would expose those assets to an excessive risk of loss (potential result), allowing to make such judgement already from the point of view of the perpetrator's mere act.

In all of the five cases, it is necessary that the perpetrator fulfil the *mens rea* requirement, either in the form of intention to expose the company to excessive risk or in the form of recklessness with personal intention. In all five cases the perpetrators are aware that the acts they undertake expose their companies to excessive risk, i.e. they intentionally create an abnormal situation in which the probability of suffering loss is higher than normal, and in cases three and five the source of risk is also of a kind to which the company should not be exposed. Therefore there should be no particular problem in proving that in all cases the perpetrators acted at least with *dolus eventualis*. The requirement of personal interest would not be necessary for intentional mismanagement as designed in this study. If necessary it could be proved in case 2 only, in view of the strict approach to this requirement proposed here.

The negligence version of the cases will not lead to criminal liability as this form of *mens rea* was excluded. In order for the manager who acts without intention to fall into the scope of the proposed offences it is necessary that he acts at least recklessly and with personal intention. More concretely, in cases I, II and IV it would be necessary that he is aware that some rules of diligence are neglected and that this may lead to excessive risk. He is convinced however that this will not be the case in the concrete situation. Moreover, he neglects the rules while pursuing some personal interests, for which there is no indication in the cases.

3. Evaluation of the three national legal systems

3.1. General remarks

The aim of this section is to critically evaluate the three legal systems chosen for this study. This evaluation will be based on the findings contained in the national chapters, the comparative analysis in Chapter V, the discussion on legitimate and proportionate criminalisation of excessive risk-taking by managers in Chapter VI as

well as the previous section of this chapter. It is important to stress that while the national chapters and Chapter V provided information about the three legal systems, the evaluation of them is based only on the system-transcendet analysis of Chapter VI and of this chapter.

The analysis will not repeat details of the analyses provided in these chapters and will concentrate only on the core aspects of the solutions provided in the three systems. Moreover, no assessment will be made as regards rules concerning criminal liability for preparation, attempt, participation in the commission of the offence or defences. These aspects will only be addressed when necessary to assess the scope of criminalisation of excessive risk-taking in a given system.

The analysis concluded in the preceding sections of this chapter demonstrated that excessive risk is harmful and should be criminalised, although the borders of criminal law intervention may depend on policy considerations. In this regard all the three legal systems merit praise for including risk into their respective offences: fraud by abuse of position (among others)[6], abuse of company assets[7] and *Untreue*[8]. The requirements of these offences allow judges to convict managers who intentionally expose their companies to excessive risk and in general (minority views aside) it is sufficient that the intention is directed at excessive risk and the effective loss. Moreover, as it is recommended here, all three legal systems exclude liability for (inadvertent) negligence. However, all the systems have their limitations, which create obstacles to punishing the wrongdoing to the full extent. These aspects will be discussed separately for each system below. Before embarking on this analysis, some preliminary remarks are in order.

In view of the detrimental consequences of excessive risk-taking it is important that law send a message that excessive risk-taking is not accepted. In this sense, if a law punishes such conduct, it should be clear about it. None of the three legal systems expressly informs that it criminalises excessive risk-taking. The English legal system interprets it from the term "abusing one's position" or from elements of the offences of conspiracy to defraud or even theft. The requirement of acting against

[6] The English Fraud Act 2006, in particular its Section 4.
[7] Provided mainly by articles L241-3 4° and 5° as well as L242-6 3° and 4° of the French Commercial Code (*Code de commerce*).
[8] Section 266 StGB.

company interests in the French offence of abuse of company assets may be interpreted as acting in a way to cause loss or expose the company to abnormal risk of loss. These formulations may be influenced by legal tradition and as long as there is no doubt about including excessive risk, there is no need for criticism. It is more problematic when excessive risk is hidden under terms, which may suggest that criminalisation is limited to effective losses. This is the case for Germany, where only jurisprudential interpretation extended the understanding of the term "damage" to include excessive risk by using the concept of "risk-damage". The details of this interpretation have changed considerably over time from a more extensive approach to a new, stricter one.[9] The extension from the requirement of damage to excessive risk demonstrates a need for criminalising excessive risk-taking by managers and it shows that the judges may feel compelled to provide for it by extending interpretation of the terms of available offences. The evaluation of the interpretation of the notion of "risk-damage" demonstrates however how detrimental this approach is from the point of view of legal certainty.

As regards the legal interests protected by the analysed offences, these focus on protecting property or financial interests of the company and (more or less directly) of the shareholders. They differ as to the consideration given to the stakeholders, who are protected to the greatest extent by the French legislation and to the least extent by the English one, while the German legal system represents a middle way position. This is in accordance with the findings of this study because the question of balance of protection between these circles of actors is a policy question.

The analysed offences do not address the protection of systemic economic interests. While the analysis above discussed the method of using criminal law to enforce certain rules in order to protect economic systemic interests, full examination of how this is done in the examined legal systems would require another body of research. Such research should be combined with cross-disciplinary analysis of what a systemically important institution is and which rules should be considered as systemically relevant. Research of this kind would belong to company law rather than to the criminal law domain and, as already noted in the introduction, falls outside the scope of this study. However, two remarks in this respect can be made. Firstly, the

[9] For details, see the analysis in Chapter IV: 3.5.3. Risk-damage – '*Schadensgleiche Vermögensgefährdung*'.

offences criminalising excessive risk-taking in companies play indirectly the function of protecting the economic system because by safeguarding the companies from abuses of its assets, they should contribute (at least in theory) to the prosperity of the economy. This aim is reached under the condition that the abuses are punishable despite the shareholders' consent to acts which are detrimental for the company. This is the case for France and to a limited extent for Germany.

Secondly, two legal systems introduced provisions which incriminate excessively risky management of systemically important banking (and in the case of Germany insurance) institutions. They will be critically analysed below in the section devoted to the respective systems.

3.2. England

The English legal system provides for a plethora of offences, which, at least in theory, may be used to punish managers taking excessively risky decisions as regards the assets of their companies. All these offences provide for liability only if they are committed intentionally. Hence, the liability for recklessness, recommended in this study, is excluded. While the latter choice of the legislator may be accepted, as recklessness is considered here a borderline case, the abundance of legislation may be questioned. In particular the existence of various inchoate offences punishing possession of items that may be used for committed fraud (e.g. in form of exposing the company to excessive risk) might lead to liability for acts posing slight, if not inexistent danger. The threat of such unjust solutions is tempered by prosecutorial discretion and so far no cases where the necessity of conviction could be called into question have been identified.

The seemingly vast criminalisation offered by the English system is limited by the requirement of dishonesty. This requirement, which is the core feature of the English system as regards cases analysed in this study, will affect the understanding of both the *actus reus* and the *mens rea*. It includes into the definition of the offence a sort of moral judgement. In cases where the jury acts as the tribunal of facts, the dishonesty will be decided by this body, i.e. a group of twelve laymen, most probably

without experience in business affairs, and based only on a formal test. Moreover the juries do not give reasons for their findings.

Dishonesty is an element of definitions of many other offences in the English legal system (e.g. theft, false accounting) and has a long tradition. It would go far beyond the scope of this study to examine the pros and cons of this requirement, which is subject to debate in the English literature.[10] A similar remark can be made about the jury system. Some limited observations can however be made. The analysis of the offences offered by the English legal system proved that despite providing for various requirements eventually the whole wrongdoing was explained by this limb. One could wonder whether all offences analysed in the English chapter could not in fact be replaced by one criminalising "acting dishonestly" in business. Dishonesty can be interpreted differently by different persons, but also have divergent meanings within various groups of people. Whilst it may be reasonable not to let the managers be detached from the moral standards of normal (reasonable and honest) people, the absence of a body of jurisprudence caused by the lack of justification for juries' decisions impedes better understanding of this limb as applied to concrete cases. Due to all these factors such a solution does not contribute to legal certainty and it also fails to send a clear signal to potential perpetrators as to what types of acts or omissions should be avoided. The use of such imprecise terms to define the core of the offence requires significant trust in the functioning of the justice system. It cannot be excluded that investigative authorities would open proceedings for any, even slightly doubtful, act. While such an approach may give correct results within a concrete legal system, it cannot be recommended as a model in general.

The study proved that the use of the requirement of dishonesty also has two consequences for the liability for excessive risk-taking. The impossibility of foreseeing the result of a jury trial limits cases for fraud or conspiracy to defraud to those where dishonesty is not very problematic. It results that the offence contains additional requirements, not defined in the offence, elevating the threshold of criminal liability: the manager must either behave in a way, which would compromise his integrity or act in personal interest. This study does not call for such requirements, although it cannot be excluded that on many occasions they will anyway be fulfilled.

[10] See for instance: Ashworth, *Principles*... (note 1) p. 65; Richard Tur, 'Dishonesty and the Jury: A Case Study in the Moral Content of Law', *Philosophy and Practice*, 18 (1984), pp. 75-96.

A very limited number of identified cases leaves doubts as to whether in practice the system penalises the wrongdoing in question in this study.

Another aspect of the English legal system is that it contains a common law offence of conspiracy to defraud. As already mentioned in Chapter II, the use of this offence, and in general of the common law offence, has been subject to debate. It would go beyond the scope of this study to analyse this problem. In principle, common law offences fulfil the requirements of Article 7 ECHR.[11] The shortcomings of this offence are in line with the comments above: problems of the requirement of dishonesty and the overly extensive scope encompassing acts, which create only a very slight risk of harm.

Since recently the English legal system has also contained an offence punishing banking managers for decisions which fall far below what could reasonably be expected from a person in the manager's position and taken while being aware that the implementation of the decision they took or failed to prevent carries a risk of causing the failure of the entire institution.[12] The aim of this offence is mainly the protection of the economic system. This formulation of the requirement of conduct comprises excessive risk taking. It must however be criticised for its vague language. Moreover, this offence contains the requirement that the implementation of the manager's decision caused the failure of the bank. This requirement not only limits the application of the offence to those unlucky managers, whose institutions effectively collapsed, but it renders the offence toothless, as it may be very difficult to prove that a concrete decision effectively caused the collapse of the institution. Furthermore, it limits its application also to the senior management. In effect it can only be a reaction to an already occurred catastrophe and only, if liability can be clearly attributed. The fact that the offence opens criminal liability to recklessness, as it is recommended by this study, does not compensate for the mentioned shortcomings. Since the law provided for the offence has not yet entered into force, it is necessary to wait and see how the practice will react to these limitations.

[11] Christoph Grabenwarter, *European Convention on Human Rights. Commentary*, (C. H. Beck, Hart, Nomos, Helbing Lichtenhahn Verlag, 2014) p. 174.
[12] Section 36 Financial Services (Banking Reform) Act 2013.

3.3. France

The assessment of the French legal system points out to several positive aspects of the French solution and to its major shortcomings. The French offence of abuse of company assets is based around the notion of acting against the company interests. An act (including an omission) is interpreted as being against the company interests, if it is of such character that in normal circumstances it causes loss or exposes the company to an abnormal (i.e. excessive) risk of loss. This approach is very much in line with the one recommended in this study, which demonstrated that these two aspects of mismanagement should be taken into account by the criminal provision. The lack of requirement of result, but assessing the detrimental character of the manager's act on the basis of its potential results in normal circumstances is also in accordance with the philosophy argued for *supra*. Such an approach does not leave criminal liability in the hands of fortune, but addresses all serious misdealings. At the same time it avoids punishing managers whose acts, although not fully in compliance with some standards, were not of such gravity as to create abnormal risk of loss, where the loss occurred due to sheer bad luck. The offence sends quite a clear message as to what kind of activity should be avoided.

Although the scope of criminalisation created by the definition of conduct is well designed, two limitations inherent in the offence merit criticism. First of all it is applicable only to a very limited circle of perpetrators, namely the senior management of companies. This solution is doubtful as it excludes from its scope a large group of persons who may act against the interests of their companies and merit punishment in the same way as the senior management. This concerns in particular bigger companies with more sophisticated management structures. As a result of this limitation other solutions have to be used in order to bring to justice managers who abused their position. One solution is to use the rules on complicity, which however requires that the main offence was committed by a senior manager. The second solution is to use the offence of abuse of trust. In order to apply this offence to mismanagement, it requires a broad interpretation of the requirement that the perpetrator misappropriated the assets of the company. Therefore the application of this offence is limited as regards cases of excessive risk-taking.

Secondly, the application of the offence of abuse of company assets is limited by the requirement that the senior manager acted in his personal interest. It was demonstrated above that such a limitation is only necessary as regards liability for recklessness, which as such is not at all provided for in the French system. Adding this requirement is a policy choice, which excludes from the scope of the offence situations where the perpetrator knowingly exposed the company to excessive risk, but without looking for personal benefit. Such a choice may be justified by the fact that acting in personal interest, at the expense of the company, adds a layer of wrongfulness to an act of mismanagement. However, as abundant jurisprudence demonstrates, the judges when confronted with an act which gravely infringes the interests of the company exhibit a tendency to interpret the requirement broadly, thus negating its real meaning for the definition of the offence. Such an extensive interpretation, where 'diluted' personal interest is sufficient, has not yet been applied in cases of excessive risk-taking. The possibility of its future application, however, cannot be excluded. In sum, while the limitation of the requirement of personal interest, according to this study, unnecessarily limits criminal liability as regards acts exposing companies to excessive risk, the potential use of the concept of 'diluted' personal interest does not contribute to legal certainty as regards the precise scope of the offence.

3.4. Germany

The German offence of *Untreue* has been intensely criticised in the (more than abundant) German literature. There is no need to repeat these criticisms here and their most relevant aspects were pointed out in Chapter IV. Therefore the remarks formulated below will be limited to the problem of excessive risk-taking by managers.

The German solution can be praised for including a wide scope of perpetrators. It is described in an abstract way, allowing the judges to apply the offence indiscriminately to managers of all levels of company hierarchy. What merits criticism is the design of the requirements of conduct and result and, to a limited extent, uncertainty as regards *mens rea*.

The distinctive characteristic of the German model is that for criminal liability it requires that the manager breach a rule aimed at protecting the financial interest of the company. As such this technique is not questionable and it could contribute to legal certainty if the catalogue of rules is well defined. The consequence of using this method is that it leaves less scope of appreciation in the hands of the judge who has to rely on interpretation based in another domain of law. It is important that he does not become just a civil servant providing for a punishment for breaches of rules defined in other domains of law. In theory, such a risk does not exist in the German system as the offence also contains further requirements describing the perpetrator's wrongdoing. Furthermore, in practice the outcome will not differ much from the other examined legal systems, where the acts of the perpetrator will often breach an applicable rule or standard. However the application of this method creates the risk that it is impossible to punish a manager who clearly and deliberately acted against his company's interests, but for some nuanced reason he did not infringe the rules. In order to avoid this danger in the system it is necessary that the set of applicable rules is tight enough to avoid such loopholes.

In contrast to the advantages of the analysed technique as enumerated above, the application of the requirement of a rule breach within the offence of *Untreue* has created some unnecessary confusion. Some courts have required that the breach of rules be severe. While it may be justified by the principle of subsidiarity to increase the threshold for criminal liability, in comparison with e.g. civil liability, this has resulted in losing the benefit of certainty. Not only is the requirement not part of the definition of the offence, but it was also unclear what "severely" means. Furthermore the decision to limit the catalogue of breaches to those, which aim at protecting the financial interests of the company, may also raise doubts. A manager may expose the company to excessive risk or cause a loss by breaching rules describing the duties towards the administration. It is not so much a question of a catalogue of rules, but a question of whether a manager knowingly acts against the company interest. The wrongfulness is not so much in the breach of rules, but in the manager's awareness that he is acting against the company interests.

As already mentioned, the offence of *Untreue* as interpreted in the jurisprudence includes the result in the form of excessive endangerment of the company through the notion of 'risk-damage', while the text of the offence provides

only the result in the form of damage. It is probable that the attempts of the German jurisprudence to extend the concept of damage to encompass excessive risk are testament to frustration that the offence omits something which is wrong and should be included into the scope of *Untreue*. At the same time criminal law should not be subject to overly broad interpretation and recent efforts of the jurisprudence to limit the application of the concept of 'risk-damage' should be understood in this sense. However, it creates a situation, where criminal liability depends on accountancy rules and opinions of experts as to whether the risk can be quantified or not. The logic of this solution is understandable in light of the offence. It risks however drawing the line in a way, which may not correspond with the justice and fairness. While neither the old approach nor the new one is satisfactory, it is recommendable to clearly state in the offence that it encompasses excessive risk.

The last element of the offence of *Untreue*, which created doubts as to its scope is *mens rea* as it was uncertain whether the perpetrator who created the result in the form of 'risk-damage' should have also foreseen that his act may cause an effective loss. Such a solution merits criticism, with which it was met in the German literature, as summarised in Chapter IV. So far however this approach does not seem to have gained wide acceptance.

In a development similar to those observed in the English legal system, the German legislator recently introduced special offences punishing the excessively risky management of banking (and also insurance) institutions.[13] The offence allows judges to punish managers who breach one of the enumerated risk-preventive measures, which as such would stay in line with the approach proposed in this study (provided that the punishment is in proportion to the infringement). However the offence requires an effective collapse of the institution and a causal link between the manager's failure and this result. The same remarks about the difficulty of proving especially the latter requirement, which were formulated as regards the English system, can be repeated here. Yet again the circle of potential perpetrators is limited to senior managers. Moreover the manager needs to be warned by the competent Financial Supervisory Authority about the failure of the institution to have an enumerated risk-preventive measure in place and he has to be requested to remedy

[13] Section 54a KWG and Section 142 VAG.

this situation. Only a failure to execute this request may lead to criminal liability, and provided that it leads to the effective collapse of the institution. In view of these requirements, the fact that the offence comprises liability for negligence (as regards the detrimental result) does not alleviate much of the scepticism about the practical application of the said offences. If they are to be used at all, they will only be applicable to managers who knowingly failed at least twice to implement risk-preventive measures and effectively led to the collapse of a systemically important institution. While this may satisfy some need for justice, it is hard to foresee how this solution should effectively contribute to the protection of economic systems.

4. Final conclusion

Cicero considered it to be the gravest injustice when a person hides their falsity under a mask of good man.[14] Dante puts those who betray trust vested in them in the lowest circle of sinners.[15]

Managers who act against the interests of their companies can easily find themselves in the centre of criticism of these two moralists. While the mask of serious and successful businessman and the attached allure can hide their abuses, it qualifies their acts as the gravest injustice according to Cicero. Betraying the trust of those who entrusted them their assets and the belief of the stakeholders that their behaviour is motivated only by the interest of the companies they represent deserve the greatest damnation in the eyes of Dante.

Without discussing the hierarchy of wrongdoing, breaching the trust of shareholders and stakeholders by acting against the entrusted interests of the company

[14] "*Totius autem iniustitiae nulla capitalior quam eorum, qui tum, cum maxime fallunt, id agunt, ut viri boni esse videantur*" – Cicero, *De Officiis*, from the double language edition by Walter Miller (London: Heinemann, 1928) at [41]. There exist several translations of this book, besides the one mentioned, also: Cicero, *On Obligations*, translated by P.G. Walsh (Oxford University Press, 2000), p. 17 or Cicero, *On Duties*, translated by M. T. Griffin, edited by M. T. Griffin and E. M. Atkins (Cambridge University Press, 1991). The version cited at the beginning of this study uses the translation quoted in: Paul G. Chevigny, 'From Betrayal to Violence: Dante's Inferno and the Social Construction of Crime', *Law & Social Inquiry*, 26 (2001), No. 4, pp. 787-818, 788.

[15] "*Per l'altro modo quell' amor s'oblia che fa natura, e quel ch'è poi aggiunto, di che la fede spezïal si cria; onde nel cerchio minore, ov' è 'l punto de l'universo in su che Dite siede, qualunque trade in etterno è consunto.*", Dante Alighieri*, La Divina Commedia, Inferno*, as edited by Giorgio Petrocchi (Milano: A. Mondadori Editore, 1966-67), canto 11, at [61-66]. The English translation used at the beginning of this study provided by Robert Hollander, Jean Hollander, The Inferno, (Doubleday/Anchor, 2000).

does deserve a criminal response. Most commonly such acts of the managers cause loss and the visibility of the detrimental results makes the need for a criminal law reaction less debatable. The objective of this study was to analyse criminal response to the less obvious modality, which is exposing companies to excessive risk. The study thoroughly and critically examined the state of the art in three selected legal orders – England, France and Germany – as well as analysing whether it is legitimate and proportionate to provide for such criminalisation and how this ought to be done.

It was demonstrated that all three legal systems feature provisions encompassing excessive risk-taking by managers. However as regards all these systems important shortcomings have been identified, which limit their use for cases deserving criminal law response. The analysis revealed that in situations where excessive risk-taking is not directly targeted by a criminal law provision, the jurisprudence has a tendency to extend the understanding of the requirements of available offences in order to punish such acts.

The normative part of this study proved that it is indeed legitimate and proportionate to criminalise excessive risk-taking. It elaborated conditions for such a criminalisation, suggesting the provision of offences of intentional and reckless mismanagement. The detailed design of these offences has been discussed and criminalisation of its negligence modality has been excluded. While these model offences aim at protecting the interests of companies, shareholders and, to variable extent, stakeholders, there may also be a need to subject to criminal liability breaches of certain rules aimed at safeguarding the interests of the economic system. The study examined also the general conditions of this type of offences, which could potentially extend even to acts committed negligently.

In sum, criminal law has been and should be used to contain abuses of companies consisting in exposing them to excessive risk. While the last financial crisis (2007-2008) showed the dangers of excessive risk in business, the importance of the issue goes beyond times of economic difficulties and must be seriously addressed by legislators. Punishing excessive risk does not necessarily mean that criminal law liability should be extended to the preparatory stage of wrongdoing, since the act of the perpetrator takes place in any case and it is sometimes a question of sheer luck if it causes a loss, exposes the company to a risk of loss or even takes place without any

detrimental consequences. Although risk is certainly a less precise category than effective damage, this does not mean that it cannot be grasped and proven. And if it cannot be demonstrated with the required certainty, the perpetrator must benefit from the *in dubio pro reo* rule.

On the other hand, legislators should avoid the tendency of attempting to cure all problems by using criminal law. Criminalisation should be justified, observe basic principles and be limited to that which is truly necessary. The economy should not be thwarted by unnecessarily burdensome criminalisation, and enough space should be left for human creativity. Risk is an inherent part of business. In order for it to thrive, it must also embrace failure. Criminal law should not be used to punish a scapegoat after a failed project, or managers whose creativity led them to breach some standards or resulted in losses but where they did not betray the trust vested in them. Only those who effectively abuse the rights to manage the company should be the focus of criminal law provisions.

Appendix 1: English Summary

Stanisław Tosza

Criminal Liability of Managers for Excessive Risk-Taking?

The aim of the thesis was to analyse and evaluate the criminalisation of excessively risky decisions taken by managers of limited liability companies. This research examines possibilities to punish excessive risk-taking in three selected legal orders representing three different models of criminalisation (England and Wales, France and Germany) and analyses whether it is justified and proportionate to criminalise excessive risk-taking. Since the latter proved to be the case, it formulates a blueprint how to design criminalisation of such acts taking into account the factual and legal background within which such a criminalisation would have to be fitted. This proposal might serve the national legislator as well as potentially the European one.

While most commonly managers who act contrary to the company interests or breach relevant rules would be subject to criminal liability when they cause loss to the company, the question of the need to punish excessively risky decisions can appear in three situations. Firstly and most typically it would be the case where an act of mismanagement was detected, but no loss occurred. The prosecution may also be inclined to look for a possibility to punish excessively risky management, if it is impossible to prove the loss according to the relevant standard of proof or where it is impossible to link it to the manager's act.

These cases remain at the borderline between causing a loss to the company because of wilful misuse of the company assets and decisions, which were technically correct and taken without breaching any applicable rules, but turned out to be failures, which resulted in a loss for the company. The excessively risky decision in this context does not cause loss (at least not yet), but there is a need to demonstrate that the risk was excessive, thus its analysis must significantly enter into the sphere of the quality of the business decision.

In order to examine criminalisation of excessive risk-taking three legal orders containing relevant provisions have been identified: England and Wales[1], France, Germany. As to the first, the Fraud Act 2006, in particular fraud by abuse of position provided for in Section 4, provides a possibility to punish a manager who dishonestly abuses his position by exposing the company to excessive risk. The French offence of *abus de biens sociaux* (provided mainly by Article L241-3 4° and 5° as well as Article L242-6 3° and 4° of the Commercial Code – *Code de commerce*) punishes high-level managers for acting against the company's interests. Exposing the company to excessive risk is one of the forms of acting against these interests. The offence of *Untreue* in German law (Section 266 of the Criminal Code, StGB) punishes improper conduct in relation to entrusted property if the conduct results in damage. However the theory of *"schadensgleiche Vermögensgefährdung"* associates, under certain conditions, endangerment with damage and thus excessive risk-taking is also incriminated.

By criminalising managers' excessive risk-taking criminal law enters a sphere, which is at the core of the activity it affects. At the same time it provides for criminal punishment for courses of conduct that without doubt can be extremely harmful. In none of the chosen countries is taking excessive risk criminalised as such, but rather remains one of the possibilities to commit the offence mainly targeting acts causing effective loss. It is therefore highly relevant to shed light on this type of managerial misconduct in existing law and to evaluate whether it is justified and proportionate to criminalise it, and if so, under which conditions and to what extent.

The analysis is limited to managers of companies, which have legal personality and their own assets. While the legal framework of company law may differ significantly between national systems, the typical models for such companies are the limited liability company (*société à responsabilité limitée*, *Gesellschaft mit beschränkter Haftung*) and the public limited company (*société anonyme*, *Aktiengesellschaft*). The analysis focuses mainly on these types of companies.

The methodological approach chosen for this study is composed of an in-depth study of the three selected legal systems, functional comparison of identified solutions

[1] For the sake of brevity further references to the legal system of England and Wales will only use 'England' or 'English'.

as well of a normative study aiming at proposing recommendations for a use of criminal law to counter excessive risk-taking. The results of the latter analysis inspired by the findings of functional comparison is used to evaluate the approaches in the three selected legal orders. An additional methodological tool used throughout the whole study is a set of five sample cases illustrating typical situations of excessive risk-taking.

The structure of this study is composed in the following way:

After the introduction presenting the objectives, the design and the methodology of the study, the following three chapters analyse the criminalisation of excessive risk-taking in the three national legal systems (Chapter II. England and Wales, Chapter III. France and Chapter IV. Germany). The function of these chapters is twofold: on the one hand they analyse the existing law in view of excessive risk-taking, which is in particular important as regards the English and the French legal systems, where such analysis is scarce. On the other hand they should set the scene for the comparative analysis.

In order to achieve a common platform and facilitate the comparison, the three national chapters are built up according to the same structure, complemented only by necessary adaptations to the particularities of each of the systems. After identifying the relevant offences in the analysed system, the first two subchapters analyse the historical aspects of the introduction of relevant provisions and their subsequent modifications in the context of their application to excessive risk-taking. The third subchapter is devoted to the analysis of the identified offences. It is composed of sections on relevant aspects of the *actus reus* and the *mens rea*. The two following subchapters present the possibilities to extend criminal liability through the criminalisation of inchoate offences, such as attempts, conspiracy or possession of materials to be used in the course of the commission of the offences or through possibilities to punish persons involved in the commission of the offence through different forms of perpetration, aiding or abetting. The sixth subchapter is dedicated to selected factors that may exclude criminal liability. The analysis of criminal liability for all of the selected offences is complemented in the following subchapter by a brief presentation of the punishment provided for these offences. Before each of the national chapters is closed with concluding remarks, the penultimate subchapter

examines the relevant offences in the context of the five sample cases discussing whether it is possible to punish the acts described in these cases and which factors will determinate criminal liability.

Having analysed the possibilities to criminalise excessive risk-taking and setting the common ground for comparison, Chapter V provides the comparative analysis of the three national systems. The aim of this chapter is to establish what are the models of criminalisation of excessive risk-taking by managers and what are the crucial factors determining criminal liability in each of the systems and providing distinguishing characteristics for these systems. The crucial findings of this chapter can be summarised as follows:

Besides a similar approach as regards protected legal interests, the three models of incrimination present various similarities in the design of the offences. However, the three models differ as regards key requirements which shape the scope of liability and will be ultimately decisive for the focus of the prosecution. These requirements also reflect the policy choices as well as criminal law traditions of each system. The distinctive feature of the English model, which is constructed around the offence of fraud by abuse of position and the common law offence of conspiracy to defraud, is its reliance on the concept of dishonesty. The French system based on the offence of abuse of company assets is shaped by two requirements that will be decisive for criminal liability and will significantly curb the possibilities to punish managers taking excessively risky decisions. First of all, contrary to the two other systems, the French one restricts liability to head management. Secondly, the manager must act in personal interest. The distinctive feature of the German model based on the offence of *Untreue* is that it requires establishing that the manager breached a concrete rule defining his conduct and that this rule was aimed at protecting the financial interest of the company.

Chapter VI is devoted to the normative analysis of the problem of criminalisation of excessive risk-taking. It discusses whether it is justified and proportionate to criminalise excessive risk-taking and if yes, under which conditions and to which extent. The chapter provides a normative framework including the theories on reasons for criminalisation (such as the harm theory and the theory of legal goods) as well as principles limiting the use of criminal law (Principle of *Ultima*

ratio and the Principle of Proportionality as well as legal certainty and fair warning), and further analyses the problem of excessive risk-taking by mangers against its backdrop. It demonstrates that to a certain extent it is legitimate to criminalise excessive risk-taking by managers in companies and examines the conditions determining the scope of such criminalisation. It concludes that two types of criminal offences are legitimate and proportionate:

1) a general offence of mismanagement punishing for exposing the company to excessive risk (or causing a loss),

2) offence(s) enforcing concrete risk-preventing rules.

As to the first type of offence, it proved to be proportionate to criminalise mismanagement, if it was committed intentionally or recklessly, provided for the latter form that the perpetrator acted with personal interests. Its aim is to protect the interests of the company together with the interests of the shareholders as well as stakeholders. The question whether the interests of the shareholders (as owners of the company) should be given priority is a policy issue, which will mainly be reflected through the rules on the validity of consent to acts exposing the company to excessive risk. The second type of offences aims at protecting interests of the economic system. Depending on the concrete rule in question, the gravity of potential consequences of its breach and other considerations that might be necessary as regards the rule in question, it may be legitimate to criminalise the breaches even if committed negligently.

Based on this outcome, the concluding Chapter VII firstly examines what should be the conditions and boundaries of criminalisation of excessive risk-taking, which variables the legislator may use in defining it, and what may be the consequences of particular choices. Secondly, in view of these findings, the three national regulations are examined as regards whether they fulfil the criteria of criminalisation elaborated in this study. The study concludes that while all three legal systems feature provisions encompassing excessive risk-taking by managers, all the systems present important shortcomings, which limit their use for cases deserving criminal law response. Furthermore the analysis revealed that in situations where excessive risk-taking is not directly targeted by a criminal law provision, the

jurisprudence has a tendency to extend the understanding of the requirements of available offences in order to punish such acts.

Appendix 2: Dutch Summary (*Samenvatting*)

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Strafrechtelijke aansprakelijkheid van leidinggevers voor het nemen van buitensporige risico's?

Het proefschrift heeft als doel de strafbaarstelling van het nemen van buitensporig risicovolle beslissingen door managers van bedrijven met beperkte aansprakelijkheid te analyseren en te evalueren. Dit onderzoek neemt de mogelijkheden om het nemen van buitensporige risico's te bestraffen onder de loep binnen drie voor dit onderzoek geselecteerde rechtsordes (Engeland en Wales, Frankrijk en Duitsland). Het gaat ook na of het bestraffen van het nemen van buitensporige risico's proportioneel en gerechtvaardigd is. Aangezien in dit onderzoek wordt geconcludeerd dat dit het geval is, wordt een blauwdruk voorgesteld voor een strafbaarstelling van dergelijke handelingen, rekening houdend met de feitelijke en juridische achtergronden waarin een dergelijke strafbaarstelling zou moeten passen. Dit voorstel zou nuttig kunnen zijn voor de nationale en de Europese wetgever.

Hoewel managers die de bedrijfsbelangen schaden of de toepasselijke regels overtreden meestal eerst strafrechtelijk bestraft worden als ze het bedrijf schade toebrengen, kan men de vraag of bestraffing van buitensporige risico's nodig is, in drie gevallen stellen. In het eerste en meest typische scenario wordt het wanbeleid vastgesteld, zonder dat er schade aan het bedrijf werd toegebracht. De openbare aanklager zou ook geneigd kunnen zijn om buitensporig risicovol bestuur te vervolgen als het onmogelijk is om de schade te bewijzen overeenkomstig de toepasselijke bewijsregels of indien het onmogelijk is die schade te verbinden aan de handeling van de manager.

Dergelijke gevallen liggen op de grens tussen enerzijds het veroorzaken van een verlies voor het bedrijf door opzettelijk bedrijfsactiva te misbruiken en anderzijds beslissingen die technisch gezien correct waren en geen inbreuk vormden op de

toepasselijke regels, maar toch tot een mislukking leidden met schade voor het bedrijf tot gevolg. De buitensporig risicovolle beslissing veroorzaakt in deze context (nog) geen schade, maar wel moet worden aangetoond dat het risico buitensporig was, hetgeen impliceert dat de kwaliteit van de zakelijke beslissing in de analyse wordt betrokken.

Drie rechtsordes werden met het oog op de analyse van de strafbaarstelling van het nemen van buitensporige risico's geïdentificeerd: Engeland en Wales[1], Frankrijk en Duitsland. In Engeland voorziet de '*Fraud Act 2006*', en meer bepaald artikel 4 dat betrekking heeft op fraude door middel van misbruik van functie, in de mogelijkheid om managers te straffen voor het bedrieglijk misbruik maken van hun functie door de blootstelling van het bedrijf aan buitensporige risico's. Het Franse misdrijf *abus de biens sociaux* (voorzien in artikel L241-3 4° en 5°, alsook artikel L242-6 3° en 4° van de *Code de commerce*) betreft hooggeplaatste managers wier handelingen ingaan tegen de bedrijfsbelangen. Het blootstellen van het bedrijf aan buitensporige risico's wordt beschouwd als handelen tegen de bedrijfsbelangen. In Duitsland stelt de *Untreue*-bepaling (artikel 266 van het Strafwetboek, *StGB*) foutief handelen in verband met toevertrouwde goederen of zaken strafbaar indien het handelen schade veroorzaakt. Evenwel stelt de zogenoemde *"schadensgleiche Vermögensgefährdung"*-theorie, indien bepaalde voorwaarden vervuld zijn, gevaarzetting gelijk aan schade en dus wordt het nemen van buitensporige risico's ook strafbaar gesteld.

Met de strafbaarstelling van het nemen van buitensporige risico's door managers begeeft het strafrecht zich op een terrein dat behoort tot de kern van zakelijke activiteit. Tegelijkertijd voorziet het in de strafrechtelijke beteugeling van gedrag dat bijzonder schadelijk kan zijn. Het nemen van buitensporige risico's is in geen van de geselecteerde rechtsordes als zodanig strafbaar gesteld; het gedrag blijft daarmee veeleer één van de verschijningsvormen van een misdrijf dat gericht is op handelingen die reële verliezen veroorzaken. Bijgevolg is het uiterst belangrijk om de bestaande wetgeving betreffende dergelijk wanbeleid door managers onder de loep te nemen en na te gaan of de strafbaarstelling ervan gerechtvaardigd en proportioneel is, en zo ja, onder welke voorwaarden en in welke mate.

[1] Hierna wordt naar 'Engeland en Wales' verwezen als volgt : 'Engeland' of 'Engels'.

De analyse is beperkt tot managers van bedrijven die over rechtspersoonlijkheid en een eigen vermogen beschikken. Hoewel het juridisch kader van het rechtspersonenrecht in de nationale rechtsordes sterk kan verschillen, zijn de typische rechtsvormen van dergelijke bedrijven de vennootschappen met beperkte aansprakelijkheid (*société à responsabilité limitée*, *Gesellschaft mit beschränkter Haftung)* en de naamloze vennootschap (*société anonyme*, *Aktiengesellschaft)*. De analyse heeft voornamelijk betrekking op die rechtsvormen.

Op methodologisch vlak omvat het proefschrift een diepgaand onderzoek van de drie geselecteerde rechtsordes, een functionele vergelijking van de daarin gevonden oplossingen, alsook een normatieve studie gericht op het formuleren van aanbevelingen inzake het gebruik van het strafrecht om het nemen van buitensporige risico's tegen te gaan. De resultaten van die studie, die geïnspireerd zijn door de bevindingen van de functionele vergelijking, worden gebruikt om de aanpak in de geselecteerde rechtsordes te evalueren. Een bijkomend methodologisch instrument is de reeks van vijf voorbeeldcasussen die doorheen het gehele proefschrift gebruikt worden om typische gevallen van het nemen van buitensporige risico's toe te lichten.

Het proefschrift is als volgt gestructureerd:

Na in de inleiding het doel, de opbouw en de methodologie van de studie geschetst te hebben, wordt in de volgende drie hoofdstukken een analyse gemaakt van de strafbaarstelling van het nemen van buitensporige risico's in de drie nationale rechtsordes (Hoofdstuk II. Engeland en Wales, Hoofdstuk III. Frankrijk en Hoofdstuk IV Duitsland). Die hoofdstukken hebben een dubbele rol: enerzijds analyseren zij de bestaande wetgeving in verband met het nemen van buitensporige risico's, wat bijzonder belangrijk is in de Engelse en Franse rechtsorde, waar dergelijke analyses vooralsnog beperkt zijn, anderzijds bereiden zij de vergelijkende analyse voor.

De drie nationale hoofdstukken hebben dezelfde structuur om een gemeenschappelijke basis te creëren en de vergelijking te vergemakkelijken. Waar nodig werden echter aanpassingen doorgevoerd aan de bijzonderheden van elk van de drie rechtsorders. Eerst worden de relevante misdrijven in de geanalyseerde systemen geïdentificeerd, om vervolgens in de eerste twee delen van ieder hoofdstuk in te gaan op de historische aspecten van de invoering van de relevante bepalingen en de daaropvolgende wijzigingen in het kader van hun toepassing op het nemen van

buitensporige risico's. Het derde deel van ieder hoofdstuk is gewijd aan de analyse van de geïdentificeerde misdrijven en het bestaat uit onderafdelingen die de relevante aspecten van *actus reus* en *mens rea* behandelen. De twee daaropvolgende delen behandelen de mogelijkheden om de strafrechtelijke aansprakelijkheid uit te breiden via de strafbaarstelling van pogingen, samenspanningen of het in het bezit zijn van voorwerpen die gebruikt kunnen worden bij het plegen van het misdrijf of door de methodes om personen die betrokken zijn bij het plegen van het misdrijf door verschillende vormen van daderschap en deelneming. Het zesde deel van ieder hoofdstuk gaat in op bepaalde elementen die de strafrechtelijke aansprakelijkheid kunnen uitsluiten. In het volgende deel van ieder hoofdstuk wordt de analyse van de strafrechtelijke aansprakelijkheid voor de geselecteerde misdrijven aangevuld met een kort overzicht van de straffen die voor die misdrijven bepaald zijn. Vervolgens wordt in het voorlaatste deel nagegaan of de relevante misdrijfbepalingen, toegepast op de vijf voorbeeldcasussen, gebruikt kunnen worden om de handelingen die in die casussen beschreven worden, te bestraffen en welke elementen bepalend zullen zijn voor de eventuele strafrechtelijke aansprakelijkheid. Tot slot worden de nationale hoofdstukken afgerond met enkele slotopmerkingen.

Na de analyse van de mogelijkheden om het nemen van buitensporige risico's strafbaar te stellen en het schetsen van de basis voor vergelijking, komt in Hoofdstuk V de vergelijkende analyse van de drie nationale systemen aan bod. Dit hoofdstuk heeft tot doel de verschillende modellen in kaart te brengen van de strafbaarstelling van het nemen van buitensporig risicovolle beslissingen door managers, met oog voor de doorslaggevende elementen voor de strafrechtelijke aansprakelijkheid in elk van de rechtsordes, en met aandacht voor de onderscheidende kenmerken van die rechtsordes. De belangrijkste conclusies van dit hoofdstuk kunnen als volgt samengevat worden:

De drie modellen van strafbaarstelling benaderen niet alleen de beschermde belangen op een gelijkaardige wijze, ze vertonen ook talrijke gelijkenissen qua opbouw van de misdrijven. De drie modellen verschillen op het vlak van enkele beslissende constitutieve elementen die bepalend zijn voor de strafrechtelijke aansprakelijkheid en doorslaggevend zijn voor de vervolging. Die elementen zijn een weergave van de beleidskeuzes en de strafrechtelijke traditie van elke rechtsorde. Het onderscheidende kenmerk van het Engelse model, dat opgebouwd is rond het misdrijf

van fraude door middel van misbruik van functie en het gemeenrechtelijk misdrijf van samenspanning tot oplichting is het grote belang van de notie misleiding Het Franse systeem, gebaseerd op het misdrijf van misbruik van goederen van de onderneming, wordt sterk bepaald door twee elementen die doorslaggevend zijn voor het vaststellen van strafrechtelijke aansprakelijkheid en die de mogelijkheden om managers te bestraffen voor het nemen van buitensporig risicovolle beslissingen sterk beperken. In de eerste plaats beperkt het Franse systeem, in tegenstelling tot de twee andere, de aansprakelijkheid tot het topkader van het management. Ten tweede moet de manager zijn eigen belang behartigen. Het onderscheidende kenmerk van het Duitse model, dat steunt op het *Untreue*-misdrijf, is gelegen in het vereiste dat men aantoont dat de manager een concrete regel overtreden heeft die een bepaalde handeling voorschrijft en dat die regel erop gericht was de financiële belangen van het bedrijf te beschermen.

Hoofdstuk VI bevat de normatieve analyse van het concept van de strafbaarstelling van het nemen van buitensporige risico's. Nagegaan wordt of de strafbaarstelling daarvan gerechtvaardigd en proportioneel is en zo ja, onder welke voorwaarden en in welke mate. Dit hoofdstuk biedt een normatief kader, met inbegrip van de voornaamste algemene theorieën inzake rationes voor strafbaarstelling (zoals de schadetheorie en de theorie over de rechtsgoederen), alsook de principes die het gebruik van strafrecht beperken (*ultima ratio* beginsel, het proportionaliteitsbeginsel, het rechtszekerheidsbeginsel en het voorzienbaarheidsbeginsel). Tevens wordt tegen die achtergrond het probleem van het nemen van buitensporig risicovolle beslissingen verder geanalyseerd. Het onderzoek toont aan dat het in zekere mate gerechtvaardigd is om het nemen door managers van buitensporig risicovolle beslissingen in een bedrijfscontext strafbaar te stellen en het gaat de voorwaarden na die aan een strafbaarstelling van dergelijke handelingen gesteld moeten worden. Geconcludeerd wordt dat twee typen misdrijfbepalingen gerechtvaardigd en proportioneel zijn:

1) een algemeen misdrijf dat wanbeleid bestraft dat het bedrijf blootstelt aan buitensporige risico's (of schade veroorzaakt),

2) misdrijven die het naleven van concrete regels inzake risicopreventie afdwingen.

Met betrekking tot de eerste misdrijfomschrijving, bleek dat de strafbaarstelling van wanbeleid proportioneel is, indien het met opzet of roekeloos

gepleegd was. Indien het op roekeloze wijze gebeurde, moet aangetoond worden dat de dader zijn eigen belang nastreefde. Het doel van de eerste misdrijfbepaling is zowel de bedrijfsbelangen, als de aandeelhoudersbelangen en de belangen van andere belanghebbenden te beschermen. De vraag of aan de aandeelhoudersbelangen (als eigenaars van het bedrijf) voorrang moet gegeven worden is een beleidskeuze, die zijn weerslag zal vinden in de regels die betrekking hebben op het geven van toestemming voor handelingen die het bedrijf aan risico's blootstellen. Het tweede type misdrijven beoogt vooral de belangen van het economisch systeem te beschermen. Afhankelijk van de concrete regel in kwestie, de ernst van de mogelijke gevolgen van de overtreding ervan en van de andere overwegingen verbonden aan die regel, kan het gerechtvaardigd zijn om zelfs overtredingen ervan die uit nalatigheid gepleegd zijn, strafbaar te stellen.

Op basis van deze resultaten, wordt in Hoofdstuk VII nagegaan onder welke voorwaarden en binnen welke grenzen het nemen van buitensporige risico's strafbaar zou kunnen worden gesteld, welke variabelen de wetgever kan gebruiken bij de definiëring ervan, en wat de gevolgen kunnen zijn van de gemaakte keuzes. Vervolgens wordt onderzocht of de wetgeving van de drie nationale rechtsordes, gelet op die bevindingen, in overeenstemming zijn met de in het proefschrift uitgewerkte criteria voor de strafbaarstelling. Geconcludeerd kan worden dat ondanks het feit dat de drie rechtsordes over wetgeving beschikken die van toepassing is op het nemen van buitensporig risicovolle beslissingen door managers, de drie systemen gekenmerkt worden door belangrijke tekortkomingen die hun toepasbaarheid op strafwaardige gevallen beperken. Bovendien komt uit de analyse naar voren dat in gevallen waar het nemen van buitensporige risico's niet rechtstreeks beteugeld wordt door een strafrechtelijke bepaling, de rechtspraak geneigd is om de bestanddelen van bestaande misdrijfbepalingen zo te interpreteren dat ze op dergelijke handelingen toepasselijk zijn.

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Curriculum vitae

Stanislaw Tosza studied law as well as philosophy at the Jagiellonian University of Krakow where he also started his academic career in the Chair of Criminal Law in October 2007. At the time he also contributed to the creation of the Polish National School of Judiciary and Public Prosecution. He continued researching at the Max-Planck Institute for Foreign and International Criminal Law in Freiburg i. Br. as well as studied at the University of Heidelberg (LL.M.). In April 2010 he joined the University of Luxembourg as research associate for the project on the elaboration of the model rules for the procedure of the European Public Prosecutor. This assignment was followed by the thesis on criminal liability of managers for excessive risk-taking prepared in joint-supervision at the University of Luxembourg and at the Utrecht University (2012-2016). His research focuses on European, white-collar and comparative criminal law and he has published in various journals and collective books on these subjects. He has taught criminal law and white-collar offences. He was awarded scholarships by the DAAD, the Max-Planck-Gesellschaft as well as the Luxembourgish Research Funds. Fluent in five languages (Polish, English, French, German, and Spanish) he is also fond of literature, philosophy and classical music.