Corporate Liability for Manslaughter – A comparison between English and German Law*

Von Wiss. Mit. **Anne Schneider**, LL.M., Münster

I. Introduction

When death is caused by a company, the company is liable in tort law. However, more and more legal systems provide for criminal liability as well. In order to illustrate how corporate liability for manslaughter works, two very divergent legal systems will be compared: English and German law.

The comparison of criminal law is a rather new phenomenon.[1] The comparative methodology has traditionally been used by contract lawyers. However, corporate criminal liability has already been discussed all over the world,[2] mostly in view of solutions in other jurisdictions.[3] The eagerness of applying comparative methods in this particular field derives from the fact that corporate criminal liability is a mixture of company law and criminal law[4] and is thus close to civil law, the core subject of comparative lawyers.[5] Therefore, this paper is following a trend among criminal lawyers.

However, the comparison of two utterly different jurisdictions presents a particular challenge. To avoid comparing elements which have nothing in common, the topic must be specified carefully. Therefore, the paper starts by defining the type of organisation, the offences and the forms of liability that will be examined. This is already done from a comparative point of view to provide a basis for the following analysis of the current law of corporate liability for manslaughter. As will be seen, in English law the emphasis is now placed on the newly enacted Corporate Manslaughter and Corporate Homicide Act 2007 c. 19[6], whereas German law had to develop mechanisms to overcome a lack of (statutory) corporate criminal liability. To underline the peculiarities of corporate criminal law, the comparative analysis will focus on cases.[7]

After illustrating the current law, the paper will return to the cases and examine their solutions under each jurisdiction. The results show significant differences between German and English law which are due to the CMA. Finally this leads to the question whether a statute like the CMA could and should be implemented into German law.

II. The problem of corporate liability for manslaughter

When comparing two jurisdictions, it is necessary to determine what exactly is to be compared. The issue that will be examined has to be identified as precisely as possible. Corporate liability for manslaughter deals with the question whether an organisation can be criminally liable for homicide. In order to be able to compare the English and German positions on this question, three aspects need to be specified: the type of organisation[8] whose liability is at issue, the form in which liability occurs and the criminal offences that can be committed. These shall be discussed in turn.

1. Organisations

If the idea of an artificial entity being criminally responsible is commonly accepted, no type of organisation is necessarily excluded. Thus it does not matter whether the organisation is governed by public or private law. On the other hand, there are considerable differences between organisations in the public and in the private sector which influence the way in which liability is attributed. The former are bearers of sovereignty and thus part of the state system, whereas the latter are mere associations of private persons. Due to these differences, it will not be possible to treat the criminal liability of all types of organisation in detail. Therefore, it is necessary to concentrate on particular types of organisations.

a) The type of organisation

In order to decide which organisations will be examined, it seems appropriate to look at the constellations which form the core of the discussion. The debate about corporate liability focuses on organisations in the private sector. That is because there were several tragic accidents involving such organisations in the past years in England[9] which ignited the

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[1] An example is the newly published comparative analysis of the rules on abetting by *Syrrothanassi*. See *Syrrothanassi*, Die Regelung der Anstiftung in einem europäischen Modellstrafgesetzbuch, 2008.

[2] See e.g. *Faure*, in: Eser/Heine/Huber (edit.), Criminal Responsibility of Legal and Collective Entities, 1999, p. 105 ff.; *Hill*, JBL 2003, p. 1 ff.; *Shibahara*, in: Eser/Heine/Huber (edit.), Criminal Responsibility of Legal and Collective Entities, 1999, p. 39 ff.

[3] *Coffee*, in: Eser/Heine/Huber (Fn. 2), p. 9 ff.; *Eidam*, Straftäter Unternehmen, 1997, p. 30 ff.; *Jorg/Field*, CLR 1991, 156 (156 ff.); *Napp*, Unternehmensstrafbarkeit und Unternehmenskuratel, 2006, p. 114 ff.; *Stessens*, ICLQ 1994, 493 (493 ff.); *Wells*, Corporations and Criminal Responsibility, 2nd ed. 2001, p. 127 ff.

[4] See *Mujih*, CoL 2008, 76 (76).

[5] *Zweigert/Kötz*, Einführung in die Rechtsvergleichung, 3rd ed. 1996, p. 3.

[6] Hereafter referred to as CMA.

[7] On the advantages of case-based comparison see generally *Markesinis*, Foreign Law and Comparative Methodology: A subject and a thesis, 1997, p. 1 ff.

[8] The term 'organisation' is used as a synonym for any association of one or more people that is of legal consequence.

[9] E.g. the capsize of the Herald of Free Enterprise, the King's Cross fire in 1987, the North Sea Piper Alpha oil platform tragedy, the Clapham rail crash, the Southall train crash, the Paddington train crash and the Hatfield train crash. See *Clarkson*, CLR 2005, 677; *Mujih*, CoL 2008, 76 (76 Fn. 1).

debate. This can also be seen in the term 'corporate liability' which refers to corporations[10] and thus to organisations in the private sector.[11] In Germany, too, the discussion centres mainly on this type of organisations.[12] Therefore, one can say that the most important issue concerning criminal liability of organisations is that of the liability of organisations in the private sector. Accordingly, this paper will focus on their liability.

However, there are numerous forms of organisations in the private sector. Most of them are very different in their structure. The main distinction has to be drawn between organisations that have legal personality and those that merely consist of individuals working together. Only the former are called 'company' under English Law,[13] whereas the German notion 'Gesellschaft' refers to both types of organisations.[14]

With regard to criminal liability, there is a fundamental difference between organisations which are legal persons and those that are an undertaking by natural ones. As the latter are not regarded as persons in law, they cannot be liable themselves. Accordingly, any liability imposed can only be a personal liability of those involved in the organisation.[15] Moreover, in those cases there is usually personal fault involved, so that a natural person can always be convicted. Therefore, liability of an organisation which is not a legal person can hardly be justified.

For this reason, the following discussion will focus on the liability of companies, i.e. of organisations that have legal personality. Furthermore, the cases mentioned in Fn. 10 which have recently fuelled the debate refer exclusively to organisations with legal personality. That is because companies have by now become so important that they can be encountered everywhere.[16] It is this omnipresence of companies which makes the question of corporate liability so important.[17]

The next issue to be examined is which organisations do have legal personality in English and German law.

b) English Law

As has already been said, every English company is a legal person. A company is a legal body which was created according to the rules contained in the Companies Act 2006 c. 46.[18] This includes public or private companies with limited and unlimited liability,[19] or, more precisely, companies with members whose liability is limited or not.[20] A company is 'public' if it has registered as such and met the requirements stated in the Act.[21] Any other company is private.[22] The difference between the two types of companies is that public companies have more rights,[23] but are subject to a greater degree of regulation.[24] Nevertheless, they are companies formed under private law and should therefore not be confused with organisations in the public sector.

There are other organisations as well which are regarded as legal persons without being companies.[25] Although the term 'company' will be used in the following discussions, those other forms of organisation are understood to be included. In contrast, other forms of organisations in the private sector such as fully liable partnerships, which lack legal personality, will be left out.

c) German Law

The German law of private organisations distinguishes between organisations whose rights and obligations depend on its members[26] and those that have an independent legal personality.[27] Although this distinction seems to be similar to that between partnerships and companies in English law,[28] there are differences between German and English organisations. Whereas English companies can be either limited or unlimited, German corporations are generally limited.[29] And although German 'partnerships' do not have legal personality under German law, they can acquire rights in their own name just like corporations.

It is thus not possible to concentrate on English companies and German corporations just because they are legal persons under the applicable law. Instead, it is necessary to compare the criteria how an organisation becomes a legal person. The defining aspects of an English company are formation and registration.[30] Registration is therefore necessary for the company to come into existence.[31] This is due to the

[10] 'Corporation' is the corresponding term to 'company' in the United States, *Sealy/Worthington*, Cases and Materials in Company Law, 8th ed. 2008, p. 1.
[11] The new Corporate Manslaughter and Corporate Homicide Act 2007 c. 19 which also applies to police forces and governmental departments [Art. 1 (2)] is therefore misnamed, see *Gobert*, L.Q.R 2002, 72 (77); *Jefferson*, Criminal Law, 8th ed. 2007, p. 231.
[12] See *Dannecker*, GA 2001, 101 (102); *Eidam* (Fn. 3), p. 22 ff.; *Napp* (Fn.3), p. 42 ff.
[13] *Sealy/Worthington* (Fn. 10), p. 1. See also *Just*, Die englische Limited in der Praxis, 2nd ed. 2006, Rn. 6.
[14] *Eisenhardt*, Gesellschaftsrecht, 13th ed. 2007, Rn. 11; *Kübler/Assmann*, Gesellschaftsrecht, 6th ed. 2006, p. 1; *Schmidt*, Gesellschaftsrecht, 4th ed. 2002, p. 4.
[15] See *Sullivan*, CLR 2001, 31 (34 ff.).
[16] *Sealy/Worthington* (Fn. 10), p. 1.
[17] *Jefferson* (Fn. 11), p. 216.
[18] *Sealy/Worthington* (Fn.10), p. 1. On the former law see *Dignam/Lowry*, Company Law, 4th ed. 2006, p. 3 ff.
[19] Cf. Art. 3, 4 Companies Act 2006.
[20] *Sealy/Worthington* (Fn. 10), p. 3.
[21] *Sealy/Worthington* (Fn. 10), p. 20.
[22] Art. 4 (1) Companies Act 2006.
[23] Such as the right to offer shares to the public, see Art. 755 Companies Act 2006.
[24] *Sealy/Worthington* (Fn. 10), p. 20.
[25] E.g. building societies, *Sealy/Worthington* (Fn. 10), p. 22.
[26] Personengesellschaften.
[27] Körperschaften. See generally *Grunewald*, Gesellschaftsrecht, 6th ed. 2005, p. 3 ff.
[28] See *Aigner*, Einführung in die englische Rechtssprache – Introduction into Legal English, 2nd ed. 2004, p. 310 who translates 'Personengesellschaft' as 'partnership'.
[29] *Grunewald* (Fn. 27), p. 179.
[30] Art. 1 (1) (a) Companies Act 2006.
[31] See *Sealy/Worthington* (Fn. 10), p. 22 ff.

fact that the company is a legal person. When an organisation has legal personality, it is indispensable to know when exactly this entity came into being. The compulsory requirement of registration removes this uncertainty.

The German law of organisations stipulates registration for either some form of 'partnership' or corporation.[32] However, registration is only a necessary requirement for the existence of corporations.[33] The German organisations that resemble partnerships do not need registration to come into existence. Accordingly, they are not legal persons as understood in English law. Therefore, it is arguable whether 'legal personality' means the same in English and German law.

In the following the organisations whose criminal liability will be examined are those that have legal personality under the respective legal system: English companies and German corporations.[34]

2. Form of liability

It is also necessary to determine which form of corporate liability will be examined. There are two main possibilities how a company could be liable as a perpetrator: direct liability and vicarious liability.[35] Direct liability means that the company is liable as the principal offender of a crime because of acts that have been committed by the company. In contrast, vicarious liability means that the company is liable as the principal offender, although the *actus reus* of the crime was physically committed by someone else.[36] The difference between the two forms of liability is therefore the question of whose actions constitute the *actus reus*: those of the company itself or those of another person which are attributed to the company.

The concept of vicarious liability for holding companies liable has its charms.[37] As companies have "neither body nor soul",[38] there are no genuine corporate actions. Accordingly, the actions of natural persons must in some way be attributed to the company,[39] and vicarious liability is a possible way of attribution.

However, it has to be noted that vicarious liability is a rare and exceptional doctrine in criminal law.[40] In contrast to tort law where vicarious liability is extremely common,[41] criminal law is based on the idea of personal liability.[42] Therefore, vicarious liability mainly applies when it is imposed by statute, either expressly or impliedly.[43] Only the common law offences of public nuisance and criminal libel can be committed under the doctrine of vicarious liability.[44] That is because they are strict liability offences,[45] meaning that neither *mens rea* nor negligence is required on the part of the perpetrator.[46] Accordingly, there is no vicarious liability for manslaughter in English law.

The following discussion will therefore focus on direct liability of companies and examine the different ways how employees' actions can be attributed to the company.

3. Criminal offences of homicide

Homicide means the killing of another person.[47] Although an offence of unlawful killing exists worldwide, the circumstances under which homicide amounts to a criminal offence differ considerably from jurisdiction to jurisdiction.[48] Often there are several offences of unlawful killing. In addition to that, the characteristics of corporate liability have an impact on the offences that can be committed by companies. It is therefore necessary to provide an overview of the English and German law of homicide and to decide which offences will be compared with each other.

a) English law

The English law of homicide distinguishes between murder and manslaughter.[49] While it is more or less clear what murder encompasses, manslaughter exists in disparate forms.[50] There, the main distinction has been drawn between voluntary and involuntary manslaughter.[51]

aa) Murder

Murder is any killing committed with 'malice aforethought'.[52] This "[…] anachronistic and now wholly inappropriate phrase […]"[53] means in fact that the offender must have had the intention to cause death or grievous bodily harm.[54] However, as the sentence for murder is lifelong imprisonment without any discretion for the judge,[55] a company

[32] Cf. e.g. s. 161 (2), s. § 106 HGB; s. § 11 Abs. 1 GmbHG.
[33] *Grunewald* (Fn. 27), p. 180.
[34] Hereafter, both will simply be referred to as 'companies'.
[35] See *Clarkson*, MLR 1996, 557 (563 ff.); *Molan/Bloy/Lanser*, Modern Criminal Law, 5th ed. 2003, p. 127.
[36] *Heaton*, Criminal Law, 2nd ed. 2006, p. 459.
[37] See *Clarkson*, MLR 1996, 557 (563). For more details on vicarious liability see *Gobert*, LS 1994, 393 (396).
[38] See *Clarkson*, MLR 1996,557 (557).
[39] *Glazebrook*, CLJ 2002, 405 (406).
[40] *Jefferson* (Fn. 11), p. 232.
[41] *Heaton* (Fn. 36), p. 459.
[42] *Jefferson* (Fn. 11), p. 232. See also *Sealy/Worthington* (Fn. 10), p. 152.
[43] See *Heaton* (Fn. 36), p. 460.
[44] *Heaton* (Fn. 36), p. 460.
[45] See *Jefferson* (Fn. 11), p. 216.
[46] *Heaton* (Fn. 36), p. 402.
[47] *Heaton* (Fn. 36), p. 139.
[48] See The Law Commission (edit.), The Law of Murder: Overseas Comparative Studies, available at: http://www.lawcom.gov.uk/docs/comparative_studies.pdf.
[49] *Dine/Gobert/Wilson*, Cases & Materials on Criminal Law, 5th ed. 2006, p. 203.
[50] *Heaton* (Fn. 36), p. 149.
[51] *Hogan/Smith*, Criminal Law, 8th ed. 1996, p. 360.
[52] See R v Vickers, [1957] Q.B. 664, p. 666 ff.
[53] R v Moloney, [1985] A.C. 905, p. 920.
[54] *Rogers*, JCL 2006, p. 223 (225 [table 1]).
[55] Art. 1 (1) Murder (Abolition of Death Penalty) Act 1965 c. 71.

cannot be convicted of murder.[56] Accordingly, there is no corporate liability for murder.[57]

bb) Manslaughter

In contrast to murder, the sentence for manslaughter is not fixed. This means that an offender can be sentenced to pay a fine. Therefore, it is theoretically possible to convict companies of manslaughter.[58] However, further examination of the offence may show that distinctions must be made.

The common law offence of manslaughter is separated into voluntary and involuntary manslaughter. Voluntary manslaughter[59] is a criminal offence which applies when the accused has killed with the *mens rea* for murder.[60] This means he[61] must have had an intention to kill.[62] If there are certain mitigating circumstances, the charge is reduced from murder to manslaughter.[63]

In contrast, involuntary manslaughter is confined to unlawful homicides which are committed without an intention to kill.[64] In order to distinguish manslaughter from mere accidents, an element of unlawfulness must be present.[65] Therefore, two types of involuntary manslaughter have been developed: gross negligence manslaughter and unlawful act manslaughter.[66] Whether there is a third type, reckless manslaughter, is not clear from the Court decisions, so that there is no sound authority on this issue.[67]

The two types of manslaughter are very different. Whereas voluntary manslaughter applies to intentional killings and is therefore a privilege to murder, involuntary manslaughter applies to unintentional killings which are for some reason deemed to be unlawful. The main difference is therefore the intention of the offender.

As companies are artificial entities,[68] they cannot form an intention like individuals. One of the main problems associated with the discussion of corporate liability in England was the difficulty of establishing a corporate *mens rea*. However, under current English criminal law, this difficulty has been overcome.[69] The doctrine of identification[70] allows the identification of a human *mens rea* with the company. Therefore, the conviction of a company for intentional killing is possible in principle.[71] Where a human being would be convicted of murder because of an intentional killing, a company can in any case only be convicted of manslaughter,[72] regardless of whether mitigating circumstances apply.[73]

Accordingly, a company can be convicted of voluntary manslaughter, if it has an intention to kill, and of involuntary manslaughter, if it lacks this intention but has acted grossly negligent or unlawfully.

b) German Law

The German law of homicide distinguishes between voluntary and involuntary killings.[74] The main voluntary offence[75] is defined as "[…] any killing of a human being carried out with an intention to kill which is not murder."[76] An offence is murder[77] when the offender either has an especially despicable motivation or commits the offence in a specified dangerous way.[78] If the offender acts on the express and earnest request of the victim, he is liable under the privilege offence 'homicide upon request'[79].

All those offences require the offender to have an intention to kill.[80] An intention to cause grievous bodily harm is not sufficient for a conviction of voluntary killing, but could only give rise to the offence of "bodily injury resulting in death"[81]. However, as intention in German law encompasses

[56] R v I.C.R. Haulage, Ltd. and Others, [1944] K.B. 551, 554.
[57] In favour of the development of new sanctions *Jefferson*, JCL 2001, 235 (235 ff.)
[58] R v P & O Ferries (Dover) Ltd., [1991] 93 Cr. App. R. 72, 84.
[59] See generally on voluntary manslaughter *Elliott*, JCL 2004, 253 (253 ff.).
[60] *Heaton* (Fn. 36), p. 149.
[61] Wherever a pronoun is referring to a noun of unspecified gender, it is meant to include both male and female forms.
[62] For the sake of simplicity, 'intention to kill' is in this context meant to include an intention to cause grievous bodily harm.
[63] These circumstances are listed in s. 2-4 Homicide Act 1957 c. 11 and are provocation, diminished responsibility and action in pursuance of a suicide pact.
[64] *Heaton* (Fn. 36), p. 172.
[65] Andrews v DPP [1937] AC 576, 581.
[66] *Toczek*, JP 2005, 594, 1 (LN). Page numbers followed by '(LN)' refer to the electronic version available at LexisNexis.
[67] *Rogers*, JCL 2006, 223 (225 [table 1]).
[68] *Sealy/Worthington* (Fn. 10), p. 1.
[69] See *Clarkson*, MLR 1996, 557 (560); *Molan/Bloy/Lanser* (Fn. 35), p. 125 ff.
[70] This doctrine will be explained in more detail further below.
[71] So far, only seven companies have been convicted of manslaughter and none of voluntary manslaughter, see http://www.corporateaccountability.org/manslaughter/cases/convictions.htm.
[72] *Mujih*, CoL 2008,76 (77).
[73] It can be doubted whether a company could claim to have been provoked or have diminished responsibility. It certainly cannot act in pursuance of a suicide pact. (See Fn. 63).
[74] See *Rengier*, Strafrecht, Besonderer Teil, Vol. 2, 9th ed. 2008, § 2 Rn. 1 ff.
[75] Totschlag, § 212 StGB.
[76] *Pedain*, in: The Law Commission (edit.), The Law of Murder: Overseas Comparative Studies, available at: http://www.lawcom.gov.uk/docs/comparative_studies.pdf, p. 3.
[77] Mord, § 211 StGB.
[78] See *Horn*, in: Rudolphi et al. (edit.), Systematischer Kommentar zum Strafgesetzbuch, 6th ed., 50th delivery, updated: April 2000, § 211 Rn. 1 ff.
[79] All references to the StGB are based on the English version found at http://www.iuscomp.org/gla/statutes/StGB.htm#211 unless otherwise indicated.
[80] See § 15 StGB. Also *Rengier* (Fn. 74), § 2 Rn. 2.
[81] § 277 StGB. See *Pedain* (Fn. 76), p. 11.

dolus eventualis,[82] an intention to kill can be found more easily than in English law.[83]

Another element these voluntary homicide offences have in common is that the sentence for each is imprisonment, ranging from a period between six months and five years for the least serious offence[84] to lifelong imprisonment for murder.[85] There is no possibility of converting the penalty of imprisonment into a fine.[86] As the imprisonment of companies is physically impossible,[87] the offence of voluntary homicide cannot apply to companies.

Involuntary homicide is covered by the offence of negligent homicide[88]. Negligent homicide applies when death is caused by the negligent conduct of another. In contrast to the voluntary homicide offences, negligent homicide allows either imprisonment or a fine as a sentence. Therefore, corporate liability could in principle arise for negligent homicide.

c) Comparison

This overview shows that the first limitation of corporate liability lies in the available types of punishment. Companies can only be convicted of those offences that are punishable by a fine. In England this excludes only murder, but in Germany all voluntary homicide offences are excluded as they cannot be punished by a fine.

This leaves negligent homicide as the only offence in German law which could apply to companies. However, in German criminal law negligent homicide is necessarily contained in every voluntary homicide offence.[89] This is due to the fact that negligence is mainly regarded as a lesser form of intention (cf. § 18 StGB).[90] Therefore, intentional killings by a company would also be covered by the negligent homicide offence. This is similar to the situation in English law where intentional killings by companies cannot be murder but are automatically manslaughter.[91]
Accordingly, the offences that will be compared are German negligent homicide and English manslaughter, both applying to either intentional or unintentional killings.

4. Summary

When comparing the two jurisdictions to comprehend the problem of corporate liability, it becomes evident that the issue of criminal responsibility of organisations is a complicated one. Many different problems are linked to the broad question of criminal responsibility and it is impossible to deal with all of them here. Therefore, the issue has been specified in three ways.

First, focus has been placed on organisations which have legal personality according to private law: English companies and German corporations such as the GmbH. Secondly, only the company's direct liability will be examined, not its vicarious liability. Third, this paper will focus on German negligent homicide and English manslaughter, the latter both in its voluntary and involuntary form. Therefore, this paper intends to examine the problem of direct liability of 'companies'[92] for manslaughter, negligent homicide respectively. It will start by explaining the current English law on corporate manslaughter.

III. English Law

This chapter will explain how liability is attributed to companies in English law by describing the main principle, the doctrine of identification, and focussing on the changes the CMA has made. Differences between the former and the current law will be illustrated with two cases, thus giving an overview of corporate liability for manslaughter.

1. The doctrine of identification

English criminal law accepts corporate liability in principle. It is covered by the doctrine of identification which has been established in 1944.[93] According to this doctrine the people that manage and control the company's affairs are regarded as embodying the company.[94] Hence the name of the doctrine: some employees are identified with the company itself. The result of the doctrine of identification is that a company can be liable for nearly any offence,[95] including *mens rea* offences.[96]

The main problem attached to the identification doctrine is the question of who can be identified with the company. This question was addressed in Tesco Supermarkets Ltd. v Nattrass[97] which has become the leading case in this field.[98] In this case, Lord Diplock said that only those that are "[…] entrusted with the exercise of the powers of the company

[82] Dolus eventualis is a form of intent where it is sufficient that the principal considers a factual matter to be possible and accepts it, see *Frister*, Strafrecht, Allgemeiner Teil, 3rd ed. 2008, ch. 11 Rn. 13 ff.
[83] *Pedain* (Fn. 76), p. 1 Fn. 3. See generally *Taylor*, OJLS 2004, 99 (99 ff.)
[84] § 216 StGB – homicide on request.
[85] § 211 Abs. 1 StGB.
[86] Cf. § 38 StGB.
[87] Arbeitsgruppe "Strafbarkeit juristischer Personen", Bericht an die Kommission zur Reform des strafrechtlichen Sanktionensystems, in: Hettinger (edit.): Reform des Sanktionenrechts, Vol. 3: Verbandsstrafe, 2002, 7 (12).
[88] Fahrlässige Tötung, § 222 StGB.
[89] *Hoyer*, in: Rudolphi et al. (edit.), Systematischer Kommentar zum Strafgesetzbuch, 7th ed., 39th delivery, updated: June 2004, Attachment to § 16 Rn. 7.
[90] *Hoyer*, in: Rudolphi et al. (edit.) (Fn. 89), Attachment to § 16 Rn. 3.
[91] See II. 3. a. bb. Also *Hogan/Smith* (Fn. 51), p. 360.
[92] Including English and German private organisations with legal personality.
[93] R v I.C.R. Haulage, Ltd. and Others, [1944] K.B. 551; DPP v Kent and Sussex Contractors, Ltd., [1944] K.B. 146; Moore v I Bresler Ltd., [1944] 2 All E.R. 515.
[94] "Legislating the Criminal Code: Involuntary Manslaughter", Law Com 237, 1996, Rn. 6.27 in: *Molan/Bloy/Lanser* (Fn. 35), p. 125.
[95] *Molan/Bloy/Lanser* (Fn. 35), p. 125.
[96] Tesco Supermarkets Ltd. v Nattrass, [1972] A.C. 153.
[97] [1972] A.C. 153.
[98] *Heaton* (Fn. 36), p. 466.

[…]"[99] can be identified with the company. This means that only the most senior officers' acts could be attributed to the company, as only they are the "directing mind and will"[100] of the company.

In the later Meridian case[101], Lord Hoffmann tried to introduce a more flexible approach concentrating on the aim of the statutory provision which contained the offence.[102] Thereby, other employees' acts could be attributed to the company, if the interpretation of the statute that had been breached allowed it.[103] However, the Meridian rule does not apply to common law crimes which are still covered by Tesco v Nattrass.[104] Therefore, to convict a company of a common law crime, it is still necessary to find someone in a sufficiently high position who is guilty of the crime and can be identified with the company.

Because of these problems, it has been argued that the aggregation principle should be adopted.[105] According to this theory the faults of several people can be aggregated in order to achieve the degree of culpability necessary for the offence.[106] However, as only the mental states of the company's senior managers could be aggregated,[107] the aggregation theory would have to address the same problems as the identification doctrine. Moreover, the aggregation doctrine has been rejected by the courts.[108] Therefore, it could only be introduced into English law by statute.[109]

The identification doctrine also applies to manslaughter.[110] Although the doctrine was established early, its first application to manslaughter only occurred as recently as 1991. In R v P & O Ferries (Dover) Ltd.,[111] the judge accepted that a company could be charged with manslaughter under English law.[112] As in all cases of corporate liability, attribution of an employee's actions is necessary. Unless otherwise regulated, the identification principle remains the only rule for attributing liability to corporations.[113] Accordingly, it is necessary to find a senior manager who is guilty of manslaughter in order to convict the company.

2. Failings of the doctrine

Since the first case of corporate manslaughter in 1991, 18 companies have been charged with manslaughter, resulting in seven convictions.[114] This is a low number when contrasted with that of workplace deaths which amount to more than 10,000 since then.[115] The reason for this lies in the shortcomings of the doctrine of identification.[116]

The main problem with the doctrine of identification is that it "[…] works best in cases where it is needed least and least in cases where it is needed most […]"[117]. This statement refers to the fact that it is easier to convict small companies under the identification doctrine than large ones. In large companies, the board of directors is usually remote from the actual operation of business.[118] In most cases, the boardroom lacks awareness of problems and it is the conduct of minor employees that gives rise to a charge of manslaughter. Therefore, the larger the company, the more difficult it is to find a senior manager who has indeed committed the offence.[119]

A look at the convictions that have occurred so far confirms this. The first company convicted of manslaughter, OLL Ltd.,[120] was a one-man company whose conviction added nothing to that of its owner and managing director Peter Kite.[121] The other six companies were also small and relatively unknown. It is, however, the big companies that people may want to blame that remain unharmed under the identification doctrine.[122] This can well be illustrated with two cases which aroused much interest among the public: the prosecution of P. & O. European Ferries[123] after the capsize of the Herald of Free Enterprise and that of Great Western Trains Co. Ltd. after the Southall train crash.[124]

[99] Tesco Supermarkets Ltd. v Nattrass, [1972] A.C. 153, p. 200.
[100] H. L. Bolton (Engineering) Co. Ltd. v T. J. Graham & Sons Ltd., [1957] 1 Q.B. 159, p. 172.
[101] Meridian Global Funds Management Asia Ltd. v Security Commission, [1995] A.C. 500.
[102] See *Pinto/Evans*, Corporate Criminal Liability, 2003, p. 59.
[103] *Heaton* (Fn. 36), p. 467.
[104] *Jefferson* (Fn. 11), p. 218 ff.
[105] As it is in tort law, *Parsons*, JCL 2003, 69 (76). See also *Hogan/Smith* (Fn. 51), p. 189.
[106] *Clarkson*, Understanding Criminal Law, 4th ed. 2005, p. 151; *Wells* (Fn. 3), p. 109.
[107] *Mujih*, CoL 2008, 76 (77).
[108] R v Her Majesty's Coroner of East Kent ex parte Spooner, (1987) B.C.C. 636; Attorney-General's Reference (No. 2 of 1999), [2000] QB 796.
[109] *Wells* (Fn. 3), p. 109. In view of its rejection by the courts, this is highly unlikely.
[110] See Attorney-General's Reference (No. 2 of 1999), [2000] QB 796.
[111] [1991] 93 Cr. App. R. p. 72 ff.
[112] *Wells* (Fn. 3), p. 106.
[113] Attorney-General's Reference (No. 2 of 1999), [2000] QB 796, p. 815.
[114] See http://www.corporateaccountability.org/manslaughter/cases/main.htm.
[115] Cf. *Bergman*, NLJ 1997, 1652 who spoke already of 10,000 in 1997.
[116] See *Clarkson* (Fn. 106), p. 151; *Jorg/Field*, CLR 1991, 156 (158 ff.); *Mujih*, CoL 2008, 76 (77 ff.); *Parsons*, JCL 2003, 69 (74); *Pinto/Evans* (Fn. 102), p. 57 ff.
[117] *Gobert*, LS 1994, 393 (401).
[118] *Pinto/Evans* (Fn. 102), p. 57.
[119] *Molan/Bloy/Lanser* (Fn. 35), p. 127.
[120] R v OLL Ltd. and Kite, (1994) 144 NLJ 1735.
[121] *Heaton* (Fn. 36), p. 470; *Wells* (Fn. 3), p. 115.
[122] *Pinto/Evans* (Fn. 102), p. 238; *Wells* (Fn. 3), p. 115.
[123] R v P & O European Ferries (Dover) Ltd. [1991] 93 Cr. App. R., p. 72 ff.
[124] R v Great Western Trains Co. Ltd., 30th June 1999, Central Criminal Court (unreported).

a) The capsize of the Herald of Free Enterprise

In 1987, the ferry Herald of Free Enterprise left Zeebrugge Harbour with its bow doors open. Due to the opened bow doors, water flooded in and eventually led to the capsize of the vessel. As a consequence 192 people died.[125] The assistant bosun who should have closed the doors was asleep. The first officer who should have checked that the doors were closed was at the same time required to be on the bridge. Previously, the directors of P & O European Ferries had refused to have indicator lights put on the bridge, so that the captain was ignorant of the open doors.

In the aftermath of the disaster, P & O European Ferries Ltd. was charged with manslaughter. Having decided that a company could in principle be liable for manslaughter,[126] the court set out to find a responsible individual which could be identified with the company – and failed. Although many persons had committed mistakes, there was not one person of the senior management to whom sufficiently faulty conduct could be attributed.[127] Only the aggregation of several individuals' conduct could have amounted to the recklessness required by the law.[128] However, as aggregation of culpability is not possible under English law,[129] P & O European Ferries Ltd. had to be acquitted.

b) The Southall train crash

In 1997, a train operated by Great Western Co. Ltd. ran over red lights and collided with another train whereby seven people were killed. It was found that Great Western's safety system was insufficient to prevent this sort of accident.[130] However, the trial judge was unable to find an individual who could be identified with the company and who had been negligent.[131] Accordingly, Great Western Co. Ltd. was acquitted of manslaughter.[132] This decision was upheld by the Court of Appeal.[133]

The two cases are very similar. In both there is a minor employee who has made the last, fatal mistake, the sleeping assistant bosun of the Herald of Free Enterprise and Great Western's driver who was allegedly been packing his bag[134] and thus missed the red light. Furthermore, both companies have disregarded safety standards. And yet, neither could be convicted, because no one of the respective company's directing mind could be found guilty.

3. Corporate Manslaughter and Corporate Homicide Act 2007

The acquittal of Great Western Trains accelerated a reform process that had been started after the Herald of Free Enterprise disaster. The legal system's inability to prosecute successfully a company attracted more and more criticism.[135] In order to make prosecution of large companies easier,[136] the Law Commission proposed a new offence of 'corporate killing' in 1996.[137] The Government accepted the proposal in principle and started work on a corporate manslaughter Act.[138] After more than seven years,[139] the CMA was introduced into Parliament and received Royal Assent on 26th July 2007. It came into force on 6th April 2008.[140]

a) Content

The CMA introduces a new offence of 'corporate manslaughter'[141], replacing the common law offence of manslaughter by gross negligence.[142] An organisation which falls within the Act is guilty of corporate manslaughter if
(1) the way in which its activities are managed or organised
(a) causes a person's death, and
(b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased.
(2) […]
(3) An organisation is guilty of an offence under this section only if the way in which its activities are managed or organised by its senior management is a substantial element in the breach referred to in subsection (1).[143]
Six elements can be identified to constitute the offence. Accordingly, a person's death must have occurred (a) and the potential offender must be an organisation to which s. 1 CMA applies (b). This organisation must have owed a relevant duty of care to the deceased (c) and grossly breached it by the way in which its activities are managed or organised (d). Mismanagement or disorganisation by the organisation's senior management (e) must be a substantial element of the breach (f). In effect, these criteria are similar to those of the common law offence of gross negligence manslaughter[144] and will now be examined in turn.

[125] *Wells* (Fn. 3), p. 107.
[126] R v P & O European Ferries (Dover) Ltd. [1991] 93 Cr. App. R., p. 72 ff.
[127] *Heaton* (Fn. 36), p. 468.
[128] See *Wells* (Fn. 3), p. 109, on the definition of manslaughter at that time.
[129] *Heaton* (Fn. 36), p. 468.
[130] See *Wells* (Fn. 3), p. 112.
[131] *Pinto/Evans* (Fn. 102), p. 219.
[132] It was, however, fined £1.5 million for breach of its duty under s. 3 (1) Health and Safety at Work etc. Act 1974 c. 37.
[133] Attorney-General's Reference (No. 2 of 1999), [2000] Q.B. 796.
[134] Cullen Inquiry, 2000, in: *Wells* (Fn. 3), p. 112.
[135] *Griffin*, JCL 2007, 151, 1 (LN).
[136] *Sopp*, CN 2007, 82 (82).
[137] Law Com No. 237.
[138] On the legislative process see the homepage of Parliament, http://www.publications.parliament.uk/pa/pabills/200607/corporate_manslaughter_and_corporate_homicide.htm.
[139] See *Watkins*, JP 2005, 488, 1 (LN).
[140] See http://www.justice.gov.uk/guidance/manslaughteractguidance.htm.
[141] Or 'corporate homicide' in Scotland, see s. 1 (5) (b) CMA.
[142] See s. 20 CMA.
[143] S. 1 CMA.
[144] See *Harris*, CoL 2007, 321 (321).

aa) A person's death

The requirement that a death must have occurred is the simplest one, because it is what one would expect of an offence which is called 'corporate manslaughter'. The boundaries of life are examined in the same way as for the other homicide offences and the same questions have to be discussed.[145] This may become especially relevant for private hospitals or nursing homes which refuse to keep 'brain-dead' or persons who are in a persistent vegetative state alive.

bb) Organisation

The kind of organisations which should fall within the ambit of the Act is subject to controversy. The Government has adopted a wide approach and includes, besides corporations, specific Governmental departments, police forces and unincorporated organisations if they are employers.[146] Especially the application of the new offence to unincorporated undertakings has been criticised.[147] Moreover, the Act applies not only to "[…] any body corporate wherever incorporated […]",[148] but also to organisations of a similar character to partnerships formed under foreign law. Thus it creates a considerable risk for foreign enterprises, too.

cc) Relevant duty of care owed to the deceased

The organisation must have owed a relevant duty of care to the deceased.[149] A duty of care is an obligation to take reasonable steps to protect another person's safety.[150] What 'relevant duty of care' means is explained in detail in ss. 2-7 CMA. It includes most of the duties owed under the law of negligence and is thus rather wide. According to s. 1 (1) (b) CMA, the duty must have been owed to the deceased. This will always be the case when the victim is an employee or in custody, otherwise it has to be decided on the facts.[151] Moreover, it has to be noticed that two rules of the common law of tort are disregarded for the purposes of the Act: those that exclude liability for joint unlawful conduct and in case of acceptance of risk.[152]

Whether the organisation had a duty or not is a question of law and thus for the judge to decide.[153] Regarding the numerous examples contained in the Act,[154] it is likely that the question of the existence of a relevant duty of care will be much discussed in future judgments.

dd) Gross breach

The way in which the organisation's activities are managed must also have constituted a gross breach of this duty. This means that the organisation's conduct in this area must fall far below what can reasonably be expected of the organisation in the circumstances.[155] S. 8 CMA gives a non-exhaustive list of factors which could be considered by the jury when deciding whether a breach was gross. In contrast to what had been proposed in the Corporate Manslaughter and Corporate Homicide Bill of 2005[156], the senior management's knowledge of the company's failings is not necessary.[157] Therefore, the test to determine whether there was a gross breach of duty is an objective one.

ee) Senior management

However, an organisation is only guilty of corporate manslaughter if the way in which its activities are organised by its senior management constitutes a substantial element in the breach.[158] According to s. 1 (4) (c) CMA, senior management means the persons who play significant roles in the making of decisions affecting the whole organisation or the actual managing of those activities. Exactly who belongs to the senior management depends on the structure of the organisation.[159] As it is sufficient for someone to make decisions about a partial area of activities to be regarded as part of the senior management, it is also possible that regional managers are part of the senior management.[160] The term 'senior management' is thus slightly wider than the 'directing mind' criterion of the identification doctrine,[161] albeit still a limitation.[162]

Two points need to be emphasized. The first one is that it is not necessary anymore to find an individual that has committed a gross breach. It is sufficient that the senior management has collectively failed to take due care.[163] This constitutes the originality of the Government's approach. The other point that needs to be emphasized is that the reference to 'senior management' prevents the directors to escape liability by delegation.[164] The Centre for Corporate Accountability had feared that directors might take this course to avoid liabi-

[145] See *Heaton* (Fn. 36), p. 141 ff.
[146] S. 1 (2) CMA.
[147] See *Sullivan*, CLR 2001, 31 (34 ff.).
[148] S. 25 CMA.
[149] This is similar to the requirement laid down in the Adomako case, R v Adomako [1995] 1 A.C. 171. See also *Herring/Palser*, CLR 2007, 24.
[150] Ministry of Justice, A guide to the Corporate Manslaughter and Corporate Homicide Act 2007, p. 8, available at: http://www.justice.gov.uk/docs/guidetomanslaughterhomicide07.pdf.
[151] Ministry of Justice (Fn. 150), p. 11.
[152] S. 2 (6) CMA. This resembles the principle laid down in R v Wacker, [2003] Q.B. 1207.
[153] S. 2 (5) CMA.
[154] Ss. 2-7 CMA.
[155] S. 1 (4) (b) CMA.
[156] Corporate Manslaughter and Corporate Homicide Bill 220 05-06, introduced on 20th July 2006.
[157] See *Mujih*, CoL 2008, 76 (80).
[158] S. 1 (3) CMA.
[159] Ministry of Justice (Fn. 150), p. 13.
[160] See Ministry of Justice (Fn. 150), p. 13.
[161] Cf. Tesco Supermarkets Ltd. v Nattrass, [1972] A.C. 153, where a regional manager was not regarded as the directing mind of Tesco Supermarkets Ltd.
[162] *Watkins*, JP 2005, 488, 1 (4 ff.) (LN).
[163] Ministry of Justice (Fn. 150), p. 14.
[164] *Mujih*, CoL 2008, 76 (79); Ministry of Justice (Fn. 150), p. 14.

lity.[165] However, under the CMA such a delegation of power away from the senior management could in itself be seen as a management failure.

ff) Substantial element

The way in which the activities of the organisation are managed by its senior management must be a substantial element in the breach of the duty of care. This requirement limits its liability to cases when the breach can be traced to a senior manager's fault. However, it is not necessary that the death has been caused by a senior management failure. It suffices that senior management plays a substantial part in the breach. This requirement is new. When the Government proposed its first Bill on corporate manslaughter[166], it was necessary that the death had been caused by a senior management failure. During parliamentary debates there were concerns, however, that the failure would have to be pinpointed to the senior management and that thus the failings of the identification doctrine could not be removed.[167] Moreover, it was not thought right to convict companies for gross negligence manslaughter when only a minimal failure had occurred at senior level.[168] This would in fact constitute vicarious liability of the company.

The problem with the requirement of management failure being a substantial element of the breach is that it is vague. It is not possible to determine by reading the statute when the impact of the senior management is sufficient to establish the guilt of the organisation. Moreover, the Act does not specify who will decide whether the management failure was a substantial element in the breach. The general rule is that the jury decides questions of fact and the judge those of law. The Act clarifies that the question whether there is a duty of care is one of law,[169] whereas the question whether there was a gross breach of this duty is for the jury to decide.[170] Therefore, it is necessary to determine if it is a question of law or fact whether a senior management failure was a substantial element in the breach.

The answer depends on the definition of 'substantial'. According to the parliamentary debates 'substantial' is a synonym for 'large' and 'noteworthy'.[171] Whether the impact of the senior management on the breach was large or not is a question of weight and measurement and thus one of fact.[172] This is supported by the fact that it is also the jury who decides whether someone is a senior manager or not.[173]Accordingly, the jury will decide whether a senior management failure was a substantial element in the breach. However, the exact criteria are still unclear.

b) Cases

The reform of corporate manslaughter had been started as a reaction to severe accidents such as the capsize of the Herald of Free Enterprise and the Southall train crash.[174] The Government's aim was to facilitate the prosecution of large companies for manslaughter to avoid acquittals like those of P & O European Ferries and Great Western Trains.[175] But would these companies have been convicted under the new Act? In order to decide whether the Act has achieved this purpose, both cases will now be examined under the provisions of the CMA.

aa) The capsize of the Herald of Free Enterprise

The persons who died in the capsize of the ferry Herald of Free Enterprise were both passengers and crew.[176] As such, P & O European Ferries owed them a duty of care under s. 2 (1) (a) CMA, s. 2 (1) (c) (i) CMA respectively. However, the way in which the company's activities were organised must amount to a gross breach of this duty.

The Sheen report about the disaster found numerous faults with P & O European Ferries and concluded that the company was "[…] from top to bottom […] infected with the disease of sloppiness […]"[177]. From this one could conclude that the way in which its activities were organised fell far below what could have been expected of the company, and that there was thus a gross breach. A substantial part of this breach could be referred to the senior management, so that P & O European Ferries would probably have been convicted under the new Act.[178]

However, *Wells* points to the fact that the trial judge directed acquittals for the employees of P & O European Ferries because he did not think that they would or should have perceived that the company's operation system created an

[165] *Harris*, CoL 2007, 321(322).
[166] Corporate Manslaughter and Corporate Homicide Bill 220 05-06, introduced on 20th July 2006.
[167] See Standing Committee B (House of Commons), Debate about the Corporate Manslaughter and Corporate Homicide Bill, 1st Session, 19th October 2006, Session 2005-06, available at: http://www.publications.parliament.uk/pa/cm200506/cmstand/b/st061019/am/61019s01.htm.
[168] Standing Committee B (House of Commons) (Fn. 167), column 20.
[169] S. 2 (5) CMA.
[170] S. 8 (1) (b) CMA.
[171] Standing Committee B (House of Commons) (Fn. 167), column 22.
[172] See Standing Committee B (House of Commons) (Fn. 167), column 21.
[173] Standing Committee B (House of Commons) (Fn. 167), column 22.
[174] See *Wright*, CLR 2007, 949 (951 ff.).
[175] See *Herring*, Criminal Law – Text, Cases and Materials, 2nd ed. 2006, p. 796.
[176] R v Her Majesty's Coroner of East Kent ex parte Spooner, (1987) B.C.C. 636, p. 638.
[177] Department of Transport, The Merchant Shipping Act 1894, mv Herald of Free Enterprise, Report of Court No 8074 (Sheen Report), London: HMSO, 1987, available at: www.maib.gov.uk/cms_resources/HofFE%20part%201.pdf, p. 14.
[178] *Mujih*, CoL 2008, 76 (79).

obvious and serious risk.[179] *Wells* goes on asking "[…] Is there not a difficulty here? The reasons given for the failure of the prosecution […] suggests that we cannot regard it as a management failure that no system was devised to avoid it. Are not the two tests (obvious and serious risk and management failure to ensure safety) very similar ways of putting the same question? [...]"[180]

By this, *Wells* indicates that the 'obvious risk test', which was the main test for involuntary manslaughter at that time,[181] is similar to the new test of 'senior management failure'.[182] If this were true, the judge's findings would also prevent the finding of a senior management failure under the new offence.

However, it is not possible to transfer the judge's findings to the new offence of corporate manslaughter. The trial judge had to decide whether an individual could have foreseen an obvious and serious risk, and despite some doubts about his approach,[183] it should be accepted that no one could. It is a different question whether the company's management's failure to address that risk fell far below what could be expected. The reason for this is that a management failure can derive from the addition of some employee's or director's fault. For example, if someone knows that the building of the vessel is risky and another that there are no controlling lights and a third that there is no controlling officer, the management failure can be based on the fact that nobody was bothering to inform the others of the risks. This means that ignorance of risks by the senior management cannot serve as a defence.[184]

This is exactly the case of P & O European Ferries. Although no individual could be blamed, the organisational structure itself was faulty. The accumulation of individual failings led to an organisational standard that would now be deemed a gross breach of the duty of care. Accordingly, P & O European Ferries would now be convicted of corporate manslaughter if the jury held a failure by the senior management to have been a substantial element in the breach. In the light of the facetious comments of the boardroom when asked for indicator lights,[185] this is likely.

bb) The Southall train crash

In the trial of Great Western Trains after the Southall train crash, the courts found that the company's management policies had caused the fatal crash.[186] However, no human individual who was responsible could be found.

This is exactly the situation which is to be addressed by the new offence of corporate manslaughter. Great Western Trains owed a duty of care to its passengers.[187] This duty was breached by the manner in which the company was operated, notably the management policies that prevented the installation of a proper safety system. These policies came from the boardroom and therefore the senior management, so that a substantial element of the breach could be attributed to the senior management. Accordingly, Great Western Trains would now be convicted of corporate manslaughter.

c) Criticism

The two examples show that the Act has – at least in some respects – achieved what the Government set out to do. Nevertheless, throughout the discussion of an Act on corporate manslaughter, several issues were raised which have not found their way into the final Act. Some would have preferred the extension of director's personal liability instead of the introduction of an offence of corporate manslaughter.[188] Others criticise that the new offence applies to killings, but not to bodily injuries.[189] Moreover, the Director of Public Prosecution's (DPP) consent is necessary for the beginning of any proceedings for the offence of corporate manslaughter.[190] This is a rather unusual limitation and as such also regarded with unease.[191]

All these arguments are worth considering. However, they concentrate on the question which sort of regulation is preferable and are thus not helpful when discussing the actual law. Accordingly, this paper will focus on criticism of the Act as it is in its application to companies.[192]

The first point of criticism concerns the notion of 'senior management' which is thought too vague. It is unclear who belongs to the management and when management is 'senior'.[193] Since the definition of 'senior manager' is based upon a person's position in the company, it is necessary to understand the whole corporate structure in order to decide whether someone is a senior manager or not.[194] Moreover, the requirement of a senior management failure has much in common with the identification doctrine, so that one can speculate whether the new Act will lead to many more prosecutions.[195] In fact, the Act provides a new challenge for the jury. It has to understand the structure of the company and its activities thoroughly in order to decide who belongs to the senior management.

[179] *Wells* (Fn. 3), p. 125, and NLJ 1997, p. 1468.
[180] *Wells* (Fn. 3), p. 125.
[181] *Wells*, NLJ 1997, 1467 (1467). On details see R v Lawrence [1982] A.C. 510.
[182] Similarly *Glazebrook*, CLJ 2002, 405 (412).
[183] See *Wells* (Fn. 3), p. 108 ff.
[184] See Fn. 159 on delegation.
[185] See *Clarkson* (Fn. 106), p. 150.
[186] *Wells* (Fn. 3), p. 112.
[187] S. 2 (1) (c) (i) CMA.
[188] *Bergman*, NLJ 1990, 1501; *Harris*, CoL 2007, 321. (322); *Wells*, NLJ 1997, 1467 (1468).
[189] *Glazebrook*, CLJ 2002, 405 (414).
[190] S. 17 CMA.
[191] *Watkins*, JP 2005, 488, 1 (4 ff.) (LN). The main concern is that the DPP could decide for political reasons whether proceedings should begin or not.
[192] Thus the problems attached to the wide definition of 'organisation' will be left out. On this see Sullivan, CLR 2001, 31 (34 ff.).
[193] See *Glazebrook*, CLJ 2002, 405 (411).
[194] *Watkins*, JP 2005, 488, 1 (5 ff.) (LN).
[195] See *Harris*, CoL 2007, 321 (p. 321).

This leads to the second point which is also for the jury to decide, namely the notion of a 'gross breach' of the duty of care. Here, the jury must determine whether the conduct falls far below what can reasonably be expected of the organisation in the circumstances.[196] In order to do so, the jurors must try to put themselves in the shoes of the organisation – an experience which will be far removed from anything the jurors have known so far.[197] A gross breach[198] will be even more difficult to establish when the practice in this branch of industry on the whole is faulty.[199] Therefore, it is foreseeable that the practical problems of applying the new offence will be substantial.

Overall, one can say that the new Act is still far from perfect. Its vagueness means that the jury will have a hard and complex task during the trial. As long as no one has been convicted yet, there are no criteria which will serve to clarify the Act. Accordingly, one will have to wait until it becomes clear whether the criticism is justified or not.

4. Remaining scope for the doctrine of identification

Although the Corporate Manslaughter and Corporate Homicide Act 2007 has come into force now, this does not mean that the doctrine of identification is superfluous. The Act replaces only the common law offence of gross negligence manslaughter.[200] This means that the other form of involuntary manslaughter, unlawful act manslaughter, still applies to companies under the identification doctrine.

A conviction for unlawful act manslaughter requires that the defendant must have committed an unlawful act, which must objectively have been dangerous and led to another person's death.[201] In this context, 'unlawful' must be understood as 'criminal' and thus in a narrow sense.[202] Moreover, negligently committed crimes cannot be seen as unlawful.[203] According to the identification doctrine, a company is guilty of unlawful act manslaughter if the unlawful act has completely been committed by a director. The same is true for voluntary killings which fall under the definition of manslaughter. Accordingly, the identification doctrine with its shortcomings is still part of the English law of corporate criminal liability.

5. Summary

The basic principle of corporate criminal liability in English law is the doctrine of identification. According to this doctrine, a person who belongs to the directing mind of the company has to be identified. If this individual commits both *actus reus* and *mens rea* of manslaughter, this can be attributed to the company so that it can be convicted.

However, especially in large companies it is very difficult to find a person who is a directing mind of the company and who has indeed committed the offence. Therefore, so far only small companies have been convicted of manslaughter under the identification doctrine.

To facilitate the prosecution of large companies, the Government has introduced a new offence of corporate manslaughter. An organisation is guilty of this offence if the way in which its activities are managed amounts to a gross breach of a duty of care which is owed to the deceased. A substantial element of this breach must have been the way matters are organised by the senior management.

Examining those elements further, it becomes clear that most of them are very vague. It is not apparent from the Act either what a senior management is or what a substantial element constitutes. Moreover, the jury will have a hard task to decide whether a gross breach occurred.

Apart from the new Act, which replaces the common law offence of gross negligence manslaughter, the identification doctrine still applies to voluntary killings and unlawful act manslaughter. Therefore, the perceived problems continue to exist.

The next chapter will explain how German law deals with the problem of corporate liability for manslaughter.

IV. German Law

This chapter will present corporate liability for manslaughter in German law. It will start by explaining the general principle of dealing with corporate criminal liability, which is complete rejection. Then, alternative methods of holding companies criminally liable will be presented. The way in which they apply will finally be illustrated by means of two cases, thus providing an overview of German law on 'corporate manslaughter'.

1. The principle: no corporate liability

The principle in German criminal law is that companies are not criminally liable.[204] However, there is no explicit statement to that effect in the German Criminal Code, the StGB. The reason for this is that the theoretical and philosophical background of German criminal law doctrine eschewing corporate liability was so commonly known that an explicit rule was considered superfluous.[205]

[196] S. 1 (4) (b) CMA.
[197] *Glazebrook*, CLJ 2002, 405 (410 ff.).
[198] It can also be questioned whether companies should not be liable for any breach instead of only a gross one, *Glazebrook*, CLJ 2002, 405 (412).
[199] *Gobert*, LQR 2002, 72 (82 ff.).
[200] S. 20 CMA.
[201] *O'Doherty*, JP 2004, 5, 1 (LN).
[202] See *Heaton* (Fn. 36), p. 182 ff.
[203] See Andrews v DPP [1937] AC 576.
[204] *Cramer/Heine*, in: Schönke/Schröder (edit.), Strafgesetzbuch, Commentary, 27th ed. 2006, Vorbemerkungen zu den §§ 25 ff. Rn. 119; *Fieberg*, in: Eser/Heine/Huber (Fn. 2), p. 83 (83); *Frister* (Fn. 82), ch. 3 Rn. 13.; *Jescheck/Weigend*, Strafrecht, Allgemeiner Teil, 5th ed. 1996, p. 227; *Napp* (Fn. 3), p. 41; *Otto*, Die Strafbarkeit von Unternehmen und Verbänden, 1993, p. 5; *Schmidt-Salzer*, Entscheidungssammlung Produkthaftung, Vol. IV, 1982, p. 9; *Scholz*, ZRP 2000, 435 (436); *Tiedemann*, Wirtschaftsstrafrecht, Einführung und Allgemeiner Teil, 2004, p. 242. See also BGHSt 5, 28, (32).
[205] *Napp* (Fn. 3), p. 45.

German criminal law is based on the traditional idea that only a voluntary human act or nonfeasance can lead to criminal liability.[206] This is also expressed in the principle of culpability, *nulla poena sine culpa*. According to this principle, criminal liability must mirror the individual's guilt. Guilt is understood as personal blame (Vorwerfbarkeit) in German law.[207] The specifications of this principle, which are contained in the StGB, are similar to the English defences. This means that they are made for human beings and not fitting for companies. All this indicates that there is no corporate liability in German criminal law yet. Accordingly, there is no corporate liability for manslaughter[208] either.

2. Alternative ways of constructing 'corporate' liability

Although there is no direct criminal liability of companies, there are several provisions that may be resorted to take account of the growing importance of companies in criminal law. The most important are §§ 9, 30 and 130 OWiG.[209] German criminal law distinguishes between criminal offences and misdemeanours (Ordnungswidrigkeiten) which are a less serious form of criminal offence and can be imposed by administrative departments.[210] Misdemeanours are regulated by a special code, the OWiG, but belong otherwise to criminal law.

a) § 9 OWiG

§ 9 OWiG belongs to the general part of the OWiG. A similar provision for criminal offences is contained in § 14 StGB. The legal rule complements the criminal offences and misdemeanours by allowing special personal characteristics of one person to be attributed to another.[211] This means that § 9 OWiG only applies in a two-person-situation where one person is authorised to represent another person. If a misdemeanour demands certain personal characteristics to be present in the perpetrator, it is sufficient under § 9 OWiG if the person for whom the act has been carried out possesses these characteristics.[212]

This is especially significant when the person who has been acted for cannot be criminally liable, as is the case with companies.[213] Companies cannot act and are not criminally liable themselves.[214] However, in some situations it is the company that possesses certain characteristics which are constitutive for criminal liability, e.g. being an employer in the sense of § 266a StGB,[215] whereas the natural person who has acted does not possess these characteristics. In these situations, § 9 StGB is the bridge which allows for criminal liability.[216]

The result of the application of § 9 StGB is not liability of the person who has been acted for, but of the person who actually carried out the act. In the process, personal characteristics of the former are attributed to the latter to establish criminal liability. Accordingly, § 9 OWiG and § 14 StGB contain rules of attribution.

b) § 30 OWiG

§ 30 OWiG has a different function. It makes it possible to fine companies and partnerships although they have not acted themselves.[217] In order to do so, it is necessary that a natural person, who is an entity or an agent of the organisation, has committed an offence or misdemeanour.[218] By this, the natural person must have either breached a duty of the organisation or tried to enrich it.[219] If these requirements are fulfilled, the organisation can be penalised. The amount of the fine that can be imposed on the organisation depends on the type of offence that has been committed.[220] Thus § 30 OWiG provides for (accessory) corporate liability.[221] However, this liability is independent from the company's culpability.

As liability under § 30 OWiG is dependent on a natural person's liability, it is necessary to find a natural person who has committed an offence.[222] However, this can be very difficult, especially if the decision is made by a board. For these reasons, § 30 Abs. 4 OWiG allows in certain circumstances the imposition of a fine, although no individual is prosecuted for the offence.[223] It is even possible to fine the company if the identity of the individual who has committed the offence is obscure.[224] However, it is only the identity that can remain unknown; there must be someone belonging to the persons named in § 30 Abs. 1 Nr. 1-5 OWiG who has committed the

[206] *Möllering*, in: Hettinger (ed.), Reform des Sanktionenrechts, Vol. 3: Verbandsstrafe, 2002, p. 71.
[207] BGHSt 2, 194 (200).
[208] Or rather 'negligent homicide', § 222 StGB. For more details see II. 3.
[209] See *Peglau*, ZRP 2001, 406; *Többens*, NStZ 1999, 1.
[210] See *Scholz*, ZRP 2000, 435 (437).
[211] See *Napp* (Fn. 3), p. 59; *Perron*, in: Schönke/Schröder (Fn. 204), § 14 Rn. 1 ff.
[212] *Hoyer*,in: Rudolphi et al. (edit.), Systematischer Kommentar zum Strafgesetzbuch, 8th ed., 40th delivery, updated: February 2005, § 14 Rn. 23.
[213] See *Hoyer*, in: Rudolphi et al. (edit.) (Fn. 212), § 14 Rn. 4.
[214] *Többens*, NStZ 1999, 1 (2).
[215] *Perron*, in: Schönke/Schröder (Fn. 204), § 14 Rn. 10/11. As § 266a StGB is a criminal offence, § 14 StGB applies in this case, not § 9 OWiG.
[216] *Hoyer*, in: Rudolphi et al. (edit.) (Fn. 212), § 14 Rn. 4; *Napp* (Fn. 3), p. 60; *Perron*, in: Schönke/Schröder (Fn. 204), § 14 Rn. 1; *Többens*, NStZ 1999, 1 (2).
[217] *Bohnert*, Kommentar zum Ordnungswidrigkeitenrecht, 2nd ed. 2007, § 30 Rn. 1.
[218] § 30 Abs. 1 OWiG.
[219] *Rogall*, in: Senge (edit.), Karlsruher Kommentar zum Gesetz über Ordnungswidrigkeiten, 3rd ed. 2006, § 30 Rn. 72 ff.
[220] § 30 Abs. 2 OWiG.
[221] Similarly *Eidam* (Fn. 3), p. 83; *Rogall* (Fn. 219), § 30 Rn. 3 ff.
[222] *Bohnert* (Fn. 217), § 30 Rn. 5.
[223] See generally on § 30 Abs. 4 OWiG *Eidam*, wistra 2003, 447.
[224] BGH NStZ 1994, 346; *König*, in: Göhler, Gesetz über Ordnungswidrigkeiten, Commentary, 5th ed. 2006, § 30 Rn. 40; *Rosenkötter*, Das Recht der Ordnungswidrigkeiten, 5th ed. 2000, Rn. 215.

offence. Only in that case would each alternative scenario lead to the company's liability under § 30 OWiG.

Therefore, one can say that § 30 OWiG provides for an accessory liability of the company or partnership.[225] However, this accessoriness[226] can be avoided if it is unclear which individual has committed the offence. The reason for this is that the decision-making structure of companies regularly leads to causation problems. Accordingly, in certain circumstances, § 30 OWiG allows a corporate fine independent from an individual's conviction.

c) § 130 OWiG

Finally, § 130 OWiG creates a misdemeanour of the breach of a supervision duty.[227] According to this provision, the owner of a business is criminally liable if he breaches his duty to supervise the business.[228] A supervision duty exists insofar that the owner has to take care that nobody acts contrary to duties he himself has. In case of delegation of these duties, the owner has to supervise his employees accordingly.[229]

The exact extent of the supervision duty depends on the structure of the business and differs from case to case.[230] It is the courts' task to decide whether the supervision in a company was sufficient or not.[231] Moreover, if the owner of the business is a legal person, § 130 OWiG does not apply directly.[232] That is because corporate liability for criminal offences is in principle rejected.[233]

d) Relationship between §§ 9, 30 and 130 OWiG

Together, the three provisions form a composite which leads in effect quite often to corporate liability.[234]

When some minor employee has made a mistake and the owner of the enterprise has breached his duty of supervision, the latter is liable for a misdemeanour under § 130 OWiG. However, this does not apply if the owner of the business is a company. Then, it is necessary to identify a representative of the company by means of § 9 OWiG.[235] This representative will be regarded as owner of the business under § 9 OWiG and thus be liable for breach of a duty of supervision (§ 130 OWiG).

In these cases the representative will be of such a position that in turn § 30 OWiG applies.[236] This means that it is also possible to fine the company according to § 30 OWiG. The misdemeanour which forms the basis of liability under § 30 OWiG is the one contained in § 130 OWiG, the breach of a duty of supervision. Accordingly, the three provisions lead to the fining of the company and thus to corporate liability.[237]

3. Negligent homicide cases

In order to determine whether the rules contained in the OWiG provide corporate liability for manslaughter, it is necessary to examine how 'corporate manslaughter' cases are dealt with in Germany.

a) The suspension railway disaster in Wuppertal

One of the most important cases of negligent homicide was the crash and derailment of the suspension railway in Wuppertal.[238] On 12th April 1999, the first train of the morning crashed into a metal claw and fell down into the river Wupper. Five people died, numerous others were severely injured.

The courts established that the claw had been forgotten by a building team which had been modernising the railway construction. The suspension railway operator WSW was responsible for supervising the work, whereas the enterprise ARGE was responsible for construction. Four workers of ARGE had failed to remove the claw from the railway after the work had been finished. The ARGE construction manager and two supervisors from WSW failed to check the railway before traffic started. These checks were necessary according to a safety system that had been devised by a representative of WSW, but which was in several respects unclear and thus likewise faulty.[239]

The LG convicted each of the three supervisors of negligent homicide.[240] The four workers were on appeal convicted of negligent homicide by nonfeasance.[241] The representative of WSW was found negligent in devising the safety system, but causation between his fault and the deaths could not be proven. Thus he was acquitted.[242]

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[225] See also *Mitsch*, Recht der Ordnungswidrigkeiten, 2nd ed. 2005, p. 166.

[226] Akzessorietät, *Köbler*, Rechtsenglisch – Deutsch-englisches und englisch-deutsches Rechtswörterbuch für jedermann, 6th ed. 2005, p. 8.

[227] See generally on § 130 OWiG *Krekeler/Werner*, Unternehmer und Strafrecht, 2006, Rn. 19 ff; *Maschke*, Aufsichtspflichtverletzungen in Betrieben und Unternehmen, 1997, p. 1 ff.

[228] *Rogall* (Fn. 219), § 130 Rn. 1.

[229] *Rogall*, (Fn. 219), § 130 Rn. 3 ff.

[230] *König* (Fn. 224), § 130 Rn. 10; *Förster*, in: Rebmann/Roth/Herrmann (edit.), Gesetz über Ordnungswidrigkeiten, Kommentar, 3rd ed. 2007, § 130 Rn. 14; *Rogall* (Fn. 219), § 130 Rn. 40; *Többens*, NStZ 1999, 1 (4).

[231] See *Rogall* (Fn. 219), § 130 Rn. 41.

[232] See *Bohnert* (Fn. 217), § 130 Rn. 8.

[233] See IV. 1.

[234] See *Többens*, NStZ 1999, 1 (7 ff.).

[235] *Bohnert* (Fn. 217), § 130 Rn. 8.

[236] See *Peglau*, ZRP 2001, 406 (406).

[237] See Abschlussbericht der Kommission zur Reform des strafrechtlichen Sanktionensystems, 2000, available at: http://www.bmj.bund.de/files/-/2565/Reform_Sanktionsrecht.pdf, which considers the OWiG rules to be sufficient.

[238] LG Wuppertal, Urt. from 29.9.2000 – 21 KLs 411 Js 533/99 - 2/00 and BGHSt 47, 224.

[239] For details see LG Wuppertal, Urt. from 29.9.2000 – 21 KLs 411 Js 533/99 - 2/00.

[240] Conviction was due to their failure to undertake the necessary checks, §§ 222, 13 StGB.

[241] See BGHSt 47, 228.

[242] See LG Wuppertal, Urt. from 29.9.2000 – 21 KLs 411 Js 533/99- 2/00.

Neither WSW nor ARGE was prosecuted. This is characteristic of German criminal law which focuses on individual liability, although the OWiG allows for a certain form of corporate liability. Nevertheless, it is an interesting question whether WSW or ARGE could have been fined under § 30 OWiG.

§ 30 OWiG requires a representative in a sufficiently high position to have committed an offence or misdemeanour. However, the only defendant who would have fallen in this category, the representative of WSW who devised the safety system, was acquitted of homicide. The next question is whether he could – with the use of § 9 OWiG[243] – have been liable for breach of a duty of supervision (§ 130 OWiG). The court of first instance – the criminal division of the LG – found, however, that he had not breached his duty to supervise the construction work.[244] Therefore, he could not have been found guilty under § 130 OWiG either.

As none of the other defendants was in a sufficiently high position to invoke corporate liability according to § 30 OWiG and there was no proof of a breach of the duty of supervision by ARGE either, neither of the two companies could be fined. Therefore, the suspension railway case is not one of corporate liability under German Law.

b) The 'Monza Steel' case

The second case that is to be examined under the heading of corporate liability in Germany is the 'Monza Steel' case.[245] This case is slightly different from those discussed above,[246] because it is an example of product liability in criminal law.[247]

A company[248] produced high speed tyres of the type 'Monza Steel'. However, the tyres had numerous defects[249] which led to car accidents resulting in a total of seven deaths. Four individuals were prosecuted for negligent homicide (§ 222 StGB). Three of them were part of the board of directors of the company, whereas one was responsible for the control of the tyres and as such part of the so-called "middle management"[250].

The court found that severe errors had been made. The product was so defective that it should not have been sold or at least should have been recalled after the first accidents.[251] Although negligence was obvious, only the middle manager responsible for tyre control was finally convicted of negligent homicide. This was due to the fact that one of the defendant directors had died, whereas the other two had become unfit to plead.[252] Thus only the defendant with the lowest position could be tried.

In light of these facts the question of corporate liability becomes more important. It does not seem fair to convict a middle manager when the top managers cannot be tried for 'technical reasons'[253]. However, the question of a corporate fine under § 30 OWiG was not addressed in the decision.

When applying the OWiG rules, the first thing to realise is that the middle manager who has been convicted of negligent homicide is not in a sufficiently high position to make a corporate fine possible. Being only responsible for one department of the company, he does not fall within the description of § 30 Abs. 1 Nr.1-5 OWiG.

In contrast, the three directors fulfil the criteria listed in § 30 Abs. 1 Nr. 1 OWiG. Although the court decision does not name the company, the description of the functions of the three directors reveals to which type of organisation they belong: One of them is called "Vorstandsvorsitzender" (Managing Director), whereas the other two are referred to as "Geschäftsführer" (Chief Executive Officer).[254] There are only two types of organisations in German law which have an organ called "Vorstand" (board): the AG and the KGaA.[255] Both have a similar structure. Accordingly, the three directors are representatives in the sense of § 30 Abs. 1 Nr. 1 OWiG. It is therefore not necessary to know which type of organisation the tyre company is. Moreover, it is clear from the facts that the directors have breached the company's duty not to sell defective products.

The next question is whether the company can be fined although none of the directors could be tried. According to § 30 Abs. 4 OWiG, a separate fine of the company is possible when there are no 'legal impediments' to the prosecution of the individuals.[256] However, it seems to be unclear whether the impediments to the prosecution of the directors were 'legal'.

According to *Rogall*, neither death nor unfitness to plead are legal impediments.[257] This makes sense as a trial is in both situations impossible because the defendant in either case cannot, for factual reasons, participate.[258] In contrast, *Eidam* regards unfitness to plead as a legal impediment.[259]

[243] See IV. 2. d. for the relationship between the rules.
[244] LG Wuppertal, Urt. from 29.9.2000 – 21 KLs 411 Js 533/99- 2/00.
[245] LG München II, Urt. from 21.4.1978 – IV KLs 58 Js 5534/76 in: *Schmidt-Salzer* (Fn. 204), p. 296 ff.
[246] III. 3. b) aa), bb) and IV. 3. a).
[247] *Schmucker*, Die 'Dogmatik' einer strafrechtlichen Produkthaftung, 2001, p. 41 ff. See also *Eidam*, NJW 2005, 1021 (1023).
[248] As German criminal decisions are typically published anonymously, neither the name of the company nor its organisational structure is known to the author.
[249] For details see LG München II, Urt. from 21.4.1978 – IV KLs 58 Js 5534/76 in: *Schmidt-Salzer* (Fn. 204), p. 296 ff.
[250] *Schmucker* (Fn. 247), p. 43.
[251] *Eidam* (Fn. 3), p. 10.
[252] *Schmidt-Salzer* (Fn. 204), p. 336; *Schmucker* (Fn. 247), p. 43.
[253] 'Unfitness to plead' does not affect criminal guilt in German law although it prevents only a trial. However, the death of the defendant makes a conviction obviously pointless.
[254] *Schmidt-Salzer* (Fn. 204), p. 336.
[255] Cf. §§ 76, 278 AktG. For details of both forms see *Semler/Perlitt*, in: Semler/Kropff (edit.), Münchener Kommentar zum Aktiengesetz, 2nd ed. 2000, § 278 Rn. 1 ff. and *Semler*, in: Semler/Kropff (edit.) (Fn. 255), Introduction, Rn. 1 ff.
[256] § 30 (4) p.3 OWiG.
[257] *Rogall* (Fn. 219), § 30 Rn. 169.
[258] Of the same opinion *Krekeler/Werner* (Fn. 227), Rn. 106.
[259] *Eidam*, wistra 2003, 447 (455).

The reasoning behind this is that fitness to plead is a legal requirement for prosecution and unfitness to plead thus a legal impediment.

In order to decide whether unfitness to plead is a legal impediment in the sense of § 30 Abs. 4 OWiG, one has to keep in mind the purpose of the rule. § 30 OWiG links corporate liability to individual liability of the company's representatives. However, § 30 Abs. 4 OWiG allows an exception of the accessoriness. That is because the liability of companies should not be affected by procedural impediments. The company's liability is accessory to the individual's liability, not to his prosecution. Accordingly, unfitness to plead is a legal impediment if it concerns the individual's liability and not only his prosecution.

As German law doctrine regards unfitness to plead as a procedural impediment which does not affect criminal liability itself,[260] it is not a legal impediment in the sense of § 30 Abs. 4 OWiG. Therefore, the company can be fined under § 30 OWiG although the directors themselves could not be prosecuted. Consequently, the 'Monza Steel' case is one of corporate liability.

4. Individual liability for homicide

As the two examples above show, German law focuses on individual liability rather than on corporate liability. Although the OWiG provides a possibility to fine the company,[261] it is only rarely used in homicide cases.[262] Even in evident cases of 'corporate liability' the public authorities are reluctant to impose a fine under § 30 OWiG. What are the reasons for this?

As has been shown above,[263] the requirements for a fine under § 30 OWiG are not too difficult to meet. In many cases, when an individual has been convicted of homicide, the company could be fined without any problem.[264] Therefore, the reason why a fine under § 30 OWiG is rarely imposed must be of a different nature. If it has nothing to do with the possibility of imposing a fine, it must relate to its desirability. Apparently, the fining of a company in cases of homicide is not desirable.

The reason for this is hard to find. It could be that varying degrees of importance are attached to a conviction of negligent homicide, a criminal offence, and a misdemeanour under § 30 OWiG. Put bluntly, one could say that in public perception, there is no point in convicting the company of a misdemeanour if one of its representatives has already been convicted of a criminal offence. The individual's conviction of negligent homicide expresses guilt better than the company's conviction of a misdemeanour under § 30 OWiG. This interpretation fits with the general conception in German law that companies cannot be guilty. A fine under § 30 OWiG is not seen as a real punishment and thus only of marginal importance in comparison with the individual's criminal sentence.[265]

Whatever the reason, it is a fact that liability for homicide is, so far, almost exclusively treated as individual liability of the company's employees. This means that all the problems attached to liability for board decisions apply. These are mainly causation problems[266], especially when the decision has been made by several people.[267] Another problem is that, in most of these cases, liability is attached to nonfeasance, so that one has to decide whether a duty to act[268] existed.[269] The practical difficulty of identifying an individual member of a board who has committed the offence even leads some authors to argue for 'joint participation in negligence crimes' (fahrlässige Mittäterschaft), a concept that is not yet accepted in German law.[270]

This brief overview shows that the question of individual liability for homicide becomes very complex when organisational structures are involved. This conclusion is supported by the number of cases in this area.[271] Often the courts failed to convict individuals because their guilt could not be established. The wish to overcome the difficulties of individual liability fuelled the discussion of corporate liability.

5. Summary

The alleged principle in German law is that there is no corporate liability.[272] However, this principle is only in part correct. That is because German criminal law distinguishes between criminal offences and misdemeanours. While companies cannot be liable for criminal offences, there are misdemeanours which apply to companies. The most important of those is § 30 OWiG. Together with §§ 9 and 130 OWiG, § 30 OWiG leads to a form of corporate liability.

Nevertheless, this does not apply to homicide. Although the rules of the OWiG would make a corporate fine possible in case of homicide by a representative of the company, they

[260] *Ranft*, Strafprozessrecht, 3rd ed. 2005, Rn. 1107.

[261] Similarly *Peglau*, ZRP 2001, 406 (406). See also *U. Schneider*, EuZW 2007, 553.

[262] It was actually impossible to find any example of that in official publications of court decisions. § 30 OWiG mainly applies in competition law, *Cramer/Heine* (Fn. 204), Vorbemerkungen zu den §§ 25 ff. Rn. 120.

[263] IV. 2. b).

[264] See *Eidam*, wistra 2003, 447 for details.

[265] Similarly *Coffee* (Fn. 3), p. 22.

[266] On causation see the leading case BGHSt 37, 106.

[267] See *Eidam* (Fn. 3), p. 11 ff.; *Krekeler/Werner* (Fn. 227), Rn. 55 ff.; *Schmucker* (Fn. 247), p. 63 ff.

[268] On liability for omissions to act in German law see generally *Kühl*, Strafrecht, Allgemeiner Teil, 6th ed. 2008, p. 571 ff.

[269] See *Schmucker* (Fn. 247), p. 106 ff.; *Walter*, Die Pflichten des Geschäftsherrn im Strafrecht, 2000, p. 115 ff.

[270] See *Schaal*, Strafrechtliche Verantwortlichkeit bei Gremienentscheidungen in Unternehmen, 2001, p. 209 ff.; *Cramer/Heine* (Fn. 204), Vorbemerkungen zu den §§ 25 ff. Rn. 115 ff.; *Hoyer*, in: Rudolphi et al. (edit.), Systematischer Kommentar zum Strafgesetzbuch, 7th ed., 32nd delivery, updated: March 2000, § 25 Rn. 154 with further references.

[271] RGSt 63, 211; BGH RdE 1959, 47; LG Aachen JZ 1971, 507; LG München II, Urt. from 21.4.1978 – IV KLs 58 Js 5534/76 in: *Schmidt-Salzer* (Fn. 204), p. 296 ff.

[272] See Fn. 199.

are rarely[273] applied in this situation. A reason for this is not immediately obvious. It might be that a fine under § 30 OWiG is not perceived to be a criminal sanction and thus not regarded as desirable.

The effect of this reluctance to impose a corporate fine under § 30 OWiG is that the discussion of corporate mistakes centres on individual liability of the company's employees. However, individual liability is very often problematic.

Thus the situation in German law is odd. On the one hand, there is a form of corporate liability which could even apply to homicide cases. On the other hand, the existence of corporate criminal liability is mainly denied[274] and homicide cases are treated as cases of individual liability. In the light of these contradictions, it is not astonishing that there is an increasing demand for reform in German law.

V. Comparison

The basic principles in English and German law are controversial. While English law accepts corporate liability and argues only about details, German law is averse to the idea of corporate liability in classical criminal law. Nevertheless, German law recognises other mechanisms which provide for a form of corporate liability. In order to see whether those are comparable to English corporate liability, it will be examined how the English cases would be solved under current German law and vice versa.[275]

1. English cases under German law

a) The capsize of the Herald of Free Enterprise

The reason for the capsize of the Herald of Free Enterprise was the cumulative fault of different people.[276] However, there was no individual belonging to the senior management who could be convicted of manslaughter. That was because everyone could rely on the other ones' correct conduct and thus was not reckless in the sense of the law. Although the criteria of the German conception of negligence are slightly different,[277] a conviction of negligent homicide is also impossible if the death would have occurred anyway, i.e. even if the individual's conduct had been correct. Accordingly, no member of the senior management would have been liable for negligent homicide under German law either.[278] Therefore, § 30 OWiG would not apply in combination with a homicide offence.

Nevertheless, an individual in a high position, who counts as the owner of the business under § 9 OWiG, could have been guilty of a breach of a supervision duty in the sense of § 130 OWiG. This would allow the conviction of P & O European Ferries under § 30 OWiG.[279]

The problem is that the facts make it hard to find a breach of a duty of supervision by an individual person. Assuming that some lesser employee could indeed have been convicted of homicide,[280] an individual would have to be found who has committed a breach of a duty of supervision. However, it is as difficult to find one individual who has breached a supervision duty as to find one individual guilty of negligent homicide. Although one can say that the management collectively has failed to supervise the employees properly, this failure cannot be pinned to one individual. Therefore, no individual is guilty of a breach of a supervision duty under §§ 130, 9 OWiG either. Accordingly, the company could not be fined under § 30 OWiG. Thus, the current German law would not allow a corporate fine in the Herald of Free Enterprise case.

b) The Southall train crash

In the Southall train crash case, Great Western Trains could at first not be convicted because no individual in a sufficiently high position could be found to have been negligent.[281] This looks different under the new Act.[282]

However, the same problem exists in German law. The facts do not allow an individual's conviction of negligent homicide. Nor can anyone be convicted because of the breach of safety standards, which amounts to a breach of a duty of supervision.[283] Accordingly, there is no possibility of convicting the company under § 30 OWiG either.

2. German cases under English law

a) The suspension railway disaster of Wuppertal

In the suspension railway case, three supervisors and four workers had finally been found guilty of negligent homicide by the court.[284] Under current English law, the question arises whether the two companies, WSW and ARGE, would be criminally liable. This situation is governed by the CMA.

WSW and ARGE are companies and thus organisations which fall within the CMA.[285] Moreover, they must have owed a relevant duty of care to the five deceased. Since they were involved in construction work, both companies had a duty to work safely and supervise the work properly, which amounts to a relevant duty of care under s. 2 (1) (c) (ii) CMA. Furthermore, the way in which the companies' activities have been managed must amount to a gross breach of this duty. With regard to the failures that have occurred (four workers

[273] See Fn. 256.
[274] See Fn. 199.
[275] For the solution of the cases in their own jurisdiction see III. 3. b). aa), bb) and IV. 3. a), b).
[276] See III. 2. a).
[277] For an overview of the law of negligence see e.g. *Wessels/Beulke*, Strafrecht, Allgemeiner Teil, 38th ed., 2008, Rn. 655 ff.
[278] This might be different if joint participation in negligence crimes were to be accepted, see *Schmucker* (Fn. 247), p. 219 ff.
[279] On § 30 OWiG see IV. 2. b).
[280] Whether this was really the case is not clear from the decision. See R v P & O Ferries (Dover) Ltd., [1991] 93 Cr. App. R. 72.
[281] See III. 2. b).
[282] See III. 3. b). bb).
[283] Cf. *Bohnert* (Fn. 217), § 130 Rn. 20.
[284] LG Wuppertal, Urt. from 29.9.2000 – 21 KLs 411 Js 533/99 - 2/00 and BGHSt 47, 224. See IV. 3. a).
[285] On the definition of organisation see III. 3. a). bb).

failing to remove the claw, three supervisors failing to notice this), one cannot argue that the duty of care has been breached grossly by the company as a whole.

However, according to s. 1 (3) CMA, it is necessary that the way in which the companies' activities were organised by their senior management was a substantial element in the breach. There was serious disorganisation in both companies, but it expressed itself in the workers' and supervisors' failings. Neither the former nor the latter played a significant role in decisions concerning the whole company, so that none of them was part of the senior management. In fact, there was no disorganisation which could be traced to the senior management. Accordingly, the requirements of the CMA are not fulfilled and thus neither company would be liable for corporate manslaughter.

b) The 'Monza Steel' case

The 'Monza Steel' case is slightly different. In this case, the company, an organisation which falls within the CMA,[286] had sold defective high speed tyres although they had had reports of the defects. This would amount to a gross breach of the duty to supply non-defective goods which is owed to customers.[287] Again, the main question is whether the senior management's organisation was a substantial element in this breach.

In contrast to the suspension railway case however, 'Monza Steel' is a clear case of a senior management failure. It was the board's task to organise sufficient controls of the tyres and it was the board's failure to do so which led to the customers' deaths. Therefore, a failure by the senior management was a substantial element of the breach. As corporate liability is independent from individual liability under the CMA, it is of no consequence that none of the directors could finally be prosecuted due to death and unfitness to plead. Accordingly, the company that was producing Monza Steel tyres would be liable for corporate manslaughter under current English law.

3. Conclusion

a) The German cases

The German cases that have been examined here[288] did not fall within corporate liability in German law. However, the investigation has shown that liability under § 30 OWiG could have been attached to the company in the 'Monza Steel' case. In contrast, even an application of the rules in the OWiG is not sufficient to establish corporate liability in the suspension railway case.

This is similar under English law. Although the CMA has simplified the finding of corporate liability, English law would not have led to WSW or ARGE being held liable for the suspension railway disaster either. That is because of the 'senior management requirement' contained in the Act due to which the company is only liable if its senior management played a substantial part in the mismanagement. By this, the line between liability of the company and vicarious liability is drawn. In the suspension railway case, the minor employees had acted grossly negligent, not the management. Thus, the rejection of corporate liability in this case conforms to the refusal of vicarious liability.

For the same reasons, but with a different outcome, the 'Monza Steel' case would be one of corporate liability under English law. Here, it was the board's decision which led to the customers' deaths. However, the independence of corporate liability from individual liability in current English law facilitates the finding of corporate liability considerably. While it has to be examined in detail under German law whether an individual's unfitness to plead or death are legal impediments to prosecution,[289] English law regards the senior management as a unity and subsequently concentrates on its collective failure.

Thus, the German cases illustrate the underlying decision of current English law to reject vicarious liability. Moreover, the 'Monza Steel' case illustrates how current English law simplifies the finding of corporate liability in contrast to German law.

b) The English cases

This becomes more obvious when regarding the English cases. Both English cases treated here, P & O European Ferries[290] and Great Western Trains[291], illustrate the achievements of the new Act in contrast to the former situation in the law.[292] Prosecutions that have failed under former English law would now lead to convictions. It is remarkable that the outcome under current German law would be similar to that under English law before the coming into force of the CMA.

That is because both German and former English law require an individual to be guilty of an offence. Both § 30 OWiG and the identification doctrine are based on individual liability of a senior representative of the company. Although this liability can be considerably widened by means of § 130 OWiG in German law, it is still necessary that one individual has committed the offence. Thus German law fails when death has been caused by the collective failure of individuals. The same was true for English law before the CMA came into force. Under the current law, however, this difficulty has been overcome by means of including 'senior management' instead of 'senior managers', as had been suggested at first.[293]

[286] According to s. 25 CMA, the notion 'corporation' also includes associations incorporated under foreign law, such as AG and KGaA.

[287] Cf. s. 2 (1) (c) (i) CMA.

[288] LG Wuppertal, Urt. from 29.9.2000 – 21 KLs 411 Js 533/99 - 2/00 and BGHSt 47, 224; LG München II, Urt. from 21.4.1978 – IV KLs 58 Js 5534/76 in: *Schmidt-Salzer* (Fn. 204), p. 296 ff.

[289] See IV. 3. b).

[290] R v P & O Ferries (Dover) Ltd., [1991] 93 Cr. App. R. 72.

[291] Attorney-General's Reference (No. 2 of 1999), [2000] Q.B. 796.

[292] Cf. III. 1., 2.

[293] S. 1 (1) Corporate Manslaughter and Corporate Homicide Bill 220 05-06, introduced on 20th July 2006.

Therefore, the English cases illustrate the differences that exist between English and German law. Even if the OWiG rules are accepted as a form of corporate liability,[294] they are still dependent on individual liability and thus resemble more the former English law. This leads to the question whether corporate liability for manslaughter as it is contained in the CMA could and should be implemented into German law.

VI. Implementation of corporate liability into German law

This issue consists of two parts: The first is that of the possibility of implementing corporate liability, or, to be more precise, the question whether there are legal impediments to the adaptation of a statute such as the CMA.[295] The second is whether the implementation of corporate liability as contained in the CMA is desirable at all.

1. Possibility of implementation

A preliminary point to be kept in mind is that the introduction of corporate liability following the model of the CMA would have to happen by a parliamentary statute. Although the StGB does not exclude corporate liability,[296] there is consensus that it is not yet existent in classical criminal law. However, such a statute introducing corporate liability would have to be reconcilable with German constitutional law and especially with the fundamental rights contained in the GG.[297] There are numerous ways in which such a statute could violate constitutional law. Therefore, this part will concentrate on the constitutional rules that are most likely to be problematic.

a) The principle of culpability

One of the main arguments raised against corporate liability concerns the inability to reconcile it with the principle of culpability.[298] This principle is based on Art. 20 GG[299] and thus has its roots in the Rechtsstaatsprinzip[300] which is one of the basic principles of German legal doctrine.[301] It provides that punishment must mirror the individual's guilt. As guilt is understood as bearing personal blame for one's conduct, this principle guarantees that the punishment is related to the perpetrator's conduct.

With regard to corporate liability, the main question to ask is whether the principle of culpability applies to companies at all. The GG contains in Art. 19 Abs. 3 GG a provision according to which the fundamental rights apply to domestic legal persons "[…] to the extent that the nature of such rights permits […]".[302] Although the principle of culpability is not a fundamental right,[303] it closely resembles them insofar as it also serves to protect individual rights. Therefore, the principle contained in Art. 19 Abs. 3 GG is applicable to the principle of culpability. Accordingly, it has to be asked whether the nature of the principle of culpability permits application to companies. Effectively, the question is whether companies can be guilty or not.

This is one of the most controversially discussed issues in German law doctrine.[304] For more than a century, lawyers have argued about the concept of corporate guilt and whether or not it should be accepted into German law doctrine. Instead of weighing up all the arguments in general, the following part will only focus on the consequences of following either opinion.

aa) Consequences of acceptance of corporate guilt

Assuming that it is possible to construct corporate guilt, the principle of culpability applies. The next problem is to find out how corporate guilt could be constructed.[305] Those in favour of corporate liability have developed different models how liability could be attached to a company:[306] an attribution model, a model of original corporate liability and a model of measures of reform and prevention.[307] The first one is based on the idea of attribution of individual guilt, whereas the latter replaces punishment with a measure of reform and prevention. Such a measure is independent of guilt and thus not a punishment in German law doctrine.[308] Only the model of

[294] As is suggested here, see IV. 2. d).

[295] Such a statute would be German law and thus not the same as the English CMA. In order to make this difference clear, the hypothetical German statute will in the following simply be called 'the statute'.

[296] See IV. 1.

[297] On the relationship between German criminal law and constitutional law see *Lagodny*, EJCCC 1999, 277.

[298] *Eidam* (Fn. 3), p. 91 ff.; *Fieberg* (Fn. 204), p. 83; *Gómez-Jara Diéz*, ZStW 2007, 290 (290) with further references in Fn. 1.

[299] *Hofmann*, in: Schmidt-Bleibtreu/Klein (edit.), Kommentar zum Grundgesetz, 10th ed. 2004, Art. 20 Rn. 63.

[300] BVerfGE 20, 323 (331). It has also been based on Art. 1 Abs. 1, 2 Abs. 1 GG; *Frister* (Fn. 82), ch. 3 Rn. 1; *Roxin*, Strafrecht, Allgemeiner Teil, Vol. 1, 4th ed. 2006, p. 92, but these articles cannot apply to companies, *Dannecker*, GA 2001, 101 (114).

[301] On this principle see generally *Kunig*, Das Rechtsstaatsprinzip, 1986, p. 1 ff.

[302] German Bundestag – Administration – Public Relations section, Basic law for the Federal Republic of Germany, Text Edition, Status: June 2008; available at: http://www.bundestag.de/interakt/infomat/fremdsprachiges_material/downloads/ggEn_download.pdf.

[303] Fundamental rights are only those contained in the first part of the GG (Art. 1-19 GG).

[304] See *Jescheck/Weigend* (Fn. 204), p. 226 ff.; *Roxin* (Fn. 300), p. 262 ff. See also *Gómez-Jara Diéz*, ZStW 2007, 290 (290) with further references.

[305] See generally on corporate guilt *Gómez-Jara Diéz*, ZStW 2007, 290.

[306] See Abschlussbericht der Kommission zur Reform des strafrechtlichen Sanktionensystems (Fn. 237), p. 191, for a brief overview.

[307] Maßregel der Besserung und Sicherung.

[308] *Jescheck/Weigend* (Fn. 204), p. 803.

original corporate liability accepts a genuine corporate guilt. Neither the attribution of individual guilt nor the relinquishment of the requirement of guilt is reconcilable with the assumption made above: that the principle of culpability does in its nature apply to companies. Therefore, one has to assume that a genuine corporate guilt exists.

In the light of this assumption, it is necessary to determine whether such a statute would constitute an expression of genuine corporate guilt. Only then would it be possible to decide whether the statute could be implemented into German law. There is no consensus about what constitutes genuine corporate guilt. Those supporting the idea of corporate guilt provide different definitions.[309] However, one thing that the different approaches have in common is that they are based on organisational deficits in the company. As companies have the right to organise themselves, they must in turn have the duty to provide an organisation which takes risks sufficiently into account.[310] Accordingly, corporate guilt expresses itself in failures in organisational structure.

It only remains to be asked whether the CMA is a good model for corporate guilt. The British Government has tried to develop an original and innovative approach to corporate liability and separate it from individual liability. The collective identity of companies is for the first time taken into account. Therefore, one can say that the CMA is based on corporate instead of individual guilt. Accordingly, the statute which is at stake here would also have to be based on corporate guilt.

This means that the statute could be implemented into German law, provided that the idea of corporate guilt is accepted in general. If the idea of genuine corporate guilt is acknowledged and thus the principle of culpability applies, it is necessary that the statute is based on corporate guilt. This paper suggests that the CMA provides a model of corporate guilt which fulfils the requirements of the German principle of culpability, as it is based on collective organisational failures. Accordingly, the consequences of accepting corporate guilt would be that the statute could be implemented into German law.

bb) Consequences of rejecting corporate guilt

In contrast, if it is found that corporate guilt is impossible to construct, the consequence must be that the principle of culpability does not apply to companies. Most authors conclude from this that companies cannot be punished.[311] However, this is not necessarily so. The idea that punishment is impossible without guilt is part of the principle of culpability.[312] If the principle of culpability does not apply, however, there is no reason why punishment should be dependent on guilt. On the contrary, the lack of this principle widens the possibility of punishment by allowing punishment without guilt.

Nevertheless, those who say that the absence of the principle of culpability forbids punishment do so with good reason. The definition of punishment is central in this argument. Punishment is generally understood as "inflicting evil for evil done"[313]. However, it is also generally thought to contain an element of reproach: punishment expresses disapproval of the perpetrator's conduct.[314] He is reproached for having behaved in a criminal way, although it was possible for him to change his course of action. This is also what is understood by guilt.[315] Accordingly, guilt and punishment are entwined in German legal doctrine: punishment is defined as the consequence of guilty conduct.

Considering this, one could say that punishment of companies in the strict sense of the word is impossible when they are not culpable.[316] However, this does not hinder the legislator to attach consequences to management failures. Although it is not possible to call those consequences 'punishment', there is no reason why an obligation to pay money to the state – which is effectively a fine – could not be introduced by law. From the dogmatic point of view, such an obligation would resemble a measure of reform and prevention.[317] The difference between this obligation and measures of reform and prevention is that the latter are independent of guilt in a criminal system where the principle of culpability applies, whereas the former belongs to a system without any guilt.
Accordingly, the implementation of corporate liability by statute is possible, even if the applicability of the principle of culpability is rejected. The statute would simply not be regarded as providing criminal punishment but rather other forms of sanctions which resemble measures of reform and prevention. Thus, the consequences of the rejection of corporate guilt would be that the statute could nonetheless be implemented.

cc) Conclusion

The analysis of the consequences of either accepting or rejecting the idea of corporate guilt shows that the dispute is in fact only of theoretical importance. In either case, the statute could be implemented into German law without being in conflict with the principle of culpability.

Thus, if the principle of culpability were to apply to companies, a statute modelled on the CMA would fulfil the criterion of providing for corporate guilt. If the application of the principle of culpability is rejected altogether, there is no need for the statute to be based on guilt. In that case, however, the sanction provided by the statute could not be called a pu-

[309] See *Gómez-Jara Diéz*, ZStW 2007, 290: "constructivist culpability"; *Dannecker*, GA 2001, 101(112 ff.): "socio-ethical culpability". More generally *Schünemann*, in: Eser/Heine/Huber (Fn. 2), 225 (232).
[310] *Gómez-Jara Diéz*, ZStW 2007, 290 (326).
[311] See e.g. *Jescheck/Weigend* (Fn. 204), p. 227; *Napp* (Fn. 3), p. 152.
[312] *Frister* (Fn. 82), ch. 3, Rn. 1.
[313] This goes back to *Grotius*, De iure belli ac pacis (1625), liber II, caput XX, de poenis, in: *Frister* (Fn. 82), ch. 1 Rn. 1.
[314] *Eidam* (Fn. 3), p. 116; *Kühl* (Fn. 268), p. 324.
[315] Cf. *Jescheck/Weigend* (Fn. 204), p. 423.
[316] In view of this, § 30 OWiG, which allows a fine and thus a punishment of companies, is an oddity in German criminal law. See *Eidam* (Fn. 3), p. 108.
[317] *Schünemann* (Fn. 309), p. 232.

nishment under German law doctrine.[318] However called, the statute would effectively demand the payment of money and thus constitute a fine.

As the legislator could therefore implement the statute regardless of whether companies can be guilty or not, there is no need to address this difficult question here. Suffice it to say that, in any case, there is no conflict with the principle of culpability.

b) Principle of clarity[319]

Another important principle that has to be observed in German criminal law is the principle *nulla poena sine lege*. The principle of clarity is contained in Art. 103 Abs. 2 GG[320] which provides that criminal statutes have to be precise, clear and unambiguous.[321] This does not mean that statutes must have the utmost degree of precision. It is sufficient when the addressee is able to appreciate the risk that his conduct attracts criminal liability.[322] Even the use of indefinite terms is reconcilable with the principle of clarity, if the statute is on the whole sufficiently precise.[323] Such precision can derive from jurisprudence and interpretation of the norm in context.[324] So far, only one infringement of the principle of clarity in criminal law has been found.[325]

The statute would be modelled on the CMA and thus use the same expressions. However, the CMA has already been criticised for its vagueness by British authors.[326] It contains several indefinite terms such as "gross breach"[327], "duty of care"[328], "senior management"[329] and "substantial element"[330]. The question is therefore whether a statute modelled on the CMA would be sufficiently precise in spite of these indefinite terms. This depends on whether the exact content of the statute can be determined by interpretation by a judge.[331] The terms "gross breach" and "duty of care" are not unknown in German law: the former is a common notion in civil law[332], whereas the latter is an element of every negligence offence.[333] Thus it is clear what is understood by these terms.

The other two indefinite terms present more difficulties. It is, for instance, not clear who belongs to the "senior management" of a company without further knowledge of its structure.[334] However, a German judge is in a good position to cope with it, as he can hear evidence to gain insight into the company's structure. In this respect he has an advantage over the English jurors who cannot demand further evidence. Thus, "senior management" is also interpretable.

The most problematic element of the CMA is the requirement that the way in which the activities of the organisation are managed by its senior management must be a substantial element in the breach of the duty of care. This leads inevitably to the question what is to be understood by 'substantial'. The text itself is not helpful on this point. According to the Standing Committee debates on the Bill, 'substantial' is a synonym for 'large'.[335] However, this does not explain when a senior management's conduct is considered to have had enough impact to be a substantial or large element in the breach. Ultimately, this will be the judge's task to decide in a German court.

The question remains whether this would be reconcilable with the principle of clarity. On the one hand, terms like 'substantial' are always vague and thus should be used with care.[336] On the other hand, the legislator is sometimes obliged to use indefinite terms in order to make the statute workable. Therefore, the principle of clarity demands only the highest degree of precision possible.[337]

Accordingly, one has to ask whether the statute is formulated in the best possible way. With regard to the lack of a definition of "substantial element" and the general vagueness of the statute, this must be answered in the negative. The legislator should at least indicate the reasons for introducing the requirement of a substantial element[338] in order to make the statute clearer or try to give guidance on when a senior management failure is a substantial part in the breach. Therefore, a statute following the precise wording of the CMA would be unclear and imprecise and thus would infringe the principle of clarity.

c) Conclusion

The examples of the principles of culpability and clarity mentioned provide a good insight into the complex constitutional considerations which need to be undertaken before implementing corporate liability.[339] The discussion shows

[318] See VI. 1. a). bb).
[319] Bestimmtheitsgrundsatz.
[320] Similar provisions can be found in § 1 StGB and § 3 OWiG.
[321] Cf. http://www.gbirkinshaw.co.uk/germanlegalglossary-AtoC.html (last accessed on the 2nd of May 2008), cited at: http://dict.leo.org/forum/viewUnsolvedquery.php?idThread=237234&idForum=1&lp=ende&lang=de.
[322] BVerfGE 92, 1 (12); *Degenhart*, Staatsrecht I, Staatsorganisationsrecht, 22nd ed. 2006, Rn. 359; *Nolte*, in: von Mangoldt/Klein/Starck (edit.), Das Bonner Grundgesetz, Vol. 3, 5th ed. 2005, Art. 103 Rn. 141.
[323] *Nolte* (Fn. 322) Art. 103 Rn.143.
[324] *Brockmeyer* (Fn. 299), Art. 103 Rn. 7.
[325] BVerfGE 78, 374.
[326] See III. 3. c).
[327] See III. 3. a) dd).
[328] See III. 3. a) cc).
[329] See III. 3. a) ee).
[330] See III. 3. a) ff).
[331] *Nolte* (Fn. 322), Art. 103 Rn. 139.
[332] Cf. e.g. § 277 BGB.
[333] See *Kühl* (Fn. 268), p. 507 ff.
[334] For a definition see III. 3. a) ee).
[335] Committee B (House of Commons) (Fn. 167), column 22.
[336] Also doubtful BGH NJW 2004, 2990 on tax evasion "on a large scale".
[337] *Rogall* (Fn. 219), § 3 Rn. 27.
[338] See III. 3. a) ff).
[339] Another constitutional principle worth considering is *ne bis in idem*. See *Eidam* (Fn. 3), p. 93 ff.; *Scholz*, ZRP 2000, 435 (438 ff.).

that dogmatic concerns like reconcilability with the principle of culpability are ultimately of minor importance. If the legislator decides to adopt corporate liability, the GG will not prevent it. It will be left to the criminal scholars to combine such a law with current criminal doctrine.[340]

However, the way in which corporate liability is implemented into German law needs to be chosen carefully. This is due to constitutional requirements which the CMA would not fulfil. The difference between English and German law on this point can be explained by their different constitutional laws: While Germany does have a modern constitution, English constitutional law arises out of different documents.[341] The consequence is that a German statute after the English model would have to be rendered more precise. As it would be necessary to draft a German version of the law in any case, this requirement could easily be met. Otherwise, the implementation would violate the GG.

2. Desirability?

Having thus established that a statute like the CMA could be implemented into German law, but only with the relevant element of precision, the next question would be whether it should. This question is very complex, because it addresses the reason for criminal law in general. Moreover, its answer depends on political considerations. Therefore, no attempt will be made to answer it here.

However, it should not be forgotten that rules of corporate liability exist in the OWiG which also apply to homicide.[342] In light of this, there is need for an explanation why a criminal offence by way of statute is necessary. Similarly, as English Health and Safety law already allowed for an unlimited fine of companies,[343] the same question had to be addressed.[344] This was resolved by reverting to the principle of fair labelling, basically saying that crimes should be labelled to reflect the severity of wrongdoing.[345] This might also serve as explanation under German law,[346] especially when bearing in mind the reluctance to apply the OWiG to homicide offences.[347] Moreover, the new statute would solve the problem of collective failings. Whether this provides a sufficient reason to enact a new criminal offence remains to be seen.

VII. Conclusion

The results of the comparison of English and German law of corporate manslaughter[348] show that German law, as it is now, resembles English law as it was before the CMA. The rules of the OWiG allow fining a company if an individual belonging to the senior management has committed an offence and thus are similar to the English identification doctrine. This is surprising, as German criminal law allegedly rejects the idea of corporate liability.[349]

Curiously though, the potential of fining companies under German criminal law is not used in homicide cases. In this respect, there is a big gap between 'law in books' and 'law in action'[350]. It is suggested here that a fine under the label of 'misdemeanour' does not meet the expectations of the people with regard to a criminal penalty. However, the reasons for this merit further examination.

In any case, German law is dependent on individual liability. As was the case with English law before the reform, individual liability is hard to prove in complex organisational structures. Thus German prosecutions fail where English ones failed before the introduction of the CMA. Accordingly, the question presents itself whether a statute like the CMA could and should be implemented into German law.

This statute would need to be reconcilable with German constitutional law. In that regard, two constitutional rules have been examined: the principle of culpability and the principle of clarity. The former has always been the best argument of the opponents to corporate liability who reject the idea of corporate guilt.[351] However, with regard to the possibility of the implementation of a specified statute, the question of guilt does not need to be tackled. Assuming that corporate guilt exists, it is submitted that the CMA is an expression of it and thus would fulfil the requirements of the principle of culpability.

If the idea of corporate guilt were to be rejected, however, the principle of culpability would not apply at all, so that it could not prevent the implementation of the statute. The only consequence would be that the fine could not be regarded as criminal punishment, because 'punishment' and 'guilt' are interdependent. However, this is not the legislator's concern, but rather that of doctrinal lawyers.

In contrast, the statute would not satisfy the requirements of the German principle of clarity. This is surprising, as the CMA is applicable law in England. The reason can be mostly ascribed to the differences between common and civil law systems: Civil law systems tend to put more emphasis on the written word than common law ones and thus might have stricter requirements.

One must conclude that the CMA as it is could not be implemented into German law. However, lack of precision is a defect that can easily be avoided by the legislator. It is therefore still possible to adopt a statute in Germany that is modelled on the CMA, but with different wording.

This leaves last the question of desirability of new legislation like the CMA. In view of the existing mechanisms in the

[340] Similarly *Gómez-Jara Diéz*, ZStW 2007, 290 (292 ff.).
[341] See *Sedley*, LQR 1994, 270.
[342] See IV. 2.
[343] S. 33 Health and Safety at Work Act 1974.
[344] See *Griffin*, JCL 2007, 151, 7 (LN).
[345] *Clarkson*, CLR 2005, 677 (681).
[346] Especially in the light of a decision by the BVerfG which recognised that a right to the introduction of a criminal offence could derive from the fundamental rights, BVerfGE 39, 1.
[347] See IV. 5.
[348] Examined above, II. 4.
[349] See IV. 1.
[350] On the difference see *Bradney* et al., How to Study Law, 5th ed. 2005, p. 20 ff.
[351] *Gómez-Jara Diéz*, ZStW 2007, 290 (290) with further references in Fn. 1.

OWiG, one can be doubtful whether there are sufficient reasons for the introduction of a criminal offence of corporate manslaughter. Thus, its adoption would mainly depend on political considerations. Would a criminal offence of corporate manslaughter prevent homicide? Would a conviction satisfy the victim's relatives? The improvement of their situation in tort law might be more beneficial to the victim's family than the introduction of a criminal offence. All this has to be considered before deciding the issue. However, legal impediments can be overcome.