Criminal Law Forum (2013) 24:87–111
DOI 10.1007/s10609-012-9189-x

MANUEL LADIGES*

CRIMINAL LIABILITY OF DIRECTORS OF A PRIVATE LIMITED COMPANY SEATED IN GERMANY

ABSTRACT. During the last decade, a great number of German businesses formed private limited companies by shares in England and transferred the company's real seat to Germany in order to avoid the minimum capital rules for the German limited liability company. The discrepancy between the place of registration and the real seat leads to questions about the criminal liability of company directors under English and German law. This article shows that English courts have jurisdiction over certain offences regardless of the place the director acted. In particular, he may be convicted for failing to comply with statutory duties under the Companies Act 2006 as well as false accounting or false statements under Theft Act 1968 ss. 17, 19. With respect to German law, the company law reform of 2008 explicitly imposed the duty to file for insolvency on directors of foreign corporations. Also, the criminal offence for failing to file for insolvency in § 15a (4) of the Insolvency Code is compatible with the freedom of establishment under European law. If the director causes a financial loss to the company by breaching his director's duties, he may be convicted for breach of trust under § 266 of the Criminal Code regardless of the fact that the relevant duties are regulated by English law. The German Federal Supreme Court recently held that recourse to English company law in order to establish a criminal breach of trust does not violate the principle of legal certainty in Article 103 (2) of the Basic Law. Furthermore, German bankruptcy offences may apply if the director violates the authoritative English accounting standards.

I INTRODUCTION

The ECJ's interpretation of the freedom of establishment in Articles 43 and 48 of the EC-Treaty (now Articles 49 and 54 of the Treaty of the Functioning of the European Union) significantly impacted

* The author is Assistant Professor at the Georg-August-University Göttingen and thanks Prof. Dr. Mathias Siems (Durham University) and Nicholas Grier (Edinburgh Napier University) for their helpful comments on an earlier version of this article. The manuscript was concluded in November 2011.

corporate mobility[1] as well as the company law of Member States who adopted the real seat theory. A legion of articles and books was published on the movement of companies, the exact scope of the freedom of establishment, the impact of the ECJ's rulings on international company law and the effect on regulatory competition. In particular, much was written on directors' civil liability in case of insolvency, opening and execution of insolvency proceedings as well as directors' disqualification. Indeed, after the dust created by *Centros*,[2] *Überseering*[3] and *Inspire Art*[4] settled, further important problems appeared in the area of criminal law.

This article focuses on the criminal liability of directors of English incorporated private companies limited by shares with the real seat in Germany.[5] The first part concentrates on the directors' liability under English law. The second part analyses the criminal liability under German criminal law for breach of trust, bankruptcy offences and tax evasion. A closer look at German law is of special interest because, in the past, Germany adopted the real seat theory and, today, commercial activities of German seated limited companies have great practical importance. In 2010 nearly 20,000 foreign limited companies were registered in Germany. Most of them were English private limited companies.[6]

II CRIMINAL LIABILITY UNDER ENGLISH LAW

Since the transfer of the company's real seat does not alter the company's status as an English incorporated company, it seems possible that a director can violate English criminal law. Keeping in mind that most commercial activities of German seated limited companies actually take place in Germany, a closer look at the jurisdiction of English criminal courts for actions committed abroad

[1] *Cf.* For an empirical study M. Becht, C. Mayer & H. F. Wagner, 'Where do Firms Incorporate? Deregulation and the Cost of Entry' (2008) 14 Journal of Corporate Finance 241, at 241 ff.

[2] Case C-212/97 Centros Ltd v. Erhvervs- og Selskabsstyrelsen [1999] ECR I-1459.

[3] Case C-208/00 Überseering BV v. Nordic Construction Company Baumanagement GmbH (NCC) [2000] ECR I-9919.

[4] Case C-167/01 Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd [2003] ECR I-10155.

[5] Such company is further called 'German seated limited'.

[6] U. Kornblum, 'Bundesweite Rechtstatsachen zum Unternehmens- und Gesellschaftsrecht' (2010) GmbH-Rundschau 739, at 746.

is required. Indeed, this article cannot provide a comprehensive analysis of all criminal offences that may apply to directors. It rather focuses on offences under the Fraud Act 2006 (FA 2006), the Companies Act 2006 (CA 2006) as well as false accounting and false statements under the Theft Act 1968 (TA 1968) ss. 17, 19.

2.1 *English Jurisdiction*

In common law, jurisdiction for criminal acts is based on the principle of territoriality. The default rule states that English criminal law only applies to acts or omissions perpetrated within England or Wales.[7] In general, English courts have no jurisdiction for actions in Germany. However, the principle of territoriality is not absolute. For example, English courts approved jurisdiction in cases of conspiracy to commit an offence in England, even if no act had been carried out on English soil.[8] Moreover, secondary participants who support a crime in England by acting in another jurisdiction can be convicted.[9]

Criminal Law Act 1977 s. 1A ended the common law principle that inchoate activity directed at breaching foreign laws did not constitute an offence under English law.[10] English courts have jurisdiction as long as the intended breach constitutes an offence under English law, were the act carried out in England or Wales. Thus, Criminal Law Act 1977 s. 1A covers an enormous range of criminal activity with only little connection to England. However, the Attorney General must consent to any prosecution under this provision.[11]

English jurisdiction was further expanded by part 1 of the Criminal Justice Act 1993 with respect to various fraudulent offences (Group A offences), such as forgery, false accounting or false statements by an officer of a body corporate or unincorporated association. English courts have jurisdiction if any 'relevant event', e.g. 'any act or omission or other event (including any result of one or more acts or omissions) proof of which is required for conviction of the

[7] *Harden* [1963] 1 QB 8; *Treacy v. DPP* [1971] AC 537.

[8] *Sansom* [1991] 2 QB 130.

[9] G. Williams, 'Venue and the Ambit of Criminal Law' (1965) 81 Law Quarterly Review 518, at 529 ff.

[10] *Cf.* R. v. Atakpu [1994] QB 69, at 70; Attorney-General's Reference (No. 1 of 1982) [1983] 1 QB 751; Board of Trade v. Owen [1957] AC 602.

[11] A. P. Simester et al., *Simester and Sullivan's Criminal Law: Theory and Doctrine* (4th edn., Oxford: Hart Publishing, 2010) 357.

offence', occurs in England or Wales.[12] Additionally, Criminal Justice Act 1993 s. 3 provides that incitement, conspiracy or attempt to commit a Group A offence, as well as common law conspiracy to defraud, are triable in England regardless of whether the defendant became a party to the conspiracy in England and Wales or whether any act, omission or other occurrence with respect to the conspiracy took place in England and Wales. It is only required that the substantive Group A offence, if committed, would involve a 'relevant event' in England or Wales, or, in case of conspiracy to defraud, that the fraud takes effect there.[13]

2.2 *Fraud Act 2006*

On January 15, 2007 the FA 2006 went into effect in England and Wales. This act regulates offences for fraud by false representation (s. 2), fraud by failing to disclose information (s. 3) and fraud by abuse of position (s. 4). Fraud carries a maximum sentence of 10 year imprisonment on indictment. It applies to any person who 'occupies a position in which he is expected to safeguard, or not to act against, the financial interests of another person'.[14] Since a director has the main duties to act within powers and to promote the success of the company (CA 2006 ss. 171, 172), he holds such position.[15] The offender has to abuse his position dishonestly. The abuse may be a positive act, as well as an omission, FA 2006 s. 4 (2). Under FA 2006 s. 12 a director may be liable for offences by a body corporate if the offence is proved to have been committed with the director's consent or connivance.[16]

---

[12] For details see M. Hirst, *Jurisdiction and the Ambit of the Criminal Law* (Oxford: Oxford University Press, 2003) 165 ff.

[13] M. Allen, *Textbook on Criminal Law* (11th edn., Oxford: Oxford University Press, 2011) 316 f.

[14] For details see D. Ormerod, 'Criminalising Lying' (2007) 19 Criminal Law Review 193, at 207 ff. For a comparison to § 266 StGB see A. du Bois-Pedain, 'Die Strafbarkeit untreueartigen Verhaltens im englischen Recht: ''Fraud by abuse of position'' und andere einschlägige Strafvorschriften' (2010) 122 Zeitschrift für die gesamte Strafrechtswissenschaft 325, at 342 ff.; T. Rönnau, '(Rechts-)Vergleichende Überlegungen zum Tatbestand der Untreue' (2010) 122 Zeitschrift für die gesamte Strafrechtswissenschaft 299, at 307 ff.

[15] See S. Farell, N. Yeo & G. Ladenburg, *Blackstone's Guide to the Fraud Act 2006* (Oxford: Oxford University Press, 2007) para. 2.69: 'It is clear that those in a fiduciary relationship are indented to be included in that section'.

[16] See for details Farell, Yeo & Ladenburg (n. 15 above) para. 7.04–7.13. One should note that contrary to English law, companies are not subject to criminal

English courts have jurisdiction over fraudulent actions under the FA 2006 if any act as well as any occurrence of a financial loss or profit takes place in England or Wales.[17] This will be clearly the case, if the director or the company defraud creditors or customers in England or if money is taken out of an English bank account.[18] However, a German seated limited usually does not carry out any commercial activities in England or Wales. Therefore, at first glance, the scope of the FA 2006 with respect to German seated limited companies seems to be of little practical relevance. Indeed, a second look shows the importance of FA 2006 s. 4 since it is not uncommon that directors abuse their position for their own profit. Then the main question is: Does a financial loss occur in England if the limited company is seated in Germany and does not carry out any commercial activities and does not hold assets in England?

Apparently, no case law exists on this matter and this jurisdictional issue has not yet been discussed in academic literature. On the one hand, a formalistic approach could underline the importance of the place of incorporation and registration. In other words: As long as the limited company is registered in England, a loss will occur there, even if all company assets are located abroad. Indeed, the legislative did not adopt the proposal, that English courts should have jurisdiction over any fraudulent activities committed by English nationals or English companies.[19] In fact, the nationality principle of jurisdiction for offences under the FA 2006 was expressly rejected.[20] Therefore, English jurisdiction cannot merely be based on the fact that fraud is committed abroad by English nationals or limited

---

Footnote 16 continued
sanctions in Germany. Only natural persons can be held responsible under German criminal law. However, a limited company may be sanctioned to pay fines under § 30 of the Administrative Offences Act (*Ordnungswidrigkeitengesetz*, OWiG), *cf*. M Bohlander, *Principles of German Criminal Law* (Oxford: Hart Publishing, 2009) 23.

[17] D. Ormerod & D. Williams, *Smith's Law on Theft* (9th edn., Oxford: Oxford University Press, 2007), para. 3.15; Ormerod (n. 14 above) 215; C. Grau, S. Airey & S. Frick, 'Neuere Strafbarkeitsrisiken im Geschäftsverkehr mit England & Wales – The Fraud Act 2006' (2009) Betriebs-Berater 1426, at 1430.

[18] *Cf*. HC Deb 22 June 2006, vol 447, col 87.

[19] See The Fraud Advisory Panel, 'Fraud Law Reform: Consultations on Proposals for Legislations' (August 2004) <http://www.fraudadvisorypanel.org/pdf_show_52.pdf> accessed 18 October 2012, para. 8.1.

[20] UK Government, 'Fraud Law Reform, Government Response to Consultations' (September 2004) <www.homeoffice.gov.uk/documents/cons-fraud-law-reform/Government_response.pdf?view=Binary> accessed 18 October 2012, para. 57.

companies incorporated and registered in England. The same applies in case the English company suffers a loss abroad. Consequently, a director of a German seated limited cannot be charged for fraud by abuse of position in England for breaching his fiduciary duties, unless funds located in England or Wales are diminished. The incorporation and registration in England are not sufficient factors for establishing English jurisdiction for any offence against the company.

2.3 *Offences Under the Companies Act 2006*

The Companies Act 2006 (CA 2006) contains a number of offences that can be committed by directors who are in default to comply with certain statutory obligations. Numerous clauses govern failure to give proper notice to the registrar of companies concerning company's or director's matters.[21] A director is 'in default' if he authorises or permits, participates in, or fails to take all reasonable steps to prevent the contravention.[22]

Many of these offences are crimes of omission.[23] In these cases the omission itself constitutes the crime and is equivalent to the *actus reus*.[24] With regard to omissions it may be particularly complicated to determine the place of the *actus reus* because the offender simply does not act at all. Therefore, jurisdiction can be based on the place where the offender is, or was obliged to act.[25] Otherwise, a director of a German seated limited could circumvent the notification requirements that aim to maintain proper information for the public about each company at the registrar of companies.

If the company chooses to keep accounts in Germany, 'accounts and returns with respect to the business dealt with in the accounting records so kept must be sent to, and kept at, a place in the United

[21] Violations of theses clauses will mostly be punished by summary conviction to a fine not exceeding level 5 or 3 on the standard scale and, for continued contravention, a daily default fine not exceeding one-tenth of level 5 or 3 on the standard scale.

[22] Companies Act 2006 (CA 2006) s. 1121(3). Part 36 of the CA 2006 contains further general provisions for offences under the CA 2006.

[23] For example, every director has the duty to approve and sign the company's balance sheet pursuant to CA 2006, s. 414. Failure to do so or the failure to draw up the accounts according to the provisions of the CA 2006 constitutes a criminal offence under CA 2006, s. 414 (4), (5).

[24] *Cf.* T. Jones & M. Christie, *Criminal Law* (4th edn., Edinburgh: W. Green, 2008) para. 3-09.

[25] *Cf. Rex v. Oliphant* [1905] 2 K.B. 67; A. Arlidge, J. Parry & J. Hacking, *Arlidge and Parry on Fraud* (3rd edn., London: Sweet & Maxwell, 2007) para. 22-052.

Kingdom, and must at all times be open to such inspection' (CA 2006 s. 388). A director who does not comply with CA 2006 s. 388 may be punished by imprisonment up to 2 years or a fine under CA 2006 s. 389 (1), (4). He cannot claim that he was only present in Germany because the statute refers to accounts 'sent to' the UK. Thus, it is not required that the director actually acts in the UK. Furthermore, if a director deceives auditors by providing false information or by disguising relevant information, he may be punished under CA 2006 s. 501,[26] even if the information was sent from Germany.[27]

CA 2006 s. 993 imposes criminal sanctions on individuals who take part in fraudulent business activities of limited companies. It is unclear if CA 2006 s. 993 (1) applies to directors of a German seated limited. The *actus reus* consists of operating a business for fraudulent purposes. On the one hand, this element can be interpreted in a broad sense[28] and, thus, one could argue that not only business activities, but also the company's formation in England are included. On the other hand, in *Rottmann v. HMP Brixton* the court held that the 'essential nature' of fraudulent trading under CA 1985 s. 458 'is the carrying on, for a fraudulent purpose, of a business of a company in the country where the company was formed'.[29] Thus, the gist of fraudulent trading lies in carrying on the business rather than on the company's formation. In conclusion, a director of a German seated limited does not violate CA 2006 s. 993 (1) if he sets up an English limited company for fraudulent purposes in Germany.

2.4 *False Accounting and False Statements, Theft Act 1968 ss. 17, 19*

TA 1968 s. 17 penalizes the violation of accounting regulations. TA 1968 s. 17 (1) (a) may be committed by a director who destroys, defaces, conceals or falsifies any account or any record or document made or required for any accounting purpose. TA 1968 s. 17 (1) (b) involves using any account, record or document made for accounting purposes, which to the knowledge of the offender, is or may be

[26] A similar provision exists in CA 2006, s. 1112(1) for providing false information to the registrar of companies.

[27] *Cf. Reg. v. Harden* [1963] 1 QB 8, where the offender sent a letter with false information from England to a recipient in Jersey and it was held that an offence was committed in Jersey; see also Williams (n. 9 above) 521.

[28] See *R. v. Bright (Michael John)* [2008] EWCA Crim 462, para. 26, regarding the previous offence under Companies Act 1985, s. 458.

[29] *Rottmann v. HMP Brixton* [2003] EWHC 496 (Admin) para. 49.

misleading, false or deceptive in a material particular.[30] In both cases the director must act dishonestly with a view to gain for himself or another, or with intent to cause loss to another. Under TA 1968 s. 18 the director may be guilty also where an offence committed by a body corporate under TA 1968 s. 17 is proved to have been committed with the consent or connivance of any director, manager, secretary or other similar officer of the body corporate or any person who was purporting to act in any such capacity.

TA 1968 s. 19 (1) deals with cases where directors or other company officers publish false written statements or accounts with the intent to deceive members or creditors of the company. The offence carries a sentence of imprisonment up to 7 years. While TA 1968 s. 19 is much narrower compared to FA 2006 s. 2,[31] its jurisdictional scope also applies to directors of a German seated limited in certain cases.

TA 1968 ss. 17, 19 are Group A offences under Criminal Justice Act 1993 s. 1 (2). Thus, English courts have jurisdiction if a relevant event occurs in England or Wales. A German seated limited has to comply with English accounting regulations set out in the CA 2006. In particular, directors have the duty to deliver to the registrar of companies, for each financial year, the accounts and reports required by CA 2006 ss. 444 ff.[32] The period for filing is 9 months for private limited companies under CA 2006 s. 442 (2) (a). The main question with respect to TA 1968 s. 17 (1) (b) is: Does a relevant event occur if the director furnishes the mentioned documents to the registrar of companies?

This topic was touched in *ex p Osman* where the defendant had falsified, or concurred in the falsification of monthly returns in Hong Kong, and send the returns to the holding company based in Malaysia. The Hong Kong government tried to obtain extradition for charges under TA 1968 s. 17 (1) (a) and had to show that false accounting was committed in Hong Kong. Lloyd LJ said: 'We do not think it is possible to lay down any general rule as to the place where the offence of false accounting is committed. In some cases it may be that it is at the place where the account is used. But in the present case it would be artificial to regard Malaysia as the place of making or concurrence, when the documents in question were prepared and created in Hong Kong, and relate to a business carried on by BMFL [the subsidiary] exclusively in

[30] For details on the *actus reus* see D. Ormerod, *Smith and Hogan's Criminal Law* (13th edn., Oxford: Oxford University Press, 2011) 927, at 935; Arlidge, Parry, and Hacking (n. 25 above) para. 12-002 ff.

[31] Ormerod (n. 30 above) 937.

[32] See on the authoritative accounting regulations also Sect. 3.3.1.1 below.

Hong Kong. In our view the magistrate was right to hold that the offence of false accounting was complete when the documents were falsified, or when the material particulars were omitted'.[33]

Based on this decision one can conclude that no relevant event occurs in England when a director of a German seated limited simply falsifies accounts in Germany.[34] However, the *actus reus* of TA 1968 s. 17 (1) (b) also includes *using* any falsified account etc. for complying with accounting and filing duties under the CA 2006. Therefore, a relevant event in terms of Criminal Justice Act 1993 ss. 2 (1), 4 (2) (b) (ii) occurs in England if the falsified accounts are presented to the registrar of companies, even if they were sent from Germany. The same goes with respect to TA 1968 s. 19 as long as the written statement or account is published in England or Wales.

III CRIMINAL LIABILITY UNDER GERMAN LAW

With respect to German criminal law, the article examines the following offences that are of great importance for commercial activities of German seated limited companies: (1) violation of the duty to file for insolvency under § 15a of the Insolvency Code (*Insolvenzordnung*, InsO), (2) embezzlement and breach of trust under § 266 of the Criminal Code, (*Strafgesetzbuch*, StGB), (3) bankruptcy offences (§§ 283 ff. StGB), (4) providing false information to the German registrar of companies under § 82 (1) No. 5 of the Commercial Code (*Handelsgesetzbuch*, HGB) and (5) tax evasion (§ 370 of the Fiscal Code, *Abgabenordnung*, AO).

In Germany, criminal jurisdiction is governed by §§ 3-7 StGB. § 3 StGB states that German criminal law shall apply to acts committed domestically. § 9 (1) StGB stipulates that an act is committed at every place the perpetrator acted or, in case of an omission, should have acted, or at which the result, which is an element of the offence, occurs or should occur according to the understanding of the perpetrator. In general, German criminal courts have jurisdiction if, either the director acts in Germany, or the effects of his actions occur in Germany.[35] This requirement will be fulfilled on a regular basis in case of a German seated limited.

[33] *ex p Osman* [1990] 1 WLR 277, at 297.

[34] *Cf.* Hirst (n. 12 above) 172.

[35] A. Ransiek & S. Hüls, 'Strafrecht zur Regulierung der Wirtschaft' (2009) Zeitschrift für Unternehmens- und Gesellschaftsrecht 157, at 175.

One issue concerning the criminal liability is not problematic. If someone uses a limited company in order to carry out fraudulent business activities, he can be convicted for fraud under § 263 StGB just as any managing director of a German limited liability company (*Gesellschaft mit beschränkter Haftung*, GmbH).[36] Incorporation in another Member State does not justify criminal immunity for fraudulent actions in Germany. A criminal conviction would not violate the freedom of establishment because the ECJ has acknowledged 'that a Member State is entitled to take measures designed to prevent certain of its nationals from attempting, under cover of the rights created by the Treaty, improperly to circumvent their national legislation or to prevent individuals from improperly or fraudulently taking advantage of provisions of Community law'.[37]

3.1 *Duty to File for Insolvency*

Until November 1, 2008, the violation of the duty to file for insolvency was regulated in §§ 84, 64 of the Limited Liability Companies Act (*Gesetz betreffend die Gesellschaften mit beschränkter Haftung*, GmbHG). German courts[38] and most authors[39] argued that this

[36] H. Richter, "'Scheinauslandsgesellschaften" in der deutschen Strafverfolgungspraxis' in U. Sieber et al. (eds.), Strafrecht und Wirtschaftsstrafrecht – Dogmatik, Rechtsvergleich, Rechtstatsachen – Festschrift für Klaus Tiedemann zum 70. Geburtstag (Köln: Carl Heymanns Verlag, 2008) 1023, at 1040 f.; B. Gross & A. T. Schork, 'Strafbarkeit des directors einer Private Company Limited by Shares wegen verspäteter Insolvenzantragstellung' (2006) Neue Zeitschrift für das Recht der Insolvenz und Sanierung 10, at 12; *cf.* also R. Schmitz, 'Über die Auflösung des (deutschen) nationalen Wirtschaftsstrafrechts durch das europäische Recht' in J. C. Joerden & A. J. Szwarc (eds.), Europäisierung des Strafrechts in Polen und Deutschland – rechtsstaatliche Grundlagen (Berlin: Duncker & Humblot, 2007) 199, at 207; H. Eidenmüller, 'Mobilität und Restrukturierung von Unternehmen im Binnenmarkt' (2004) JuristenZeitung 24, at 26.

[37] Case C-167/01, [2003] ECR I-10155, para. 136; Case C-212/97, [1999] ECR I-1459, para. 25.

[38] See Landgericht (Regional Court) Gera (2004) wistra – Zeitschrift für Wirtschafts- und Steuerstrafrecht 435 and Amtsgericht (Local Court) Gera (2004) wistra – Zeitschrift für Wirtschafts- und Steuerstrafrecht 435 regarding a Panamanian corporation seated in Germany.

[39] See for example C. Just, *Die englische Limited in der Praxis* (3rd edn., München: Verlag C.H. Beck 2008), para. 342; A. Cappel, *Grenzen auf dem Weg zu einem europäischen Untreuestrafrecht* (Frankfurt am Main: Verlag Peter Lang, 2009) 225; G. Dannecker, T. Knierim & A. Hagemeier, *Insolvenzstrafrecht* (Heidelberg: Verlagsgruppe Hüthig-Jehle-Rehm, 2009), para. 13; Richter (n. 36 above) 1032; C. Müller-Gugenberger, 'Glanz und Elend des GmbH-Strafrechts – Einige

offence did not include directors of foreign incorporated limited companies. In the course of the German company law reform the German legislative enacted a new provision in § 15a InsO and explicitly extended the duty to file for insolvency to directors of all limited companies, regardless of the place of incorporation. Under § 15a (1) InsO directors (*Mitglieder des Vertretungsorgans*) and liquidators (*Abwickler*) have the duty to file for insolvency without delay or no later than 3 weeks from the time the company is unable to pay up (*zahlungsunfähig*) or becomes overindebted (*überschuldet*).[40] § 15a (3) InsO extends this duty to members of limited companies in case the company has lost all directors (*Führungslosigkeit der Gesellschaft*),[41] unless the members

---

Footnote 39 continued
Bemerkungen zum Problem der Auslandsgesellschaften im deutschen Strafrecht' in U. Sieber et al. (eds.), *Strafrecht und Wirtschaftsstrafrecht – Dogmatik, Rechtsvergleich, Rechtstatsachen – Festschrift für Klaus Tiedemann zum 70. Geburtstag* (Köln: Carl Heymanns Verlag, 2008) 1003, at 1014; Schmitz (n. 36 above) 206; K. Leipold & M. Böttger, 'Insolvenzdelikte' in K. Volk (ed.), *Verteidigung in Wirtschafts- und Steuerstrafsachen* (München: Verlag C.H. Beck, 2006) § 18, para. 220; P. Mankowski & S. Bock, 'Fremdrechtsanwendung im Strafrecht durch Zivilrechtsakzessorietät bei Sachverhalten mit Auslandsbezug für Blankettatbestände und Tatbestände mit normativem Tatbestandsmerkmal' (2008) 120 Zeitschrift für die gesamte Strafrechtswissenschaft 704, at 753; F. Krüger, 'Die persönliche Haftung der handelnden Personen einer Private Limited Company im Überblick' (2007) Zeitschrift für das gesamte Insolvenzrecht 861, at 866; F. Kienle (2007) 'Zur Strafbarkeit des Geschäftsleiters einer in Deutschland ansässigen Limited englischen Rechts' GmbH-Rundschau 696, at 697; F. Bittmann, 'Die ''limitierte'' GmbH aus strafrechtlicher Sicht' (2007) GmbH-Rundschau 70, at 75; J. Schlösser, 'Die Strafbarkeit des Geschäftsführers einer private company limited by shares in Deutschland' (2006) wistra – Zeitschrift für Wirtschafts- und Steuerstrafrecht 81, at 84; T. Rönnau, 'Haftung der Direktoren einer in Deutschland ansässigen englischen Private Company Limited by Shares nach deutschem Strafrecht – eine erste Annäherung' (2005) Zeitschrift für Unternehmens- und Gesellschaftsrecht 832, at 839; A. Schumann, 'Die englische Limited mit Verwaltungssitz in Deutschland: Kapitalaufbringung, Kapitalerhaltung und Haftung bei Insolvenz' (2004) Der Betrieb 743, at 746; differently U. Weiß, *Strafbare Insolvenzverschleppung durch den director einer Ltd.* (Baden-Baden: Nomos Verlag, 2009) 120 ff.; M. Nuys, *Die englische Limited als faktische GmbH im strafrechtlichen Sinne?* (Hamburg: Verlag Dr. Kovač, 2009) 221 ff.

[40] See for details C. Poertzgen, 'Der 3-Wochen-Zeitraum im Rahmen der Antragspflicht (§ 15a InsO)' (2008) Zeitschrift für das gesamte Insolvenzrecht 944.

[41] For details on the term 'Führungslosigkeit' see Amtsgericht (Local Court) Hamburg, (2009) Neue Juristische Wochenschrift 304; S. Hiebl, 'Neue strafrechtliche Risiken durch die Neufassung des Straftatbestandes der Insolvenzverschleppung in § 15a InsO infolge des MoMiG vom 01.11.2008, in S. Hiebl, N. Kassebohm & H. Lilie (eds.), *Festschrift für Volkmar Mehle* (Baden-Baden: Nomos Verlag, 2009) 273, at 287 f.

have no knowledge of the grounds of insolvency. Failure to comply with the duty to file for insolvency is punishable by imprisonment not exceeding 3 years or a fine, § 15a (4) InsO. Under § 15a (5) InsO the *actus reus* can also be committed negligently. In this case the maximum prison sentence is reduced to 1 year.

According to the relevant parliamentary documents the explicit scope of § 15a InsO is to ensure creditor protection.[42] By inserting the offence in the Insolvency Act, the legislative intended to emphasise that the duty to file for insolvency is classified as insolvency law rather than company law.

While many authors approve of the duty to file for insolvency for foreign companies (and the company officers) without further discussion,[43] others doubt whether § 15a InsO is compatible with the freedom of establishment.[44] Mainly, this debate is a sequel to the German discussion about the qualification of the duty to file for insolvency before § 15a InsO was enacted. While many perceived the

[42] *Cf*. Bundestags-Drucksache 16/6140, 55.

[43] S. Kolmann, 'Kommentierung § 64 GmbHG' in I. Saenger & M. Inhester (eds.), *GmbHG* (Baden-Baden: Nomos Verlag, 2011), § 64, para. 130; A. Ransiek, 'Kommentierung vor § 82, § 82 und § 84 GmbHG' in P. Ulmer, M. Habersack & M. Winter (eds.), *GmbHG, Großkommentar, Ergänzungsband MoMiG* (Tübingen: Mohr Siebeck, 2010), § 84, para. 8; E. Schramm & P. Hinderer, 'Die Untreue-Strafbarkeit eines Limited-Directors, § 266 StGB, insbesondere im Lichte des Europäischen Strafrechts' (2010) 7-8 Zeitschrift für Internationale Strafrechtsdogmatik 494, at 497; C. Müller-Gugenberger, 'GmbH-Strafrecht nach der Reform' (2009) GmbH-Rundschau 578, at 579; A. Leithaus & A. D. Riewe, 'Inhalt und Reichweite der Insolvenzantragspflicht bei europaweiter Konzerninsolvenz' (2008) Neue Zeitschrift für das Recht der Insolvenz und Sanierung 598, at 601; R. Weyand, 'Strafrechtliche Aspekte ders MiMoG im Zusammenhang mit juristischen Personen' (2008) Zeitschrift für das gesamte Insolvenzrecht 702, at 705; I. Dernedde, 'Nach den Reformen: GmbH oder englische Limited als Gesellschaftsform?' (2008) Juristische Rundschau 47, at 50; P. Kindler, 'Grundzüge des neuen Kapitalgesellschaftsrechts – Das Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen (MoMiG)' (2008) Neue Juristische Wochenschrift 3249, at 3254; F. Bittmann, 'Reform des GmbHG und Strafrecht' (2007) wistra – Zeitschrift für Wirtschafts- und Steuerstrafrecht 321.

[44] H. Hirte, 'Neuregelungen mit Bezug zum gesellschaftsrechtlichen Gläubigerschutz und im Insolvenzrecht durch das Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen (MoMiG)' (2008) Zeitschrift für das gesamte Insolvenzrecht 689, at 699; B. Knof & S. Mock, 'Das MoMiG und die Auslandsinsolvenz haftungsbeschränkter Gesellschaften – Herausforderung oder Sisyphismus des modernen Gesetzgebers?' (2007) GmbH-Rundschau 852, at 854.

duty to file for insolvency as part of German insolvency law,[45] others argued that it is closely connected with company law.[46] Some authors understand the new regulation in § 15a InsO as a definite classification as insolvency law.[47] However, the material nature of the duty to file for insolvency cannot be amended by simply moving the relevant section from the GmbHG to § 15a InsO.[48]

At the end of the day, the duty to file for insolvency under § 15a (1) InsO and the possible criminal sanctions do not violate the freedom of establishment.[49] The duty to file for insolvency can be classified as insolvency law, regardless of its place of codification. It safeguards the creditor's interests with regard to companies that are either unable to pay up or over indebted and, thus, it is a remedy against risks stemming from insolvency. Furthermore, since the right to file for insolvency is clearly classified as insolvency law, the duty to file

[45] Kammergericht (Higher Regional Court Berlin), (2010) Neue Zeitschrift für Gesellschaftsrecht 71, at 72, with numerous references; Landgericht (Regional Court) Kiel (2006) Deutsche Zeitschrift für Wirtschafts und Insolvenzrecht, 390, at 392; similar also K. Schmidt, 'Grounds for Insolvency and Liability for Delays in Filing for Insolvency Proceedings: Necessary Supplement to Capital Protection' in M. Lutter (ed.), *Legal Capital in Europe* (Berlin: De Gruyter, 2006) 144, at 157, 160.

[46] See for example W.-G. Ringe & C. Willemer, 'Zur Anwendung von § 64 GmbHG auf eine englische Limited' (2010) Neue Zeitschrift für Gesellschaftsrecht 56, at 57; Krüger (n. 39 above) 865, with further references.

[47] E. Wälzholz, 'Die insolvenzrechtliche Behandlung haftungsbeschränkter Gesellschaften nach der Reform durch das MoMiG' (2007) Deutsches Steuerrecht 1914, at 1916; V. Römermann, 'Insolvenrecht im MoMiG' (2008) Neue Zeitschrift für das Recht der Insolvenz und Sanierung 641, at 645.

[48] Weiß (n. 39 above) 215; F. Bittmann & U. P. Gruber, 'Limited – Insolvenzantragspflicht gemäß § 15a InsO i.d.F. des MoMiG: Europarechtlich unwirksam?' (2008) GmbH-Rundschau 867, at 869.

[49] See S. Leible, 'Internationales Gesellschaftsrecht' in L. Michalski (ed.), *Kommentar zum Gesetz betreffend die Gesellschaften mit beschränkter Haftung* (2nd edn., München: Verlag C. H. Beck, 2010), Syst. Darst. 2, para. 145; P. A. Hinderer, *Insolvenzstrafrecht und EU-Niederlassungsfreiheit am Beispiel der englischen private company limited by shares* (Freiburg: Centaurus Verlag, 2010) 170 ff.; Nuys (n. 39 above) 256 ff., 357 ff.; Weiß (n. 39 above) 215 f.; M. Heil, *Insolvenzantragspflicht und Insolvenzverschleppungshaftung bei der Scheinauslandsgesellschaft in Deutschland* (Baden-Baden: Nomos Verlag, 2008) 103 ff.; M. Foit, *Die Insolvenz der englischen private limited company in Deutschland* (Jena: 2008) 235 f.; H. Wilk & T. Stewen, 'Die Insolvenz der Limited in der deutschen Strafrechtspraxis' (2011) wistra – Zeitschrift für Wirtschafts- und Steuerstrafrecht 161, at 163 f. The Kammergericht (Higher Regional Court Berlin) held in a decision of September 24, 2009, that the former version of § 64 (2) GmbHG applies to German seated limited companies as well, (2010) Neue Zeitschrift für Gesellschaftsrecht 71, at 72 f.

for insolvency should share a common fate.[50] In particular, a duty to file for insolvency under German law is necessary to protect creditors in Germany. Regardless whether the rules on fraudulent and wrongful trading in Insolvency Act 1986 ss. 213, 214, or the director's liability for breach of duty towards creditors under common law are classified as insolvency law or company law, these rules cannot guarantee sufficient protection if the limited company does not operate in England. On the one hand, if they were classified as insolvency law,[51] they would not apply to a German seated limited, since the COMI is located in Germany. On the other hand, if they were classified as company law and, thus, would include directors of German seated limited companies, German creditors would, in general, encounter practical difficulties in enforcing claims.[52]

3.2 *§ 266 (1) StGB, Embezzlement and Breach of Trust (Untreue)*

§ 266 (1) StGB plays an important role for criminal liability of individuals who act on somebody else's behalf. In general, a director can be convicted for breach of trust if he violates his duty to promote the success of the company or other duties stipulated in the CA 2006.[53] German courts have jurisdiction pursuant to §§ 3, 9 StGB if the director commits the breach of trust in Germany or if the financial loss occurs in Germany.[54]

---

[50] H. Radtke & M. Hoffmann, 'Die Anwendbarkeit von nationalem Insolvenzstrafrecht auf EU-Auslandsgesellschaften' (2009) Europäische Zeitschrift für Wirtschaftsrecht 404, at 408.

[51] W. Servatius, in M. Henssler & L. Strohn (eds.), *Gesellschaftsrecht* (München: Verlag C.H. Beck, 2011), IntGesR para. 173; Weiß (n. 39 above) 200 f.; Heil (n. 49 above) 122 ff.; differently W. Bayer, 'Die Limited in Deutschland' in M. Lutter, P. Hommelhoff & W. Bayer, *GmbHG-Gesetz* (17th edn., Köln: Dr. Otto Schmidt, 2009), Anh II zu § 4a para. 163 with numerous further references; Schumann (n. 39 above) 748.

[52] See also Weiß (n. 39 above) 202.

[53] See on the director's duties under the CA 2006, N. Grier, *Company Law* (3rd edn., Edinburgh: W. Green, 2009) para. 9-04 ff.; A. Keay, 'Good Faith and directors duty to promote the success of the company' (2011) Company Lawyer 138 ff.; P. Davies & J. Rickford, 'An Introduction to the New UK Companies Act' (2008) 5 European Company and Financial Law Review 48, at 61 ff.; F. Steffek, 'Geschäftsleiterpflichten im englischen Kapitalgesellschaftsrecht – Kodifizierung der directors' duties im Companies Act 2006' (2007) GmbH-Rundschau 810 ff.; M. Ladiges & C. Pegel, 'Neue Pflichten für directors einer limited durch den Companies Act 2006' (2007) Deutsches Steuerrecht 2069 ff.

[54] H. Radtke, 'Untreue (§ 266 StGB) zu Lasten von ausländischen Gesellschaften mit faktischem Sitz in Deutschland?' (2008) GmbH-Rundschau 729, at 732; Schlösser (n. 39 above) 84.

The offence contains the abuse alternative (*Missbrauchsalternative*) and the breach of trust alternative (*Treubruchsalternative*). In the first alternative, the offender acts *ultra vires,* while his action is valid externally. Of particular importance are the elements *Vermögensbetreuungspflicht* (duty to safeguard the property interests of another) and the abuse of this position. The exact ambit of the director's *Vermögensbetreuungspflicht* has to be derived from the underlying legal relationship. Therefore, in case of a German seated limited, *English* company law is authoritative for German criminal courts in order to establish the elements of § 266 (1) StGB. However, it is questionable if § 266 (1) StGB can be used to punish a breach of English company law.

Many commentators emphasize that applying foreign law in order to determine the breach of trust would lead to uncertainty.[55] It would be impossible for criminal judges to know and handle foreign company law sufficiently.[56] Moreover, the principle that the German parliament has to decide about essential elements of an offence (so called *Wesentlichkeitstheorie*) would be violated if the interpretation of criminal offences would depend mostly on foreign law.[57] Others approve a broad application of § 266 (1) StGB because they do not regard this clause a *Blankettstrafgesetz*.[58,59] However, it is suggested

[55] N. Hoffmann, 'Reichweite der Niederlassungsfreiheit bis ins Strafrecht?' in O. Sandrock & C. Wetzler (eds.), *Deutsches Gesellschaftsrecht im Wettbewerb der Rechtsordnungen* (Heidelberg: Verlag Recht und Wirtschaft, 2004) 227, at 258; M. Mosiek, 'Fremdrechtsanwendung – quo vadis? Zur Anwendung ausländischen Rechts im deutschen Wirtschaftsstrafrecht', (2008) Zeitschrift Strafverteidiger 94, at 97 f.; C. Altenhain & K. Wietz, 'Die Ausstrahlungswirkung des Referentenentwurfs zum Internationalen Gesellschaftsrecht auf das Wirtschaftsstrafrecht' (2008) Neue Zeitschrift für Gesellschaftsrecht 569, at 572.

[56] Schmitz (n. 36 above) 209; Mosiek (n. 55 above) 99; Rönnau, (n. 39 above) 853; see on the possible difficulties in determining and applying foreign law Mankowski & Bock (n. 39 above) 730 ff.

[57] Mosiek (n. 55 above) 98 f.; Rönnau (n. 39 above) 856 ff.

[58] The term *Blankettstrafgesetz* cannot be translated literally. It describes a criminal offence that refers to the violation of duties laid down in different judicial acts. Thus, the ambit of the offence can only be determined by consulting outside clauses rather than interpreting the criminal offence itself, cf. also Bohlander (n. 16 above) 11, who uses the translation 'blanket Acts'.

[59] C. Müller-Gugenberger, 'Allgemeines zum Unternehmen' in C. Müller-Gugenberger & K. Bieneck (eds.), *Wirtschaftsstrafrecht* (5th ed., Köln: Verlag Dr. Otto Schmidt, 2011) § 23, para. 118; Hinderer (n. 49 above) 154 ff.; J. H. Pattberg, *Die strafrechtliche Verantwortlichkeit des Directors einer englischen Limited in Krise und Insolvenz* (Hamburg: Verlag Dr. Kovač, 2010) 291 ff.; Gross & Schork (n. 36 above) 15.

that German criminal law should be diffident and reserved for significant breaches.[60]

3.2.1 *The Federal Supreme Court Decision*

The Federal Supreme Court held on April 13, 2010, that recourse to foreign company law to determine a breach of trust under § 266 (1) StGB does not violate the principle of legal certainty (*Bestimmtheitsgebot*) pursuant to Article 103 (2) GG.[61]

In this ground breaking case the defendant and his business partner exported high-end hifi-systems from Germany to Russia and other East European countries. In order to evade taxes and import duties in those countries, the defendant and his partner formed a limited company by the law of the British Virgin Islands. Both held 50 % of the company's shares and acted as the only directors. The limited company kept bank accounts in Copenhagen and Hamburg. In Russia, the defendant and his partner had also set up a distribution company. The distribution company entered only 40 % of the sales volume in the books; the rest was stored cash in bank safes in Moscow. These illegal earnings summed up to 10 million € in 2007 and were supposed to be divided equally among both business partners. In 2007 the business partners fell out with each other. The defendant felt that he was losing control over the business and its earnings. Therefore, he set aside significant cash sums from the illegal

[60] Gross & Schork (n. 36 above) 15; similar also M. Kubiciel 'Gesellschaftsrechtliche Pflichtwidrigkeit und Untreuestrafbarkeit' (2005) Neue Zeitschrift für Strafrecht 353 at 357 f.

[61] Bundesgerichtshof (Federal Supreme Court) (2010) Neue Zeitschrift für Strafrecht 632 ff.; see also E. Kraatz, 'Zu den Grenzen einer » Fremdrechtsanwendung « im Wirtschaftsstrafrecht am Beispiel der Untreuestrafbarkeit des Direktors einer in Deutschland ansässigen Private Company Limited by Shares' (2011) Juristische Rundschau 58, at 62 ff.; P. Mankowski & S. Bock, 'Anmerkung zum Urteil des BGH vom 13.04.2010, Az.: 5 StR 428/09 (Strafbarkeit des Directors einer EU-Auslandsgesellschaft wegen Untreue)' (2010) GmbH-Rundschau 822; Schramm & Hinderer (n. 43 above) 497 f.; F. Bittmann, 'Anmerkung zum Urteil des BGH vom 13.04.2010, Az.: 5 StR 428/09' (2010) wistra – Zeitschrift für Wirtschafts- und Steuerstrafrecht 303; J. Schlösser & M. Mosiek, 'Anwendbarkeit ausländischen Gesellschaftsrechts im Rahmen der Untreue zum Nachteil einer EU-Auslandsgesellschaft' (2010) Höchstrichterliche Rechtsprechung im Strafrecht 424; J. Rubel & L. Nepomuck, 'Kurzkommentar zu BGH, Urt. v. 13.4.2010 – 5 StR 428/09 – zu Fragen des Untreuetatbestandes (§ 266 StGB) und des anzuwendenden Gesellschaftsrechts bei Handeln eines Directors einer Limited als EU-Auslandsgesellschaft' (2010) Entscheidungen zum Wirtschaftsrecht 761.

earnings for his personal use and wired 1.8 million € from the company's bank account in Hamburg to his personal account.

On prosecutor's appeal the Federal Supreme Court overturned the acquittal by the Regional Court Hamburg. The decision underlines correctly that a British Virgin Islands limited company has legal capacity in Germany since the British Virgin Islands are included in the freedom of establishment under EU law and, therefore, the place of incorporation is authoritative. The fact that the company was set up to evade Russian taxes and import duties did not circumvent German or EU regulation and, thus, the defendant and his business partner did not misuse the freedom of establishment that would justify to ignore the limited's status as a legal person.[62]

Since the company law of the incorporation state is authoritative for the defendant's duties as a director, the Federal Supreme Court held, that German courts must interpret § 266 (1) StGB in the light of the relevant foreign company law. The application of foreign law does not violate the principle of legal certainty under Article 103 (2) GG. The Court argued that § 266 (1) StGB defines the *actus reus* precisely enough. Although the element breach of trust is often largely determined by non-criminal law, or even private agreements, criminal liability still requires proof that all elements of § 266 (1) StGB are fulfilled.[63]

3.2.2 *Assessment*

The Federal Supreme Court correctly refused to follow the argument that recourse to English company law would violate Article 103 (2) of the Basic Law. In practice, German criminal courts often apply foreign law in order to determine elements of an offence. For example, under the rule *lex rei sitae* the element 'property not his own' in § 242 (1) StGB (theft) must be interpreted according to the laws of another country if the transfer of title took place there.[64] Additionally, under § 7 (2) StGB an act committed in a foreign

---

[62] Bundesgerichtshof (Federal Supreme Court) (2010) Neue Zeitschrift für Strafrecht 632, at 633 f.

[63] Bundesgerichtshof (Federal Supreme Court) (2010) Neue Zeitschrift für Strafrecht 632, at 634.

[64] Bundesgerichtshof (Federal Supreme Court) (2010) Neue Zeitschrift für Strafrecht 632, at 634; Oberlandesgericht (Higher Regional Court) Schleswig (1989) Neue Juristische Wochenschrift 3105; A. Eser 'Vorbemerkungen zu den §§ 3–9 Territoriales und transnationales Strafanwendungsrecht (sog. Internationales Strafrecht) in A. Schönke & H. Schröder, *Strafgesetzbuch (StGB)*, *Kommentar* (28th edn., München: Verlag C.H. Beck, 2010), Vor §§ 3–7, para. 41.

country may be punishable in Germany as long as the given act is punishable at the place of its commission or if this place is not subject to criminal law enforcement. It is also possible to define the scope of the *Vermögensbetreuungspflicht* by agreeing on fiduciary duties under the laws of any legal system. Thus, in these cases it is also necessary to know and apply the relevant foreign legal framework.

Nobody who chooses to incorporate in England can claim that he was unaware of his duties under foreign law.[65] A director can be expected to inform himself about his fiduciary duties towards the company. The argument that the directors' duties are derived largely from common law and, therefore, are rather nebulous,[66] is not convincing if one considers that, today, the director's duties are codified in CA 2006 ss. 170–177. However, the Federal Supreme Court pointed out correctly that courts may have to consider the *mens rea* element carefully, unless the director is an experienced international businessman and has opted voluntarily to comply with foreign company law.[67]

§ 266 (1) StGB safeguards the interests of the German seated limited by penalizing dishonest directors who breach their duties owed to the *company*. From this perspective, penalizing directors of foreign incorporated companies does not violate the company's freedom of establishment.[68] On the other hand, a director who is also the sole shareholder could claim that he as well – in his shareholder capacity – is exercising the freedom of establishment by incorporating in another state. However, a breach of trust towards the company constitutes a misuse of this freedom and, therefore, a conviction would not violate the freedom of establishment.

3.3 *Offences Pursuant to §§ 283 ff. StGB*

§§ 283 ff. StGB contain offences related to insolvency of legal, as well as natural persons. Generally speaking, even if the offence is

[65] Gross & Schork (n. 36 above) 10, at 15; similar also W. Perron, 'Kommentierung zu § 266 StGB' in Schönke & Schröder (n. 64 above) § 266, para. 21e; M. Böse, 'Vorbemerkungen zu § 3' in U. Kindhäuser, U. Neumann & H.-U. Paeffgen (eds.), *Strafgesetzbuch* (3rd edn., Baden-Baden: Nomos Verlag, 2010), Vor § 3, para. 67; Ransiek & Hüls, (n. 35 above) 178; Radtke (n. 54 above) 734 f.

[66] This argument is expressed by Rönnau (n. 39 above) 856; Mosiek (n. 55 above) 98.

[67] Bundesgerichtshof (Federal Supreme Court) (2010) Neue Zeitschrift für Strafrecht 632, at 635; Schlösser & Mosiek (n. 61 above) 425 f.

[68] See Pattberg (n. 59 above) 307 f.

committed outside Germany, German courts have jurisdiction as long as the constitution or dismissal of insolvency proceedings and the payment stop take place in Germany (§ 3 StGB).[69] If the offender acts in Germany and the effect of the crime occurs in England, German criminal law also remains relevant, § 9 (1) StGB.

If a company becomes insolvent, it is necessary to recourse to § 14 (1) No. 1 StGB in order to penalize the company's director because the director himself has no duty to keep proper records. For criminal law purposes, § 14 (1) No. 1 StGB 'transfers' the relevant company's duties to the representative entity of any legal person. A private limited company has legal capacity because it is recognized as a legal person in England and Germany. However, it is questionable whether a director can be treated as an entity (*Organ*) of the company. In English company law a director is regarded as the company's agent, but not as an entity.[70] Indeed, the heading of § 14 StGB reads 'acting on behalf of another person' and the clause also uses the formulation 'agent' (*Vertreter*) in context with the term *Organ*. The purpose of § 14 StGB is to constitute criminal liability for persons acting on behalf of another legal entity by closing loopholes that would otherwise be caused by the divergence between the company as a legal person and the persons acting for the company. Therefore, the provision includes all individuals who hold legal power to act on behalf of a legal person[71] and also shadow directors.[72] In conclusion, § 14 (1) No. 1 StGB applies to directors and shadow directors of a German seated limited.[73]

---

[69] Kienle (n. 39 above) 697.

[70] T. Wachter, 'Insichgeschäfte bei englischen private limited companies' (2005) Neue Zeitschrift für Gesellschaftsrecht 338, at 339.

[71] Perron (n. 65 above) § 14, para. 16/17.

[72] The prevailing opinion argues that including the factual managing director does not violate Article 103 (2) of the Basic Law, see T. Fischer, *Strafgesetzbuch: StGB* (58th edn., München: Verlag C.H. Beck, 2011) § 14, para. 18; R. Weyand & G. Diversy, *Insolvenzdelikte* (8th edn., Berlin: Erich Schmidt Verlag, 2010), para. 27, with numerous further references.

[73] E.-M. Worm, *Die Strafbarkeit eines directors einer englischen Limited nach deutschem Strafrecht* (Baden-Baden: Nomos Verlag, 2009) 66; Richter (n. 36 above) 1031; Gross & Schork (n. 36 above) 15; Rönnau (n. 39 above) 844. In any case, § 14 (1) No. 2 StGB can be applied to a director, *cf*. Oberlandesgericht (Higher Regional Court) Karlsruhe (1985) Neue Zeitschrift für Strafrecht 317; Radtke & Hoffmann (n. 50 above) 405.

3.3.1 *Violation of Accounting Regulations*

§§ 283 (1) No. 5-7, 283b (1) No. 1-3 StGB penalize the violation of accounting regulations in certain circumstances[74] by imprisonment up to five years or a fine.[75] The offence is based on the fact that, in time of a financial crisis, company officers often intend to camouflage the company's actual financial status and/or the real value of company assets. The duty to keep proper records is not stipulated in the criminal code itself, but professional traders (*Kaufleute*) are obliged to keep records under §§ 238 ff. HGB. In general, a German seated limited is deemed to be a professional trader under § 6 (1) HGB.[76] However, it is controvertible whether the company has to comply with German or British accounting standards or with regulations in both countries.

Some authors negate a duty to keep accounts pursuant to § 238 (1) HGB because this provision is regarded as material company law.[77] However, others underline the public function of accounting standards and conclude that German accounting regulations are relevant for a German seated limited.[78] Lastly, some authors contend that

---

[74] For specific details see *in extenso* M. Böttger, 'Insolvenzdelikte' in K. Volk (ed.), *Verteidigung in Wirtschafts- und Steuerstrafsachen* (München: Verlag C.H. Beck, 2006) § 18, para. 161 ff.

[75] If the *actus reus* is carried out while the company is not in a financial crisis, the punishment is decreased pursuant to § 283b StGB to a maximum sentence of 2 years.

[76] Worm (n. 73 above) 70 f.; J. Hennrichs, 'Bilanz- und steuerrechtliche Aspekte der sog. Scheinauslandsgesellschaften – Am Beispiel der englischen Privat Limited Company by Shares' in K. P. Berger et al. (eds.), *Festschrift für Norbert Horn* (Berlin: De Gruyter, 2006) 387, at 389. For possible exceptions from this general rule see Wilk & Stewen (n. 49 above) 167.

[77] V. G. Heinz, *Die englische Limited* (2nd edn., Baden-Baden: Nomos Verlag, 2006) § 12, para. 25; M. Rehberg, 'Zivil-, Handels- und Verfahrensrecht' in H. Eidenmüller (ed.), *Ausländische Kapitalgesellschaften im deutschen Recht* (München: Verlag C.H. Beck, 2004), § 5, para. 109; T. Rönnau, Untreue als Wirtschaftsdelikt' (2008) 119 Zeitschrift für die gesamte Strafrechtswissenschaft 887, at 905 f.; Rönnau (n. 39 above) 846; H. Graf & M. Bisle, 'Besteuerung und Rechnungslegung der britischen "private company limited by shares" (Limited) – Teil II' (2004) Internationales Steuerrecht 873 ff.; E. Ebert & S. Levedag, 'Die zugezogene "private company limited by shares (Ltd.)" nach dem Recht von England und Wales als Rechtsformalternative für in- und ausländische Investoren in Deutschland' (2003) GmbH-Rundschau 1337, at 1339.

[78] Richter (n. 36 above) 1037; Radtke & Hoffmann (n. 50 above) 406; A. Schumann, 'Die englische Limited mit Verwaltungssitz in Deutschland: Buchführung, Rechnungslegung und Strafbarkeit wegen Bankrotts' (2007) Zeitschrift für Wirtschaftsrecht 1189, at 1190; see also Amtsgericht (Local Court) Stuttgart (2008) wistra – Zeitschrift für Wirtschafts- und Steuerstrafrecht 226, at 229.

although the limited company itself has no duty to file accounts under German law, its registered German branch has to fulfil the same accounting standards as every other professional trader.[79]

3.3.1.1 *Authoritative Accounting Standards.* The answer to the question if a German seated limited has to comply with German accounting regulations requires a look at § 325a HGB and European law. § 325a HGB contains specific accounting and disclosure requirements for branches of foreign corporations. The accounts for the branch may be kept, audited and disclosed in compliance with the law of the main seat (*Hauptniederlassung*). If German is not the official language at the company's seat, the branch may fulfil its disclosure duties by handing in transcripts certified by the company's registrar at the main seat, s. 325a (1) HGB. This provision implemented Article 2 (1) (g) and Article 3 of the Eleventh Council Directive.[80] The term *Hauptniederlassung* in § 325a HGB is somewhat unclear because one might argue that it means the centre of main interests and, therefore, in the case of a German seated limited, the branch would have the duty to comply with German law. However, § 325a HGB has to be interpreted in the light of the *Inspire Art* decision. The ECJ confirmed that the place of incorporation is relevant for purposes of the Eleventh Directive, even if the centre of commercial activities is located in another country.[81] Consequently, it is sufficient that a German seated limited draws up and discloses annual accounts under English law.[82] The same applies to the company's branch because the branch has no legal personality and cannot bear separate statutory duties.[83] Furthermore, it is important to acknowledge that the majority of German seated limited companies do not carry out any commercial activities in England. Thus, the imposition of the accounting burden on the branch would actually have the same

[79] References are given by W. Schön, 'EU-Auslandsgesellschaften im deutschen Handelsbilanzrecht' in S. Lorenz, A. Trunk & H. Eidenmüller et al. (eds.), *Festschrift für Andreas Heldrich zum 70. Geburtstag* (München: Verlag C.H. Beck, 2005) 391, at 393.

[80] Directive 89/666/EEC of December 21, 1989, concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by the law of another State (cited as 'Eleventh Directive').

[81] *Cf.* Case C-167/01 [2003] ECR I-10155 – *Inspire Art*, para. 55.

[82] Müller-Gugenberger (n. 59 above) § 23, para. 120a; Hinderer (n. 49 above) 118 f.; Schön (n. 79 above) 394 f.; Kienle (n. 39 above) 699; B. Riegger, 'Centros – Überseering – Inspire Art: Folgen für die Praxis' (2004) Zeitschrift für Unternehmens- und Gesellschaftsrecht 510, at 516; Graf & Bisle (n. 77 above) 874.

[83] Schön (n. 79 above) 394 f.

effect as imposing the duty on the company. However, one should note that a German seated limited has the duty to keep accounts for tax purposes under § 141 (1) of the Fiscal Code (*Abgabenordnung*, AO) if its turnover exceeds 500,000 € or its profits exceed 50,000 €. This duty does not create a double accounting burden because the company has no duty to file accounts for *tax* purposes in England.[84] However, the duty derived from § 141 (1) AO does not belong to accounting duties under the Commercial Code, therefore, a violation does not trigger criminal liability under § 283 (1) No. 5-7 StGB.[85]

3.3.1.2 *Recourse to English Accounting Standards?* Since the accounting regulations in CA 2006 s. 394 ff. are authoritative for a German seated limited, a director can only be convicted as long as § 283 (1) No. 5-7 StGB penalizes the violation of English accounting regulations. This question is highly debated among German scholars. Some argue that the offence does not refer explicitly to *German* accounting regulations. Therefore, German criminal law should apply as long as German accounting rules are not stricter than their English counterparts.[86] Others point out that the interpretation of § 283 (1) No. 5-7 StGB relies largely, or even completely, on the underlying accounting regime.[87] Therefore, the violation of foreign accounting duties should not be penalized by German criminal law.[88]

---

[84] See C. Graf von Bernstorff, 'Das Betreiben einer englischen Limited in Deutschland' (2004) Recht der internationalen Wirtschaft 498, at 502.

[85] G. Heine Kommentierung zu § 283 StGB' in Schönke & Schröder (n. 65 above) § 283, para. 29; Kienle (n. 39 above) 699.

[86] K. Tiedemann 'Kommentierung zu § 283 StGB' in H. W. Laufhütte *et al.* (eds.), *StGB, Leipziger Kommentar* (Band 9/2, 12th edn., Berlin: De Gruyter, 2009) § 283, para. 244 f.; Müller-Gugenberger (n. 59 above) § 23, para. 120a; similar Eser (n. 64 above) Vor §§ 3–7, para. 23; Heine (n. 85 above) § 283, para. 29; Weyand & Diversy (n. 72 above) para. 26; C. Christ, *Englische Private Limited und fanzösische Société à Responsabilité Limitée* (Baden-Baden: Nomos Verlag, 2008) 340; Worm (n. 73 above) 75 ff.; Mankowski & Bock (n. 39 above) 754 ff.; Kienle (n. 39 above) 698; Schumann (n. 78 above) 1194 f.; see also G. Werle & W. Jeßberger, 'Vorbemerkungen zu den §§ 3 ff. (Strafanwendungsrecht)' in H. W. Laufhütte *et al.* (eds.), *StGB, Leipziger Kommentar* (Band 1, 12th edn., Berlin: De Gruyter, 2007) Vor § 3, para. 335.

[87] Oberlandesgericht (Higher Regional Court) Karlsruhe (1985) Neue Zeitschrift für Gesellschaftsrecht 317; Rönnau (n. 39 above) 848; differently K.-G. Liebelt, 'Anmerkung zu OLG Karlsruhe, Urteil vom 21.02.1985 – 1 Ss 4/85' (1989) Neue Zeitschrift für Strafrecht 182.

[88] Pattberg (n. 59 above) 130 ff.; Hinderer (n. 49 above) 129 ff.; Schmitz (n. 36 above) 208; F. Bittmann, 'Strafrecht und Gesellschaftsrecht' (2009) Zeitschrift für

The *Amtsgericht* (Local Court) Stuttgart decided the first and only case on § 283 (1) No. 5-7 StGB with respect to a director of a German seated limited. The court held that a shadow director of a German seated limited can commit a bankruptcy offence under § 283 (1) No. 5-7 StGB if he fails to comply with both English and German accounting regulations.[89] Although the court showed a tendency to consider German accounting regulations relevant, it left this question undecided because, at any rate, the defendant violated English accounting regulations. In conclusion, the court implicitly allowed a conviction under § 283 (1) No. 5-7 StGB for violating English accounting regulations. At the end of the day, it is likely that other courts will also refer to English accounting standards in order to convict a director for bankruptcy offences. Case law with respect to § 170 StGB shows that *Blankettstrafgesetze* may be interpreted by applying foreign law.[90]

3.3.2 *Conclusion*

A director of a German seated limited may be convicted for bankruptcy offences under §§ 283 (1) No. 5-7, 283b (1) No. 1-3 StGB if he fails to comply with accounting regulations set out in the CA 2006. Furthermore, a director can be convicted under the general bankruptcy offences in § 283 (1) No. 1-4 and 8 StGB that do not require a violation of accounting duties.[91]

3.4 *§ 82 (1) No. 5 GmbHG*

In the past, individuals who were disqualified to serve as a director of a German GmbH tried to continue their business activities by setting

---

Footnote 88 continued
Unternehmens- und Gesellschaftsrecht 931, at 952; see also Oberlandesgericht (Higher Regional Court) Karlsruhe (1985) Neue Zeitschrift für Strafrecht 317.

[89] Amtsgericht (Local Court) Stuttgart (2008) wistra – Zeitschrift für Wirtschafts- und Steuerstrafrecht 226, at 229, see also Weyand (n. 43 above) 705; A. Schumann, 'Zur Strafbarkeit wegen Bankrotts und Untreue bei einer ausländischen Kapitalgesellschaft' (2008) wistra – Zeitschrift für Wirtschafts- und Steuerstrafrecht 229, at 230.

[90] *Cf.* Oberlandesgericht (Higher Regional Court) Saarbrücken (1975) Neue Juristische Wochenschrift 506, at 507, with further references; Oberlandesgericht (Higher Regional Court) Stuttgart (1977) Neue Juristische Wochenschrift 1601, at 1602; K. Dippel, 'Kommentierung zu § 170 StGB' in H. W. Laufhütte *et al.* (eds.), *StGB, Leipziger Kommentar* (Band 6, 12th edn., Berlin: De Gruyter, 2010) § 170, para. 15; Mankowski & Bock (n. 39 above) 745 ff.; differently Hinderer (n. 49 above) 131 ff.

[91] For details see Hinderer (n. 49 above) 56 ff., 134 ff.; Rönnau (n. 39 above) 850 ff.

up an English limited company. This door was already closed by the Federal Supreme Court in 2007.[92] Under the amended § 6 (2) sentence 3 GmbHG anybody who is convicted of certain offences related to commercial activities is disqualified to serve as a director (*Geschäftsführer*) of a German GmbH, even if these offences were committed in another jurisdiction. Additionally, § 82 (1) No. 5 GmbHG now includes managing personnel of foreign corporations and, thus, applies to directors of German seated limited companies. If the director provides false information to the German registrar of companies (*Handelsregister*) in connection with the registration of the branch under § 13g HGB,[93] he may be convicted to a maximum sentence of 3 years imprisonment or a fine.

3.5 *Tax Evasion*

Under the incorporation theory a German seated limited will be treated as a corporation for tax purposes.[94] The company will be liable for local business tax (*Gewerbesteuer*),[95] corporation tax (*Körperschaftsteuer*),[96] and VAT (*Umsatzsteuer*). If the company fails to comply with its tax obligations, the director may be prosecuted under § 370 (1) AO. This offence is committed when the director submits false or incomplete information to the tax authorities (or other public authorities) that is relevant for tax purposes, or conceals such information for the purpose of reducing taxes or obtaining unjustified tax privileges. Tax evasion may be punished by imprisonment up to five years; the maximum sentence is increased by § 370 (3) AO under certain aggravating circumstances.

IV CONCLUSION

The article has shown the difficulties in criminal law created by the movement of English incorporated limited companies to Germany. However, creditors and the financial interests of the company are, in many cases, protected against dishonest activities by criminal law in both jurisdictions. Although practical problems exist in enforcing

[92] BGHZ 172, 200.

[93] § 13g HGB refers to the disqualification rules in the GmbHG.

[94] P. Korts & S. Korts, 'Die steuerrechtliche Behandlung der in Deutschland tätigen englischen Limited', (2005) Betriebs-Berater 1474.

[95] Hennrichs (n. 76 above) 400.

[96] Graf & Bisle (n. 77 above) 838.

English criminal law if the offender is based in Germany, any director of a German seated limited should be aware that he may be punished under English criminal law even if the company operates exclusively in Germany and the director does not act in England or Wales.

OPEN ACCESS