Public Enforcement of Directors’ Duties
- A Comparative Perspective -

by Felix Abetz
Overview

I. Introduction
II. Private Enforcement in Germany
III. Public Enforcement in Germany
   1. Administrative Law
   2. Criminal Law
IV. Public Enforcement in Australia
V. Current state of my research
I. Introduction

„The VW crisis poses a threat to Germany as a business location and the label „Made in Germany“.“
(German Institute for Economic Research)

„Volkswagen has become a bigger downside risk for the German economy than the Greek debt crisis.“
(ING chief economist Carsten Brzesk)
I. Introduction

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II. Private Enforcement in Germany

• The private nature of Directors’ Duties
• Central mechanism: **Damage claims** (Sec 93 (2) Stock Corporation Act)
• (P) Lack of Enforcement
  – by the supervisory board
  – by shareholders
• (P) D&O – Policies

→ Lack of personal accountability through private mechanisms
III. Public Enforcement in Germany

Branches

Administrative Law  Criminal Law
III. Public Enforcement in Germany

1. Administrative Sanctions

- Administrative fine (Bußgeld) as the core administrative sanction
- **(P)** Fragmented nature
  - Narrow scope of application
  - No central supervisory authority
  - Prevalent use as a sanction against corporations

- Lack of personal accountability through administrative sanctions
III. Public Enforcement in Germany
2. Criminal Sanctions

- **Sec 266 Criminal Code**
  „Whoever breaches duties, being imposed upon him by law to safeguard third parties‘ pecuniary interests, and thereby causes financial loss to the third party whose pecuniary interests he is responsible for, will be punished by imprisonment of up to 5 years or by fine“

- **(P) Extremely wide scope of application**
  => Almost every civil breach of duty can trigger criminal liability

  Criminal liability can be too severe
IV. Public Enforcement in Australia

• **Until 1993**: Only Criminal Enforcement
  – Similar situation to Germany

• **Introduction of the Civil Penalty Regime**
  – Complementary to the criminal regime
  – Enforced by the Australian Securities & Investment Commission (ASIC)
  – Court based proceedings
  – Three types of penalties:
    – Pecuniary Penalties ($ 250,000 max.)
    – Disqualification Orders
    – Compensation Orders

  } Most commonly used in practice
IV. Public Enforcement in Australia

- Relationship between the Civil Penalties and the Criminal Sanctions

Diagram:

- Personal Enrichment
  - Civil Penalties
  - Criminal Sanctions
V. Current state of my research

• Practical implementation of the Civil Penalty Regime in Australia
  – Has a more balanced approach to enforcement been achieved?
  – Case study

• Potential ways to improve Public Enforcement in Germany
  – Restriction of Criminal Sanctions
  – Development of Administrative Sanctions
  – Introduction of new sanctions?