

Section III: Criminal Procedure

**XX AIDP International Congress of Penal Law
Criminal Justice and Corporate Business**

**Prevention, Investigation, and Sanctioning
of Economic Crime
– A Comparative Analysis of Major Normative Control Systems –**

Questionnaire

Ulrich Sieber

OUTLINE AND TEMPLATE FOR COUNTRY REPORTS

**Alternative Investigation and Sanctioning Systems
for Corporate and Corporate-Related Crime in**

..... (Country)
Author:

I. Introduction

A. Development and impact of economic crime

Please give a short introduction to the factual problems surrounding economic and corporate crime, delinquency and irregularities in your legal order, if possible with references to statistics on cases, extent of damage, etc. As emphasized above, the scope of this overview need not be limited to purely criminal activities such as are usually prohibited in the criminal law but can also include other economic and corporate delinquency or irregular behavior. It can inclose specific sectors, such as infringements of competition and cartel law, banking law, telecommunication law, subsidy law, agricultural law, consumer protection, etc.

B. Main problems controlling economic crime

Please summarize the legal problems and obstacles to criminal justice in dealing with economic and corporate crime, especially as regards preventive forms of crime control, criminal investigation, criminal prosecution, and criminal adjudication. Is criminal law considered satisfactory? Are there reasons for exploring alternative solutions beyond the traditional means of criminal law in your country?

C. Measures of legal reform

What has the legislature done to improve the control of economic and corporate crime, delinquencies and irregularities (only major changes)? Are there any alternative regulations, sanctioning, or investigation regimes designed to implement a more effective legal policy in the field of economic and corporate activities? Are there any evaluations or reports on the practical impact of such measures? Are any reform measures planned?

D. Overview of normative control regimes

Are any alternative systems or regimes for preventing, investigating, prosecuting, and adjudicating economic crime and delinquency applied or proposed in your country (e.g., criminal law, law of regulatory offences, administrative sanction law, different areas of administrative law, civil law)? Are these systems defined or developed in a systematic way? Please give only an enumeration of the

alternative mechanisms that currently apply to economic and corporate crime. Then, please indicate which of these regimes will be dealt with in the following report.

II. Criminal Law

Model template, based on a common meta-structure, by which to compare the normative systems for controlling economic crime:

The following model template is formulated in a general (and not in a criminal law specific) way. It should be used to describe both the system of *criminal law* as well as the various *alternative legal regimes* thus facilitating the comparison of regimes and legal orders. This means:

- When using the template to discuss the *criminal law system*, the focus should be on those issues whose treatment under the alternative systems discussed subsequently (in this or the other country reports) deviates from the criminal law standards. Please do not give long, general descriptions of elements in your legal system that are not significant for the *comparison* of the various investigating, prosecuting, and sanctioning systems. Please try to anticipate differences!
- When using this template to describe *alternative investigating and sanctioning systems* (infra III., IV., etc.), the text should emphasize and explain the differences between these systems and the criminal law standards discussed previously.
- In this way, the criminal law system should not only be the reference point for analyzing and evaluating the alternative sanctioning systems (which can be summarized in the final chapter), it should also be decisive for one of the main questions in the field of legal policy, namely, deciding whether the various broad safeguards of criminal law should be limited to the field of criminal law (sanctions), however defined, whether they can also be applied (directly or analogously) to other types of alternative sanctions, whether functional equivalents of these safeguards can be based on other grounds, or whether resort to other legal regimes can indeed avoid the application of these safeguards.

A. Aims and general characteristics of the legal regime

What are the aims of the sanctioning and investigating system under study (e.g., repression, prevention – such as by means of inchoate criminal offenses – asset recovery for eliminating unjust enrichment, information gathering)?

What are the characteristics of this legal regime? Which kinds of conducts (in theory and in practice) are required in order for the sanctions of this regime to be applied (e.g., certain extent of social harm, ethical blameworthiness of the act, creation of a future danger, just illegal behavior)? Do these characteristics have consequences for legal safeguards?

Please give only a short answer here for characterizing the systems; details may follow below (esp. under B. and C.).

B. Sanctions and their substantive requirements

1. Types of sanctions

What kinds of sanctions are provided by this system with respect to economic and corporate crime?

Explanatory note: Please note that the term “sanction” is used in a very broad sense to encompass any detrimental effects. Thus, it includes secondary penalties and other consequences, such as professional bans, corporate dissolution, supervision of business activities, public announcements (“naming and shaming”), blacklisting (e.g., with respect to public procurements), withdrawal of licenses, reporting obligations, asset recovery and confiscation, purely preventive measures, (normal, double or treble) damage recovery etc.

2. Substantive requirements and safeguards for imposing sanctions

What are the requirements of substantive law for imposing sanctions with respect to the prohibited conduct? (e.g., past infringement of specific rules protecting an important legal interest, existence of an imminent concrete danger, anticipation of a future danger, a specific organizational responsibility due to status as a financial institution)? What are the substantive limitations and safeguards? E.g., culpability, proportionality? Must the specific requirements be described precisely by law (*nullum crimen sine lege*) or does a general clause suffice?

3. Sanctions against companies and other organizations

Can sanctions in cases of economic and corporate crime be imposed only on natural persons or on natural persons and companies or only on companies? What are the basic requirements for sanctioning natural persons (e.g., personal culpability) and companies (e.g., failure to fulfill supervisory duties, vicarious liability of an employee)? What kinds of sanctions are possible? Are sanctions against legal persons based on the same concepts and requirements for responsibility as sanctions against natural persons?

C. Procedures and their safeguards

1. Institutions and actors

a) Investigating authorities

- Which authorities are tasked with the investigation of cases of economic and corporate crime?
- Are the same authorities responsible for the investigation of natural persons and companies?
- Are these authorities specialized in the respective field (e.g., special police force)?
- Do these institutions and especially their officers deal with such cases independently (e.g., comparable to a judge) or are they subject to the orders of their superiors? If they act independently, are there measures to secure this independence? If yes, what are they?
- Are the officers and state officials recruited from a specialized administrative institution? Are they institutionally or in another way (e.g. working in the same organization or the same building) connected with any other (specialized) institutions acting in this area?
- Do these authorities have legislative, executive, judicative and sanctioning powers? If yes, what are they? To whom do they transfer their cases?

b) Prosecutorial authorities

See questions under a); if the authorities for a) and b) are the same, the questions may be answered together (please avoid unnecessary repetition and use cross-references).

c) Deciding (esp. adjudicating) authorities

See questions under a); if the authorities for a), b), and c) are the same, the questions may be answered together (please avoid unnecessary repetition and use cross-references).

Esp. in case of so-called independent regulatory and supervisory administrative bodies:

- Is there any division between investigation, prosecution, and decision-making within the administrative body?
- If yes, how separated are they from each other?
- What are the factors that determine the amount of punishment, the amount of the sanction?
- Must a reasoned decision be given?

- Are the decisions directly final and enforceable? Does enforcement require any other administrative or judicial approval?

d) Control authorities and range of control

See, questions under a), especially: Are these authorities courts or administrative bodies?

In addition:

- What (kinds of) remedies are there to review the imposition of the sanctions described under B) (e.g., appeal before administrative authorities or before a higher court)?
- To what extent can and does the aforementioned control mechanism scrutinize the decision (e.g., standard of review: full or limited review of the facts or only review of the application of the law)?

2. Investigative powers and duties to cooperate

a) Investigative powers

- Where and how detailed are the relevant powers codified? Is there a general clause?
- What investigatory powers does the authority have in cases of economic and corporate crime? Please do not provide extensive descriptions of the ordinary criminal law arsenal, as the study is primarily interested in deviations from the criminal law standards within specific regimes. Please enumerate only the most relevant powers (e.g., interrogation of witnesses, search and seizure, interception of telecommunications, video surveillance, online searches, access to bank accounts, bank data or specific data banks).
- Who decides and/or authorizes these decisions (administrative body, prosecutor, judge)?
- Can the responsible institutions start investigations by means of data mining, thus identifying suspicious activities (e.g., by risk analysis) without a concrete suspicion or a concrete danger?

b) Duties to cooperate and right against self-incrimination

- Does the investigated (natural and legal) person have a duty to cooperate? If yes, what are they? How can these duties be enforced (e.g., by which administrative or criminal sanctions)?
- Does the principle of *nemo tenetur se ipsum accusare* or another right against self-incrimination apply?
- Can information obtained by means of a mandatory duty to cooperate (e.g., in the field of taxation) be used for the imposition of sanctions on the investigated person or a third party under a different regime? Or do such cooperation duties render the evidence obtained thereby inadmissible?

3. General procedural safeguards

Note: The following answers should not only deal with criminal procedural law. If possible, please indicate also to what extent legal safeguards are prescribed by constitutional law (superior to normal law).

a) Privileges against coercive powers

- Does the law provide for (e.g., testimonial) privileges for relatives, special professions (e.g., attorney, accountant), or the accused (no details please, just a general answer with some examples)?
- How are these privileges applied if legal persons are investigated or prosecuted?

b) Proof of claim

- What is the standard of proof? Who has the burden of proof?
- To what extent can the investigated person request the additional taking of evidence or initiate further investigation?
- Is the presumption of innocence applicable?

c) Access to the file

- (When) is the suspect informed of the proceedings?
- Does the investigated person and/or the person's lawyer have full access to the file? At what point does the investigated person have a right to such access (e.g., from the beginning of the investigation, after the conclusion of the investigation)? What restrictions apply to access to the file during the investigation and during court proceedings?

d) Right to be heard and oral hearing

- Does the investigated person have a right to be heard, to comment on the evidence, to present evidence? At which moment(s) do these rights apply? How comprehensive are these rights (e.g., is the authority obliged to reply to the investigated person's objections)?
- Can the duration of the the final words or other interventions of the investigated person be limited?
- To what extent does the investigated person have the right to an oral hearing or oral proceedings? What limitations apply to such a hearing?

e) Secret evidence

Can secret evidence (i.e., evidence that is not fully disclosed) be used to the detriment of the investigated person, either for triggering investigative measures or in the final decision?

If yes, what procedures are used (e.g., *in camera* procedures, using hearsay evidence of intermediaries, anonymous witnesses, analysis of written statements of witnesses)?

f) Transparency

To what extent is the procedure as such public or confidential? Are files, (possible) hearings, and decisions to denounce open to the general public?

g) Companies and other organizations

- To what extent do the aforementioned safeguards also apply to companies/organizations (e.g., lesser standard of proof in proceedings against companies, no right against self-discrimination)?
- How do privileges for natural persons affect proceedings against companies/organizations?

4. Discretion to commence and to stay proceedings

- How are cases selected?
- Is the decision of the competent authority to initiate an investigation in a case of economic and corporate crime mandatory or discretionary? Is this decision regulated by specific laws and/or principles (e.g., the principles of "legality" or "opportunity")?
- (How) can the authority suspend or stay the proceedings on a discretionary or a legally defined basis? Is it possible to engage in deferred prosecution agreements, non-prosecution agreements, other consensual proceedings, and informal settlements? How are these procedures legally regulated?

- Are there provisions or practices for granting impunity or leniency to crown witnesses (e.g., with respect to whistle-blowers or informants in corruption cases)?
- Are the aforementioned discretionary powers used to achieve specific aims (e.g., ensuring future lawful behavior or the fulfilment of other conditions by the investigated person)?

5. Relationship with other national and international legal regimes

a) Transfer of evidence within the national legal order

Can evidence gathered in the regime under study be used in other regimes (criminal law, administrative law, civil law, etc.) and vice versa? For example, can information obtained by means of telephone interception or *cooperation duties* of the investigated person within one sanctioning system (see above) be used in other sanctioning systems (and especially in criminal justice)?

b) Ne bis in idem within the national legal order

Do decisions of other legal regimes justify the application of “ne bis in idem” and vice versa?

c) International cooperation

What is the regime of international cooperation with respect to foreign institutions in the field of criminal justice and alternative regimes?

D. Evaluation

1. Safeguards

As noted, the above answers should already indicate whether legal safeguards are prescribed by constitutional law (superior to normal law). Please, summarize the range of constitutional, procedural and other legal protections of the respective system here. Please specify whether the safeguards are only applicable to criminal law (sanctions) or whether they apply to all types of sanctions. You may also indicate the extent to which safeguards are governed by other international legal regimes, e.g., the ECHR; however, we hope to receive a special, generally applicable report on ECHR protection.

2. Efficiency

How favorably is this system judged in your country (e.g. by practitioners, by academia, by you)?

3. Overall evaluation

III. Administrative criminal law

Model Template:

Please copy the above template here and use it for this regime as well.

Please emphasize and explain the differences between this system and the previously described criminal law standards, especially those with respect to efficiency and legal safeguards.

Please indicate whether there is no difference to the criminal law system (important for the comparative analysis).

IV. Asset forfeiture and confiscation

Model Template:

Please copy the above template here and use it for this regime as well.

If your country has various asset forfeiture systems (e.g., criminal, purely preventive, non-conviction based recovery of unjust enrichment), you can discuss confiscation as a criminal sanction above under II. (with the other sanctions of criminal law) and nonconviction based confiscation here; you may also discuss both regimes here.

Please pay special attention to the standards of proof (especially proof with respect to the relationship between a crime and the confiscated proceeds). Do constitutional guarantees regarding the protection of property have an impact on these regimes?

V. *Optional, e.g.: Compliance regimes*

Model Template:

Please copy the above template here and use it for this regime.

Using the template for the description of private compliance regimes might require some functional analysis and adaptations (see supra in Part 1): *In compliance regimes, the institution imposing sanctions is the company*. Respective sanctions are not only internal sanctions against employees but also the transfer of investigation results to the state administrative or criminal justice system. Functional equivalences for coercive powers are, e.g., the questioning of employees (with or without “Miranda warnings”?) and the screening of their computer systems. Possible limits to these investigation methods might result especially from constitutional law, labor law, and data protection law.

VI. *Optional: Other regimes*

Model Template:

Please copy the above template here and use it for this regime as well.

If you wish, you can describe other investigation and sanctioning systems that are of specific importance or that you consider interesting in your legal order (see Part 1). E.g.: purely preventive regimes, such as listing mechanisms, reporting mechanisms against money laundering, special financial market regulations, cartel regulations, etc.

VII. **Analysis and summary**

In a final chapter, please compare the *effectiveness* and the level of *legal safeguards* of the various regimes that exist in your country (e.g. by using partly the structure of the above template) and, in light of this, formulate legal policy recommendations.

You can also briefly reflect on the following aspects (unless they are subject to special reports, see below under Part 3 C.):

1. Identifying criteria to distinguish (criminal law) punishment from other sanctions in order to determine the scope of criminal law guarantees.
2. Analyzing whether the various safeguards of criminal law are limited to a field of criminal law (sanctions), hether they can also be applied (directly or analogously) to other types of alternative sanctions, whether functional equivalents of these safeguards can be based on other grounds, or whether resort to other legal regimes can indeed avoid the application of these safeguards. Example: the legitimacy of applying different standards of proof in criminal, civil, and administrative law.

PART 3 ADDITIONAL SPECIAL REPORTS

The analysis of legal regimes (based on country reports) dealt with above can be supported by additional special reports. Proposals for such reports should be sent to the general rapporteur (u.sieber@mpicc.de). Please do not commence with a special report before prior approval of the general rapporteur. The special reports might deal with specific legal orders or specific cross-sectional problems (especially safeguards) supporting the above-mentioned aims of the project:

I. Reports on specific legal orders

Reports on specific legal orders might deal with special sanctioning regimes (or just one individual sanctioning regime) of an international or supranational legal order. Examples are:

1. Specific reports on European Union law:

E.g. European antitrust law, administrative sanctions for the protection of the EU's financial interests (including blacklisting of public tenders, license registration and withdrawal, professional restrictions and disqualifications), financial market regulation, insider trading, single supervisory mechanisms

2. Smart sanctions of EU and UN law:

Especially travel and financial restrictions

II. Reports on specific topics

1. Civil damages as sanctions

Especially under the law of the United States of America

2. Investigations under anti-money laundering regimes or regimes against the financing of terrorism

3. Investigations by intelligence services

The possibility of these special reports should not prevent you from also dealing with these topics in your country report.

III. Reports on special safeguards

1. Identifying criteria to distinguish criminal sanctions from other (e.g. administrative or civil) sanctions in order to determine the scope of criminal law guarantees

2. The legitimacy of differing standards of proof in criminal, civil, and administrative law

3. The circumvention of legal safeguards as a result of the growing crime control role within the private sector

The possibility of the following special reports should not prevent you from also dealing with the following topics in your country report.