

**IPW 2015**

**Course Professor Dr. Holger Buck  
Saarbrücken, Germany**

**The Legal Basis for Business Ethics from a  
German Lawyer's Perspective -  
Practical Approach\***

\*special thank to my colleague Prof. Dr. Barbara Weitz

- Part 1**                    **Freedom of Contract and its  
Limitations**
  
- Part 2**                    **Consumer Protection in the EU and  
Employee Protection in the EU**
  
- Part 3**                    **Rules for Playing the Market**
  
- Part 4**                    **Legal Issues regarding Business  
Ethics in relation to the Shareholder**

## **Introduction: Short questions and answers:**

**A:** Enterprise A spends 5 Mio €/year for logistics services. The 3 CEOs conclude a fixed contract (15 years) with Logistics company L GmbH. After 15 years A (represented by the 3 CEOs) buys L and integrates L into enterprise A.

**B:** Partner P of a law firm that shares all the profits equally amongst partners rejects new clients because he has too much work. Privately, he starts consultancy work for new client C.

**C:** Enterprise C needs new production sites. The CEO decides to rent new premises tailor-made for C and for a fixed time of 20 years from N.

**D:** High tech company D needs new technical developments. The head of the R&D department decides to buy new developments from a Swiss company S.

**E:** Law firm's partner B negotiates the purchasing of new hard ware (45 computers) and lawyer's software. During the negotiations one potential supplier adds a laptop for free (at the time worth 3.500 €).

**F:** During lunchtime A advises his best friend which share he should buy at the stock exchange today.

## **Introduction: Short questions and answers:**

**A:** Enterprise A spends 5 Mio €/year for logistics services. The 3 CEOs conclude a fixed contract (15 years) with Logistics company L GmbH. After 15 years A (represented by the 3 CEOs) buys L and integrates L into enterprise A.

Hidden agenda: L GmbH has been founded by the wives of the three CEOs. As CEO of L they use a third person not connected with them.

**B:** Partner P of a law firm that shares all the profits equally amongst partners rejects new clients because he has too much work. Privately, he starts consultancy work for new client C.

Hidden agenda: The contract P/C (75.000 €) contains a strong non-disclosure clause. P at that time was building his fancy new home.

**C:** Enterprise C needs new production sites. The CEO decides to rent new premises tailor-made for C and for a fixed time of 20 years from N.

Hidden agenda: N is the CEO's best friend. The CEO's wife is N's sleeping partner and gets a share of 50% of the profits.

## **Introduction: Short questions and answers:**

**D:** High tec company D needs new technical developments. The head of the R&D department decides to buy new developments from a Swiss company S.

Hidden agenda: S is owned by the head and the deputy head of D's R&D department. The annual profit of S ist € 200.000.

**E:** Law firm's partner B negotiates the purchasing of new hard ware (45 computers) and lawyer's software. During the negotiations one potential supplier adds a laptop for free (at the time worth 3.500 €).

Hidden agenda: The offer was directed to B personally, not to the law firm. The laptop should be delivered to B's home.

**F:** During lunchtime A advises his best friend which share he should buy at the stock exchange today.

Hidden agenda: A is an employee of an investment bank. His duty is to analyse listed companies and to say „Yes“ or „No“ to the purchasing of large quantities of shares. Tomorrow the bank buys a large portion of these shares.

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# Legal Framework for Contracts

**EU legislator is taking possession**  
of the field

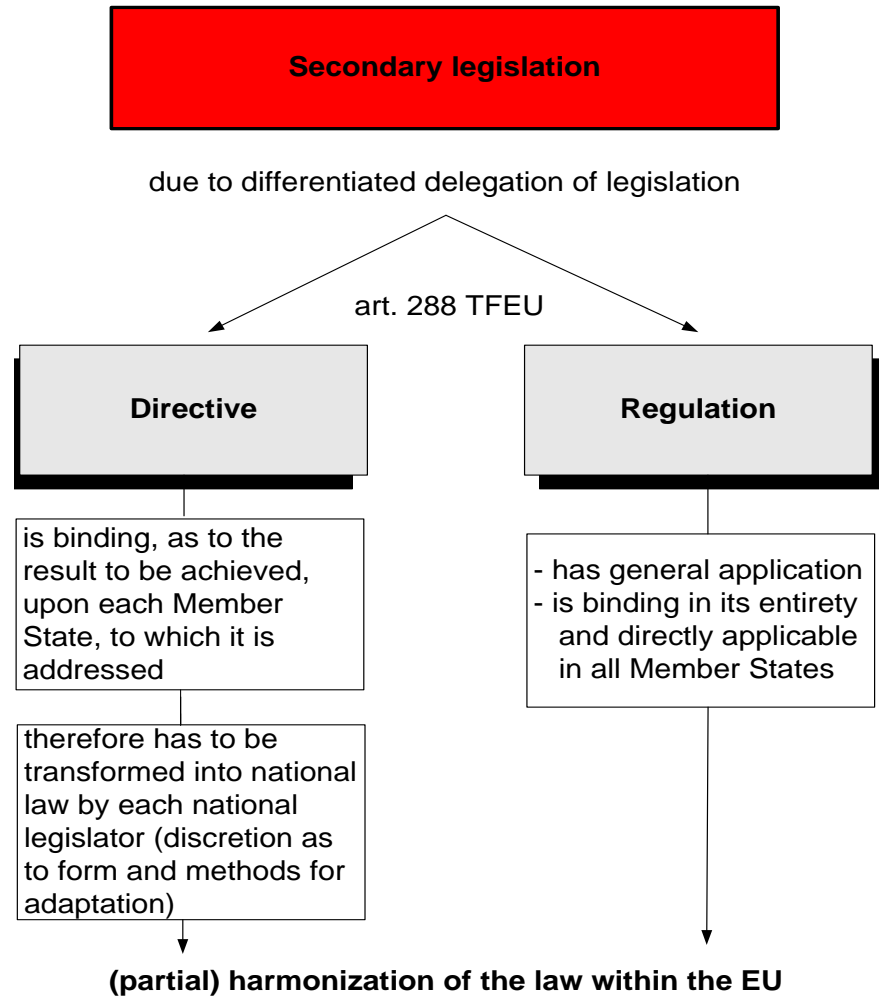
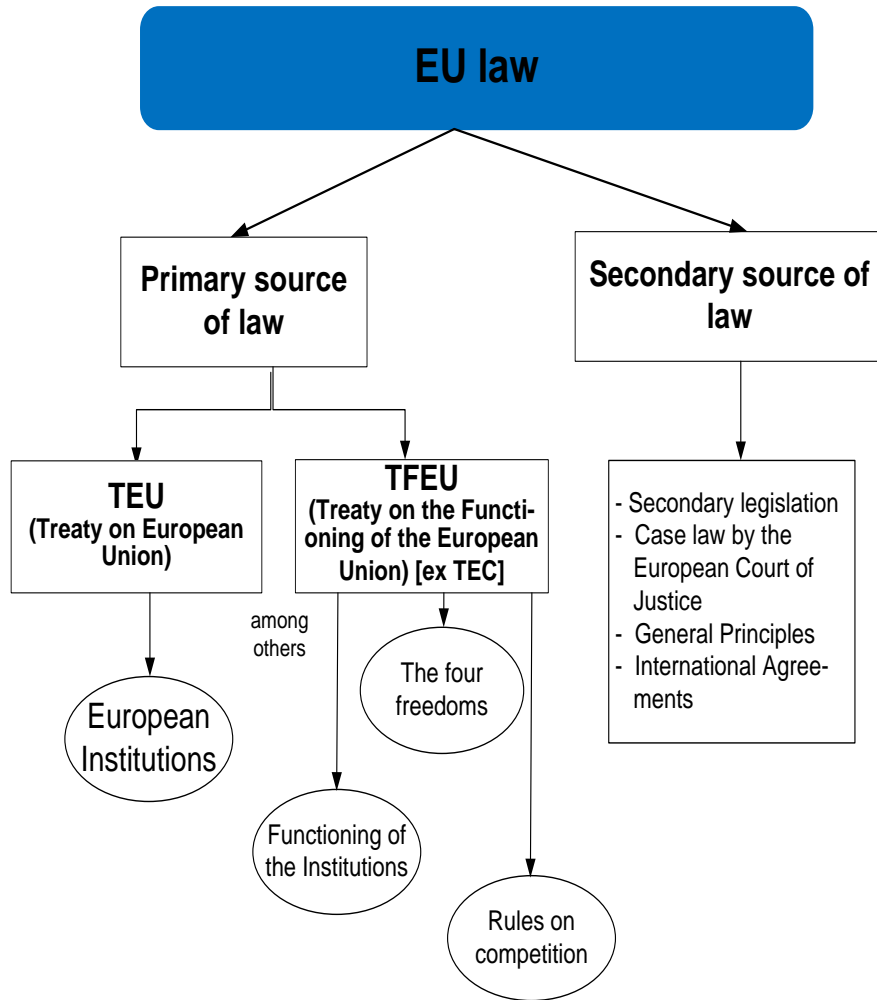
Where EU legislator has acted,  
in principle, **EU law prevails**  
over domestic law

**Result:**

**Progressive harmonization of  
national laws on contracts  
in all Member States**



# Structure of EU Law





# Structure of EU Law

Source	Addressees	Binding effect on private party
Treaties + Charter of Fundamental Rights*	Member States, private parties	Yes, if suitable
Regulations	Private parties, Member States	Yes
Directives	Member States only	Only as to specified goals: Directives must be implemented by Member States

\* See list EU Primary Law.

Table based on Hakenberg (2012), p. 60.

# Influences on e.g. the German civil law

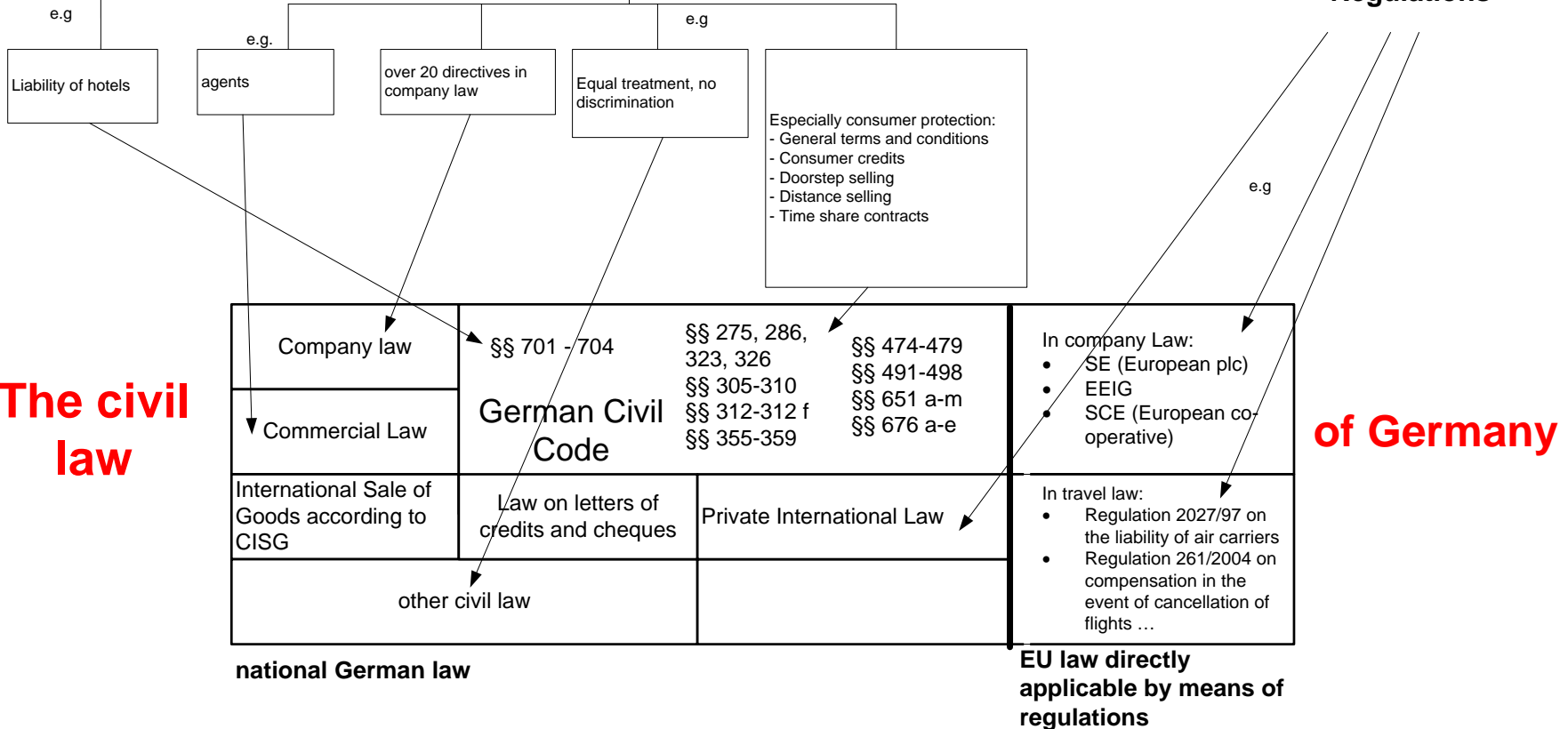
## European influences

### Council of Europe

### EU

### Directives

### Regulations



# Protection of Freedom under EU primary law and the German Constitution

## EU

TEU: Artt. 2, 6

CFREU: Art. 6

CFREU: Artt. 15-17

TEU: Art. 67 (1)

## German Constitution

GG: Art. 2 (1)

## Freedom in general

Freedom to work,  
freedom to conduct a business  
and right to property

Acknowledgement of rights  
under the laws of a Member State

General freedom to act:  
**includes freedom of contract**

# General Limitations

(without protection of special groups)

## EU primary law

TEU: Artt. 2, 3 (3)

Combat of social exclusion and discrimination, **promotion of social justice** and **social protection**

CFREU: Artt. 21-26

Diversity, non-discrimination, equality

TFEU: Art. 10

**Non-discrimination**

## German Constitution

GG: Art. 2

Rights of others or **safeguards of the constitution or the code of ethics**

GG: Art. 3

Equality

GG: Art. 20

Social state principle

# Resulting Concept under German Civil Law

(as an example of domestic law of a Member State)

## **Contractual Freedom**

as to

- **Conclusion**
- **Form**
- **Contents**

vs.

## **Minimum Contract Justice**

in particular

**Protection of the  
„Structurally Weaker Party“**

# References

## Statutory Material:

EU primary law – see list EU Primary Law, also as to abbreviations used.

Grundgesetz für die Bundesrepublik Deutschland (Basic law = Constitution), [http://www.gesetze-im-internet.de/englisch\\_gg/](http://www.gesetze-im-internet.de/englisch_gg/) (retrieved on 9 May 2015) - “GG”.

Bürgerliches Gesetzbuch, [http://www.gesetze-im-internet.de/englisch\\_bgb](http://www.gesetze-im-internet.de/englisch_bgb) (retrieved on 9 May 2015) – “BGB”.

## Literature:

Becker, Vertragsfreiheit, Vertragsgerechtigkeit und Inhaltskontrolle, in: Wertpapier-Mitteilungen (WM) 1999, p. 709-718.

Bruns, Die Vertragsfreiheit und ihre Grenzen in Europa und den USA – Movement from Contract to Status?, in: Juristenzeitung 2007, p. 385-393.

Ellenberger, BGB Buch 1 Allgemeiner Teil, in: Palandt BGB. 73<sup>rd</sup> ed. Munich 2014, ‘Einf v § 145, passim.

Hakenberg, Europarecht. 6<sup>th</sup> ed.. Munich 2012, passim.

Kötz, Freiheit und Zwang im Vertragsrecht, in: Immenga et al (eds.), Festschrift für Mestmäcker. Baden-Baden 1996, p. 1037-1047.

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# EU Policy

**TFEU:**

**Art. 12**

**Consumer protection** requirements shall be taken into account in defining and implementing other **Union policies and activities**.

**Art. 114 (3)**

**“... high level of consumer protection...”**

**Art. 169 (1)**

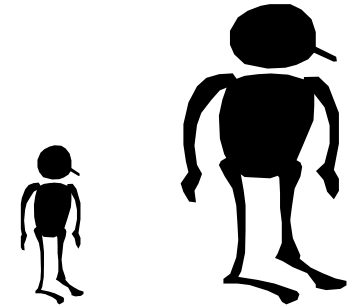
**“... protecting the health, safety and economic interests of consumers, as well as to promoting their right for information, education and to organize themselves in order to safeguard their interests.”**



# Implementation of the EU Policy by EU

**EU-Directives** on substantive law issues  
see list EU Consumer Protection

- **Goal :**  
**“Targeted full harmonization”**
- **Main concern:**  
**Business to consumer (“btc”) contracts**



**European Court of Justice (ECJ)**

**Role:**  
**Judicial review of proper implementation**



# Consumer Protection

Implementaion of EU law under German law 1

- **Sales contracts on moveable goods btc**

**Mandatory law  
unilaterally protecting the consumer**



- **Standard terms and conditions btc**

**Far reaching judicial review**



# Concept of Consumer Protection

## Implementaion of EU law under German law 2

- **Distance contracts btc,  
on-premises and off-premises contracts btc**

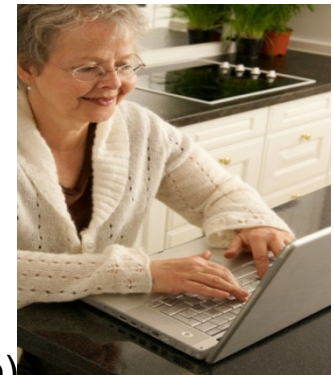
**Basic information**

**Restraints on fees and additional payments**



- **Distance and off-premises contract btc**

**Specific information in specific form**



Note:

Implementation of EU Directive 2011/83 (see list EU Consumer Protection) into German Law effective as from June 13, 2014.

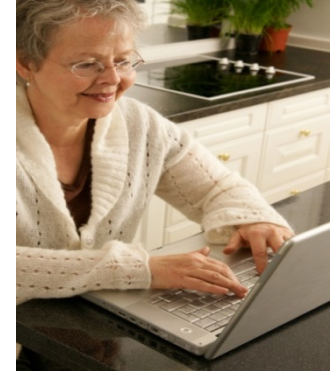
# Concept of Consumer Protection

## Implementation of EU law under German law 3

- **Distance or off-premises contracts btc**

### **Consumer's right of withdrawal**

exceptions and restrictions, preclusive period



- **Specific contracts btc**

(for example package travel, consumer credit)

### **Protection against specific risks**



Note:

Implementation of EU Directive 2011/83 (see list Consumer Protection)  
into German Law effective as from June 13, 2014.

# Concept of Consumer Protection in b2c Contracts

**Group work (1):**

**Critical analysis of the ethics issues**

**Case study**

# Employee Protection: Fundamental Rights

**CFREU:**

**Art. 15:**

**Right to engage in work**

**Art. 31:**

**Fair and just working conditions**

**Art. 32:**

**Prohibition of child labour and protection of young people at work**

**Art. 33:**

**Family and professional life**

**Art. 34:**

**Social security and social assistance**



# Employment and Social Policy of EU

## TEU

**Art. 3 (3): ...full employment and social progress”...”It shall combat social exclusion and discrimination....”**

**Artt. 145-166:** two chapters on employment and social policy

**Art. 153** lists *inter alia*

- **Working conditions**
- **Protection against termination**
- **Equality** between men and women
- **Combat of social exclusion**

# Impact of EU Law (on German Law)

## **EU activities mainly through EU Directives**

see List EU Employee Protection

**EU Directives on top of traditionally labour-minded German law** (both as to individual contracts as to collective labour law)

## **Judicial review of proper implementation of EU Directives**

European Court of Justice (ECJ)

**+**

## **Judicial review of violation of fundamental rights**

European Court of Human Rights (ECHR)

## **Impact of consumer protection laws**

Restraints on clauses in standard contracts:

Employees are considered consumers



# Structure of German Employment Law



Table based on Büdenbender/Will (2008), p. 53.

# Influence of the European Court of Justice

Given the broad scope of EU activities

**Judicial control** by  
the **European Court of Justice** (ECJ)

has an

**enormous impact on the actual  
business and working life in key areas**



# Influence of the European Court of Justice

**Group work (2):**

**Critical analysis  
of anti-discrimination issues**

**Case study**



## References

### Statutory Material:

EU law – see lists EU Primary Law, EU Consumer Protection, EU Employee Protection

Allgemeines Gleichbehandlungsgesetz, <http://www.gesetze-im-internet.de/agg>;  
[http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/agg\\_in\\_englischer\\_Sprache.html](http://www.antidiskriminierungsstelle.de/SharedDocs/Downloads/DE/publikationen/agg_in_englischer_Sprache.html), retrieved on 13 May 2015

### Decisions (selection):

European Court of Justice (ECJ), judgement of April 19, 2012 – C-415/10 – Meister.

European Court of Justice (ECJ), judgement of March 13, 2014 – C-38/13 – Nierodzik.

### Literature:

Büdenbender/Will, Crash-Kurs Arbeitsrecht. Stuttgart 2007, p. 53..

Buck, Current status of consumer law within the EU, in: Sławomir Smyczek (ed.), Consumer Behavior on European market, Journal of Economics and Management, special edition, vol. 9, 2012, p. 69-85

EU's Enhancement of Passengers' and Tourists' Rights: A challenge to the tourism sector, in: Acta Prosperitatis 2 (2011), Riga, p. 32-40

Freisfeld, Europa verändert das Arbeitsrecht, in: Frankfurter Allgemeine Zeitung (FAZ) No. 105 of 05./6.05.2012, C2.

Link, in: Schaub, Arbeitsrechts-Handbuch. 15<sup>th</sup> ed. München 2013. § 4 III.

Sagan, Deutsches Arbeitsrecht im Zangengriff europäischer Grundrechte, in: Frankfurter Allgemeine Zeitung (FAZ) of 28.03.2012 No. 75, p.19.

Schulte-Nölke, The way forward in European consumer contract law: optional instrument instead of further deconstruction of national private laws, In: European Union Private Law. Ed. Ch. Twigg-Flesner. Cambridge University Press. Cambridge 2010, p. 131-146.

Schliemann, Einführung in das EU-Arbeitsrecht, in: EU-Arbeitsrecht. Beck-Texte im dtv. 4 th ed. München 2011, p. XIII-XXIV.

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# Presentation of Case Study

## Anti-Corruption Laws (3)

Presentation  
of the case study

by the respective team



# Meaning of Relevant Terms in Everyday Language

## Corruption

“...1 dishonest or illegal behaviour, especially of people in authority...  
2 the act or effect of making sb change from moral to immoral standards of behaviour...”

Oxford Advanced Learner's Dictionary (2006)



## Bribe (verb)

“to give sb money or sth valuable in order to persuade them to help you, especially by doing sth dishonest”

Oxford Advanced Learner's Dictionary (2006)

## Legal Background of the Siemens Case in the US (settled in 2008)

### US Foreign Corrupt Practices Act of 1977 – “FCPA“

- Prohibition of **bribery to a foreign official**
- **Offenders: individuals or corporations**
- **Possible offender** includes **any issuer of securities in the US**
- FCPA may be enforced through **civil and criminal proceedings**

Siemens AG was listed on the New York Stock Exchange



# Bribes to persons in the **Public Sector** under German law

Germany has implemented:

- **EU Act on Corruption of Officials**
- **OECD Convention on Combating Bribery**
- **UN Convention against Corruption**

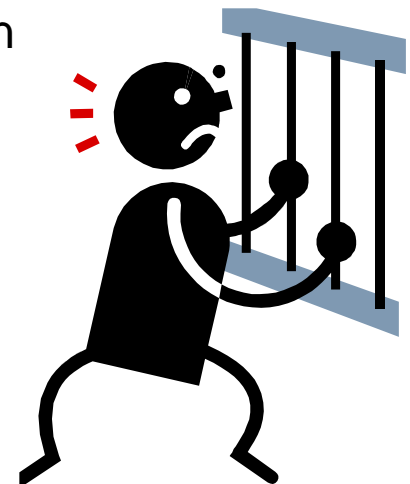
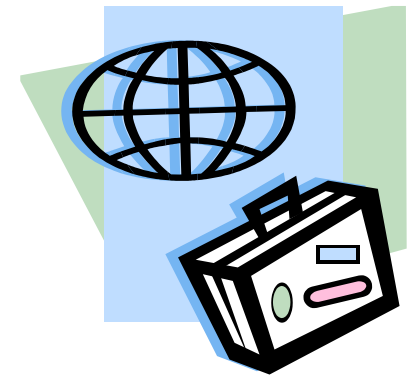
**German Criminal Code (StGB):**  
**Sec. 331 et seq.**

**Criminal responsibility of individuals**

- for **taking bribes by or giving bribes to a person in a public office** or with public service function
- for the mere (lawful) **performance of a duty**
- or as an **incentive to violate his or her duty**

**Extraterritorial Effect**

**These provisions are applied to the bribery of officials abroad**



# Bribes in the **Private Sector** under German Law

## **German Criminal Code (StGB)**

**Sec. 299 et seq.**

### **Criminal responsibility of individuals**

- **for taking and giving bribes in commercial practice**
- **with a view to an unfair preference to another** in the competitive purchase of goods or commercial services

## **German Misdemeanour Act (OwiG)**

**Secs. 30, 130 OwiG**

### **Corporate responsibility for fines**

**Extraterritorial effect** (since amendment in 2003):

**It does not matter whether these acts are performed in Germany or abroad!**

# References

## Statutory Material

### International Conventions

OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions adopted on 21 November 1997 - OECD Convention on Combating Bribery”

[http://www.oecd.org/document/20/0,3343,en\\_2649\\_34859\\_2017813\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/20/0,3343,en_2649_34859_2017813_1_1_1_1,00.html) , retrieved on 9 May 2015.

United Nations Convention against Corruption adopted by resolution no. 58/4 on 31 October 2003 - “UN-Convention against Corruption”

<http://www.unodc.org/unodc/en/treaties/CAC>, retrieved on 9 May 2015.

### EU Law

Council Act of 26 May 1997 drawing up the Convention made on the basis of Article K.3 (2)(c) of the Treaty on European Union, on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union, OJ C 195 of 25.06.1997 - EU Act on Corruption of Officials”

[http://europa.eu/legislation\\_summaries/fight\\_against\\_fraud/fight\\_against\\_corruption/l33027\\_en.htm](http://europa.eu/legislation_summaries/fight_against_fraud/fight_against_corruption/l33027_en.htm), retrieved on 9 May 2015.

### German Statutory Law

Strafgesetzbuch (Criminal Code) – “StGB”; English translation of version amended on 2 October 2009 (Federal Gazette I, p. 3214) available at [http://www.gesetze-im-internet.de/englisch\\_stgb/index.html](http://www.gesetze-im-internet.de/englisch_stgb/index.html) , retrieved on 12 May 2015.

EU-Bestechungsgesetz (EU Bribery Act) of 10 September 1998 (Federal Gazette II, p. 2340; III, p. 188-88) last amended 21 July 2004 (Federal Gazette I, p. 1763) - “EUBestG”

Gesetz zur Bekämpfung internationaler Bestechung (International Bribery Act) of 10 September.1998 (Federal Gazette II, p. 2327; III, p. 450-28) – “IntBestG”

## US

Foreign Corrupt Practices Act of 1977, as amended, 15 U.S.C. §§ 78dd-1, et seq. - ("FCPA")  
<http://www.justice.gov/criminal/fraud/fcpa/>, retrieved on 14 May 2015.

## Siemens Case US

SEC Press and Litigation Releases of 15 December 2008 (including copy of the complaint)  
<http://www.sec.gov/news/press/2008/2008-294.htm>, retrieved on 12 May 2015.

## Literature

Fischer, Strafgesetzbuch: StGB. 59<sup>th</sup> ed. Munich 2012.

Hornby (ed.). Oxford Advanced Learner's Dictionary. 7<sup>th</sup> ed. Berlin 2006.

Kasten, Kartellrechtscompliance, in: Mäger (ed.). Europäisches Kartellrecht. 2<sup>nd</sup> ed. Baden-Baden 2011, p. 381-142

Razzano/Nelson, The Expanding Criminalization of Transnational Bribery: Global Prosecution Necessitates Global Compliance, in: The International Lawyer, Winter 2008, Vol. 42, No. 4, p. 1259-1288.

Vollmer, Sabine, Anti-Corruption Steps, in: Journal of Accountancy, October 2013,  
[www.journalofaccountancy.com](http://www.journalofaccountancy.com), retrieved on 14 May 2015.

Witten et al, Prescriptions for Compliance under the Foreign Corrupt Practices Act: Identifying Bribery Risks and Implementing Anti-Bribery Controls in Pharmaceutical and Life Sciences Companies, in: The Business Lawyer May 2009, Vol 65 No. 3, p. 691-737.

## Other Sources

For damages caused by corruption see [http://archive.transparency.org/news\\_room/faq/corruption\\_faq](http://archive.transparency.org/news_room/faq/corruption_faq),  
retrieved on 14 May 2015.

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# Presentation of Case Study

## Competition Restraints under EU Law (4)

Presentation  
of the case study

by the respective team



# Basic EU Policy

## TEU

**Art. 3 (3):** ...”internal market” .... ”highly competitive social market”

## TFEU

**EU competition law directly applicable in the Member States**

**Artt. 101-106**

**Focus: Prohibition of competition restraints**

**Art. 101 (1):**

“**...prohibited...all agreements** between undertakings... **and concerted practices** which may affect trade between Member States and which have as their **object or effect the prevention, restriction or distortion of competition within the internal market...**” ; for exemptions see Art. 101 (3)

# Main Sanctions

## TFEU

Art. 101 (2): **Prohibited agreements** or decisions automatically **void**

## Reg. (EC) 1/2003

Art. 23: **Fines** (review by ECJ under Art.31)

Art. 24: **Periodic penalty payments** (review by ECJ under Art. 31)

## ECJ

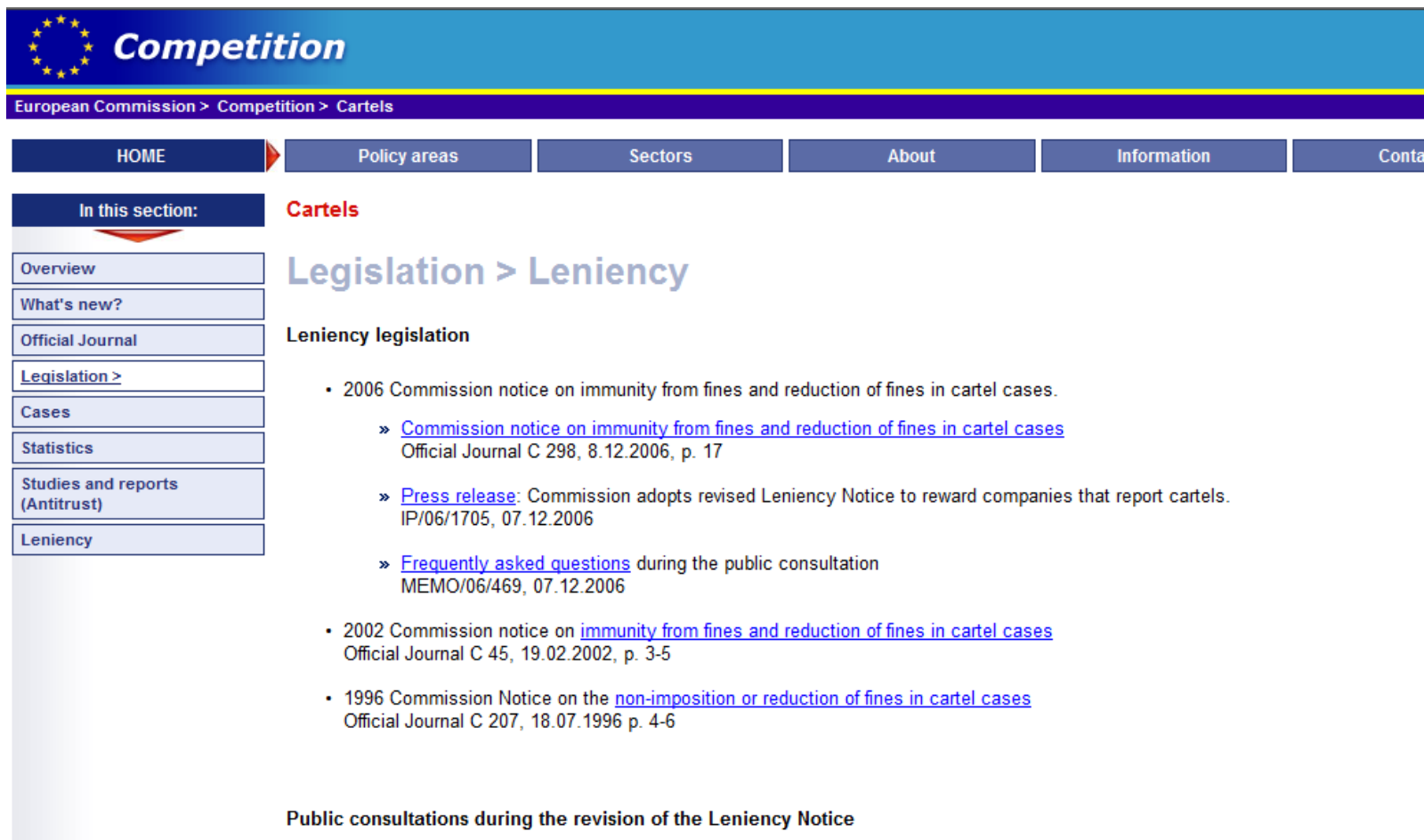
„Private enforcement“ by **suits for injunction or damages by parties who suffered as result of a cartel**: path opened by ECJ in cases Coruage/Dreher and Manfredi (ongoing legislative process for respective EU Directive)

## Commission Note of 8 Dec. 2006

**Leniency programme** for enterprises that cooperate



# Leniency programme for enterprises that cooperate



The screenshot shows the European Commission website for the Competition section, specifically the Cartels page. The header features the European Union flag and the word "Competition". Below the header is a navigation bar with links for "HOME", "Policy areas", "Sectors", "About", "Information", and "Contact". The main content area is titled "Cartels" and "Legislation > Leniency". A sidebar on the left contains a menu with options: "Overview", "What's new?", "Official Journal", "Legislation >", "Cases", "Statistics", "Studies and reports (Antitrust)", and "Leniency". The main content area is titled "Leniency legislation" and lists three items:

- 2006 Commission notice on immunity from fines and reduction of fines in cartel cases.
  - » [Commission notice on immunity from fines and reduction of fines in cartel cases](#) Official Journal C 298, 8.12.2006, p. 17
  - » [Press release](#): Commission adopts revised Leniency Notice to reward companies that report cartels. IP/06/1705, 07.12.2006
  - » [Frequently asked questions](#) during the public consultation MEMO/06/469, 07.12.2006
- 2002 Commission notice on [immunity from fines and reduction of fines in cartel cases](#) Official Journal C 45, 19.02.2002, p. 3-5
- 1996 Commission Notice on the [non-imposition or reduction of fines in cartel cases](#) Official Journal C 207, 18.07.1996 p. 4-6

Below the list is a section titled "Public consultations during the revision of the Leniency Notice".

Source: <http://ec.europa.eu/competition/cartels/leniency/leniency.html>, retrieved on 15 May 2015

## **Fines imposed by the Commission – period 2010 – 2014**

(not adjusted for Court judgements) as of April 2, 2014

Year	Amount in €
2010	2 868 459 674
2011	614 053 000
2012	1 875 694 000
2013	1 882 975 000
2014++	1 405 708 000
<b>total</b>	<b>8 646 889 674</b>

Source: <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf>  
(retrieved on 15 May 2015).

# Fines imposed by the Commission

## 1.5. Ten highest cartel fines per case (since 1969)

Last change: ++10 October 2014++

Year	Case name	Amount in €*
2012	TV and computer monitor tubes	1 470 515 000
++2008++	Carglass	1 185 500 000
2013	Euro interest rate derivatives (EIRD)	1 042 749 000
2014	Automotive bearings	953 306 000
2007	Elevators and escalators	832 422 250
2010	Airfreight	799 445 000
2001	Vitamins	790 515 000
2007/2012	Gas insulated switchgear (incl. re-adoption)	675 445 000
2013	Yen interest rate derivatives (YIRD)	669 719 000
2009	E.ON/GDF collusion	640 000 000

## 1.6. Ten highest cartel fines per undertaking (since 1969)

Last change: ++31 March 2014++

Year	Undertaking**	Case	Amount in €*
++2008++	Saint Gobain	Carglass	715 000 000
2012	Philips	TV and computer monitor tubes	705 296 000 <small>of which 391 940 000 jointly and severally with LG Electronics</small>
2012	LG Electronics	TV and computer monitor tubes	687 537 000 <small>of which 391 940 000 jointly and severally with Philips</small>
2013	Deutsche Bank AG	Euro interest rate derivatives (EIRD)	465 861 000
2001	F. Hoffmann-La Roche AG	Vitamins	462 000 000
2013	Société Générale	Euro interest rate derivatives (EIRD)	445 884 000
2007	Siemens AG	Gas insulated switchgear	396 562 500
2014	Schaeffler	Automotive bearings	370 481 000
2008	Pilkington	Car glass	357 000 000
2009	E.ON	E.ON/GDF collusion	320 000 000
	GDF Suez		320 000 000

Source: <http://ec.europa.eu/competition/cartels/statistics/statistics.pdf> (retrieved on 15 May 2015).

## Court Action for damages of victims of EU cartels

- Court of Justice of the European Union opened the path that victims of EU antitrust rules may exercise the right to compensation/may obtain reparation (ECJ, judgement of 20.9.2001, C-453/99 – Courage/Drehan; judgement of 13.7.2006, C-295/04 – C 298/04 – Manfredi).
- E.g. the buyer of cement who suffered harm as a result of a cartel (he paid too much) may start court action against the cartel member who delivered the cement.
- Judgment of the Court of Justice of the European Union, 5 June 2014 (C-557/12 – Kone AG et al. - ÖBB): *„Art. 1010 precludes ... domestic legislation enacted by a Member State which categorically excludes, for legal reasons, any civil liability of undertakings belonging to a cartel for loss resulting from the fact that an undertaking not party to the cartel, having regard to the practices of the cartel, set its prices higher than would otherwise have been expected under competitive conditions.”*

- Oberlandesgericht Hamm (Supreme Court Hamm), order of 26 November 2013 (1 Vas 116/13, 120/13 and 122/13) allows that the victim of a cartel may inspect the files of the public prosecutor (right to inspection of the records) to prepare civil court proceedings/action for damages against the cartel participants.

**Deutsche Bahn sues ThyssenKrupp over rail cartel**  
Premium Article • Friday, 21 December 2012



German railway operator Deutsche Bahn has sued ThyssenKrupp and other rail manufacturers for damages following a cartel decision by Germany's Federal Cartel Office.

(source: <http://globalcompetitionreview.com/news/tags/1188/deutsche-bahn>, retrieved on 15 May 2015)

- Landesarbeitsgericht Düsseldorf (Supreme Labour Court), partial judgment and court order of 20 January 2015 (16 Sa 459/14, 16 Sa 460/14, 16 Sa 458/14): a staff member is not personally liable for cartel damages paid by the employer [rail cartel].

- **Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014** on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (Official Journal L 349, 5.12.2014, p. 1–19) – to be implemented into national law of the Member states the latest by 27 December 2016

- Current court actions:

Vivil against sugar producers (sugar cartel in Germany), county court of Mannheim



Deutsche Bahn AG (German railway company) vs Lufthansa AG (aircraft fuel cartel), county court of Köln, claim of 1,2 billion €

## Back to Business Ethics: Compliance

Look at the principles as stated for compliance with antitrust law!

How do you apply them in order to comply with anti-corruption laws?



**Compliance: Comply with the rules!**

**Errors do not count!** (ECJ in the Schenker case)

**Legal Responsibility** (of the Management Board)

**Leadership** „Tone from the top“

**Organization, control, response**

- Communication and organisation
- Regular check and improvement
- Preventive measures
- Control and detection
- Response (including cooperation with the authorities)



## References p. 1

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### **Court decisions (selection):**

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ECJ, judgement of 6 June 2006 C-295/04 – Manfredi.

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Johanns, Behörden, Verfahren, Rechtsschutz, in: Mäger (ed.). Europäisches Kartellrecht. 2<sup>nd</sup> ed. Baden-Baden 2011, p. 525-597.

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### Internet Sources:

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[http://ec.europa.eu/competition/antitrust/procedures\\_101\\_en.html](http://ec.europa.eu/competition/antitrust/procedures_101_en.html), retrieved on 3 May 2014.

<http://ec.europa.eu/competition/cartels/statistics/stattics.pdf> , retrieved on 3 May 2014.

- Part 1**            **Freedom of Contract and its Limitations**
  
- Part 2**            **Consumer Protection in the EU and Employee Protection in the EU**
  
- Part 3**            **Rules for Playing the Market**  
                      **b) Anti trust laws**
  
- Part 4**            **Legal Issues regarding Business Ethics in relation to the Shareholder**  
                      **a) Transparency to the (potential) shareholder (insider information under EU law)**

# Reasons for restraints regarding inside information

## Assumptions and protective purpose of EU legislator

### Recital 2 in the preamble to Directive 2003/6:

“An integrated and **efficient financial market** requires **market integrity**

....**prerequisites for economic growth and wealth.**

**Market abuse harms the integrity of financial markets and public confidence in securities...”**

## Means of protection

### **Duties of listed companies to disclose (relevant) information**

- **on a regular basis +**
- **ad hoc**
  - narrow exception for legitimate interests of the company if information stays confidential
  - special problem: intermediate steps in a protracted process: “Geltl”

### **Prohibition of using inside information by “insiders”**

- **Broad definitions of insiders and of use**
- **Harsh consequences: Civil and criminal liability**

# **Analysis of the legislative approach**

**Group work (5):**

**Critical analysis of the ethics issues**

**Case study**

# References

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## ECJ (selected decisions)

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- Part 1**            **Freedom of Contract and its Limitations**
  
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- Part 3**            **Rules for Playing the Market**  
                      **b) Anti trust laws**
  
- Part 4**            **Legal Issues regarding Business Ethics in relation to the Shareholder**  
                      **b) Transparency to the (potential) shareholder (Corporate Governance - hot topic: Management compensation)**



# Meaning of Corporate Governance

**Relationship** between a company's **management**, its (supervisory) **board**, its **shareholders** and other stakeholders

**Structure** providing:

- the **objectives of the company** and means to attain them
- **monitoring mechanisms**
- **incentives for management** to pursue the objectives
- a degree of **confidence** necessary for the proper functioning of a market economy

*Definition in line with Preamble to OECD Corporate Governance Principles*

# Hot Topic: Management Compensation

**German Law (AktG, HGB, DCGC) as of present**

**Supervisory Board decides on compensation**

**Statutory guidelines** (in particular)

- **reasonable relationship to the duties and performance + to the condition of the company**
- **remuneration system of listed companies aimed at company's sustainable development.**

**Certain Disclosure Requirements**

**Additional recommendations for listed companies with an obligation to disclose non-compliance annually**

# Hot Topic: Management Compensation

- **Proposal by EU Commission adopted on 30 April 2014**

## „Say on pay“ for listed companies

- **Maximum level for executive pay in policy**
- **Explanation on policy as to:**
  - **Sustainability**
  - **ratio between average employees and executive pay**
- **Shareholders' vote on policy**



# **Ethical Aspects**

**Group work (6):**

**Critical analysis of the ethics issues**

**by**

**role play**

# References

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Aktiengesetz (Stock Corporation Act) as amended - “AktG”, English translation:  
<http://www.nortonrosefulbright.com/files/german-stock-corporation-act-2010-english-translation-pdf-59656.pdf>,  
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## “Soft Law”

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