Hart Studies in European Criminal Law

Criminal Liability of Managers in Europe

Punishing Excessive Risk

Stanisław Tosza

CRIMINAL LIABILITY OF MANAGERS IN EUROPE

Every managerial decision is risky, at least to some extent. Conducting business is impossible without venturing into new territories and even the most ordinary daily choices could turn out to be failures. Excessive risk, however, can be very detrimental, as was starkly illustrated by the most recent financial crisis. By criminalising managers' excessive risk-taking, criminal law enters a sphere which is at the core of the activity it affects. At the same time it provides for criminal punishment for courses of conduct that, without doubt, can be extremely harmful. This book examines existing criminalisation of excessive risk-taking and analyses whether such criminalisation is desirable and under which conditions.

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CONTENTS

TABLE OF CASES AND LEGISLATION

England

Cases

Legislation

France

Cases

Legislation

Germany

Cases

Legislation

General

Cases

EU and International Instruments

LIST OF ABBREVIATIONS

Abs	Absatz (subsection)
AG	Aktiengesellschaft
AktG	Aktiengesetz
All ER	All England Law Reports
art	article
Bafin	Bundesanstalt für Finanzdienstleistungsaufsicht
BayObLG	Bayerisches Oberstes Landesgericht
BeckRS	Beck online Rechtsprechung (CH Beck)
BGB	Bürgerliches Gesetzbuch
BGH	Bundesgerichtshof
Bull crim	Bulletin des arrêts de la Cour de cassation (chambre criminelle)
BVerfG	Bundesverfassungsgericht
Cass crim	Cour de cassation, chambre criminelle
CEO	Chief Executive Officer
ch	chapter
CP	French Penal Code (Code Pénal)
CPS	Crown Prosecution Service
Cr App R	Criminal Appeal Reports
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EWCA Crim	England and Wales Court of Appeal Criminal Division
GmbH	Gesellschaften mit beschränkter Haftung
GmbHG	Gesetz betreffend die Gesellschaften mit beschränkter Haftung
HC	House of Commons
HGB	Handelsgesetzbuch

HL	House of Lords
KB	King's Bench
KritV	Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft
KWG	Gesetz über das Kreditwesen
Law Com	Law Commission
LG	Landgericht
LIBOR	London Interbank Offered Rate
MDR	Monatsschrift für Deutsches Recht
NJW	Neue Juristische Wochenschrift
NStZ	Neue Zeitschrift für Strafrecht
NStZ-RR	Neue Zeitschrift für Strafrecht Rechtsprechungs-Report
OLG	Oberlandesgericht
QB	Queen's Bench
RGSt	Entscheidungen des Reichsgerichtes in Strafsachen
s	section
SA	Société anonyme
SARL	Société à responsabilité limitée
SAS	Société par actions simplifiée (simplified joint-stock company)
SCA	Société en commandite par actions (partnership limited by shares)
SFO	Serious Fraud Office
StGB	Strafgesetzbuch
StPO	Strafprozeßordnung
StV	Strafverteidiger
TFEU	Treaty on the Functioning of the European Union
VAG	Gesetz über die Beaufsichtigung der Versicherungsunternehmen
wistra	Zeitschrift für Wirtschafts- und Steuerstrafrecht
WLR	Weekly Law Reports
ZStW	Zeitschrift für die gesamte Strafrechtswissenschaft

'Of all injustice, none is more grave than that of the people who, when they are most false, conduct their affairs as if they were good men.'

Cicero, *On Duties*

'Fraud against the trusting fails to heed not only natural love but the added bond of faith, which forms a special kind of trust. Therefore, in the tightest circle, the centre of the universe and seat of Dis, all traitors are consumed eternally.'

Dante, *Inferno*, canto 11

'In retrospect, many firms … took on too much risk and did not have sufficient resources to manage those risks effectively in a rapidly changing environment.'

John J. Mack, Chairman, *Written Submission of Morgan Stanley to the Financial Crisis Inquiry Commission*

1

Introduction

In the first weeks of January 2008, a trader of the Société Générale Jérôme Kerviel caused losses amounting to approximately €4.9 billion and almost brought one of the most important French banks to bankruptcy. This was the last act of otherwise very successful, however highly risky, strain of transactions spanning between 2005–2007. Kerviel's task was to bet on market tendencies in such a way that while he put the money on a certain trend, he would also bet on its opposite (a technique called hedging). In theory these investments should bring the same amount of win and loss, but market inefficiencies result in small differences from which one can make the profit if one invests huge sums of money. The mechanism entailed low risk, but the wins were also limited. In order to increase the wins, Kerviel stopped hedging his transactions, which he concealed from the bank by introducing fictitious transactions into the bank computer system. These transactions allowed him to make enormous profit, but at the same time exposed the bank to very high risk of loss and breached applicable regulations.[1] Although some red flags were waved he was not caught until his last – unsuccessful – bet.[2] Kerviel assumed that the financial crisis, which was unravelling at the time, would be just a temporary turbulence and that the market would soon start to recover. As this was not the case, the bet resulted in a huge loss, and eventually in a criminal conviction for Kerviel.[3]

Every managerial decision is risky, at least to some extent. Conducting business is impossible without venturing into new territories and even the most ordinary daily choices could end in failure. Excessive risk, however, can be very detrimental, as we were grimly reminded by the most recent financial crisis. It could bring large and reputable companies or even whole economic systems to the brink of collapse. By criminalising managers' excessive risk-taking criminal law enters a sphere which is at the core of the activity it affects. At the same time, it provides for criminal punishment for courses of conduct which, without

[1] In particular concerning the requirement regarding the Cooke ratio, which is the ratio of capital the bank should keep in order to balance the risk of its investments.

[2] It is the subject of legal battle between the bank and the trader whether there was some tacit acceptance of his actions.

[3] The case is still subject to legal procedures and both parties (Société Générale and Jérôme Kerviel) have presented different versions of the facts. The author takes no position in this regard and presented the case according to available sources, including court judgments. For judgments, see Jugement du tribunal de grande instance de Paris (chambre 11-3), 5 October 2010 (first instance); Cour d'Appel de Paris (no. 11/404), 24 October 2012 (appeal); Cass crim 19 March 2014, Bull crim no 86.

doubt, can be extremely harmful. The objective of this book is to examine existing criminalisation of excessive risk-taking, as well as to analyse whether such criminalisation is desirable, and if so, under which conditions.

The *Kerviel* case illustrates crucial issues which will be at the centre of the reflection in this book. In the first place, it shows the gravity of excessive risk-taking. Each of the unhedged bets was excessively risky and could potentially damage the bank significantly. In this sense, all of these transactions deserved a sanction in the same way as the last one, which turned out to be unlucky. Would (and should) Kerviel have been punished, had he been caught when still on a winning streak? Secondly, Kerviel did not take any money for himself. All the profits he generated over the years were for the Société Générale only. His only motivation was a sort of star status he acquired within the bank and the bonus calculated in view of his performance. Is it fair to require such motivation from a manager and punish him for it only when things go wrong?

1. Financial Crisis and Excessive Risk

The *Kerviel* case is a good exemplification of an excessively risky rogue trader. However, the problem is not limited to cases of 'black sheep'. The detrimental character of excessively risky policies led to the collapse of such banks as the Royal Bank of Scotland in the United Kingdom and Hypo Real Estate in Germany, which then needed to be nationalised, engaging large sums of public money.[4] John J Mack, the CEO of Morgan Stanley at the time when the financial crisis of 2007–2008 started, explained that what triggered the financial crisis was that:

> In retrospect, many firms … took on too much risk and did not have sufficient resources to manage those risks effectively in a rapidly changing environment.[5]

It is an almost universal opinion that the essential cause of the crisis was 'the combination of a credit boom and a housing bubble',[6] in particular linked with extending credit to borrowers, whose credit ratings were low.[7] This was coupled

[4] Financial Services Authority, *The Failure of the Royal Bank of Scotland, Financial Services Authority Board Report* (December 2011), available at www.fsa.gov.uk/pubs/other/rbs.pdf; Matthäus Buder, Max Lienemeyer, Marcel Magnus, Bert Smits and Karl Soukup, 'The Rescue and Restructuring of Hypo Real Estate' (2011) 3 *Competition Policy Newsletter* 41.

[5] Written Submission of Morgan Stanley to the Financial Crisis Inquiry Commission, John J Mack, Chairman (January 2010), available at http://fcic-static.law.stanford.edu/cdn_media/fcic-testimony/2010-0113-Mack.pdf.

[6] Viral Acharya, Thomas Philippon, Matthew Richardson and Nouriel Roubini, 'The Financial Crisis of 2007–2009: Causes and Remedies' (2009) 18(2) *Financial Markets, Institutions and Instruments* 89, 98.

[7] Tobias F Rötheli, 'Causes of the Financial Crisis: Risk Misperception, Policy Mistakes, and Banks' Bounded Rationality' (2010) 39 *Journal of Socio-Economics* 119. There is vast literature analysing the causes of the financial crisis, stemming from public institutions, non-governmental and academic institutions. Besides publications cited in this section, see, eg the following publications: *The Financial*

with financial market innovation and the practice of rating agencies of granting excellent ratings to financial assets based on underlying credit claims, turning them into very attractive investments in view of their risk-return profiles.[8]

While the crisis began in the United States with the collapse of the Lehman Brothers Bank, it spilled into Europe as European banks had also invested intensively in the American mortgage market. Moreover, European markets and institutions were affected by distressed financial markets in the United States and the resulting limited access to capital.[9] This evolved into a sovereign debt crisis due to the costs of the efforts of governments to rescue systemically important financial institutions together with already existing high government debts and in view of the deterioration of the lending climate in general.[10]

When discussing the causes of the financial crisis, excessive risk-taking is mentioned in various contexts, which include external market factors and internal business culture factors. The following reasons were named: imprudent mortgage lending;[11] amassing of vast highly correlated housing risks;[12] problems regarding sophisticated credit derivatives instruments;[13] failure of risk management systems,[14] in particular '[g]reedy and potentially incompetent executives

Crisis Inquiry Report, Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States (January 2011), available at http://fcic.law.stanford.edu/report; International Organisation of Supreme Audit Institutions, *The Causes of the Global Financial Crisis and Their Implications for Supreme Audit Institutions* (INTOSAI, October 2010), available at /www.intosai.org/uploads/gaohq4709242v1finalsubgroup1paper.pdf; Carmen M Reinhart and Kenneth S Rogoff, *This Time is Different: Eight Centuries of Financial Folly* (Princeton, NJ and Oxford: Princeton University Press, 2009); Stephany Griffith-Jones, José Antonio Ocampo and Joseph E Stiglitz (eds), *Time for a Visible Hand: Lessons from the 2008 World Financial Crisis* (Oxford University Press, 2010); Stijn Claessens, M Ayhan Kose, Luc Laeven and Fabián Valencia (eds), *Financial Crises: Causes, Consequences, and Policy Responses* (International Monetary Fund, 2014).

[8] Rötheli, 'Causes of the Financial Crisis' (n 7) 119; See also Martin F Hellwig, 'Systemic Risk in the Financial Sector: An Analysis of the Subprime-Mortgage Financial Crisis' (2009) 157(2) *De Economist* 129, 166; Adair Turner, *The Turner Review: A Regulatory Response to the Global Banking Crisis* (Financial Services Authority, March 2009) 13 et seq, available at www.fsa.gov.uk/pubs/other/turner_review.pdf.

[9] INTOSAI, *The Causes of the Global Financial Crisis and Their Implications for Supreme Audit Institutions* (n 7) 15, para [49].

[10] Ibid; DG Economic and Financial Affairs, 'Why Did the Crisis Happen?', available at http://ec.europa.eu/economy_finance/explained/the_financial_and_economic_crisis/why_did_the_crisis_happen/index_en.htm; see also DG Economic and Financial Affairs, *Economic Crisis in Europe: Causes, Consequences and Responses* (European Economy 7, 2009), available at http://ec.europa.eu/economy_finance/publications/pages/publication15887_en.pdf.

[11] Mark Jickling, *Causes of the Financial Crisis*, Report for Congress (Congressional Research Service, 29 January 2009) 5.

[12] Dissenting Statement of Commissioner Keith Hennessey, Commissioner Douglas Holtz-Eakin and Vice Chairman Bill Thomas in *The Financial Crisis Inquiry Report, Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States* (January 2011), 'The Ten Essential Causes of the Financial and Economic Crisis', 418, available at http://fcic.law.stanford.edu/report.

[13] Jongho Kim, 'From Vanilla Swaps to Exotic Credit Derivatives: How to Approach the Interpretation of Credit Events' (2008) 13(5) *Fordham Journal of Corporate and Financial Law* 705, 708.

[14] Simon Ashby, *The 2007–09 Financial Crisis: Learning the Risk Management Lessons*, Research Report (Centre for Risk, Banking and Financial Services, University of Nottingham, January 2010)

and senior managers, who have been blamed for encouraging or at best turning a blind eye to excessive risk taking';[15] homogenisation of assumptions about risk among financial actors;[16] limited information on risk exposure as regards over-the-counter derivatives;[17] short-term incentives in the form of annual bonuses; while risky strategies may become failures in the much longer run.[18] Another factor is connected with the longevity of the economic boom. In general, the longer it lasts, the more there are persons in decision-making positions not having experienced a serious downturn and thus showing a tendency to favour riskier strategies.[19] Some of these risks were linked with individual decisions; some are more systemic.

Whilst the consequences of excessive risk-taking are not solely linked to the most recent or any other financial crisis, it powerfully highlighted the potentially disastrous results when this phenomenon gets out of hand. Moreover, excessive risk-taking is not limited to the financial market as managerial decisions in any domain of business may be overly daring. An example of the disastrous consequences of careless management has been recently provided by the collapse of British Home Stores (BHS), which gravely affected not only its existing, but also former employees. Therefore, although the financial crisis was an inspiration for this monograph, the problems presented here are not limited to the times or aftermaths of financial crunches.

2. Business Decisions and Excessive Risk-Taking

Risk-taking is at the very beginning and at the very core of business activity. Since time immemorial, one of the typical business activities has been bringing merchandise from one region to another. Once arrived at their destination, the goods were sold at a higher price than that for which they were acquired. This surplus was the merchant's gain and at the same time his compensation for the risk he took while transporting the goods, which was the risk of being robbed by brigands or pirates or having the merchandise destroyed by a natural disaster. It is a truism that today's much more sophisticated businesses also carry an element of risk. An investment can always turn into a financial disaster, be it because of the action of others (criminal or legal) or because of unexpected events (eg change of

12–13, available at www.nottingham.ac.uk/business/businesscentres/crbfs/research/researchreports.aspx; Jickling, *Causes of the Financial Crisis* (n 11) 8.

[15] Ashby, *The 2007–09 Financial Crisis* (n 14) 13.

[16] Andrew G Haldane and Robert M May, 'Systemic Risk in Banking Ecosystems' (2011) 469 *Nature* 351; Robert Skidelsky, 'What the Wolves of Wall Street can teach us about risk', Project Syndicate, *The Guardian*, 24 March 2014, available at www.theguardian.com.

[17] Jickling, *Causes of the Financial Crisis* (n 11) 9.

[18] Association of Chartered Certified Accountants, *Corporate Governance and the Credit Crunch*, Discussion Paper (London, 2008), available at www.accaglobal.com/gb/en/technical-activities/technical-resources-search/2008/november/corporate-governance-and-the-credit-crunch.html.

[19] Rötheli, 'Causes of the Financial Crisis' (n 7) 120.

prices or natural catastrophes), or simply because of miscalculations (as to costs, demand, supply, etc). Many successful businessmen make bad investments and one can say that failure is as much a part of business as is success.*

The nature and level of risk can vary. It can be very limited if one invests in government bonds, although it is not impossible that the government goes bankrupt. The risk can be much higher if one invests in sophisticated financial instruments. One may risk less by investing in the production of commodities that are in common use, while investing in commercial scientific research carries the risk because it can bring no result or not be useful in practice. Even investments that look at first instance bound to be successful may turn out to be failures. In one of his short stories, the Hungarian writer Sándor Márai writes of an investment that appeared to guarantee a success and for no explicable reason failed. A waiter, tired of his profession, acquires a restaurant that had always attracted clients. Although he makes no particular mistake, from the moment he takes over the restaurant, clients stop coming without any rational explanation and at the end he is forced to sell the place. When the new owner reopens it, the flow of clients begins immediately.[20]

While Márai's is a work of fiction, it points out that an element of luck is inevitably present in every investment. When contemplating the criminalisation of excessively risky decisions by managers, one has to bear in mind that risk is always present in business and doing business is a question of measuring, accommodating and preventing risk according to the rules of the domain in question. However, even when done properly, there will always be a margin of unknown factors and their appreciation and how to evade them is left to those who take the decisions. Furthermore, risk, regardless of whether its source is natural or human created, is a social phenomenon, ie depending on dynamic factors (cultural, economic, legal, etc). The answer to the question of whether risk is excessive depends on a variety of factors and perception thereof and will thus be subject to change over time.[21]

In their pursuit of profit for the company, managers could go as far as committing acts which could turn out to be administrative irregularities or even criminal offences. In the middle of 2015 it has been revealed that, for many years, Volkswagen had been manipulating tests as regards the emission of polluting substances in various Diesel models of its cars. The manipulation consisted in furnishing the cars with software able to detect whether the car was being tested and alter its performance and pollution in comparison to situations of normal driving. The case can be understood as an exemplary case of excessive

* Note on gender-neutral formulation: Throughout this book, all gender-specific terms are to be considered to refer to both the feminine and the masculine form – except when referring to a particular person.

[20] Sándor Márai, 'Three Swans' in *Magia* (a collection of his short stories, in the Polish translation published by Czytelnik, Warszawa, 2008) 103–13.

[21] This aspect is also reflected in the changes of the standards in domains where risk is more comprehensively regulated, such as banking (eg the evolution of Basel Accords I, II, III). See Laurent Balthazar, *From Basel 1 to Basel 3. The Integration of State of the Art Risk Modelling in Banking Regulation* (Palgrave Macmillan, 2006). Similarly, the FATF Recommendations evolved over time (see www.fatf-gafi.org/topics/fatfrecommendations/documents/review-and-history-of-fatf-standards.html).

risk-taking. The managers of Volkswagen, apparently, took a decision to install the software altering the results of the tests and permitting the company to sell concerned models, while presenting them as less polluting and more powerful. However, this decision exposed the company to various risks in case the manipulation was discovered, in particular, the costs of a variety of sanctions, costs of calling back the cars and making necessary changes, as well as the damage to reputation. All these risks could be considered excessive.

In an older scandal concerning the German industrial giant Siemens, the managers were found to have paid bribes in order for Siemens to obtain lucrative contracts. Although the contracts were potentially beneficial for the company, they carried a risk that, once corruption is uncovered, it may result in significant reputational damage and in substantive losses due to fines (as well as in other expenses such litigation costs, etc). Regardless of the liability for the offence of bribery, the managers were also prosecuted for abuse of trust in managing the assets of the company. In a controversial court battle which included judgments of the Federal Court of Justice (BGH), the accusation was based on the creation and use of slush funds (which served to pay the bribes), which assets were hidden and therefore not correctly entered into the company's books.[22] According to the BGH, the company would no longer be able to use such funds,[23] an argument only theoretically plausible according to commentators, as it was the management of Siemens who controlled the slush funds.[24] This case demonstrates a similar problem to the one in *Kerviel*: the difficulty faced by the courts in addressing in a straightforward way the problem of excessive risk-taking. The essence of the problem was not so much in the hiding of the funds, but in the dilemma whether exposing the company to the risk of negative consequences by committing acts infringing the law (including criminal), but undertaken for the benefit of the company, should be assimilated to other abuses of trust in managing the company's assets.

3. Excessive Risk-Taking and Criminal Liability

The crucial context in which criminal liability for excessive risk-taking comes into play is the divide between capital and management, which is the common model of limited companies. Investors entrust their money to professionals who are supposed to manage the company's affairs in a way that brings profit. The relationship between the company (and the shareholders) and the managers

[22] BGH (29 August 2008) NStZ 2009, 95, 97, para [37].

[23] Ibid para [43].

[24] Jürgen Seier, 'Untreue' in Hans Achenbach and Andreas Ransiek (eds), *Handbuch Wirtschaftsstrafrecht*, 3rd edn (Heidelberg, München, Landsberg, Frechen, Hamburg: CF Müller, 2012) marginal no 407 et seq.

relies on trust in that the managers are expected to use the assets in the best interests of the company. Managers to whom the company assets have been entrusted are accountable vis-à-vis the investors according to rules provided for by company law, their contracts and a plethora of other rules regulating the particular domain of business.

For the most serious breaches of law, managers may be held criminally liable. However, there is a consensus (at least in the three legal orders under investigation in this book) that criminal conviction is not the appropriate response to business decisions which were simply risky and turned out to be disadvantageous. At the same time, all three legal orders (as well as many others, if not all) criminalise misappropriation of company assets by its managers or the use of assets contrary to the interests of the company, or to relevant rules, in a way that results in a loss.

The problem of criminalisation of excessively risky decisions is located between these opposite positions. While most commonly managers who act contrary to the company interests or breach relevant rules would be subject to criminal liability when they cause loss to the company, the question of the need to punish excessively risky decisions can appear in three situations. First, and most typically, it would be the case where an act of mismanagement was detected, but no loss occurred. Secondly the prosecution may also be inclined to look for a possibility to punish excessively risky management, if it is impossible to prove the loss according to the relevant standard of proof or, thirdly, where it is impossible to link it to the manager's act.

These cases will remain at the borderline between causing a loss to the company because of wilful misuse of the company assets and decisions, which were technically correct and taken without breaching any applicable rules, but turned out to be failures, which resulted in a loss for the company. The excessively risky decision in this context does not cause loss (at least not yet), but there is a need to demonstrate that the risk was excessive, thus its analysis must significantly enter into the sphere of the quality of the business decision.

In order to examine criminalisation of excessive risk-taking, three legal orders will be examined: England and Wales,[25] France and Germany. There are three main reasons for selecting these jurisdictions. First and foremost, these systems offer very different approaches to the criminalisation of excessive risk-taking and thus allow the reader to survey a panorama of existing legal solutions and to make a meaningful comparative analysis. Secondly, they represent fairly different systems of criminal law, and have a tradition of inspiring other legislators. Thirdly, Germany, the United Kingdom and France are the three biggest economies in Europe, and the biggest globally after the United States, China and Japan.[26]

[25] For the sake of brevity further references to the legal system of England and Wales will only use 'England' or 'English'.

[26] According to the Gross Domestic Product 2014 as provided by the World Bank: http://data.worldbank.org/data-catalog/GDP-ranking-table.

As to the first, England, the Fraud Act 2006, in particular fraud by abuse of position provided for in section 4, provides a possibility to punish a manager who dishonestly abuses his position by exposing the company to excessive risk. The French offence of *abus de biens sociaux* (provided mainly by article L241-3 4° and 5° as well as article L242-6 3° and 4° of the Commercial Code (*Code de commerce*)) punishes high-level managers for acting against the company's interests. Exposing the company to excessive risk is one of the forms of acting against these interests. The offence of *Untreue* in German law (section 266 of the Criminal Code, StGB) punishes improper conduct in relation to entrusted property if the conduct results in damage. However, the theory of '*schadensgleiche Vermögensgefährdung*' associates, under certain conditions, endangerment with damage and thus excessive risk-taking is also incriminated.

In none of the chosen countries is taking excessive risk criminalised as such, but rather remains one of the possibilities of committing the offence mainly targeting acts causing effective loss. It is therefore highly relevant to shed light on this type of managerial misconduct in existing law and to evaluate whether it should be criminalised, and if so, under which conditions and to what extent.[27]

4. Scope and Structure

This book studies the problem of mismanagement of company assets by exposing them to excessive risk and thus harming the financial interests of the company, and of different categories of actors whose financial interests are linked with the company (shareholders, stakeholders).[28] The problem will be examined in the existing law in three jurisdictions and then analysed in light of the question whether it is legitimate and justified to criminalise such acts and, if so, how to design criminalisation of such acts. Such a proposal may serve the national legislator as well as potentially the European one.[29]

[27] Interestingly, the BHS scandal triggered more calls to strip Sir Philip Green of his knighthood than for criminal prosecution, in particular for fraud by abuse of position.

[28] Certain issues which might be associated with the topic of risk are not treated in this book: criminal liability linked to protection of environment or safety of employees; liability for dangerous products; corporate criminal liability (as the company is rather a victim in this context). The book also does not analyse offences which criminalise breaches of very concrete rules of diligence. It concentrates on the issues of substantive criminal law, as questions about the choice of sanction and procedural law issues naturally only come afterwards and require another body of research. For preliminary reflections on the topic see Stanisław Tosza, 'La responsabilidad por los actos riesgosos de gestión en las sociedades de capital: Un estudio de derecho comparado' (2010) 26 *La Revista Penal* 177.

[29] For instance, by virtue of art. 83(2) of the Treaty on the Functioning of the European Union (TFEU), if criminalisation of excessive risk-taking or more broadly managerial misconduct becomes 'essential to ensure the effective implementation of a Union policy'. It is important to stress that this book does not examine the question whether criminalisation of excessive risk-taking should be made at the EU level or what role the EU should play in tackling this problem. In order to ask this question, it would be necessary to perform a complex analysis including issues related to the EU legal system, which would go beyond the ambitions of this book.

Three terms used throughout this book require brief explanation: 'risk', 'excessive' and 'manager'. The word 'risk' is understood here as the probability of a negative consequence.[30] Risk is a different concept from danger or hazard. The notion of risk indicates an ambition to control the future.[31] This implies a possibility to either control or at least predict the risk. Hence one can speak about its excessiveness.

The answer to the question whether the risk taken by the manager was excessive is crucial for criminal liability for offences, which punish this kind of decision. It is, however, impossible to provide it *in abstracto*. This answer will depend on a plethora of factors and standards applicable to particular commercial activities, concrete businesses or deals and contexts. An abstract definition for excessiveness of risk cannot take all these particularities into account. Therefore it is submitted here that criminal law cannot provide for such a definition. This is also linked with the function that criminal law should play among other branches of law in the protection of legal interests. While these other branches (civil or administrative) are tasked with the overall protection of such interests, criminal law should only intervene as regards selected, particularly serious infringements and thus may rely on the regulation of a particular domain provided for by other branches of law or non-legal tools. Criminal liability examined here enters the scene on the condition that risk was excessive according to the applicable standards (ie the relevant domain of law, the relevant type of business or deal, etc).[32]

This approach is similar to the one a criminal judge would need to take in many cases, where it would be necessary to call an expert witness in order to analyse whether the risk was excessive or was it normal risk that the manager was allowed to take.[33] At the same time, such assessments are no stranger to the everyday business of companies.[34] Where it is impossible to determine whether the risk was excessive or not, ultimately the *in dubio pro reo* rule will have to

[30] The term 'risk' is used in many different contexts and with different meanings. Furthermore, risk is painstakingly categorised in particular in the literature on risk management. It can be differentiated as downside risk (pure risk), which includes only the possibility of a negative outcome; or two-way risk (speculative risk) implying that the outcome may be better or worse in comparison to what is expected. It can be classified as to its type: business risk; non-business risk; financial risk; operational risk; and event risk. It can also be classified as to its source, as coming from the physical, social, political, legal, general economic or operational environment(s). For both classifications, see Brian Coyle, *Risk Awareness and Corporate Governance* (Financial World Publishing, 2002) 5–8. There is no need throughout this book to differentiate between different types or sources of risk, as the relevant question is whether it is excessive or not (which might or might not be linked to the type of risk in concrete situations). Moreover, as the question of liability makes sense only in the case of (at least potentially) negative consequences, risk will be understood here only as downside risk.

[31] Anthony Giddens, 'Risk and Responsibility' (1999) 62(1) *Modern Law Review*, 1, 3.

[32] Of course, this will need to be proved in the criminal process, depending on the concrete requirements of the offence in question.

[33] See also an interesting study on biases as regards risk among judges: W Kip Viscusi, 'How Do Judges Think about Risk?' (1999) 1(1) *American Law and Economics Review* 26.

[34] See, eg, the reflection of the German Constitutional Court (Bundesverfassungsgericht) in the judgment assessing the conformity of the offence of *Untreue* with the German Constitution: BVerfG (23 June 2010) NJW 2010, 3209, 3220, para [146].

be applied.[35] Another relevant question is related to the perception of risk as excessive or normal in the given circumstances.[36] While it is necessary to establish that the transaction was objectively abnormal, its perception as such will be the question of the manager's *mens rea*.

The understanding of the term 'manager' in this monograph is functional. It will mean a company official at any level, who is empowered to take decisions (alone or with other persons) affecting the assets of the company and who, while taking these decisions, enjoys a certain level of discretion. The latter condition is necessary to exclude persons who perform only mechanical tasks within the company. The approach adopted does not automatically imply that there is or there should be no difference between different categories of managers. The focus of the book is on managers of companies, which have legal personality and their own assets. While the legal framework of company law may differ significantly between national systems, the typical models for such companies are the limited liability company (*société à responsabilité limitée*, *Gesellschaft mit beschränkter Haftung*) and the public limited company (*société anonyme*, *Aktiengesellschaft*).[37]

The first three chapters will analyse the criminalisation of excessive risk-taking in the three national legal systems (Chapter 2, England and Wales, Chapter 3, France and Chapter 4, Germany). The function of these chapters is twofold: on the one hand, they should analyse the existing law in view of excessive risk-taking, which is particularly important as regards the English and the French legal systems, where such analysis is scarce. On the other hand, they should set the scene for the comparative analysis. In order to achieve a common platform and facilitate the comparison, the three national chapters are laid out according to the same structure.

Having analysed the possibilities to criminalise excessive risk-taking and setting the common ground for comparison, Chapter 5 will then provide the comparative analysis of the three national systems in accordance with the functional approach.[38] The aim of this chapter is to establish the models of criminalisation of excessive risk-taking by managers and the crucial factors determining criminal liability and distinguishing characteristics in each of these

[35] Ibid para [151].

[36] As to differences in attitude towards risk among managers, see Les Coleman, *Why Managers and Companies Take Risks* (Heidelberg: Physica-Verlag, 2006), in particular ch 7 'Why Managers Take Risks'.

[37] For a comparative analysis of these types of companies in the English, French and German legal systems, inter alia, see Mads Andenas and Frank Wooldridge, *European Comparative Company Law* (Cambridge University Press, 2009); Andreas Cahn and David C. Donald, *Comparative Company Law* (Cambridge University Press, 2010), the latter only as regards Germany, the United Kingdom and the United States.

[38] It requires that legal rules must be 'seen purely in the light of their function, as an attempt to satisfy a particular legal need'. Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law*, 3rd edn (Oxford: Clarendon Press, 1998) 44. See also the critique of this approach in Maurice Adams and John Griffiths, 'Against Comparative Method' in Maurice Adams and Jacco Bomhoff (eds), *Practice and Theory in Comparative Law* (Cambridge University Press, 2012) 283 et seq.