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Volker Krey

Financial Crisis and German Criminal Law

Responsibility of Managers for Highly-Speculative Trading with Obscure Asset-Backed Securities Based on American Subprime Mortgages

Institut für Rechtspolitik
an der Universität Trier

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The article deals with the responsibility of the financial sector under criminal law in Germany. This question has been of special interest since the beginning of the financial crisis.

The author argues that the transactions of asset-backed securities based on American subprime mortgages fulfill all legal elements of the criminal offence "breach of trust" (Untreue). From the author's point of view, the people's legal loyalty would be severely affected if there were no criminal proceedings against such bankers who purchased those toxic asset-backed securities without sufficient information on their structure and value. Refraining from criminal prosecution even in cases causing high loss would send a dangerous signal towards the investment banking industry.

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The list of countries to which the author has been invited as guest-speaker includes Japan, USA, Taiwan and Hong-Kong, Hungary and other European countries.

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RESPONSIBILITY OF MANAGERS FOR HIGHLY-SPECULATIVE TRADING WITH OBSCURE ASSET-BACKED SECURITIES BASED ON AMERICAN SUBPRIME MORTGAGES*

VOLKER KREY

*– with assistance by Jan Stenger and Oliver Windgätter – ***

Part One: Call for Criminal Prosecution in Public; in Contrast to this the Public Prosecution's Hesitation to Prosecute Speedy and Publicly

I. Call for Criminal Prosecution in Public

"Should bankers be publicly hanged for what they have done?" During a visit to Abu Dhabi in March 2009, the author came upon this sarcastic question while reading the well known United Arab Emirates' journal "The National": The aforesaid question was part of an interview with Paul Koster, chief executive of the Dubai Financial Services Authority, concerning the financial crisis[1]. Self-

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* Manuscript of a lecture presented by the author in October 2009 at The University of Hongkong, Faculty of Law. The manuscript has been extended, amended and completed by some footnotes.

** *Jan Stenger*, studying law at the State University of Trier, Faculty of Law, is member of the staff of the author's chair. *Oliver Windgätter*, senior researcher and assistant lecturer, is member of the staff of *Prof. Dr. Gerhard Robbers'* chair, University of Trier.

– Regarding the translation into English, the author was additionally supported by *Kerstin Labs* and attorney at law *Thomas Roggenfelder*, both being members of the author's chair as well. Last but not least, the author got helpful advices from his colleague *Prof. Dr. Jan von Hein* (Trier). –

1 See: The National, dated 26 March 2009, page 3.

evidently, he answered in the negative by saying: *"There will be court cases, but public hanging is a bit extreme."* His statement has, in a way, anticipated the result of the paper at hand: There should be criminal proceedings in Germany as well; however, they should not result in draconian criminal consequences.

Already in January 2009, during the World Economic Forum in Davos, Switzerland, the British manager John Neill called for severe punishment[2]: The producers of toxic securities should be treated like other preparers of poison; they should be sent to prison, if necessary. The State has to clarify that such conduct causes criminal responsibility. Self-evidently, John Neill's statement does not only hold for producing toxic securities, but all the more for **trading** with such financial products. More precisely: **Gambling away billions of Euros** of a bank's money by buying dubious asset-backed securities based on American subprime mortgages without sufficient information on their structure and value[3], even more causes criminal responsibility. This is because such highly speculative investments may result in the endangerment or even destruction of the bank in question's economic basis.

Moreover, Christian Wulff, Prime Minister of the German State of Lower-Saxony, in March 2009 demanded to take a hard line on those managers, responsible for the financial crisis[4]: *"Blowing a bank's money contrary to managers' duties is a criminal offence."* In the author's view, this holds at least in case of threatening the bank's financial existence.

Furthermore, Erich Samson, full professor of criminal law (Bucerius Law School, city of Hamburg), has stated in 2009[5]: "Georg Funke [former Chief Executive Officer (CEO) of the German Bank Hypo Real Estate] actually should have to face pre-trial custody at anytime", since this bank would evidently have become insolvent due to highly speculative derivative-activities with Lehman-Broth-

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2 Die Welt (i.e. a German daily newspaper), dated 30 January 2009, page 3.

3 As to this decisive aspect (lack of sufficient information) see below: Part Three, II 1, III Firstly, Fourthly.

4 Die Welt (see footnote 2), dated 03 March 2009.

5 Cited by *Gerhard Strate* (see footnote 7).

ers etc. unless the German federal authorities would not have granted a huge bail-out[6].

Finally, referring to this statement, the German defense counsel Gerhard Strate informed his colleagues during the 60th Meeting of the German Attorneys at Law in May 2009 that he had filed a request for prosecution against the CEO of the HSH Nordbank (a bank owned by the State of Hamburg and the State of Schleswig-Holstein)[7]. To give reasons for his request, Gerhard Strate referred to the nearly unbelievable amount of damage, caused by irresponsible gambling at the securities market – **lots of billions of Euros**.

Such statements correspond with the predominating public opinion in Germany. People are seriously scandalized and expect criminal proceedings against the responsible bankers as a demand of justice, particularly since the **taxpayers** have to bear the costs of numerous and large financial bail-outs by the German Federation and/or the German States. From the author's point of view, the people's legal loyalty would be severely affected if there were no criminal proceedings against such bankers. Criminal proceedings and criminal convictions inter alia have the purpose to demonstrate the inviolability of the legal system and thus reinforce the people's confidence in the law[8], not to mention the deterrent effect of prosecuting criminal offences[9].

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6 Thereto more precisely below, Part Two, I.

7 Frankfurter Allgemeine Zeitung (i.e. a German daily newspaper), dated 27 May 2009, page 21.

8 Concerning such purposes of punishment see: *Krey*, Deutsches Strafrecht Allgemeiner Teil, Lehrbuch in Deutsch und Englisch, Teil I: Grundlagen – German Criminal Law General Part, Textbook in German and English, Volume I: Basics, 2002, sidenotes 118, 129, 134-140, 142-144, 146.

9 As to deterrence as purpose of punishment see *Krey* (footnote 8), sidenotes 127, 128, 144, 146.

II. In Contrast: Actually No Criminal Proceedings by the German Public Prosecution Authorities Being Notified Publicly

In spectacular cases of economic crime, the German public prosecution authorities occasionally start criminal proceedings fast, sometimes even in a **demonstrative** manner e.g. by way of searches and seizures respectively by arresting prominent accused persons.

Case example: The German top manager Wolfgang Zumwinkel, at that time CEO of the German postal service, was one of the innumerable accused in the so called Liechtenstein-Affair, concerning **tax fraud**. The prosecution authorities arrested him in a demonstrative manner accompanied by television transmission[10]. In this case, the amount of loss to the disadvantage of the state's treasury was only a little more than **one million Euro** – "peanuts" compared with the damage caused by such bank managers involved in trading with toxic securities like Lehman-Brothers-Papers, because in the latter cases typically lots of **billions of Euros** loss are in question.

Regarding the financial crisis, the public has until now actually not been notified of criminal proceedings against bank managers by the German public prosecution authorities. In the light of the aforesaid unbelievable amount of damage, caused by managers who gambled away the banks' money, the mentioned lack of (publicly notified) criminal proceedings *prima facie* is a mystery. However, the author assumes that the following reasons may be decisive for such hesitation of the public prosecutors in charge – even though, insofar, they probably act in an unconscious manner.

Firstly, according to its personal and material resources, the public prosecution is absolutely unable to carry out criminal procedure investigations against every suspect banker. Even if the public prosecution's authorities were willing to restrict their prosecution

10 Arresting the accused in this way, was rightly criticized by the trial court in the criminal proceedings against *Wolfgang Zumwinkel*, see: http://www.fazfinance.net/Aktuell/Steuern-und-Recht/Zwei-Jahre-Bewaehrungsstrafe-fuer-Zumwinkel-4498.html.

activities at first to the prime suspect bank managers, in the long run the aforesaid resources could become seriously overloaded as well.

Secondly, fighting the financial crisis, limiting the damage to the banks concerned and rescuing their economic existence, a cooperation with criminal bankers involved may typically be necessary for the affected banks due to such managers' experience and knowledge of the obscure asset-backed securities in question.

Thirdly, to put it bluntly, in political circles the following view seems to predominate: Comprehensive and rigorous criminal proceedings against the suspect bank managers could unsettle the banking industry seriously. Moreover, such approach to the responsible managers could cause "acts of defiance", which would possibly endanger the handling of the financial crisis. Here, obviously a **self-perception of the bankers concerned** is presumed to be characterized not by sorrow but by the arrogant attitude: *"We hold systemic-relevance and thus de facto immunity."*

Fourthly, if the public prosecution started proceedings against responsible bankers being members of the boards of managing directors *(Vorstand)*, consequently, there would have to be criminal investigations against suspect members of the respective supervisory boards *(Aufsichtsrat/Verwaltungsrat)* as well. Unfortunately, members of the latter boards typically are inter alia politicians up to State ministers and – due to the German system of worker participation – trade union officials. In principle, there might not be a real political approval for criminal proceedings against such persons...

In fact, according to the author's information, the German public prosecution authorities typically recur on a **lack of criminal intent** and thus set aside criminal proceedings against bank managers, being suspected of highly speculative purchase of toxic derivatives. However, this approach is not convincing, which shall be discussed below[11].

11 See below, Part Three, II 4, III Fourthly.

Part Two: The Financial Crisis – Economic Background and Damage –

I. German Banks' Amount of Loss

– The above mentioned German bank Hypo Real Estate[12] has suffered more than **one hundred Billion Euros loss** caused by managers gambling away the bank's money. Due to its systemic-relevance, the German Federation has *de facto* nationalized the Hypo Real Estate by stock purchase in order to rescue Hypo Real Estate from insolvency.

– *Landesbanken*, i.e. banks of German States like Bavaria, North Rhine-Westphalia[13] etc., furthermore the aforesaid HSH Nordbank have each suffered **lots of billions of Euros** loss which would have resulted in their insolvency if the German Federal and State authorities had not rescued such banks by investing taxpayers' money.

– Even the Dresdner Bank, formerly number two in Germany, suffered lots of billions of Euros loss by trading with dubious asset-backed-securities. In the meantime it has been taken over by the Commerzbank nearly resulting in the latter bank's insolvency because of the financial risks in the business records of the Dresdner Bank: The German Federation had to help out the Commerzbank with **10 billion Euros**.

All in all, the German Federal financial supervisory authority *(BaFin)* has put the German banks' risks caused by toxic securities and credits in the context of the financial crisis to an amount of **800 billion Euros[14]**. However, this alarming estimation, content of a secret dossier, was meanwhile played down by politicians and bankers.

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12 See above Part One, I (in the context of footnote 5).

13 See *Marcus Lutter*, Zeitschrift für Wirtschaftsrecht (ZIP, i.e. a German business law journal) 2009, page 197, 199.

14 See inter alia: http://www.wiwo.de/unternehmen-maerkte/risiken-deutscher-banken-bei-816-milliarden-euro-395230/.

Recently, in October 2009, the US bank Merril Lynch has presented a research on the risks due to toxic securities held by **German** banks[15]. This research evaluates the amount of such risks up to 650 billion Euros and so confirms, in a way, the alarming result of the mentioned *BaFin*-dossier.

II. Economic Background

1. Subject Matter of the Mentioned Toxic Asset-Backed-Securities

In its core, American subprime mortgages are concerned. The real value of such papers is totally vague and their face amount was questionable from the beginning:

Firstly, due to dubious estimations on the annual appreciation of US homes **up to 25%**. This expectation alone should have made every serious economist suspicious.

Secondly, the financial crisis was based inter alia on a grotesque false estimation concerning the **constant value** of typical US homes: In principle, American homes have a very poor construction; they are wooden houses without basement, without any sufficient thermal insulation. Such simple houses rot very fast, if the owner does not care constantly and efficiently for his home. Unfortunately, in the USA this necessary care is neglected in too many cases.

Thirdly, contrary to the legal situation in Germany, the US home buyer, in principle, is **not personally liable** for the loan granted by the bank: If he is unable to repay the loan, he may deliver his home's front door keys to the bank resulting in getting rid of all financial liabilities[16].

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15 See: http://www.handelsblatt.com/finanzen/aktienanalysen/merrill-lynch-studie-milliarden-wertberichtigungsbedarf-bei-deutschen-banken;2470428.

16 *Marcus Lutter*, (see footnote 13) page 198.

This lack of personal liability reduces the mortgages' real value significantly since it might be very difficult or even impossible for German banks to enforce US mortgages being certified in derivatives[17].

So, a German bank as holder of asset-backed securities based on US mortgages, in the end, only has as securing asset the respective real estate's **market value** which, as was to be expected, has collapsed in the meantime due to the aforesaid aspects. Thus, investing billions of Euros of a bank's money in such US asset-backed securities by managers factually equals gambling away money on a huge scale.

2. Some Reasons for such Speculative Investments

Those highly-speculative investments were trendy among bankers during the last years. The offenders were blinded by short-term high profits resulting in high **bonus payments** for investment bankers; this may be labeled as excessive greed without any consideration of the long-term financial interests of the bank concerned.

Part Three: Criminal Responsibility under German Law

I. Focusing on "Breach of Trust" as Criminal Offence against Property

Below, criminal offences like "delay in filing for insolvency" and fraud by selling toxic securities in bad faith shall be excluded. Rather, subject matter is **criminal breach of trust** *("Untreue")* under Sec. 266 German Criminal Code. This provision reads:

17 In the meantime, an increasing number of US-Courts have required the original mortgage certificates as basis for enforcing measures. See inter alia: *Deutsche Bank Nat'l Trust Co. v. Steele, 2008 WL 111227 (S.D. Ohio).*

Whoever **abuses his authorization**, being granted by law, official mandate or private legal act, to dispose of third parties' property or to obligate a third party, **or breaches duties**, being imposed upon him by law, official mandate, private legal act or fiduciary relationship, to safeguard third parties' pecuniary interests, and thereby causes financial loss to the third party whose pecuniary interests he is responsible for, will be punished by imprisonment of up to five years or by fine.[18]

II. Legal Interpretation of the Misdemeanor "*Breach of Trust*"

1. The first modality of "breach of trust" – *abusing his authorization by the perpetrator, e.g. a banker* – is characterized by a **legally effective** disposition of third parties' property or a legally effective obligation of third parties, both ***via breach of restrictions inter partes*** imposed by law and/or contract in favour of the respective victim, e.g. the aggrieved bank[19].

Case example: M, CEO of a German bank, grants a high risk loan amounting to three million Euros. Its repayment is highly doubtful due to the credit user's serious financial problems; additionally there are no adequate securities.

Case scenario one: M acted in bad faith since he was informed of the financial risk.

Case scenario two: M acted without any sufficient knowledge of the financial risk.

In both scenarios, the loan approval is legally effective since the CEO has the legal power to obligate the bank. However, there is a breach of his fiduciary duties towards the bank *(restrictions inter partes)*. Such restrictions result from the German Stock Corporation Act. Its Sec. 93 subsection 1 (sentences 1 and 2) reads:

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18 Emphases added by the author.

19 Thereto *Krey/Hellmann,* Strafrecht Besonderer Teil, Band 2, Vermögensdelikte, 15th ed. 2008, sidenote 541, 545, with further references.

"Members of the board of managing directors have to perform their duties with the care that an ordinarily prudent person in a like position would exercise under similar circumstances. No breach of duties is given when the respective member making business decisions could reasonably believe to be **adequately informed** and to act in the best interests of the corporation."[20]

By the way, the cited sentence 2 has been laid down in view of the US Business Judgement Rule[21].

As to the mentioned case example, in **scenario one** a breach of trust in the modality "abusing his authorization by the perpetrator" is self-evidently given, since there is no acting in the best interest of the corporation due to bad faith. However such cases are rare and, if they arise, the perpetrator's knowledge is hard to prove.

More relevance in practice hold cases like **scenario two**. It clarifies the essential aspect of differentiation between legal business transactions with adequate risks on the one hand and illegal hazardous business transactions on the other hand. The decisive question is whether or not the manager's business decision **was based on adequate information**. The additional rule applying to cases of granting large loans under Sec. 18 of the German Banking Act is dominated by this aspect as well: In principle, banks are only allowed to grant large credits when the debtor discloses his financial circumstances.

So, in its core the Business Judgement Rule laid down in the German Stock Corporation Act only assures non-liability under civil law and exclusion from criminal responsibility, when managing directors make business decisions based on adequate information. This legal element requires both, **a thorough search for information and its sufficient control**. Where such duties are neglected, business transactions are like gambling away the bank's money.

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20 Emphasis added by the author.

21 *Bosch/Lange*, Juristenzeitung (JZ, i.e. a German law journal) 2009, 225, 229; *Hopt/Roth* in: Großkommentar zum Aktiengesetz (GK-AktG, i.e. a commentary on the German Stock Corporation Act), 4th ed. since 1999, § 93 sidenote 25.

2. Beside the required abuse of authorization, the perpetrator's special status as bearer of **fiduciary duties** (i.e. a specific obligation to take care of third parties' pecuniary interests, in German: *Vermögensbetreuungspflicht*) is an additional legal element of breach of trust[22]. Concerning managing directors making business decisions, this element is not in dispute.

3. Finally, breach of trust requires the victim's **detriment**, more precisely: economic loss. Up to now, German jurisdiction and legal scholars insofar deemed sufficient cases where only a mere concrete **endangerment** of pecuniary interests was given. Whether or not this extension of the objective legal elements *(actus reus)* is convincing[23] may be set aside, since in case of granting bad loans as well as in case of speculating with toxic derivatives, a real economic loss of the aggrieved bank is given due to the following reasons:

Pursuant to the latest decisions of the German Federal Supreme Court of Justice, in such cases the **real** financial loss results from a view with respect to the balance sheet[24]. As to bad loans with high repayment risk respectively to toxic asset-backed securities based on American subprime mortgages, an allowance for depreciation (downgrading, in German commercial law: *Wertberichtigung*) on the assets side is legally demanded. From a factual and a legal view, there is a real loss, based on the difference between the **face amount** of such credit claims respectively derivatives on the one hand and the **depreciated amount** on the other hand.

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22 The insight that the mentioned first modality of breach of trust (see above, Part Three, II, 1) requires such ***Vermögensbetreuungspflicht*** as well is prevailing legal opinion in case law and among legal scholars. See with further references: *Krey/Hellmann* (footnote 19) sidenote 541-543.

23 Affirmative in principle: *Bundesverfassungsgericht* (BVerfG, i.e. the German Federal Constitutional Court), Neue Zeitschrift für Strafrecht (NStZ, i.e. a German law journal) 2009, 560; answering in the negative inter alia: BGH St (*Bundesgerichtshof*, BGH, i.e. Federal Supreme Court of Justice, official reports of criminal cases), Volume 53, p. 199, 203, 204, sidenote 15, 16.

24 As to the following see: BGH St (see footnote 23), Volume 53, p. 199, 202, 203, sidenote 13; BGH dated 13.08.2009 – 3 StR 576/08 –, sidenote 25.

4. Concerning the required **intent** as mental legal element *(mens rea)*, in Germany the so-called *dolus eventualis* is sufficient[25]. Under the common definition of intent as acting with knowledge and willfulness[26], *dolus eventualis* is given, when the perpetrator seriously takes into account that his act could fulfill the legal elements of the offense and accepts this fact[27]. Such accepting has to be assumed where the perpetrator either does not care about fulfilling those legal elements or wants to act at all costs[28]. So, *dolus eventualis* is something in between the Anglo-American recklessness and intent[29]. However, it has to be conceded that the component of willfulness of *dolus eventualis* generally may be assumed where the component of knowledge is given[30].

III. Speculative Purchase of Toxic Derivatives as Breach of Trust

Firstly, the subsumption of such cases under the legal element *abusing the perpetrator's authorization* is self-evident as the banker acted without adequate information. Any German bank manager, purchasing those derivatives on a large scale, could not rely on sufficient information since even **US-rating agencies** were unable to evaluate the risk of asset-backed securities based on American subprime mortgages: Rating of mortgages regarding private homes was not part of their typical field of business activities and therefore not part of their know-how[31] – not to mention

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25 Thereto in detail: *Krey*, Deutsches Strafrecht Allgemeiner Teil, Lehrbuch in Deutsch und Englisch, Teil II – German Criminal Law General Part, Textbook in German and English, Volume II, 2003, sidenotes 331, 336, 337, 346-364.

26 *Krey* (see footnote 25), sidenote 336, 358 with further references.

27 Thereto in detail *Krey* (see footnote 25), sidenote 346 et seq., 349, 353, 358 et seq.

28 References in *Krey* (see footnote 25), sidenote 364.

29 See thorougly and in detail: *Wever*, Fahrlässigkeit und Vertrauen im Rahmen der arbeitsteiligen Medizin. Vergleichende Betrachtungen zum materiellen Strafrecht ... in Deutschland und im anglo-amerikanischen Rechtskreis, p. 121-139 with references on Anglo-American law.

30 *Krey* (see footnote 25), sidenote 359.

31 *Marcus Lutter* (see footnote 13), page 198.

the question of the rating agencies' reliability due to their high dependency on banks.

Secondly, the mentioned perpetrator's special status as bearer of fiduciary duties *(Vermögensbetreuungspflicht)*[32] is also given.

Thirdly, the required economic loss of the aggrieved bank results from the aforesaid necessity to carry out a depreciation (downgrading) on the assets side in case of toxic asset-backed securities[33]; by all means, this holds if an allowance for depreciation to a **significant extent** is in question.

Fourthly, at least in cases of purchasing toxic securities up to such amounts causing the danger of financial distress, the required **intent** is typically fulfilled. At the latest since early 2008, when purchasing the respective securities, knowledge and willfulness as to their toxic nature should be provable:

On the one hand, the deciding bank managers knew, respectively took into account, that the purchase of those securities was not based on **adequate information**. Accordingly, many offenders' typical excuse for these risky transactions is: *"We did not know what we were buying"*. This is no good excuse, since, by its very nature, it implies the perpetrator's intent.

Other offenders argue: *"We blindly trusted in the rating agencies."* As mentioned, referring to rating agencies alone cannot compensate the banker's disregard of independent and thorough search for information. Yet, this aspect is largely neglected by German prosecution authorities:

Pursuant to the author's information, the public prosecution typically accepts the bank managers' trust in the rating agencies' estimation and therefore negates the perpetrator's criminal intent[34]. However, this is no adequate solution due to the above mentioned reasons (the **rating agencies'** lack of know-how about rating the

32 See above, Part Three, II, 2.
33 See above, Part Three, II, 3 in connection with footnote 24.
34 See already above, Part Two, II, at the end.

respective US-mortgages[35], furthermore such agencies' dubious reliability because of their high dependency on banks[36]).

On the other hand, the intent's element of **willfulness** is given as well. The perpetrator's acceptance that the aggrieved bank may suffer high loss is to be assumed, when he either **did not care about** such result or was **speculating at any cost**, in both scenarios aiming for short-term high profits as reason for high bonus payments. In principle, this attitude should be provable.

IV. Closing words

There should be criminal proceedings against bank managers for purchase of the toxic derivatives in question causing high loss[37]. Yet, such proceedings should not result in long lasting imprisonment. Rather, prison on probation[38] or a high criminal fine, if adequate up to millions of Euros, may be sufficient. Even terminating the proceedings after the defendant has paid a high sum of money to the treasury[39] may be adequate in some cases. Solely decisive for reinforcing the people's confidence in the law is the enforcement of criminal proceedings, whereas draconian sentencing could be detrimental to the national economy.

Refraining from criminal prosecution even in serious cases of purchasing obscure asset-backed securities based on American sub-

35 Part Three, III, Firstly.

36 See footnote 35, additionally *Lüderssen*, Strafverteidiger (StV, i.e. a German law journal) 2009, p. 486, 492.

37 Dissenting *Lüderssen* (see footnote 36) inter alia p. 487 and 494. In his opinion both, the legal and economic aspects were absolutely not clarified and therefore the criminal courts had to contain themselves. However, this standpoint is not convincing as demonstrated above; in addition, it has to be emphasized that in Germany every transaction by banks has to be documented in records.

38 In connection with the obligation *(Auflage)* to pay a certain sum of money to the treasury; see § 56 b subs. 2 no 2 German Criminal Code *(Strafgesetzbuch, StGB)*.

39 § 153 a German Criminal Procedure Code *(Strafprozessordnung, StPO)*, thereto *Krey*, The Public Prosecution's Role in Criminal Proceedings under the Rule of Law, in Rechtspolitisches Forum (Legal Policy Forum) Vol. 46, 2009, edited by Institut für Rechtspolitik an der Universität Trier, p. 10.

prime mortgages, however, would send a dangerous signal towards the investment banking industry.

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