

# Gender and Compliance



Michele DeStefano & Hendrik Schneider  
Editorial

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Kerstin Grosch & Holger Rau  
Interview: Gender differences in leader's compliant behaviour

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Kerstin Grosch, Stephan Müller, Holger A. Rau & Lilia Zhurakhovska  
Gender differences in leader's compliant behaviour – Selection into leadership and dishonest behaviour of leaders: a gender experiment

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Ariane Bertram  
On legal thought leader and legal thinking especially concerning Internal Investigations

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Christoph Kläs  
Whistleblowing – Quo vadis?

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Simone Burel & Franziska Saur  
Gender-fair language in the context of corporate social responsibility – how much language responsibility do organizations have?

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Marie-Christin Falker & Bruno S. Sergi  
Book presentation: Strafprozessuale Schranken und Hürden in der Kriminalitätsbekämpfung und -prävention – untersucht am Beispiel der Bekämpfung der Terrorismusfinanzierung in Deutschland, Liechtenstein, Österreich und der Schweiz

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Marie-Christin Falker & Bruno S. Sergi  
Book presentation: Methoden der Geldwäscherei

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## EDITORIAL

### GENDER AND COMPLIANCE

A bill for insolvency law written in the generic feminine, gender-mainstreaming and female leadership – the subject of gender is ever-present in the field of law. Therefore, in this issue we explore the relation between gender and compliance.

In regard of the approaching deadline for the implementation of the EU-Whistleblowing Directive into national law, the current state is portrayed and the concept of legal thought leaders is examined through the example of Internal Investigations by our renowned authors.

Finally, this issue concludes with two book presentations of recently published books related to compliance and money laundering.

We aim to continue the debates on the development of compliance in digital forms and are interested in articles from all over the world. We eagerly await your respective impulses and hope you enjoy the lecture of this special issue!

With our best regards,



**Michele DeStefano & Hendrik Schneider**  
Founder and Content Curators of CEJ

## GENDER DIFFERENCES IN LEADER'S COMPLIANT BEHAVIOUR

AN INTERVIEW WITH KERSTIN GROSCH AND HOLGER A. RAU

### INTERVIEW PARTNERS

*Dr. Kerstin Grosch specializes in behavioral and experimental studies and is particularly experienced in the design, conduct, and analysis of lab and field experiments. Her research examines how individual preferences and gender can explain behavior under different incentives in realms of compliance and labor market outcomes such as occupational choice or collegiality at the workplace. Dr. Kerstin Grosch received her M.Sc. in Economics from the Technical University in Dresden. During 2014 and 2017, she mastered her Ph.D. in Economics at the University of Göttingen and became a post-doctoral researcher. Since May 2017, she is a researcher at the Institute for Advanced Studies (IHS) in Vienna. In January 2021, she has become head of the research group Behavioral Economics. Prof. Dr. Holger A. Rau specializes in laboratory and field experiments in behavioral economics, labor markets, and behavioral finance. He is interested in the explanatory power of economic preferences predicting outcomes in organizations, behavioral health economics, and financial markets. In a labor-market agenda, he focuses on gender differences in the reactions to institutions, studying gender gaps. Holger Rau received a diploma in Economics from the University of Heidelberg and a Ph.D. in Economics from the University of Düsseldorf. He was a visiting scholar at Chapman University and became a postdoctoral researcher at the University of Erlangen-Nürnberg. Since 2014 he is a Juniorprofessor at the University of Göttingen. From 2017-2018 he was a visiting Professor at the University of Mannheim.*

## GENDER DIFFERENCES IN LEADER'S COMPLIANT BEHAVIOUR

An interview with Dr. Kerstin Grosch and Prof. Dr. Holger A. Rau

### What inspired you to look into a possible connection between gender and dishonest behavior?

**Kerstin Grosch:** We know that women and men differ in several preferences and their behavior in different domains. Women behave on average less dishonestly (or more compliantly) than men and we know that dishonesty (compliance) can have consequences on other people as well. When I do not comply with several rules, others may be affected by it. For instance, if I'm a rich person and do not declare my taxes correctly, it may affect society by lower public revenues.

We know from studies that women are more prosocial than men. This means that they on average care more about the welfare of others than men. Holger and I brought these gender differences in preferences together in one study. In this study, we found that women's lower levels of dishonest behavior relative to men's can be explained by this more pronounced concern for others. The results from that study coupled with the scandals that you can follow up in the daily news, where mainly men are on the forefront (e.g. scandals of tax evasion), inspired us to study dishonesty in a leadership context.

**Holger Rau:** The study focuses on these two gender differences in preferences in a setting, which creates tension and conflicts. On the one hand, this tension can result from the wish to please the stakeholders by dishonestly increasing payoff numbers and the personal dislike of this unethical behavior. On the other hand, the already mentioned more prosocial behavior of women and therefore their preference to help others could motivate unethical behavior in payoff reporting. In other words, in our simple experiment, we test a trade-off in leadership decisions, in contexts where common gender differences in preferences exist.

### Did you expect these findings?

**Holger Rau:** The two reporting decisions we analyzed in the study design focus on subjects' dishonest behavior when reporting payoffs for themselves and when reporting payoffs for groups. Our main focus was on potential changes in dishonesty in these two contexts.

For the first instance, the individual decision, we actually confirmed what we expected, that women behave less dishonestly.

However, when women decide on responsibility for others, like in the second setting, they may think about what is expected by the group. This is what we call group norm. Members of a group anticipate that they are evaluated more positively if they behave in line with the group's social role. That's a theory in psychology, the so-called role congruity theory. Inspired by this theory we did expect a behavior change. Our idea was that women may anticipate the social role of leadership decisions, which implies a belief in other group members' expectations.

### How does the social role influence leadership behavior?

**Holger Rau:** Leadership positions can be characterized by masculine gender roles and the masculine type of behavior is more or less the unethical style. If a woman selects into a leadership position, maybe she thinks because of this responsibility that she needs to be living up to this kind of social

role. This could explain why we only find a change of behavior when leadership is applied for.

**In the context of compliance, one key factor is the person of the compliance officer. Could compliance be a matter of gender?**

**Kerstin Grosch:** Generally speaking, I would say gender matters. Maybe that's a bit surprising at first, but compliant behavior and behavior and preferences are also a matter of socialization. Societal norms and their stereotypes form people's behavior from early on. This starts as early in life as we can think of.

There is growing literature in behavioral and experimental economics supporting that development of certain preferences and behavior among girls and boys start to differ in kindergarten and school.

This is because children start to find their identities. Gender is a big part of identity which is still strongly stereotyped. Girls are expected to be more obedient and comply with rules than boys, whereas boys are more expected to break rules and behave in an untamed manner than girls. This means compliant behavior evolves in the early years, is internalized, and is relevant for how people behave later on when they get into positions such as compliance officers. In other words, behavior in the present is (partly) the result of learned behavior in the past.

Women may have internalized behavioral rules such as compliant behavior from early on in their life. They may take the position as compliance officers on average more seriously and enforce the rules and control compliance maybe more correctly than men would. However, I want to emphasize that we are talking about the results of (experimental) studies. That said, we always talk about *findings* in a specific society and context and behavioral observations *on average*.

**Does the change in behavior when women are in a leadership position bring an internal conflict between the preference for honest behavior and doing what's best for the company?**

**Kerstin Grosch:** My response becomes quite hypothetical now, as this specific question is not covered by our study. Maybe as a consequence of stress that women experience in top positions due to this internal conflict between a preference for honesty and support for the company, they resign more often from top positions than men do. In other words, they don't want the position anymore because they have to bend their honesty preferences too much to support the company or their team. This is a conflict between their relatively high prosocial preferences and their honesty preferences that we have talked about at the beginning of the interview.

Another thought that I have about the consequences of the internal conflict is that it may not end in resignation but that conviction of the rules in place plays a role. If someone is very convicted of something they might want to go through with it although it is an unpopular action among the staff. I don't know if there's any research on this but if we assume that women are more compliant than men coupled with a stronger conviction that the compliance rules are meaningful, they might be more willing to take unpopular decisions than men.

**The position of a compliance officer is special as it is technically not a leadership position, but it also is a position where you need to make decisions for others. Do you think this could be different with this position?**

**Kerstin Grosch:** To answer this question, we would first need to study the influential factors of behav-

ior in a position of a compliance officer. These could be feelings of identity with the company, for instance, and must not be limited to the preference for honesty. There are many more influential factors that could influence behavior in such a position apart from feelings of identity and support with the company and individual preferences. To only name a few, it could be, again, the conviction whether someone thinks their behavior as a compliance officer is important for the company or society or both. It could be influenced by the potential beneficiaries on non-compliance – are they close to me or not so close to me? – Am I a subordinate to them and dependent in certain ways and, in the worst case, could lose my job if they dislike my compliant decision? We would need to learn about all these potentially influencing factors to measure up the behavioral consequences on the work of a compliance officer.

### **Could your findings be used to further evolve the process of promotion and assigning leadership**

**Kerstin Grosch:** Our findings show the women's behavior changes when they get into a leadership position they applied for. That may elude us to some kind of solution for promotion procedures that could be maybe more random, meaning appointed externally.

There are already models like this, for instance, sortition in politics, where people engaging in politics are randomly selected from citizens to preserve democracy and represent the citizens' interest. In the industry, it's more complicated and complex.

**Holger Rau:** Changing the institutional setting is a very interesting idea. Other than assigning people randomly, qualification and leadership skills should also play a role. The idea is to combine these two things and as a result, have a pool of people to choose from rather than applying directly to positions. This is a way to disable a selection process influenced by discrimination and nepotism.

## GENDER DIFFERENCES IN LEADERS' COMPLIANT BEHAVIOR

EXTENDED ABSTRACT

SELECTION INTO LEADERSHIP AND DISHONEST BEHAVIOR OF LEADERS:  
A GENDER EXPERIMENT

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## LEADERS AND THEIR INCENTIVES TO BEHAVE NON-COMPLIANTLY

In recent years, news has reported extensively on the misbehavior of senior corporate officers who are out for their gain. For example, the car manufacturer Volkswagen manipulated their emissions to comply with US standards, the financial service provider Wirecard misreported 1.9 billion on the revenue side, and several large-scale tax frauds by managers were uncovered. This demonstrates the extent to which some managers violate compliance with ethical norms of honesty and integrity.

There are two key motivations for behaving non-compliantly as a leader. First, leaders benefit personally since they are typically compensated and promoted based on their performance. Thus, leaders have an incentive to misreport outcomes particularly to the entities relevant for their performance evaluation (Burns, 2006). Second, leaders' decisions impact the payoffs of different stakeholders, e.g., shareholders in the case of managers or politicians' staff members (Berman et al., 1999). Since a leader is, at least partially, evaluated based on the satisfaction of the stakeholders' needs and aspirations, his or her decisions are shaped by the beliefs about stakeholders' preferences. This indicates the potential role of social preferences or norms for decision-making.

## THE RELEVANCE OF GENDER FOR LEADERS' COMPLIANCE

Women are still largely underrepresented in leadership positions (Flabbi et al., 2019; Zenger & Folkman, 2019). Besides historical gender-role attitudes (Alesina et al., 2013), gender differences in preferences are a potential explanation for why women partly sort out. That is, on average, they lack risk tolerance, confidence, or competitive preferences, as compared to men (e.g., Barber & Odean, 2001; Niederle & Vesterlund, 2007; Ertac & Gurdal, 2012; Alan et al., 2020). In the controlled environment of an economic laboratory, it has been shown that women behave less dishonestly than men when lying benefits themselves but nobody else (e.g., Dreber & Johannesson, 2008; Grosch & Rau, 2017). This behavior translates to real-life situations. Women are less likely to accept unethical business practices and academic dishonesty than men (Franke et al., 1997; Borkowski & Ugras, 1998). Since leadership decisions may require bending the rules at times when there are social, monetary, or other incentives in place, differences in dishonest behavior may be another piece of the puzzle explaining gender differences in leadership sorting and behavior. Empirical evidence suggests that a higher share of women can be beneficial for a company's performance. Moreover, empirical studies show that women in leadership positions contribute to ethical decision-making, e.g., reducing corruption and increasing the provision of public goods in the political domain (Swamy et al., 2001; Chattopadhyay & Duflo, 2004). The majority of the gender and leadership literature is based on empirical data which makes it difficult to identify cause-effect relations and underlying motives of behavior. Hence, research calls for more causal evidence between leadership and outcomes (Garretsen et al., 2020).

## EXPERIMENTAL STUDY

To study dishonest behavior in individual and leadership decisions with a focus on gender differences, we conducted an economic laboratory experiment (Grosch et al., 2021). Economic laboratory experiments allow to draw causal inferences from observed behavior and to shed light on underlying motives of behavior. For designing the experiment, we abstract the described scenario above in which ethical misconduct pays off. We implement two stages whereas in the first stage, individual decisions are observed and in the second stage, leadership behavior is observed. To analyze the results from the

experiment, we compare individual and leadership behavior between men and women with statistical analyses tools. In the following, we describe the experimental design and the results in more detail.

In the experiment, participants roll a die and receive a payoff that increases in the reported number. This method is known as the die-rolling game by (Fischbacher & Föllmi-Heusi, 2013). Although the experiment is stylized, it encompasses characteristics that may model dishonest/non-compliant behavior in business situations. For instance, the reporting set-up resembles situations in which managers know the real outcome and may intentionally misreport to increase company returns (e.g., Burns & Kedia, 2006; Bollen & Pool, 2009), by misreporting sale figures of teams (Church et al., 2012), or figures to evade taxes (Joulfaian, 2000). The die-rolling paradigm measures honesty in a setting with practically no chance of being publicly exposed misreporting. This is a relevant simplification as many real-life situations are characterized by a relatively low chance of getting caught and punished. The focus of this study is on changes in behavior across contexts (individual vs. group) while keeping incentives and the chance of being caught constant. Decisions in the die-rolling paradigm are associated with real-life behavior in the fields of corrupt behavior (Hanna & Wang, 2017), free riding in public transportation (Potters, 2016), and refraining from reporting over-payments (Dai et al., 2018).

In our experiment, the same participants report the outcome of a die roll twice. First, subjects only report for themselves, which serves as a proxy for individual honesty preferences. Subsequently, we measure dishonest behavior when assuming responsibility for a group as a leader. That is, subjects report the outcome of a die roll in the role of a potential group leader, which may determine their payoff and the payoff of two group members. Before they make this decision, we analyze subjects' willingness to take up leadership by asking them whether they want to become a leader or not. They learn that if more than one person says "yes", a random draw will select one of the applicants. Measuring these leadership preferences allows us two things. First, we can study whether individual honesty preferences affect the decision to become a leader. Second, we can analyze whether the willingness to take up leadership affects dishonest behavior for groups. To isolate the effects of endogenous leadership, we ran a control treatment without the possibility to apply for leadership. In all treatments, we take existing evidence of gender differences in preferences into account and control for competitive, social, and risk preferences.

Our results demonstrate that women behave less dishonestly than men when deciding on individual payoffs. This is in line with lab experimental evidence that predominantly demonstrates that women behave more ethically than men, e.g., in lying situations when lying only benefits the person who lies and hurts somebody else (e.g., Dreber & Johannesson, 2008). This gender difference vanishes when subjects make their second reporting decision in the role of a group leader. It can be explained by women increasing dishonesty as leaders, particularly those who want to assume responsibility as a leader. We find that men with a preference for dishonesty self-select into leadership and show similar misreporting behavior in the group domain as in the individual domain. By contrast, women's willingness to take over leadership is not related to their individual honesty preferences. Our control treatment reveals that women only increase dishonest behavior for groups when they can apply for leadership, but not when there is an external appointment. These results demonstrate that women's increase in dishonesty is not driven by the group context *per se*. It is induced by a combination of the explicit decision to act as a leader *and* making decisions on behalf of others.

To further investigate the underlying mechanisms of women increasing dishonesty as leaders, we

conducted a follow-up (Grosch et al., 2021). The design is similar to the first study but we additionally elicit leaders' beliefs on individual honesty preferences of group members. We interpret this measure as the leader's perceived group norm when reporting joint payoffs. The study also controls for social value orientation to account for a possible relation between prosociality and misreporting for groups. Perceived norms seem to be the key driver for female leaders to increase misreporting for groups; particularly for women who want to become a leader. By contrast, for women who did not apply for leadership, we do not observe this finding.

## CONCLUSION

Our study (Grosch et al., 2021) improves the understanding of women's (and men's) motivation to apply for leadership. We also shed light on gender differences in dishonest behavior when deciding for groups. We showed that women's decision to apply for leadership is not correlated to their honesty preferences. This highlights that the gender gap in the application to leadership positions may not be associated with women's more pronounced preference for honesty. This may imply that there is no need to address differing honesty preferences of men and women in workplace policies. Interestingly, we show that although women may not behave dishonestly for themselves, actively assuming responsibility motivates them to behave dishonestly for others. This highlights the importance of promotion mechanisms since the opportunity to apply for leadership may lead to a behavioral change for women who decide for a group. (Adams & Funk, 2012) demonstrate for Sweden's top directors that women are more benevolent, care less about achievement and power than their male counterparts consistent with character trait distribution for the general population. This suggests that women's traits are not always malleable to expectations or stereotypical thinking. However, when leadership demands women to implicitly change their preferences due to others' expectations as in our context, it could have a range of consequences. For instance, affirmative action policies in the form of a women's quota may not result in higher ethical standards at the management level per se. Decision-makers should keep in mind that the procedural design of the hiring process might matter, i.e., whether women actively apply for a promotion or whether the company/institution commends their promotion which may be essential for the leader's ethical behavior. Moreover, if female executives have to adapt to a leadership style that is not in line with their individual preferences, then this may result in higher perceived mental stress (Gardiner & Tiggemann, 1999). This may ultimately make women give up the leadership position or work part-time in the long term (Manning & Petrongolo, 2008).

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## ON LEGAL THOUGHT LEADER AND LEGAL THINKING ESPECIALLY CONCERNING INTERNAL INVESTIGATIONS

Ariane Bertram

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## I. INTRODUCTION

'Two lawyers, three opinions.' A well-known saying that is often part of communication not only among lawyers, but also in general. Related in a mocking way, it reflects the 'daily business' of a lawyer, who often can only give the answer to a person seeking advice: 'It depends.' Countless factors play a role in the assessment of legal issues, and in some cases even the slightest change results in a different assessment, so that one and the same set of facts, viewed from the perspective of different observers, can lead to differentiated views. Written law neither interprets itself nor fills its gaps independently.<sup>1</sup> And so, in everyday legal life, opinions are referred to, they are represented, rejected, and criticized. This is mostly done in legal literature, especially in journals, in which articles are published as essays or commentaries on a court decision by authors, members of different professions. The legislature creates laws, which are applied by the judiciary and legal practice and under which the facts are subsumed. The assessment of different facts thus leads to the further development of the law. For some of them, laws already exist, for others, in the form of unprecedented facts, no law exists yet. Unlike the factual circumstances in the study of the lawyer, life is not prepared in such a way that only existing laws are applicable. Rather, conflict situations arise with other facts, for which it is then necessary to find a solution by methodical procedure and legal way of thinking.<sup>2</sup> Experts from science and legal practice then comment on (practice-relevant) questions until a court is called upon to answer them. The arguments put forward by the court are later discussed and evaluated.

In particular, the topic of internal investigations, which first came into focus in the Siemens scandal in 2006, provides a practical illustration of the aforementioned. Until the first judicial decision in 2010<sup>3</sup> on the period up to the decision of the Federal Constitutional Court in 2018 in the diesel scandal<sup>4</sup> and the subsequent draft law<sup>5</sup>, there were a large number of publications by authors from different professions that dealt with the topic and the associated legal problems and represented differentiated opinions.

Where do these authors get their opinions from? How and by whom are they subsequently discussed, do they show changes over the years? How does the law develop with regard to a topic? Is there a certain type among the authors who can be called an opinion-maker, even a "thought leader", whose view is of particular importance and is mentioned especially often? Does he practice a certain profession, how does he achieve recognition in society, in his sphere of influence and in his community?

The following article therefore first deals with the content of the concept of opinion, its definition and the bases and causes of different opinions, before an introduction to legal thought as the origin of legal opinion formation. Finally, the focus of the article deals with the legal thought leader of the topic of internal investigations, first elaborating on the content and the formation of law, before the person of the legal thought leader in type and characteristics concludes the article.

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<sup>1</sup> Friedrich-Wilhelm Schwöbbermeyer, *Juristisches Denken und Kreativität*, ZRP 571 (2001).

<sup>2</sup> Friedrich-Wilhelm Schwöbbermeyer, *Juristisches Denken und Kreativität*, ZRP 571, 572 (2001).

<sup>3</sup> LG Hamburg - Beschl. v. 15. 10. 2010 - 608 Qs 18/10.

<sup>4</sup> BVerfG - Beschl. v. 27. 06. 2018 - 2 BvR 1405/17, 2 BvR 1780/17, 2 BvR 1287/17, 2 BvR 1583/17; 2 BvR 1562/17.

<sup>5</sup> Bundesministerium der Justiz und für Verbraucherschutz: Referentenentwurf, April 2020, [https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE\\_Staerkung\\_Integritaet\\_Wirtschaft.pdf?\\_\\_blob=publicationFile&v=1](https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_Staerkung_Integritaet_Wirtschaft.pdf?__blob=publicationFile&v=1) (last visited July 7, 2020).

## II. THE OPINION & THE LEGAL THINKING

An opinion or also view, opinion, conviction, evaluation, judgment, assessment or opinion are words that reflect people's thoughts about a factual object or person. They are personal views someone has about something,<sup>6</sup> which are formed in the minds of people and are partly the creation of their own thoughts, and partly based on the evaluations, statements, and research of others. The subjectivity of evaluation is therefore inherent in the concept of opinion.<sup>7</sup>

In accordance with Article 5 I of the Basic Law for the federal Republic of Germany,<sup>8</sup> everyone in Germany has the right to freely express and disseminate their opinions in speech, writing and pictures and to obtain information from generally accessible sources without hindrance. The protection therefore includes both freedom of information and freedom of opinion. An opinion is first of all a value judgment, which comprises a statement characterized by the element of opinion and opinion. Characterized by a subjective relationship of the utterer to the content of his statement, it cannot be characterized as true or false and, moreover, is not amenable to proof.<sup>9</sup> While the value judgment can rather be understood as opinion in the narrower sense, the term opinion also includes the communication of facts, which - strictly speaking - cannot be called an expression of opinion. Such factual assertions lack the characteristics of statement and own consideration, although they can also be classified as opinion, because and to the extent that they are prerequisites for the formation of opinion.<sup>10</sup> The concept of opinion is therefore broad. As a prerequisite for the expression of opinion, the formation of opinion, any kind of communication of information and opinion,<sup>11</sup> conditions freedom of information and vice versa, whereby freedom of information can be understood as the receipt and procurement of information.<sup>12</sup>

### A. The bases and causes of (differentiated) opinion

An indispensable building block for forming an opinion is a reason or a basis, including a fact. In most cases, these are "heatedly debated topics" in society that experience a certain frequency of reporting. Different experts then express themselves and present the results of their (scientific) investigations. The often resulting difference finally provides for different opinions.

Both the facts and the results are provided as information. Both in radio, press, magazines and social networks, authors disseminate their own or others' opinions and give an opinion. Shortly after important events occur, they are reported. After receiving the information, opinions are formed, which are dependent on people's values, profession, life situation, knowledge, and previous life experiences, and significantly influence the process. Many factors, on the basis of which a fact is evaluated, commented, criticized or advocated, are therefore decisive for the formation of opinions.

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<sup>6</sup> Deutsches Wörterbuch von Jakob Grimm und Wilhelm Grimm, Version 01/21, <https://woerterbuch-netz.de/?sigle=DWB&sigle=DWB&mode=Vernetzung&lemid=GM03450#0>, (last visited March 7, 2021).

<sup>7</sup> Starck/Paulus: v. Mangoldt/Klein/Starck Kommentar zum Grundgesetz, Art. 5 Rn. 74.

<sup>8</sup> It means the German „Grundgesetz“.

<sup>9</sup> Grabenwater: Maunz/Dürig Grundgesetz-Kommentar, Art. 5 Rn. 47.

<sup>10</sup> Grabenwater: Maunz/Dürig Grundgesetz-Kommentar, Art. 5 Rn. 48.

<sup>11</sup> Grabenwater: Maunz/Dürig Grundgesetz-Kommentar, Art. 5 Rn. 75, 76.

<sup>12</sup> BVerfGE 27, 71; Christian von Coelln: Zur Medienöffentlichkeit der Dritten Gewalt: rechtliche Aspekte des Zugangs der Medien zur Rechtsprechung im Verfassungsstaat des Grundgesetzes, 139 (2005); Grabenwater: Maunz/Dürig Grundgesetz-Kommentar, Art. 5 Rn. 75, 76.

The aforementioned also applies to the formation of legal opinion and legal thinking, in which opinions drive the further development of the law. Based on their profession, values, life situation, knowledge and experience, lawyers also form their opinions after becoming familiar with the facts of the case, which are then commented on, criticized or endorsed.

## B. Legal thinking as the basis for the formation of legal opinion

While the events of everyday life can be easily differentiated, in 'law' the question of the emergence of different opinions arises because the law and jurisprudence have regulations ready. Differentiated opinions arise above all where legal regulations are lacking. The complexity and constant change of life mean that there is no all-encompassing and conclusive set of rules that provides an answer to all present and future legal questions.<sup>13</sup>

With the help of legal thinking, existing laws and application practices must therefore be differentiated and supplemented in order to find an appropriate solution even for unprecedented problems. Legal thinking requires both legal understanding and the ability to work methodically in order to solve, through interpretation and the further development of the law, those problems for which neither the law nor jurisprudence provides a solution. At the same time, the power of lawyers, and especially of judges, is to be limited, although their critics consider this to be superfluous, since in the end a judge decides as he or she decides.<sup>14</sup>

The jurist must be able to approach unknown problems, to develop his own disputes and solutions and to defend his own view against foreign arguments in order to make the decision comprehensible and verifiable and to achieve legal certainty.<sup>15</sup> The basis for this is Savigny's canon of four laws learned in law school: 'Wortlaut' (wording), 'Systematik' (systematics), 'Geschichte' (history) and 'Telos' (telos), which every lawyer, whether professor at the university or practitioner, has to apply to the unknown facts of a case when subsumption under existing laws is impossible. The more complex and less clear the legal situation, the more extensive the application of the legal canon.<sup>16</sup> Because each jurist executes this differently, one and the same circumstance interpreted by different persons leads to different results. The reason for this is, among other things, the personalities, the professional career and the daily environment -therefore something subjective-, which decisively influences the evaluation of a legal problem and therefore the formation of opinion. Also, legal thinking and the formation of opinions are always subjective. Legal thinking therefore requires not only that a legal dogmatic institute or a legal practical institution is known (from the inside), it must also be able to be viewed in its historical, theoretical and real conditions (from the outside), to be relativized and to be placed in larger contexts.<sup>17</sup> Unlike the formation of opinions on other topics, legal opinions are not formed on the basis of topics disseminated in the media, but rather through the application of what has been learned.

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<sup>13</sup> Friedrich-Wilhelm Schwöbbermeyer, *Juristisches Denken und Kreativität*, ZRP 571 (2001).

<sup>14</sup> Thomas M. J. Möllers, *Wie Juristen denken und arbeiten – Konsequenzen für die Rille juristischer Methoden in der juristischen Ausbildung*, ZfPW, 94, 97-98 (2019).

<sup>15</sup> Thomas M. J. Möllers, *Wie Juristen denken und arbeiten – Konsequenzen für die Rille juristischer Methoden in der juristischen Ausbildung*, ZfPW, 94, 99 (2019).

<sup>16</sup> Thomas M. J. Möllers, *Wie Juristen denken und arbeiten – Konsequenzen für die Rille juristischer Methoden in der juristischen Ausbildung*, ZfPW, 94, 100 (2019).

<sup>17</sup> Thomas M. J. Möllers, *Wie Juristen denken und arbeiten – Konsequenzen für die Rille juristischer Methoden in der juristischen Ausbildung*, ZfPW, 94, 119-120 (2019).

In addition, there are the different professional experiences and working principles, whereby a distinction must be made here in particular between those of university science in the form of professors and those of practice in the form of lawyers and judges.

Scientific work means to give space to one's thoughts and thus -specialized on one topic- to represent a process of persistence, the progress of which depends on an 'inspiration' that cannot be forced even with the help of the greatest effort. Pre-thinking and re-thinking, as well as constantly questioning the knowledge already gained, are made possible by a lack of time and content constraints or censorship.<sup>18</sup> In contrast, the practice often has to react promptly to a problem it is not familiar with and is not free in its choice of topics or working methods. The decision of short, fast-moving processes, adapted to constantly changing circumstances, therefore often leads to a different opinion than the investigation and decision of the same circumstance without time specification and pressure.

The result is differentiated views on a problem in literature and case law, whereby the view that then becomes established through dissemination can be described as the prevailing opinion. How a legal opinion develops and is disseminated, and on which factors this depends, is to be assessed based on the example of internal investigations.

### III. INTERNAL INVESTIGATIONS

Internal investigations first came into focus in connection with the Siemens affair in 2006 and have received renewed attention as a result of the Diesel scandal. They are therefore the basis of many legal publications.

#### A. Definition

Although internal investigations have been widely used in both Germany and the United States and have been the subject of numerous publications, there is no general definition and no uniform understanding. Sometimes they are described as voluntarily commissioned, cause-related investigations of contractual or administrative processes by external experts,<sup>19</sup> sometimes they serve to uncover violations of existing laws and other rules.<sup>20</sup> Still others include only compliance-relevant breaches of duty in the scope of application,<sup>21</sup> while another part restricts the application to persons and only focuses on the clarification of breaches of duty resulting from actions of the company management.<sup>22</sup> Finally, another opinion includes violations of the law by managers and employees,<sup>23</sup> while others do not limit the scope of application but allow investigations to take place without the involvement of external

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<sup>18</sup> Susanne Baer, *Wissenschaftsfreiheit als verteilte Verantwortung*, FuL 214, 215 (2017).

<sup>19</sup> Thomas Knierim: Thomas Rotsch Wissenschaftliche und praktische Aspekte der nationalen und internationalen Compliance-Diskussion, 77, 78 (2012).

<sup>20</sup> Alexander Behrens, *Internal Investigations: Hintergründe und Perspektiven anwaltlicher "Ermittlungen" in deutschen Unternehmen*, RIW 22 (2009); Hans-Joachim Gerst, *Unternehmensinteresse und Beschuldigtenrechte bei Internal Investigations – Problemskizze und praktische Lösungswege –*, CCZ 1 (2012).

<sup>21</sup> Volker Vogt, *Compliance und Investigations – Zehn Fragen aus Sicht der arbeitsrechtlichen Praxis –*, NJOZ 4206 (2009).

<sup>22</sup> Anja Mengel & Thilo Ullrich, *Arbeitsrechtliche Aspekte unternehmensinterner Investigations*, NZA 240 (2006).

<sup>23</sup> Folker Bittmann & Josef Molkenbur, *Private Ermittlungen, arbeitsrechtliche Aussagepflicht und strafprozessuales Schweigerecht*, wistra 373, 374 (2009).

parties.<sup>24</sup>

Despite this multitude of different views, there is basically a uniform understanding according to which internal company investigations are private investigations, not initiated by the state, but by the company itself, by external investigators in connection with impending or already ongoing state investigations, which are being or are to be conducted against the company itself or members of the company, and with the help of which breaches of duty, in particular criminal offenses, can be systematically clarified within the company.<sup>25</sup> In this case, a representative of the company then voluntarily commissions a special forensic investigation in which external experts, mainly a law firm or auditors, examine the processes within the company in detail and, in particular, investigate the structurally anchored or individual misconduct with regard to accounting and regulatory issues.<sup>26</sup>

The aim of conducting internal investigations is both to clarify the facts of the case and to investigate the truth, to avoid/reduce financial losses and liability risks, and to avert damage to prestige, which is of particular concern to well-known companies.<sup>27</sup>

The basis of the discussions and the content of the publications on internal investigations, however, is neither the lack of uniformity of a definition nor the implementation by external or internal parties. Rather, the implementation in the company - especially concerning the employees - entails corresponding legal questions and problems, which are judged differently by legal experts in the form of lawyers, judges, and university professors.

## B. Legal issues related to the subject matter

The differentiation from state proceedings and the lack of applicability of the German Code of Criminal Procedure (StPO) lead to legal problems, some of which affect the company's employees, some of which are connected with the search of the premises and some of which only become relevant in the criminal proceedings that may follow the internal investigations. Questions arise here as to the permissibility and selection of the investigative measures that can be chosen in the course of the investigations, in particular in order to obtain documents of the employees and management that may yield

<sup>24</sup> Alexander Behrens, *Internal Investigations: Hintergründe und Perspektiven anwaltlicher "Ermittlungen" in deutschen Unternehmen*, RIW 22, 23 (2009); Nicolas Ott & Cäcilie Lüneborg, *Internal Investigations in der Praxis - Umfang und Grenzen der Aufklärungspflicht, Mindestaufgriffsschwelle und Verdachtsmanagement*, CCZ 71, 73 (2019).

<sup>25</sup> Matthias Dann, *Compliance- Untersuchungen im Unternehmen: Herausforderung für den Syndikus*, AnwBl. 84, 85 (2009); Lambertus Fuhrmann, *Internal Investigations: Was dürfen und müssen die Organe beim Verdacht von Compliance Verstößen tun?*, NZG 881, 882 (2016); Jürgen Wessing: Hauschka/Moosmayer/Lösler (Hrsg.) *Corporate Compliance*, § 46 Rn. 1 (2016); Carsten Momsen, *Internal Investigations zwischen arbeitsrechtlicher Mitwirkungspflicht und strafprozessualer Selbstbelastungsfreiheit*, ZIS 508, 509-510 (2011); Hendrik Reuling & Christian Schoop, „*Internal Investigations*“ im Lichte des Koalitionsvertrags 2018 - *Notwendige Inhalte einer gesetzlichen Regelung*, ZIS 361 (2018).

<sup>26</sup> Thomas Knierim, *Das Verhältnis von strafrechtlichen und internen Ermittlungen*, StV 324, 328 (2009); Thomas Rotsch *Wissenschaftliche und praktische Aspekte der nationalen und internationalen Compliance-Diskussion*, 77, 78-79 (2012); Anja Mengel & Thilo Ullrich, *Arbeitsrechtliche Aspekte unternehmensinterner Investigations*, NZA 240 (2006).

<sup>27</sup> Lambertus Fuhrmann, *Internal Investigations: Was dürfen und müssen die Organe beim Verdacht von Compliance Verstößen tun?*, NZG 881, 885 (2016); Hans-Joachim Gerst, *Unternehmensinteresse und Beschuldigtenrechte bei Internal Investigations - Problemskizze und praktische Lösungswege* -, CCZ 1 (2012); Thomas Knierim, *Das Verhältnis von strafrechtlichen und internen Ermittlungen*, StV 324, 328 (2009); Hendrik Reuling & Christian Schoop, „*Internal Investigations*“ im Lichte des Koalitionsvertrags 2018 - *Notwendige Inhalte einer gesetzlichen Regelung*, ZIS 361, 362 (2018).

results. Can the personnel file be inspected? Can e-mails and documents be searched and seized?<sup>28</sup> However, the predominant basis for discussion here is the so-called ‘interviews’<sup>29</sup> conducted with the company’s employees, where it is initially questionable whether there is an obligation to participate and testify vis-à-vis the external parties and whether the employee, as a result of an affirmative answer to this question, can make use of a right to refuse to testify in the interviews or in subsequent criminal proceedings.<sup>30</sup> In this context, it is also discussed whether the findings obtained from the private investigations may be confiscated and subsequently utilized.<sup>31</sup>

Since the emergence of the topic in 2006, the above-mentioned issues have been discussed in numerous publications, most of which have appeared in journal articles, with the result that differentiated views have been expressed. While the evaluation initially focused on the issues of civil law, in particular labor law, the obligation to participate and to testify, and the nemo-tenetur principle under criminal law,<sup>32</sup> the content of the essays changed after the first court decision by the Hamburg Regional Court

<sup>28</sup> Jürgen Wessing: Hauschka/Moosmayer/Lösler (Hrsg.) Corporate Compliance, § 46 Rn. 25-43 (2016); Anja Mengel & Thilo Ullrich, *Arbeitsrechtliche Aspekte unternehmensinterner Investigations*, NZA 240, 241-243 (2006); Jürgen D. W. Klengel & Ole Mückenberger, *Internal Investigations – typische Rechts- und Praxisprobleme unternehmensinterner Ermittlungen*, CCZ 81, 83-86 (2009); Volker Vogt, *Compliance und Investigations – Zehn Fragen aus Sicht der arbeitsrechtlichen Praxis*, NJOZ 4206, 4210-4212 (2009).

<sup>29</sup> Hierbei handelt es sich um eine Befragung von Mitarbeitern, bei der zum einen Aussagen abgerufen werden können, zum anderen anhand von Mimik und Gestik der Wahrheitsgehalt einer Aussage ausgewertet und das Risiko hinsichtlich der Vornahme etwaiger Verdunklungshandlungen abgewogen werden kann. Um Verstöße aufzuklären, werden diejenigen Mitarbeiter hinzugezogen, die verdächtig sind, sich an solchen beteiligt zu haben oder Wahrnehmungen im Zusammenhang mit diesen gemacht haben könnten. Diesbezüglich werden Fragen betreffend den Aufgabenbereich des Mitarbeiters aber auch sein Umfeld betreffend gestellt; Burkhardt Göpfert, Frank Merten & Carolin Siegrist, *Mitarbeiter als „Wissensträger“ – Ein Beitrag zur aktuellen Compliance-Diskussion*, NJW 1703, 1705 (2008); Jürgen D. W. Klengel & Ole Mückenberger, *Internal Investigations – typische Rechts- und Praxisprobleme unternehmensinterner Ermittlungen*, CCZ 81, 82 (2009); Björn Krug & Christoph Skoupil, *Befragungen im Rahmen von internen Untersuchungen*, NJW 2374 (2017); Lena Rudkowski, *Die Aufklärung von Compliance-Verstößen durch „Interviews“*, NZA 612 (2011); Hans Theile, Marcele Janina Gatter & Tobis C. Wiesenack, *Domestizierung von Internal Investigations*, ZStW 803 (2014).

<sup>30</sup> Folker Bittmann & Josef Molkenbur, *Private Ermittlungen, arbeitsrechtliche Aussagepflicht und strafprozessuales Schweigerecht*, wistra 373, 375-377 (2009); Wolf-Tassilo Böhm, *Strafrechtliche Verwertbarkeit der Auskünfte von Arbeitnehmern bei unternehmensinternen Untersuchungen*, WM 1923 (2009); Björn Krug & Christoph Skoupil, *Befragungen im Rahmen von internen Untersuchungen*, NJW 2374, 2375 (2017); Hendrik Reuling & Christian Schoop, *„Internal Investigations“ im Lichte des Koalitionsvertrags 2018 – Notwendige Inhalte einer gesetzlichen Regelung*, ZIS 361, 363-364 (2018); Lena Rudkowski, *Die Aufklärung von Compliance-Verstößen durch „Interviews“*, NZA 612, 613 (2011); Sascha Süße, *Gesetzliche Vorgaben für interne Untersuchungen – Ein Weg zur Beseitigung von Rechtsunsicherheiten bei der Kooperation in Wirtschaftsstrafverfahren?* ZIS 350, 357 (2018); Ulrich Wastl, Philippe Litzka & Martin Pusch, *SEC-Ermittlungen in Deutschland – eine Umgehung rechtsstaatlicher Mindeststandards!*, NStZ 68, 70 (2009).

<sup>31</sup> Folker Bittmann & Josef Molkenbur, *Private Ermittlungen, arbeitsrechtliche Aussagepflicht und strafprozessuales Schweigerecht*, wistra 373, 377 (2009); Björn Krug & Christoph Skoupil, *Befragungen im Rahmen von internen Untersuchungen*, NJW 2374, 2378-2379 (2017); Carsten Momsen, *Internal Investigations zwischen arbeitsrechtlicher Mitwirkungspflicht und strafprozessualer Selbstbelastungsfreiheit*, ZIS 508, 512 (2011); Markus Rieder & Jonas Menne, *Internal Investigations – Rechtslage, Gestaltungsmöglichkeiten und rechtspolitischer Handlungsbedarf*, CCZ 203 (2018); Hendrik Reuling & Christian Schoop, *„Internal Investigations“ im Lichte des Koalitionsvertrags 2018 – Notwendige Inhalte einer gesetzlichen Regelung*, ZIS 361, 365-367 (2018); Ingeborg Zerbes, *Unternehmensinterne Untersuchungen*, ZStW, 551, 561-570 (2013).

<sup>32</sup> Anja Mengel & Thilo Ullrich, *Arbeitsrechtliche Aspekte unternehmensinterner Investigations*, NZA 240, 241-243 (2006); Burkhardt Göpfert, Frank Merten & Carolin Siegrist, *Mitarbeiter als „Wissensträger“ – Ein Beitrag zur aktuellen Compliance-Diskussion*, NJW 1703 (2008); Matthias Dann & Kerstin Schmidt, *Im Würgegriff der SEC? – Mitarbeiterbefragungen und die Selbstbelastungsfreiheit*, NJW 1851 (2009); Ulrich Wastl, Philippe Litzka & Martin Pusch, *SEC-Ermittlungen in Deutschland – eine Umgehung rechtsstaatlicher Mindeststandards!*, NStZ 68 (2009); Matthias Jahn, *Ermittlungen in Sachen Siemens/SEC*, StV 41 (2009); Folker Bittmann & Josef Molkenbur, *Private Ermittlungen, arbeitsrechtliche Aussagepflicht und strafprozessuales Schweigerecht*, wistra 373 (2009).

in 2010. From this point on, the problem of confiscating the interview transcripts and the other documents resulting from the conduct of the investigations was increasingly discussed in the literature.<sup>33</sup> A decisive turning point in publications on the subject was therefore the first decision and therefore opinion by a court. The question is, on what basis is the opinion expressed by the court based and which author's opinion is most recognized in the community?

#### IV. THE PERSON OF THE MASTERMIND IN THE FURTHER DEVELOPMENT OF THE LAW OF INTERNAL INVESTIGATIONS

'Science is the captain and practice, they are the soldiers.'<sup>34</sup> A quote according to which scientists and their work are given an exposed position in relation to practice. The designation of practitioners as soldiers makes their actions appear as determined by instructions and shaped by orders.

The person of the opinion-maker, the legal thought leader, is decisive in connection with the further development of the law on a subject; he or she has an influence on the publications, the views expressed and the development of case law, so that the question arises as to whether this person belongs to academia or to practice. It is partly assumed that the judge, hence a practitioner, is to a certain extent responsible for the development of the law. However, the latter oversteps his bounds when he presumes to engage in positive social shaping and thus becomes a lawmaking judge.<sup>35</sup> This leads to the conclusion that the judge participates only in part in the further development of the law. Still others argue that the further development of law must remain the task of the democratic sovereign, since written law and the methods of interpreting and applying it are a cultural achievement based on the will of the legislature and social compromises.<sup>36</sup> Moreover, it must be taken into account that different legal issues come into focus among members of different professions, and opinion is shaped by subjective characteristics. Legal thought leaders can therefore not be determined in general, but only on a topic-by-topic basis.

##### A. Further development of the law on the subject of internal investigations

Since the emergence of the topic of internal investigations in 2006, there have been numerous publications discussing the issues. The change of the discussed topics over the years is clear. While at the beginning, in addition to labor law and thus civil law issues - for example, the employee's obligation to cooperate and testify in the so-called interviews - the violation of the *nemo-tenetur* principle and

<sup>33</sup> Hans-Joachim Fritz, *LG Hamburg: Beschlagnahmefähigkeit von im Rahmen von unternehmensinternen Untersuchungen durch beauftragte Rechtsanwälte angefertigten Befragungsprotokollen – faktische Einschränkung der Auskunftspflichten von Mitarbeitern – „nemo tenetur“-Grundsatz im Arbeitsrecht*, CCZ 155 (2011); Margarete Gräfin v. Galen, *LG Hamburg: Beschlagnahme von Interviewprotokollen nach „Internal Investigations“ – HSH Nordbank*, NJW 942 (2011); Matthias Jahn & Stefan Kirsch, *Anmerkung zu einer Entscheidung des LG Hamburg, Beschluss vom 15.10.2010 (608 Qs 18/10; StV 2011, 148) – Zur Geltung des Beschlagnahmeverbots für Erkenntnisse, die ein Anwalt im Wege der internen Untersuchung in einem Unternehmen gewinnt*, StV 151 (2011); Frank P. Schuster, *Anmerkung zu LG Mannheim: Beurteilung der Beschlagnahmefreiheit von Unterlagen im Gewissenshaftung eines Zeugen vorrangig nach § 97 Abs. 2 StPO*, NZWiSt 424 (2012); Matthias Jahn & Stefan Kirsch, *LG Mannheim: Beurteilung der Beschlagnahmefreiheit von Unterlagen im Gewissenshaftung eines Zeugen m. Anm.*, NSTz 713 (2012); Hartmut Schneider, *LG Braunschweig: Beschlagnahmefreie Unterlagen* NSTz 308 (2016); Christian Graßie & Mayeul Hiéramente, *Durchsuchungen bei Anwälten – eine Zeitenwende?*, BB 2051 (2018); Carsten Momsen, *Volkswagen, Jones Day und interne Ermittlungen*, NJW 2362 (2018).

<sup>34</sup> da Vinci, Leonardo: überliefertes Zitat, 1452 – 1519.

<sup>35</sup> Thomas M. J. Möllers, *Wie Juristen denken und arbeiten – Konsequenzen für die Rolle juristischer Methoden in der juristischen Ausbildung*, ZfPW, 94, 109-110 (2019).

<sup>36</sup> Friedrich-Wilhelm Schwöbbermeyer, *Juristisches Denken und Kreativität*, ZRP 571 (2001).

the fair trial requirement are discussed in particular,<sup>37</sup> the usability and seizability of the results resulting from the employee surveys are problematized and discussed in later publications - predominantly after the publication of the first court decision in 2010.<sup>38</sup>

The literature in this regard comes from the pens of practitioners, mostly lawyers, university scientists and such persons who are professionally active both in university science and in practice. Considering the multitude of published literature and its authors, it can be stated that it is a person professionally active both in practice and university science, who publishes several times at short intervals on current topics and finds its citation in many publications and court decisions. Being a professor full-time and a judge part-time, this person is described as a hybrid type. Her publications have been regular and constant from 2006 to 2018, reacting to current events in terms of content and finding mention in publications by other authors.<sup>39</sup> In addition, there are numerous publications by lawyers who express their opinions on current problems and discuss other opinions. However, the publications of authors working exclusively in university science are neither as constant nor as up-to-date in terms of content as the publications of practitioners are. Especially their publications of the years 2013/2014, therefore some years after the emergence of the topic, treat it more generally than they can keep up in the current discourse regarding the problems.<sup>40</sup>

It is striking that Prof. Jahn as a hybrid type, in addition to numerous publications from practice by lawyers and a few from university science, has published essays on this topic in 2009, as well as in

<sup>37</sup> Anja Mengel & Thilo Ullrich, *Arbeitsrechtliche Aspekte unternehmensinterner Investigations*, NZA 240 (2006); Burkhardt Göpfert, Frank Merten & Carolin Siegrist, *Mitarbeiter als „Wissensträger“ – Ein Beitrag zur aktuellen Compliance-Diskussion*, NJW 1703 (2008); Rüdiger von Rosen, *Rechtskollision durch grenzüberschreitende Sonderermittlungen*, BB 230 (2009); Matthias Dann & Kerstin Schmidt, *Im Würgegriff der SEC? – Mitarbeiterbefragungen und die Selbstbelastungsfreiheit*, NJW 1851 (2009); Matthias Jahn, *Ermittlungen in Sachen Siemens/SEC*, StV 41 (2009); Christoph Knauer & Erik Buhlmann, *Unternehmensinterne (Vor-)Ermittlungen – was bleibt von nemo-tenetur und fair-trial?*, AnwBl. 387 (2010); Hans-Joachim Fritz, *LG Hamburg: Beschlagnahmefähigkeit von im Rahmen von unternehmensinternen Untersuchungen durch beauftragte Rechtsanwälte angefertigten Befragungsprotokollen – faktische Einschränkung der Auskunftspflichten von Mitarbeitern – „nemo tenetur“-Grundsatz im Arbeitsrecht*, CCZ 155 (2011); Hans Theile, *„Internal Investigations“ und Selbstbelastung*, StV 381 (2011); Carsten Momsen, *Internal Investigations zwischen arbeitsrechtlicher Mitwirkungspflicht und strafprozessualer Selbstbelastungsfreiheit*, ZIS 508 (2011).

<sup>38</sup> Hans-Joachim Fritz, *LG Hamburg: Beschlagnahmefähigkeit von im Rahmen von unternehmensinternen Untersuchungen durch beauftragte Rechtsanwälte angefertigten Befragungsprotokollen – faktische Einschränkung der Auskunftspflichten von Mitarbeitern – „nemo tenetur“-Grundsatz im Arbeitsrecht*, CCZ 155 (2011); Hans Theile, *„Internal Investigations“ und Selbstbelastung*, StV 381 (2011); Margarete Gräfin v. Galen, *LG Hamburg: Beschlagnahme von Interviewprotokollen nach „Internal Investigations“ – HSH Nordbank*, NJW 942 (2011); Matthias Jahn & Stefan Kirsch, *Anmerkung zu einer Entscheidung des LG Hamburg, Beschluss vom 15.10.2010 (608 Qs 18/10; StV 2011, 148) – Zur Geltung des Beschlagnahmeverbots für Erkenntnisse, die ein Anwalt im Wege der internen Untersuchung in einem Unternehmen gewinnt*, StV 151 (2011); Imme Roxin, *Probleme und Strategien der Compliance-Beratung in Unternehmen*, StV 116 (2012); Frank P. Schuster, *Anmerkung zu LG Mannheim: Beurteilung der Beschlagnahmefreiheit von Unterlagen im Gewahrsam eines Zeugen vorrangig nach § 97 Abs. 2 StPO*, NZWiSt 424 (2012); Matthias Jahn & Stefan Kirsch, *LG Bonn: Kartellrechtliches Ermittlungsverfahren*, NZWiSt 21 (2013); Hans Theile, Marcele Janina Gatter & Tobis C. Wiesenack, *Domestizierung von Internal Investigations*, ZStW 803 (2014); Hartmut Schneider, *LG Braunschweig: Beschlagnahmefreie Unterlagen*, NSTz 308 (2016).

<sup>39</sup> Matthias Jahn, *Ermittlungen in Sachen Siemens/SEC*, StV 41 (2009); Matthias Jahn, *Die verfassungskonforme Auslegung des § 97 Abs. 1 Nr. 3 StPO*, ZIS 453 (2011); Carsten Momsen, *Internal Investigations zwischen arbeitsrechtlicher Mitwirkungspflicht und strafprozessualer Selbstbelastungsfreiheit*, ZIS 508 (2011); Matthias Jahn & Stefan Kirsch, *LG Mannheim: Beurteilung der Beschlagnahmefreiheit von Unterlagen im Gewahrsam eines Zeugen*, NSTz 713 (2012); Matthias Jahn & Stefan Kirsch, *Kartellrechtliches Ermittlungsverfahren*, NZWiSt 21 (2013); Matthias Jahn & Stefan Kirsch, *LG Braunschweig: Beschlagnahmefreiheit von Unterlagen bei internen Erhebungen*, NZWiSt 37 (2016); Dierlamm, Brak-Mitteilungen 195 (2018); Michael Kubiciel: *Juris Praxiskommentar 16/2018, Anm. 1; Carsten Momsen, Volkswagen, Jones Day und interne Ermittlungen*, NJW 2362 (2018).

<sup>40</sup> Ingeborg Zerbes, *Unternehmensinterne Untersuchungen*, ZStW, 551, 561–570 (2013); Theile/Gatter/Wiesenack, ZStW 2014, S. 803.

2011, 2012, 2013 and 2016, and is cited in a large number of publications.<sup>41</sup> In addition to general approaches already discussed, on which he expresses his opinion, he contributes new ideas and theses of his own and often publishes following a printed court decision.<sup>42</sup> It can therefore be stated that - with regard to the topic of internal investigations- it is a hybrid type that reacts to current, practice-relevant topics, whose views are discussed and quoted. It therefore holds a pacemaker position, a position of legal thought leader.

## B. Characteristics of the person of the legal mastermind

It follows from the above that it is the publications of a hybrid type whose content is linked to current events that are much noticed and cited. From this it can be concluded that a legal thought leader of a topic must come into contact with this topic and be receptive to it. With regard to a practice-oriented topic, he must have a sense for the importance and necessity of this in the future and accompany the discussions throughout from the beginning. It is also important that the publications he produces are published in the right place so that they can be noticed. An essay published in a journal, read exclusively by university professors, will not attract the attention of lawyers and judges working in practice; rather, they will not become aware of it at any time. A legal thought leader on the subject matter in question here should therefore be interested in and sensitive to current events in practice and have the ability to place his publication in the right place.

In addition, an objective approach to a topic is required in order to develop an opinion that does not necessarily follow and agree or disagree with what has been said so far. Rather, an opinion that is to gain recognition in the community must contain new aspects.

At the beginning it was mentioned that the judge is responsible for the further development of the law. To a certain extent, this can be agreed with, since both practice and university science are guided by judicial decisions with regard to their decision-making. Prof. Jahn's tactic of publishing his publications as commentaries following a judicial decision is therefore not insignificant in terms of recognition.

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<sup>41</sup> Wolf-Tassilo Böhm, *Strafrechtliche Verwertbarkeit der Auskünfte von Arbeitnehmern bei unternehmensinternen Untersuchungen*, WM 1923 (2009); Matthias Dann & Kerstin Schmidt, *Im Würgegriff der SEC? – Mitarbeiterbefragungen und die Selbstbelastungsfreiheit*, NJW 1851 (2009); Ulrich Wastl, Philippe Litzka & Martin Pusch, *SEC-Ermittlungen in Deutschland – eine Umgehung rechtsstaatlicher Mindeststandards!*, NSTz 68 (2009); Thomas Knierim, *Das Verhältnis von strafrechtlichen und internen Ermittlungen*, StV 324, 328 (2009); Hans-Joachim Gerst, *Unternehmensinteresse und Beschuldigtenrechte bei Internal Investigations – Problemskizze und praktische Lösungswege* –, CCZ 1 (2012); Frank P. Schuster, *Anmerkung zu LG Mannheim: Beurteilung der Beschlagnahmefreiheit von Unterlagen im Gewahrsam eines Zeugen vorrangig nach § 97 Abs. 2 StPO*, NZWiSt 424 (2012); Imme Roxin, *Probleme und Strategien der Compliance-Beratung in Unternehmen*, StV 116 (2012); Wolfram Bauer, *Keine Beschlagnahmefreiheit für Unterlagen eines mit internen Ermittlungen beauftragten Rechtsanwalts*, StV 277 (2012); Oliver Milde, *LG Mannheim: Zur Beschlagnahmefähigkeit von Unterlagen im Gewahrsam eines Zeugen*, CCZ 78 (2013); Martina de Lind van Wijngaarden & Philipp Egler, *Der Beschlagnahmeschutz von Dokumenten aus unternehmensinternen Untersuchungen*, NJW 3549 (2013); Detlef Klengel & Christoph Buchert, *Zur Einstufung der Ergebnisse einer „Internal Investigation“ als Verteidigungsunterlagen im Sinne der §§ 97, 148 StPO*, NSTz 383 (2016); Peetr Kootek, *Unternehmensinterne Compliance-Ermittlungen*, wistra 9 (2017); Christian Graßie & Mayeul Hiéramente, *Durchsuchungen bei Anwälten – eine Zeitenwende?*, BB 2051 (2018); 1; Astrid Lillie-Hutz & Saleh R. Ihwas, *Ein Ausblick auf Internal Investigations nach den VW/Jones Day-Entscheidungen*, 349 (NZWiSt 2018).

<sup>42</sup> Matthias Jahn, *Ermittlungen in Sachen Siemens/SEC*, StV 41 (2009); Matthias Jahn, *Die verfassungskonforme Auslegung des § 97 Abs. 1 Nr. 3 StPO*, ZIS 453 (2011); Matthias Jahn & Stefan Kirsch, *LG Mannheim: Beurteilung der Beschlagnahmefreiheit von Unterlagen im Gewahrsam eines Zeugen*, NSTz 713 (2012); Matthias Jahn & Stefan Kirsch, *Kartellrechtliches Ermittlungsverfahren*, NZWiSt 21 (2013); Matthias Jahn & Stefan Kirsch, *LG Braunschweig: Beschlagnahmefreiheit von Unterlagen bei internen Erhebungen*, NZWiSt 37 (2016).

The person of an opinion or pacemaker and legal thought leader therefore needs, depending on the topic, both an objective approach, a flair and the possibility to become aware of current issues and the ability to place the publications in such a way that a perception by as many authors as possible can be achieved.

## V. CONCLUSION

The "legal thought leader" of the topic of internal investigations is professionally active both scientifically and thus researching, as well as in practice, legally. Most of the other publications are penned by lawyers and therefore practitioners, with the result that opinions are formed more in practice than in scientific research. In this context, however, it should be mentioned that this is a practice-oriented topic and therefore the shaping of the implementation in practice is the logical consequence. The closeness of the work to the case, the involvement in everyday life with its constantly changing circumstances and the time pressure of a decision-making process not only influence the content, but also the publication density and speed.

The publications in connection with the topic of internal investigations clearly show that –as with the general opinion-forming process- in particular the profession, the environment and the way of life have an influence on the frequency of publications, the selection of the place of publication and thus the formation of legal opinion. While the majority of publications on practice-oriented topics are written by practitioners, the majority of opinions on general legal doctrine are penned by members of the academic community. The latter, in turn, do not come into contact with the current problems of practice, so that they cannot develop a feeling for such topics before others have seen them.

The characteristics of a person of opinion maker, a legal thought leader, are therefore also dependent on the subject matter with respect to which an opinion is to be formed. Therefore, the subjective inheres in legal opinions usually in the profession exercised by the person of the author.

Therefore, the person of the legal thought leader cannot be determined in general for the subject of "law", but depends on the nature of the subject and the professional branch of those who deal with it. The legal thought lives from the common cooperation of the persons working both in practice and in the university science and their experience.

## WHISTLEBLOWING - QUO VADIS?

Christoph Kläs

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### ABSTRACT

*Already on 16 December 2019, the EU 'Whistleblowing Directive' (Directive (EU) 2019/1937 of 23 October 2019<sup>1</sup>) came into force. It has not yet been implemented in Germany. Nevertheless, what will change for companies and is there a concrete need for action?*

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<sup>1</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L1937> last visited 07.09.2021.

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## I. SITUATION IN GERMANY

The governing parties have not yet been able to reach an agreement on the implementation of the Whistleblowing Directive into German law. The deadline in this regard is 17 December 2021, but whether a respective law will come into being by then is of course doubtful in view of the approaching federal elections.

This development could give companies cause to lull themselves into a sense of security for the time being. This would be a mistake.

Even if a federal regulation may take some time, companies should be aware that it will come and that the Whistleblowing Directive itself already has a **direct impact on the requirements for internal corporate compliance management** as of now.

Should the implementation not take place by December, Germany will be threatened with infringement proceedings. Even if Germany is not always a paragon in the timely and correct implementation of the regulations from Brussels, it is probably not likely that the German government will allow the situation to escalate into an open conflict with the European Union on this issue. The dispute over the draft law revolves primarily around the details of national implementation; there is probably no fundamental rejection of the EU requirements by the majority.

## II. UNITED NATIONS CONVENTION AGAINST CORRUPTION

Moreover, there is great international pressure to provide effective protection for whistleblowers. For example, Germany ratified the United Nations Convention against Corruption<sup>2</sup> in 2014<sup>3</sup> and thus committed to at least examining whistleblower protection measures. An evaluation report by the OECD Working Group on Bribery also recommends that Germany finally introduces a national whistleblower law. Most recently, the heads of state and government of the G20 countries in Osaka in 2019 also spoke out in favor of comprehensive protection for whistleblowers.

**Against this background, I assume with a probability bordering on certainty that the Whistleblowing Directive will be implemented in Germany in the next legislative period at the latest.** It is not unlikely that the scope of application will not be limited to reports of violations of EU law, but will also include violations of German law (especially criminal law violations and administrative offences). This was also the intention of the previous draft law.

Regardless of the date of transposition into German law, the effects of the Whistleblowing Directive itself must already be taken into account today.

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<sup>2</sup> [https://www.unodc.org/pdf/crime/convention\\_corruption/signing/Convention-e.pdf](https://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf) last visited 07.09.2021.

<sup>3</sup> [https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger\\_BGBl&jumpTo=bgbl214s0762.pdf#\\_bgbl\\_%2F%2F\\*%5B%40attr\\_id%3D%27bgbl214s0762.pdf%27%5D\\_\\_1629726885149](https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&jumpTo=bgbl214s0762.pdf#_bgbl_%2F%2F*%5B%40attr_id%3D%27bgbl214s0762.pdf%27%5D__1629726885149) last visited 07.09.2021.

### III. WHAT IS THE SITUATION LIKE FOR WHISTLEBLOWERS?

Even and especially if the transposition should not take place on time, **it is possible under certain circumstances to directly invoke the EU Directive as an employee both in a public authority and in a company.** In the event of a dispute over the validity of a dismissal given to a whistleblower following a report, the whistleblower could invoke the protection rights in the EU Directive.

It should be borne in mind here that even a directive as an EU legal act with normally indirect effect (in the so-called two-stage legislative procedure) can exceptionally have direct effect in the case. This applies if there is a transposition deficit and the directive is *self-executing*, i.e. its regulatory content already follows directly from the text of the directive. German courts are bound by the *effet utile* principle to interpret national law in such a way that EU law is implemented as effectively as possible.

It can therefore be assumed that **the Whistleblowing Directive will also be used as a standard of interpretation and assessment** in corresponding court proceedings.

**The EU's assessment of whistleblower cases is now evident through the Directive and thus a political as well as legal reality. It should not be ignored.**

### IV. RISK FOR THE MANAGEMENT

In this context, the provision of § 130 OWiG becomes highly relevant - owners of a company also act irregularly and can be punished with heavy fines if they intentionally or negligently fail to take supervisory measures that are necessary to prevent violations of duties in the company that are incumbent on the owner and the violation of which is punishable. Which supervisory and precautionary measures should be taken or how the relevant internal company compliance management should be designed naturally depends on the individual case, i.e. in particular on the company structure and organization as well as the individual risk situation.

When deciding which compliance measures should be taken in a specific case in order to exclude the company owner's liability, the Whistleblowing Directive could certainly serve as a standard of assessment. In Art. 8, the Directive stipulates an obligation to set up internal reporting channels that enable the confidential communication of information on breaches of the rules. This requirement could be interpreted as a European minimum standard for a functioning compliance management system, regardless of its implementation in Germany. In many specially regulated sectors (e.g. the financial sector), the establishment of whistleblower channels is already state of the art today. I therefore recommend that all companies already make efforts to set up such an internal reporting office (possibly in cooperation with an external service provider) in order to prevent their compliance structure from being assessed as inadequate in possible court proceedings based on the Whistleblowing Directive as an EU standard.

### V. CONCLUSION

**The Whistleblowing Directive, irrespective of its transposition into German law, calls for action** and companies should not fail to set up a whistleblowing body as provided for in the Directive. I expect that the Whistleblowing Directive itself will have a direct influence on the assessment of internal compliance structures, at least as a standard of interpretation.

## GENDER-FAIR LANGUAGE IN THE CONTEXT OF CSR - HOW MUCH LANGUAGE RESPONSIBILITY DO ORGANIZATIONS HAVE?

Dr. Simone Burel and Franziska Saur

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## I. INTRODUCTION

The introduction and implementation of gender-fair language in organizations is a diversity measure and should be understood in the context of social justice and sustainability. Recently, this topic has received increasing attention, as a study conducted in 2021 by Darmstadt University of Applied Sciences in collaboration with Frankfurter Allgemeine Zeitung (FAZ) shows: 16 out of 30 DAX companies already gender or plan to introduce gender-fair language.<sup>1</sup> The only DAX company that has so far consistently changed its language to gender-fair wording is the VW subsidiary AUDI.

With the increasing focus on diversity and gender-fair language, the question of uniform guidelines and regulations that aid but also serve as sanctions is becoming more and more important: It is a question of (linguistic) compliance and the associated responsibilities. First, it must be clarified what is meant by the term *compliance*. This differs depending on the discipline. Often, the term *compliance* is used in the context of corruption or white-collar crime. It is about complying with legal requirements (corporate governance laws) or self-imposed guidelines such as the German Corporate Governance Code (*Deutscher Corporate Governance Kodex (DCGK)*). The 17 Sustainable Development Goals (SDGs) adopted by the UN as part of the 2030 Agenda could also be subsumed under this heading.<sup>2</sup>

We understand compliance as the fulfillment of ethical standards in entrepreneurial action. From a linguistic perspective, compliance is characterized by specific linguistic features of self-commitment that serve an obligation function. Compliance therefore combines ethical and moral elements with legal requirements and has a motivating character for employees in terms of tone of voice.<sup>3</sup> The selection of verbs in compliance guidelines clearly shows this; these include, for example, *versprechen*, *sich verpflichten* or *garantieren* (*promise, commit, guarantee*). In this way, compliance guidelines are also a direct expression of the corporate identity of an organization, as we will show in chapter II.A. Laws, rules, guidance, etc., like most of our social world, are linguistic in nature. Social, or societal, conditions are created by language, while at the same time language is shaped by existing societal conditions.<sup>4</sup> Language and mind also influence each other. Language is always in flux and subject to various influences, socio-cultural or legal frameworks, trends, and social developments.

In public discourse, the focus is all too often on the "right" or "wrong" use of language when addressing certain ways of speaking. The topic of gender-fair language in particular is highly controversial. Causes for discussion include the addition of female personal designations in DUDEN Online (for more on this, see chapter II.A), the advocacy or rejection of gender-fair language as an election campaign issue in

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<sup>1</sup> Gustav Theile, *Mehrheit der Dax-Konzerne setzt auf Gendersprache*, faz.net. 3,25 (2021). <https://www.faz.net/aktuell/wirtschaft/unternehmen/mehrheit-der-dax-konzerne-setzt-auf-gendersprache-17261408.html> (last access: 03.09.21) - In addition, our thanks go to the project leader of the Darmstadt University of Applied Sciences, Prof. Dr. Lars Rademacher, who kindly made the entire results of the study available to us.

<sup>2</sup> The SDGs provide a global point of reference for implementing measures for a sustainable society. 231 indicators are intended to make the fulfillment of the goals nationally measurable and internationally comparable. Goal 5 concerns gender equality: women and girls should be empowered worldwide. However, gender-fair language is not listed in the subgoals and indicators. The relevance of the institutional implementation of gender-fair language should not be underestimated. <https://sdg-indikatoren.de/5/> (last access: 02.09.21)

<sup>3</sup> For communicating compliance policies in practice, see: <https://www.compliance-manager.net/fachartikel/wie-ein-werte-basierter-verhaltenskodex-die-compliance-kultur-foerdert-1222417519> (last access: 07.09.21).

<sup>4</sup> Cf. Burel, Simone (2017): Vorständin und Allround-Papa: Geschlechterstereotype in der Online-Kommunikation in beruflichen Kontexten. In: *10plus1 Living Linguistics* 3: P. 121-139.

the 2021 federal election in Germany, the case of a female bank customer in the Saarland (Germany) who filed a lawsuit against the use of the so-called generic masculine<sup>5</sup> in forms, and the case of an employee of the car manufacturer AUDI who filed a lawsuit against the newly introduced gender strategy and the accompanying obligation to use gender-fair language.<sup>6</sup> The latter case shows: A pure top-down introduction of guidelines on gender-fair language causes resistance. The question arises: What does it take for language guidelines to be implemented and actually "lived" as part of CSR - namely as language responsibility?

The article answers these questions on the basis of a case study that we conducted: As part of a change process, the *Medienanstalt Rheinland-Pfalz* recognized that employees must also be involved in the process in order to ensure the sustainable anchoring of gender-fair language in the corporate culture – since they will be the ones actually using this language. For this reason, the *Medienanstalt Rheinland-Pfalz* had planned the introduction of a guideline for inclusive language. On the one hand, this guideline includes gender-fair language that is intended to address people of all genders; on the other hand, it includes criteria for low-barrier language, which also has an inclusive character due to its easy comprehensibility.

The aim of this article is to sharpen the view on interactions between linguistic guidelines (top-down) and participatory feedback culture (bottom-up) in the paradigm of genderlinguistic language awareness and responsibility. In the following sections, therefore, we first provide a theoretical classification in the context of gender linguistics and corporate communication as well as related legal issues, then we present the case, and finally we address questions regarding the transferability of the case.

## II. THEORETICAL BACKGROUND

### A. Gender Linguistics and Corporate Communication

At the moment, the use of gender-fair language in companies is mainly a matter of reputation and strategically addressing certain target groups, e.g. women, LGBTQIA\*, or younger people, who value diversity aspects of organizations in communication.<sup>7</sup> Accordingly, it is to be located in the context of organizational identity (*corporate identity*).

Corporate identity refers to “the strategically planned and operationally deployed self-presentation and behavior of a company internally and externally on the basis of a defined corporate philosophy, a long-

<sup>5</sup> The so-called generic masculinum „bezeichnet den Sprachgebrauch, dass männliche Bezeichnungen für alle Personen ‚gelten‘, d. h. dass z. B. *Schüler* eine neutrale Bezeichnung für Schüler\*innen jeglichen Geschlechts sei [...]. Dabei ist es nicht so, dass dieses sogenannte generische oder geschlechtsübergreifende Maskulinum schon immer die Standardverwendung war.“ (Müller-Spitzer, Carolin (2021): Geschlechtergerechte Sprache: Zumutung, Herausforderung, Notwendigkeit? In: Sprachreport 37(2), S. 1-12. S. 1.)

<sup>6</sup> The lawsuit filed by *Sparkasse* customer Marlies Krämer is discussed in more detail in section 2.2. Background information on the Audi employee's lawsuit are to be found here: <https://www.tagesschau.de/wirtschaft/unternehmen/audi-gender-klage-101.html> (last accessed: 06.09.2021)

<sup>7</sup> According to a representative survey conducted by the career portal *Stepstone 2020* together with *Handelsblatt*, 77% of respondents are more likely to apply to a company that stands for diversity, tolerance and openness. More than 60% of participants said they currently do not see equal opportunities in decisions about job appointments. *Stepstone und Handelsblatt Media Group Diversity Studie (2020), Wie vielfältig die Arbeitswelt wirklich ist*, <https://www.stepstone.de/wissen/diversity/> (last access: 07.09.2021)

term corporate objective and a defined (target) image - with the intention of presenting all the company's instruments of action internally and externally in a uniform framework."<sup>8</sup>

Here, a line can be drawn to the area of compliance. The genres of texts in which organizations define their corporate identity and thus (among other things) their values, form the basis for ethical guidelines and compliance regulations. These include, for example, the text types *vision*, *mission statement*, *corporate history* and *corporate philosophy*. Compliance is therefore first and foremost communication. A linguistic study of these text genres makes this clear: In 2015, almost half of the DAX 30 companies ascribed to themselves the values *integrity* and *responsibility*, as can be seen from text genres that constitute a company's corporate identity (e.g., mission statement, vision, mission).<sup>9</sup> By now, many companies also explicitly mention the terms *diversity* and *inclusion*.<sup>10</sup> This also includes the use of gender-fair language. Using gender-equitable language "should be understood as "implementing the principle of gender-fair language in one's own language production in a way that is appropriate to the situation, appropriate to the subject matter, i.e. correct in terms of content, understandable and appealing".<sup>11</sup>

If an organization decides to introduce gender-fair language, this also directly affects corporate identity, in several ways: on the one hand, the value of gender equality is established as a value of the organization; on the other hand, the entire corporate communication has the task of using gender-fair language consistently.

The aim of gender-fair language is to try to overcome old and familiar, but social disproportions, through linguistic patterns and thus also to influence people's mind. As Horvath/Sczesny explain: "languages differ in the linguistic forms they provide to refer to women and men. In languages with grammatical gender [e.g. German] most human nouns and pronouns are gender-marked and are differentiated for feminine and masculine. In English, on the other hand, which is a natural-gender language, most human nouns are gender-neutral and gender marking is largely restricted to pronouns (*he/she*). [...] In both types of languages, however, masculine-male forms (nouns and pronouns) are used as generics which means that they are used as forms referring to *both* women and men. [...] Past research on the interpretation of masculine generics in comparison to gender-fair forms has consistently demonstrated that the masculine forms are associated with a male bias in mental representations."<sup>12</sup>

<sup>8</sup> Translation by SB/FS. Original wording: „die strategisch geplante und operativ eingesetzte Selbstdarstellung und Verhaltensweise eines Unternehmens nach innen und außen auf Basis einer festgelegten Unternehmensphilosophie, einer langfristigen Unternehmenszielsetzung und eines definierten (Soll-)Images – mit dem Willen, alle Handlungsinstrumente des Unternehmens in einheitlichem Rahmen nach innen und außen zur Darstellung zu bringen“ Birkigt, Klaus; Stadler, Marinus M. und Hans Joachim Funk (Hrsg.) (2002): *Corporate Identity. Grundlagen – Funktionen – Fallbeispiele*. 11., überarbeitete und aktualisierte Auflage. München: moderne industrie.

<sup>9</sup> Cf. Burel, Simone (2015): *Identitätspositionierungen der DAX-30-Unternehmen: Die sprachliche Konstruktion von Selbstbildern in Repräsentationstexten*. Berlin/Boston: De Gruyter.

<sup>10</sup> For example, the DAX-30 company Merck: *Diversity and Inclusion*, <https://www.merckgroup.com/en/careers/diversity-and-inclusion.html> (last access: 02.09.21)

<sup>11</sup> Translation by SB/FS. Original wording: verwenden „sei zu verstehen als „situationsangemessen, sachangemessen, d.h. inhaltlich korrekt, verständlich und ansprechend den Grundsatz der geschlechtergerechten Sprache in der eigenen Sprachproduktion umsetzen“. Dieward, Gabriele und Anja Steinhauer (2020): *Handbuch geschlechtergerechte Sprache: Wie Sie angemessen und verständlich gendern*. Berlin: Dudenverlag. P. 13.

<sup>12</sup> Horvath, Lisa Kristina and Sabine Sczesny (2016): Reducing women's lack of fit with leadership positions? Effects of the wording of job advertisements. *European Journal of Work and Organizational Psychology*, 25. P. 316-328.

The connection between language and social conditions has already been postulated in the introduction. A look at the history of language and language change shows that social developments are also driven by changes in language use. This is because languages adapt flexibly to the ever-changing needs of society for communication.<sup>13</sup> A "living language develops essentially through acts of speaking and writing by those participating in the language."<sup>14</sup> However, language change has always also generated fear and criticism. Often, the groups that judge "right" or "wrong" language use have little experience with discrimination or linguistic interactions. For such a change, it is therefore indispensable to raise awareness and understanding. This is the prerequisite for acceptance of the (linguistic) change.<sup>15</sup> The management of an organization therefore has a high level of responsibility for language, because it must personally stand for and behind the change. Language awareness must be created among all employees so that they accept the change process positively and do not block it. Therefore, a form of accompanying meta-communication that supports this understanding is recommended as change communication in any case. In order to "meet the demands of employees, successful change communication creates dialog situations, thereby shaping relationships between management and employees and ideally leading to the optimization of communication activities."<sup>16</sup>

An organization's specific choice of words in change communication is not incidental: it helps shape the attitudes of organizational members and the construction of (organizational) realities. It also has an influence on much more, e.g., on the social impact of gender-fair language; this has been proven by numerous studies from psychology and linguistics.

For example, women are more likely to feel addressed in the text genre *job advertisement* when both forms, gender asterisk or neutral wording are used than by the generic masculine or a reference in brackets (e.g. *m/w/d*).<sup>17</sup> Girls are more likely to feel confident about taking a stereotypically male job if the female job title (*Ingenieurin*) is mentioned in addition to the male job title (*Ingenieur*).<sup>18</sup>

However, many organizations still prefer to use the masculine form in texts that require precise and legally compliant wording for fear of waves of lawsuits or poorer Google ranking in SEO. The DUDEN has made just 2021 an advance and in its on-line dictionary all 12,000 person designations also in female form taken up (*Lehrer/Lehrerin*). It was criticized for it among other things by the conservative *Verein Deutsche Sprache e. V.* (VDS – German Language Association), which stated in a press release:

"The Verein Deutsche Sprache e. V. calls on all friends of the German language to oppose the current efforts of the Duden editorial team to reorganize the German language. For example, the Duden's website abolishes the generic masculine, which is firmly anchored in German grammar and modern usage: 'Tenant: Noun, masculine - male person who has rented something.' Accordingly, women could

<sup>13</sup> Cf. Keller, Rudi (2014): *Sprachwandel. Von der unsichtbaren Hand in der Sprache*. Tübingen: Francke.

<sup>14</sup> Translation by SB/FS. Original wording: „lebendige Sprache entwickelt sich im Wesentlichen durch Sprech- und Schreibhandlungen der an der Sprache Teilnehmenden.“ Müller-Spitzer 2021: P. 3.

<sup>15</sup> Cf. Wagner, Eike und Stefanie Guse (2015): Herausforderungen und Erfolgsfaktoren von Change-Kommunikation. In: Hundt, Markus und Dorota Biadala (Hrsg.): *Handbuch Sprache in der Wirtschaft*. Berlin/Boston: De Gruyter. P. 177-199.

<sup>16</sup> Translation by SB/FS. Original wording: „Ansprüchen [der Mitarbeiter:innen] gerecht zu werden, schafft erfolgreiche Veränderungskommunikation Dialogsituationen, gestaltet dadurch Beziehungen zwischen Führung und Mitarbeiterschaft und führt im Idealfall zur Optimierung der Kommunikationsaktivitäten.“ Ibid. P. 194.

<sup>17</sup> Cf. Horvath and Sczesny 2016.

<sup>18</sup> Dr. Anne Klostermann, *Geschlechtergerechte Sprache beeinflusst kindliche Wahrnehmung von Berufen*, idw-online, 6,9 (2015). <https://idw-online.de/de/news632492> (last access: 06.09.21)

not be tenants. In doing so, the Duden not only contradicts the rules of German grammar, but also the Federal Court of Justice, which in March 2018 held in the last instance that the term 'the customer' addressed people of any gender. The complaint of the plaintiff, who wanted to be addressed as 'customer' by her savings bank, was recently rejected by the Federal Constitutional Court.<sup>19</sup>

This criticism must be countered by the fact that the Duden is not prescriptive, i.e. it does not prescribe, but descriptive, i.e. it describes the current use of language in society. That is, it does not prescribe how to speak, but includes words in its inventory that are used frequently enough in society. With formulations such as firmly anchored or last-instance, the association quoted above indicates a rejection of social and linguistic change processes, which, however, can no longer be dismissed in 2021. For a closer examination of the so-called generic masculine, we refer to a recent article by Carolin Müller-Spitzer, who shows linguistically and historically that the use of the generic masculine in German is not as old as commonly assumed.<sup>20</sup> The case of a plaintiff savings bank customer mentioned in the association's press release will be discussed in the following chapter, which deals with the question of gender-fair language in legal contexts.

## B. Gender-fair Language in the Context of Gender Justice and Law

What is the legal situation with regard to gender-fair language? In Germany, only public authorities and schools - but not companies - are obliged to adhere to the rules of the Council for German Orthography when it comes to spelling. The Council has not (yet) committed itself to gender-fair spelling in 2021. Nevertheless, numerous universities and municipalities have already published their own guidelines for the handling and use of gender-fair language.<sup>21</sup> A look at other European countries shows a mixed picture: In France, gender-equal language has been banned in schools nationwide by the ministry; in Sweden, on the other hand, the gender-neutral personal pronoun "hen" has been officially introduced.<sup>22</sup>

What does it look like in German law? There are two different levels to consider here: First, whether there are laws that regulate, provide for, or reject the use of gender-fair language. Second, whether legal texts themselves are written in a gender-fair way. German legal texts still predominantly use purely masculine terms to refer to employers, managing directors or shareholders. The *Straßenverkehrsordnung* (Road Traffic Act), however, has already been worded in a largely gender-neutral way since 2013 (e.g. *An Fußgängerüberwegen haben Fahrzeuge mit Ausnahme von Schienenfahrzeugen den zu Fuß Gehenden sowie Fahrenden von Krankenfahrstühlen oder Rollstühlen, welche den Überweg erkennbar benutzen wollen, das Überqueren der Fahrbahn zu ermöglichen*). Single words, such

<sup>19</sup> Translation by SB/FS. Original wording: „Der Verein Deutsche Sprache e. V. fordert alle Freunde der deutschen Sprache auf, den aktuellen Bestrebungen der Dudenredaktion zu einem Umbau der deutschen Sprache entgegenzutreten. So wird auf den Internetseiten des Duden das in der deutschen Grammatik und im modernen Sprachgebrauch fest verankerte generische Maskulinum abgeschafft: ‚Mieter: Substantiv, maskulin – männliche Person, die etwas gemietet hat.‘ Frauen könnten demnach keine Mieter sein. Damit widerspricht der Duden nicht nur den Regeln der deutschen Grammatik, sondern auch dem Bundesgerichtshof, der im März 2018 letztinstanzlich festgehalten hat, dass mit der Bezeichnung ‚der Kunde‘ Menschen jeglichen Geschlechts angesprochen seien. Die Beschwerde der Klägerin, die von ihrer Sparkasse mit ‚Kundin‘ angeredet werden wollte, wurde kürzlich vom Bundesverfassungsgericht abgewiesen.“ Aufruf des Vereins Deutsche Sprache, *Rettet die deutsche Sprache vor dem Duden*, vds-ev. <https://vds-ev.de/allgemein/aufrufe/rettet-die-deutsche-sprache-vor-dem-duden/> (last access: 06.09.2021)

<sup>20</sup> Cf. Müller-Spitzer 2021.

<sup>21</sup> For example, the University of Leipzig as well as the German cities *Hannover, Kiel, Lübeck* and *Köln*.

<sup>22</sup> Cf. Laarz, Diana (2021): *Wie gerecht ist Sprache?* In: *Geo* 09/2021. P. 30-38.

as *Fußgängerüberweg*, are still used in the masculine form).<sup>23</sup>

Equal treatment of the sexes is laid down, among other things, in the principle of equality and the prohibitions of discrimination in Article 3 of the Basic Law. Companies or the private sector are bound by the AGG. According to §§ 1, 3 AGG, discrimination on the grounds of gender is prohibited in private business transactions.

As already mentioned, the *Bundesgerichtshof* (*BGH*) dismissed the action of a customer of the defendant savings bank, from whom she demanded the use of forms with female personal designations (e.g., *Kontoinhaberin* (female account holder) instead of *Kontoinhaber* (account holder in the masculine form)). The *BGH* based this decision primarily on the argument that the generic masculine continues to be part of general linguistic usage - even the *Grundgesetz* still uses the generic masculine - and therefore the use of personal designations in the sense of the generic masculine alone does not constitute discrimination within the meaning of the AGG.<sup>24</sup> In the same judgment, however, the *BGH* also concedes that grammatically masculine personal designations, which refer to any natural gender<sup>25</sup>, are criticized as disadvantageous against the background of the question of the discrimination of women by the language system as well as language use, which has been discussed since the 70s of the last century, and are partly no longer perceived as generalizing as naturally as may have been the case in the past.<sup>26</sup>

The *Bundesverfassungsgericht* (*BVerfG*) ultimately did not accept for decision a constitutional complaint by the savings bank customer against the above ruling of the *BGH* because the complainant had not addressed the argument put forward by the *BGH* that the *Grundgesetz* itself uses the generic masculine.<sup>27</sup>

The legal situation is therefore not yet uniform or no one wants to adopt a clear regulation. However, a look at and beyond the law is certainly worthwhile: According to a survey by the Federal Anti-Discrimination Agency (*Antidiskriminierungsstelle des Bundes*), only 2.2 percent of the job advertisements evaluated there contain clear discrimination in the sense of the AGG (over 80 percent of these 2.2 on the basis of gender!) - but more than 20 percent of the job advertisements examined hold a risk of discrimination in that certain groups of people (e.g. men or younger people) are addressed to a particular extent and are thus favored over others.<sup>28</sup>

In order to discuss the topic and corresponding implications more vividly, we have chosen as an example the change process we accompanied at the Medienanstalt Rheinland-Pfalz, in which gender-fair language was implemented in a participatory manner as part of a larger, albeit not legally mandatory, language responsibility. In the following, we describe the (linguistic) steps of the implementation by means of workshops and language guidelines.

<sup>23</sup> Ingo Pickel, *Straßenverkehrsordnung jetzt auch für Frauen*, in *dw* made for minds, 5,17 (2013) <https://www.dw.com/de/stra%C3%9Fverkehrsordnung-jetzt-auch-f%C3%BCr-frauen/a-16821106> (last access: 06.09.21)

<sup>24</sup> *BGH*, Urteil vom 13. März 2018 - VI ZR 143/17 - NJW 2018, 1671 (1675 Rn. 38).

<sup>25</sup> For a critical discussion of the use of masculine personal terms in a "generic" sense, see Müller-Spitzer 2021.

<sup>26</sup> *BGH*, Urteil vom 13. März 2018 - VI ZR 143/17 - NJW 2018, 1671 (1675 Rn. 37).

<sup>27</sup> *BVerfG*, Beschluss vom 26. Mai 2020 - 1 BvR 1074/18 - BeckRS 2020, 13963 Rn. 5.

<sup>28</sup> Cf. Antidiskriminierungsstelle des Bundes (2018): Diskriminierung in Stellenanzeigen. Studie zur Auswertung von Stellenanzeigen im Hinblick auf Diskriminierung, Ausschlussmechanismen und positive Maßnahmen.

### III. CASE

#### A. Status Quo

The Medienanstalt Rheinland-Pfalz was founded in 1987 as *Landesmedienanstalt*. At the end of 2020, the state parliament amended the state media law, and since then it has officially been called *Medienanstalt Rheinland-Pfalz*. Last year (2020-2021), the Medienanstalt Rheinland-Pfalz also restructured itself organizationally, initiated by the director Dr. Marc Jan Eumann, who has been in office since 2018. The *Medienanstalt* consists of four teams, which handle the core work areas of *Medienregulierung* (media regulation), *Medienförderung* (media support), *Medienkompetenz* (media competence) and *Bürgermedien* (citizen media). *Zentrale Dienste* (central services) and *Kommunikation* (communications) are organized into two *Stabsstellen* (staff units). Another central body is the *Versammlung* (Assembly) of the *Medienanstalt Rheinland-Pfalz*, which consists of 42 delegates from various organizations and associations and thus forms an independent decision-making body. The *Medienanstalt Rheinland-Pfalz* cooperates with 13 other state media authorities (*Landesmedienanstalt*). Their joint activities are bundled in the *Geschäftsstelle der Medienanstalten* (Media Authorities' office) in Berlin. The *Landesmedienanstalten* are financed by the monthly license fee (*Rundfunkbeitrag*), which every household in Germany has to pay. Around 1.9% of the monthly *Rundfunkbeitrag* is earmarked for financing the *Landesmedienanstalten*. This corresponds to 33 cents per household (as of 2021). The *Medienanstalt Rheinland-Pfalz* works on behalf of the approximately 4 million inhabitants of the federal state of *Rheinland-Pfalz*.

#### B. The Importance of Language in Change Processes

The director of the *Medienanstalt Rheinland-Pfalz*, who has been in office since 2018, initiated a change process that went beyond the mere restructuring of organizational units. In line with a modern self-image of an authority as a service provider, the *Medienanstalt Rheinland-Pfalz* also developed a new self-image around the claim "enabling participation," as Figure 1 shows.



Figure 1: "Wie wir arbeiten" - Self-conception of the Medienanstalt Rheinland-Pfalz on its Website

"How we work: Our work is multifaceted. We strengthen and support, we qualify and protect. We are open and objective, competent and reliable. We base our work on what we can do for you. For your

participation in the media, for an open and diverse media society that offers opportunities for everyone."<sup>29</sup>

Among other things, this is in the context of public discussions on the topics of service society, but also gender-fair language, diversity and inclusion, which are becoming increasingly relevant to business, as already outlined in the previous sections. Therefore, following the restructuring of its organization, the *Medienanstalt Rheinland-Pfalz* has taken further steps in the change process.

#### **Steps of the change process:**

1. Restructuring of the organizational chart
2. Analysis of target groups and derived development of brand core by storytelling method<sup>30</sup>
3. Implementation of the brand core in design
4. Implementation of the brand core in language: image texts of the teams as well as language guidelines (implementation of barrier-free, gender-appropriate, inclusive language)
5. Launch of the texts
6. Quality management
7. Evaluation (after one year)

Why is language such a neuralgic point here? Language is a central component of change processes and fulfills a dual function. On the one hand, it is a medium for conveying the brand core and thus enables the externalization of the organizational attitude and identity. On the other hand, it is firmly anchored in the brand core and thus helps shape the organizational form. Through the targeted use of language, an organization can precisely direct its orientation and communication.

In the case of the *Medienanstalt*, a particular concern was to integrate the topics of gender-fair language and accessibility in order to do justice to its own brand core in terms of language and design. Both topics include linguistic aspects that ensure that all people feel addressed and that participation is made possible (see step 4 in the change process). In this way, responsibility for people and addressing them also become clear as linguistic responsibility. This is where the linguistic expertise of LUB came into play.

First, LUB analyzed the language of the brand core. In joint workshops, awareness was created at *Medienanstalt Rheinland-Pfalz* for a linguistic self-image as well as the topic of gender-fair language, and criteria for barrier-free language were also presented. This was followed by the texting of profile texts for the individual teams, in which they defined their respective identities.

A corporate identity or an organization's self-conception is traditionally set out in an image brochure.<sup>31</sup> In the spirit of the inclusive idea, the *Medienanstalt* wanted all employees to participate in the textual

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<sup>29</sup> Medienanstalt Rheinland-Pfalz, *Wie wir arbeiten*, Über uns, <https://medienanstalt-rlp.de/ueber-uns/wie-wir-arbeiten> (letzter Zugriff: 02.09.21)

<sup>30</sup> In its brand core, an organization records its corporate identity linguistically. The different types of words correspond to different aspects of identity: nouns (Verantwortung, Chancengleichheit; responsibility, equal opportunities) indicate the values the organization ascribes to itself; verbs define its actions (fördern, qualifizieren; support, qualify, as in the case of the Medienanstalt); adjectives define the way in which the organization sees itself and its actions (dynamisch; seriös; unkonventionell; dynamic, respectable, unconventional). The storytelling method is particularly well suited for developing a brand core. For example, target groups are asked how they see the organization, and the employees can compare these answers with their self-image.

<sup>31</sup> Cf. Burel 2015.

development process. Together with LUB, team representatives of *Medienanstalt Rheinland-Pfalz* were therefore empowered to develop the introduction and the team ideas in the new image brochure along the brand core and to lay the foundations for a general language guide. The description of the teams, their expectations and tasks were a central intermediate step in helping the teams to identify themselves linguistically.

The following excerpt (Figure 2), which can now be found on the website of the *Medienanstalt Rheinland-Pfalz*, is intended to illustrate how a corporate identity is constituted through text and how brand core (content level) and linguistic categories (expression level) go hand in hand in the process.

**Mediale Teilhabe für alle Menschen in Rheinland-Pfalz ist unser Ziel. Mit unseren Schwerpunkten Bürgermedien, Medienkompetenz, Medienförderung und Medienregulierung wollen wir alle Bürger\*innen stärken, qualifizieren, unterstützen und schützen. So sichern wir Medien- und Meinungsvielfalt.**

Figure 2: The brand core of the Medienanstalt Rheinland-Pfalz

"Our goal is media participation for all people in *Rheinland-Pfalz*. With our focus on *Bürgermedien*, *Medienkompetenz*, *Medienförderung* and *Medienregulierung*, we want to empower, qualify, support and protect all citizens. That's how we secure diversity of media and opinion."<sup>32</sup>

The brand core of the *Medienanstalt Rheinland-Pfalz* is represented in this self-description on several linguistic levels. It is made explicit literally by using the words defined in the brand core (*Mediale Teilhabe*, *qualifizieren*, *stark machen*, *unterstützen*, and *schützen*). The clear, simple sentence structure and limited sentence length ensure easy comprehension. Gendering with gender star (*Bürger\*innen*) addresses all people. This is called form-content correlation in linguistics: The outer form of the text supports the content. Furthermore, the corporate identity is built up by the vision of the organization (*Our goal is media participation*) taking into account the target group (*all people in Rheinland-Pfalz*) as well as the self-designations of the teams (e.g. *Medienkompetenz*, *Medienregulierung*).

Ultimately, consistency is central to a linguistically effective corporate identity. A language guide is therefore the tool of choice for creating a uniform image at all linguistic touchpoints of the organization in the future, in which the corporate identity is clearly recognizable.

LUB supported the *Medienanstalt* - this was the third of the above steps - in the concrete implementation of the criteria selected for the *Medienanstalt* in a language guide. Concrete language examples from the *Medienanstalt Rheinland-Pfalz* were also integrated. While categories such as the explanation of foreign words and an adapted sentence length, facilitate the comprehensibility of the *Medienanstalt* texts, the non-binary variant of gender in combination with the symbolic power of the gender star<sup>33</sup> appeals to all people.

<sup>32</sup> Medienanstalt Rheinland-Pfalz, <https://medienanstalt-rlp.de/> (last access: 30.09.21)

<sup>33</sup> The use of the gender star originated in the LGBTQIA\* community. The rays of the star, pointing in all directions, symbolize openness to a wide variety of human identities and orientations.

The language guide was developed in three processual steps: language analysis, texting & prototyping, and implementation in everyday life. These are illustrated and explained in Figure 3.

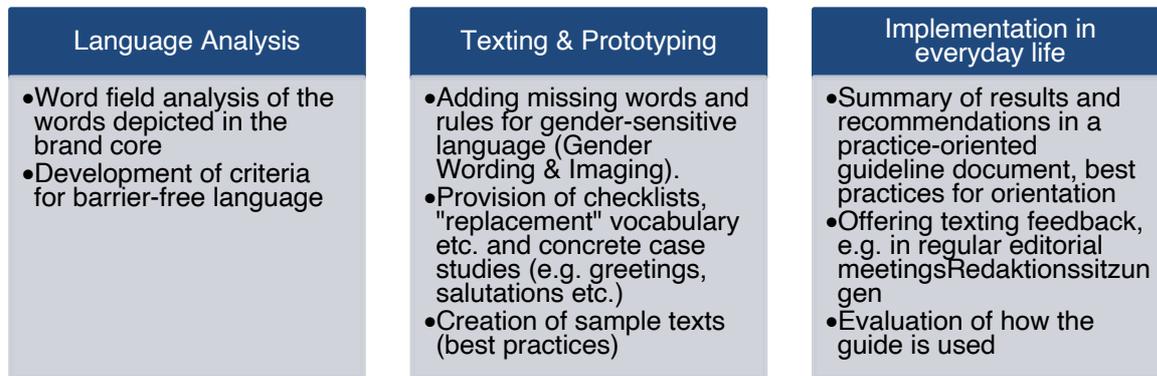


Figure 3: Developing a Language Guide in 3 Steps

The language guide (see Figure 4) has been structured by LUB according to the classical levels of language structure that need to be considered in writing and speaking - from the small to the large: Individual chapters cover the levels of spelling, word choice, and sentence structure. In addition, there are sections on gendering, media comprehensibility, images, and agents.

The language guide also contains a chapter with text templates and best practices, as well as a reference section with a glossary of certain definitions and a printout of the organization's brand core. In addition, the language guide has an introduction in which the management level and the equal opportunity officer explain the relevance of the topic.

Leitfaden Sprache Medienanstalt RLP

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Figure 4: Language Guide of the Medienanstalt Rheinland-Pfalz - Table of Contents

Throughout the entire process, the various opinions and positions in the workshops were successfully aligned to a common base. The workshop participants, as "delegates" of their respective teams, then carried this line into their teams. This is how it is ensured that the employees of *Medienanstalt Rheinland-Pfalz* identify with the new language of their brand core and can draw on the language guide as a compass for orientation. Gender-fair language thus becomes part of their rules and regulations

(compliance).

#### IV. CONCLUSION

The case presented has shown: Any organization that seriously addresses the issue of compliance also has a linguistic responsibility. Even if not yet regulated by law, it must find a response to deal with the topic of gender-fair language & identity. The social pressure from inside and outside is growing with regard to a uniform attitude and implementation. In the first step, this means above all to be clear about who should be reached with one's own language and where (type of medium, internal or external). After that, the organization should make a clear decision on how this will be implemented in a uniform way in terms of language (form of gender-fair language), whereby a participatory approach through workshops (as shown) guarantees a higher level of acceptance. In most cases, a favored gender variant is already present in the organization, but has not yet been explicitly standardized in terms of language. Linguistic guidelines that explain and summarize decisions for/against etc. in a way that is understandable for everyone also ensure better implementation in everyday life, since employees need constant support and there are many cases of doubt, be it in communication, personnel, technical documentation, etc.

The support of management and the top management level is central to all project steps, i.e., a change project in the area of gender-fair language cannot only be suspended in the areas of personnel or communication. After all, the decision for or against a certain language choice is part of corporate and thus social responsibility. It has measurable effects for organizations, including employee satisfaction, and image effects on an entire society, as could also be shown by means of the judgments.

## BOOK PRESENTATION: STRAFPROZESSUALE SCHRANKEN UND HÜRDEN IN DER KRIMINALITÄTSBEKÄMPFUNG UND -PRÄVENTION

– UNTERSUCHT AM BEISPIEL DER BEKÄMPFUNG DER TERRORISMUSFINANZIERUNG IN DEUTSCHLAND, LIECHTENSTEIN, ÖSTERREICH UND DER SCHWEIZ –

Peter Lang Verlag/1. Edition 2020

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## PRESENTED BOOK

*The book critically assesses criminal procedural obstacles to the effective combat and prevention of crime, particularly in the area of terrorist financing. For this purpose, a comparison between Germany, Liechtenstein, Austria, and Switzerland is drawn. Whereas previous works have mainly focused on measures and organizations against terrorist financing, the book closes a literature gap by analyzing concrete methods that terrorist financiers use to fly under the radar of law enforcement and intelligence agencies. Based on a qualitative study involving 15 alleged providers of illegal financial services and 15 compliance experts, the book makes suggestions for legislative changes aimed at improving the current counter the financing of terrorism regime.*

Although the Islamic State has lost most of its strongholds in Syria and the surrounding areas, terrorism continues to threaten public safety. Not only has the Islamic State's struggle for power caused death and destruction, it has also led to the displacement of millions of people. On top of that, central Europe has notoriously been a popular target of terrorist attacks in recent years, which have caused significant damage and compromised the daily lives of many. Of course, the Islamic State is only one of many terrorist organizations threatening society. Therefore, the combat of terrorism continues to be a major priority for law enforcement and intelligence agencies in the European Union and elsewhere. Apart from measures such as traditional warfare, one popular approach to the combat of terrorism consists of counter the financing of terrorism (CFT) measures; the underlying assumption being that terrorists require significant financial means to carry out attacks and uphold their structures.<sup>1</sup> Considering these aspects, the reviewed work explores and analyzes groundbreaking themes which have a potential to significantly improve current CFT regimes.

Attorney-at-law Dr. Dr. Fabian Teichmann, LL.M. is one of the leading European compliance experts when it comes to matters of corruption, money laundering, and terrorist financing who regularly teaches at various universities. Like his previous works, his novel research on CFT measures does not disappoint.

The composition of the work complements its inductive approach. The chapters of the book are allocated in a reasonable and clear order, which induces a natural flow. Initially, the author provides a comprehensive literature review that expertly discusses the state of research regarding all relevant topics, namely terrorism itself, terrorist financing as well as criminal procedural measures Germany, Liechtenstein, Austria, and Switzerland currently employ in the fight against terrorist financing. Comparing these German-speaking countries seems reasonable due to several factors. First, they are connected through their common language and proximity to one another. The countries maintain close trading relationships. In addition, Liechtenstein and Switzerland, and Germany and Austria share the same currency, respectively, which facilitates the transfer of funds between them. Interestingly, the Austrian criminal code served as a blueprint for the Liechtenstein legislation. Moreover, the literature review provides an overview of the relevant literature on sources of income and transfer methods terrorist financiers employ as well as organizations and measures focusing on the combat of terrorist financing.

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<sup>1</sup> Fabian Teichmann: *Strafprozessuale Schranken und Hürden in der Kriminalitätsbekämpfung und -Prävention – Untersucht am Beispiel der Bekämpfung der Terrorismusfinanzierung in Deutschland, Liechtenstein, Österreich und der Schweiz* – (1st ed. 2020).

The author skillfully identifies a literature gap in terms of sources of income and transfer methods terrorist financiers employ. In particular, he finds that the existing literature does not explain in sufficient depth how perpetrators must proceed to finance terrorism at low risk and the implications for German, Liechtenstein, Austrian, and Swiss criminal procedural law. Based on said literature gap, the author defines several important research questions—including potential for improved CFT mechanisms to facilitate the work of investigators in Germany, Liechtenstein, Austria and Switzerland—and aims of the research, namely, to anticipate concrete actions intelligent perpetrators of terrorist financing undertake and makes suggestions for Swiss legislators. Moreover, criminal procedural obstacles investigators face, and potential remedies are analyzed.

The work utilizes a sound qualitative approach to assessing the effectiveness of current CFT measures. In particular, the author conducted a qualitative study involving both potential perpetrators of terrorist financing and compliance experts tasked with combatting the issue. Hence, a comprehensive overview of both perspectives is provided. The approach is remarkable—after all, it should be difficult to convince alleged criminals to participate in such studies. The author competently mitigates any limitations arising from the approach (interviews with alleged perpetrators could not be recorded) by dividing the research process into a pre- and main study. The findings are comprehensively illustrated to the extent possible. Interview partners' statements in the main study are provided and the executive summary gives detailed insight into the research process and deduced findings. In addition, exhaustive protocols of all empirical findings and methods used can be found in the appendix of the book.

The empirical findings of the pre-study illustrate that virtually any source of income can be used to finance terrorism. Popular legal sources of income include real estate and stock exchange transactions. According to the interview partners in the pre-study, illegal sources of income may include trading with various goods such as resources, narcotics, CO2 emission certificates or even humans and organs. Other popular illegal sources of income include procuring, extortion, online fraud, and more. For the transfer of funds, interview partners in the pre-study identified parallel banking systems such as Hawala, cryptocurrencies, personal transfer and wire transfers to Turkey as popular methods. These empirical findings are presented in a comprehensible and reasonable manner, which first provides an overview for the reader and then dives deeper into each individual method. Each method is discussed in considerable depth and outlined coherently while offering tremendously compelling insights. Thus, the reader has the opportunity to first read about an issue in depth and later return to the section to take a second look whenever required.

The author details that naturally, intelligent perpetrators will refrain from using incriminated funds to avoid the attention of compliance officers. Because with terrorist financing, the criminal act lies in the future, substantiating willful misconduct can be extremely difficult.<sup>2</sup> However, the objective is to actively prevent terrorist attacks from happening rather than tracing who was responsible after the fact. Hence, preventative efforts should focus on methods of transfer terrorist financiers employ to remain undetected. Teichmann elaborately outlines the functioning of prominent transfer methods such as using the banking system, parallel banking or cryptocurrencies, which lays the foundation for the subsequent discussion of potential remedies.

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<sup>2</sup> Fabian Teichmann: *Strafprozessuale Schranken und Hürden in der Kriminalitätsbekämpfung und -Prävention – Untersucht am Beispiel der Bekämpfung der Terrorismusfinanzierung in Deutschland, Liechtenstein, Österreich und der Schweiz* – (1st ed. 2020).

For the main study, the executive summary flawlessly details all relevant statements made by the interview partners. Hence, for both sources of income and the transfer of funds, interview partners' statements can be traced and reproduced. The subsequent discussion puts these statements into writing and connects them to a framework that gives an astonishing overview of manifold techniques terrorist financiers employ. The empirical findings are presented from the perpetrator's point of view, which makes it both an interesting and unique read. Via this approach, the book caters perfectly to its target audience of practitioners —law enforcement officers, intelligence agencies, attorneys, prosecutors, judges, and compliance experts— because in cases of money laundering or terrorist financing, it is essential they put themselves in the criminal's position. To be able to not only retrace but even predict perpetrators' actions, these experts must be well-acquainted with how intelligent criminals usually proceed. Teichmann's book accomplishes this objective skillfully.

Within the scope of the empirical findings, five novel CFT measures in the form of increased information exchange between private actors and the authorities, undercover investigations, electronic searches, mutual assistance, and partial suspension of professional secrecy are suggested based on the interview partners' statements. The subsequent chapter discusses criminal procedural implications of the empirical findings. Here, the author focuses particularly on electronic searches and undercover surveillance because both measures can be implemented in reasonable time. For both suggested measures, the legal status quo in all four countries —Germany, Liechtenstein, Austria, and Switzerland— is discussed and potential obstacles to their implementation are analyzed within the scope of a legal comparison. In this, the author pays attention to assessing the entire situation in great detail and from various perspectives, which makes the chapter highly comprehensive. Teichmann competently discusses the intricacies of each country's legislation in relation to the relevant issues. He concludes the chapter with an overall assessment that summarizes important aspects for practitioners to consult at any time.

Teichmann's analysis of online searches and undercover surveillance is somewhat revolutionary because the two measures have thus far been legalized only in selected countries. Upon reading the analysis, however, one cannot help but wonder why these promising measures have thus far been so poorly received. Within an adequate legal framework that considers privacy and data security, both electronic searches and undercover surveillance could have the potential to significantly improve the existing international CFT regime.

Overall, the reviewed book combines informative and practice-oriented content with suspenseful and absorbent writing. The author succeeds in presenting the contents in a manner that maintains the reader's interest throughout. The book is unique in that it makes empirical findings accessible to practitioners rather than focusing on a purely academic audience. The author expertly breaks down complex processes and presents them in a captivating and informative manner. The same is true for the explanations relating to the respective national legislations, which are discussed in a manner that is comprehensible for individuals with and without a background in law. Therefore, the work is of utmost importance to both practitioners and academics in the field of counterterrorism.

## BOOK PRESENTATION: METHODEN DER GELDWÄSCHEREI

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Reviewed by Marie-Christin Falker and Prof. Bruno S. Sergi

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## METHODEN DER GELDWÄSCHEREI – METHODS OF MONEY LAUNDERING

The book answers questions with relevance to the effective combat of money laundering such as ‘how do intelligent perpetrators launder money?’, ‘which resources do they require’ and ‘which detection risks do they face?’ To analyze the concrete methods of intelligent and highly specialized money launderers, the author conducted manifold interviews with both prevention experts and suspected criminals. The book has a practical orientation and makes suggestions for an audience of bankers, compliance experts, prosecutors, judges, defense attorneys, and more. By taking the perspective of the perpetrator, the book helps these experts gain a deeper understanding of money laundering methods. It thus raises their awareness for red flags and supports them in anticipating and preventing money laundering.

When browsing the literature on the subject of money laundering, one will hardly be able to avoid the name Teichmann, because the author regularly conducts valuable research on relevant compliance topics and also teaches compliance at various universities. Attorney-at-law Dr. Dr. Fabian Teichmann LL.M.’s professional experience and dedication to preventing white-collar crime undoubtedly makes him one of Europe’s leading experts in the field. His second edition of *Umgehungsmöglichkeiten der Geldwäschereipräventionsmassnahmen* does not only surprise with a new title, but it has also been significantly expanded. The new name of the work reflects its emphasis on practicality, seeing as it has been designed to cater to the needs and interests of practitioners focused on money laundering prevention.

The study is as relevant as ever, as money laundering continues to be one of the most pressing issues for compliance officers and other diligent professional groups around the world. Despite significant international efforts in the form of regulations and prevention mechanisms, money laundering has not been eradicated. One of the underlying reasons seems to be that money launderers are extremely inventive in identifying novel means and methods to circumvent the existing anti-money laundering (AML) provisions. Hence, it can be argued that the issue of money laundering should be analyzed from the perpetrator’s perspective because only when diligent professionals are able to emphasize with how criminals operate, they will be able to anticipate their actions. In view of these aspects, the book analyzes innovative themes that could contribute significantly to more effective money laundering prevention.

Like Teichmann’s other works, the book has expertly been composed to ensure readability and a natural flow. Over the course of six chapters and over 100 subchapters, Teichmann skillfully illustrates weaknesses in the current AML regime that criminals exploit to fly under the radar of the authorities. The chapters are divided in a manner that makes it easy for the reader to find what they are looking for. In addition, chapters are allocated to optimally build upon and complement one another.

The introduction, which provides an overview of the book and introduces the reader to the topic, is followed by a literature review. The literature review comprehensively discusses definitions of money laundering, legal provisions, and the state of research, which can be particularly helpful for scholars but also practitioners aiming to understand the big picture of money laundering issues. While conveniently satisfying the need for appropriate background information and reappraisal of previous research, the literature review does not dwell on unnecessary technicalities or tedious presentation of data. Rather, it covers essential findings while maintaining a comprehensible and intriguing tone without boring the reader.

The same is true for Chapter 3, which details the methodology used in the empirical investigation. Based on the literature review, the author expertly identifies a significant literature gap in terms of concrete methods money launderers use to integrate their incriminated funds into the legal economy. Whereas most AML research focuses exclusively on prevention mechanisms, Teichmann uses a four-step approach to highlight money laundering issues from different perspectives and close this literature gap.

During a preliminary study, the author interviewed international alleged money launderers and their accomplices to gain an understanding for popular resources that are used by money launderers, risks that they face, and techniques they use. The approach of interviewing participants from different jurisdictions seems sensible seeing as money laundering has been found to be a transnational offense that requires international cooperation to be prevented. Through their international backgrounds, interview partners offer unique insights into how money laundering is carried out under different circumstances and conditions. Based on the interview partners' statements, concrete methods of money laundering are detailed. The approach of interviewing suspected criminals constitutes a unique selling point of the book because, as Teichmann points out, the literature usually focuses on prevention mechanisms without addressing how money is being laundered in detail.

To verify the findings of the pre-study, elaborate on them, and contrast them with the perspectives of prevention experts, the author conducted qualitative interviews with compliance professionals within the scope of a main study. From a methodological standpoint, this approach makes sense because other than the pre-study, the author was able to transcribe the expert interviews and hence guarantee appropriate documentation, which facilitates optimal reproduction of the findings. Methods used by the author are sound and perfectly selected for the purpose of the study. Because the intention was to exploratively analyze a new field, there would have been no better option to collect data than a qualitative research. Moreover, the approach is highly interesting from the reader's perspective, as it offers unique insights into the business routine of both money launderers and prevention experts, hence offering a comprehensive discussion of results.

Following the preliminary and main study, the author conducted a quantitative survey of 1,200 compliance officers, which analyzed how often they come into contact with the methods developed during the qualitative interviews, thus allowing conclusions to be drawn about the relevance of the respective methods. Despite its focus on the qualitative findings of the study, the book evidently does not neglect readers who prefer research to be analyzed on the basis of hard data. This decision to carry out a quantitative study also adds another important layer to the findings presented in the book.

Lastly, the author went the extra mile by conducting a follow up study specifically for the purpose of updating the second edition with regard to trends and themes that have emerged since the publication of the first edition. The new methods —law firms, debt collection, deposit at the post office counter, and tax returns— are highly innovative and have yet to be discussed in depth by other researchers. The book remains extremely relevant to practitioners in a wide range of industries and the new methods provide significant added value.

Chapter 4 is divided into 17 subchapters that all focus on a specific money laundering method, its

general suitability for money laundering, the concrete procedure, resources, risks, and an overall assessment. The findings are summarized in Chapter 4.18. The work is unique in that it provides relevant and firsthand insights by substantiating every claim with a quotation from one of the interview partners throughout these chapters. These quotations not only serve as a reference point but also make it easier for the reader to empathize with the money launderer.

The empirical findings confirm that intelligent money launderers increasingly relocate to sectors that are less regulated than banking and financial services. By discussing a wide range of money laundering methods, the author skillfully exemplifies how nuanced money laundering is. In particular, Teichmann impressively discusses how some methods are comparatively simple in that they require few resources and little expertise whereas other methods are much more complex and require significant inside knowledge. The book illustrates how money launderers adapt and combine these methods to fit their individual needs, which makes it an all-around captivating and informative read.

Chapter 5 makes recommendations for compliance officers, private bankers, asset managers, public prosecutors, defense lawyers, and judges. These recommendations are practice oriented and focus on the individual challenges the respective professional group faces. At the end of each subchapter, there is a box, which concisely summarizes the recommendations, which practitioners can refer back to at any point in time. This layout is both practical and compelling because it encourages practitioners to question their routines and pay attention to small details.

The final chapter contains a summary and conclusions and discusses limitations and avenues for future research. A comprehensive list of interview partners' statements and the corresponding generalization of statements can be found in the appendix, which accounts for transparency and accuracy in the research process.

Altogether, the reviewed book impressively builds upon the existing AML literature by using innovative methods to analyze a previously unexplored field. The author uses an original methodological approach to improve the effectiveness of current AML mechanisms by illustrating weaknesses and loopholes in the system that money launderers exploit. The work is explicitly practice oriented and designed to maintain the reader's interest throughout. Nonetheless, upon re-reading the book, some points could easily be skipped by the reader who has the option to refer to the concise lists of recommendation at any point in time to freshen their memory. The same is true for subchapters discussing the individual money laundering methods. Practitioners could easily consult the relevant chapter when confronted with a similar case in their professional life.

In contrast to most research, which is often purely technical, the book makes the empirical findings accessible for practitioners similarly to a professional guide while also catering to the wants and needs of an academic audience, thus offering the best of both worlds. The writing breaks down complex issues for a broad audience to enjoy without omitting any crucial information. The book has incredible potential to become a staple for practitioners and academics in the area of anti-money laundering, seeing as the findings are internationally applicable and presented in a well-written, intriguing, and thought-provoking manner.