

# Crimes Committed by Legal Persons: A Comparative Sino-German perspective\*

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*In Germany, the notion of corporate criminal liability has attracted the attention of lawyers, scholars, and recently of politics. At present, legal persons are not criminally responsible but may only receive administrative fines under Section 30 of the Regulatory Offences Law. In light of recent scandals involving large business enterprises, efforts are under way to expand the liability of legal persons for misconduct, possibly leading to the introduction of criminal sanctions. In China, corporate criminal responsibility for certain offenses (unit crimes) were adopted in 1997 and has been practiced ever since. Here, both the unit and its responsible members are punished if a unit crime has occurred. In addition, administrative agencies may impose administrative sanctions and measures on the unit. Since the practical and legal problems appear similarly in the German and Chinese systems, a brief review of the Chinese experience may be helpful for the German reform process.*

**Keywords:** Corporate Criminal Responsibility, Legal Person, Unit Crime, Administrative Sanctions, Criminal Punishment, Criminal Procedure

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## 1. Introduction

The diesel emissions scandal in 2015 including Volkswagen and Audi not only had a shock on the German automobile industry, but also renewed German lawyers' interest in the possibility of introducing criminal liability to corporations. At present, only administrative fines can be imposed on corporations in accordance with Article 30 of the Regulatory Offences Law (*Gesetz über Ordnungswidrigkeiten*: OWiG) if one of their leading agents has committed a crime on behalf of the corporation. However, there is no criminal punishment available. One of the reasons for this limitation is the strong position of *Schuldprinzip* (guilt principle) in German criminal law. According to the Federal Constitutional Court, the guilt principle is an indispensable part of the German *Rechtsstaat*.<sup>1</sup> Since criminal punishment presupposes 'guilt' associated with the personal blameworthiness of an individual, crimes can only be committed by natural persons whose liability cannot be ascribed to a legal person. This was the view of the committee that drafted the current German Penal Code in the 1960s.<sup>2</sup>

Several scandals involving corporate wrongdoing have, however, exposed the negative effects of this theory and led to calls for introducing criminal sanctions for corporations, especially business enterprises. Moreover, international organizations<sup>3</sup> as well as the European Union<sup>4</sup> have long argued in favor of corporate criminal liability. The current legal situation of Germany may be criticized from several aspects. In particular, the deterrent effect of administrative fines is insufficient, especially since the maximum fine under Article 30, Section 2 OWiG is Euro 10 million, which is not a substantial amount for a large business enterprise. The limited liability of legal persons may be unfair because, in many cases, a legal person is not only the main beneficiary of the crimes committed by its members, but also has encouraged its commission through a crime-prone corporate 'spirit.'<sup>5</sup> In recent years, "corporate criminal responsibility" has been drafted by the states of Hesse and North Rhine-Westphalia.<sup>6</sup> The coalition contract concluded between the parties supporting the present German government, i.e. CDU, CSU and SPD, includes some paragraphs on reforming the liability of corporations, with a view to adding probationary sanctions to mere fines.<sup>7</sup> In this regard, a concrete reform proposal would be published in the near

future.

The combat of corporate crime plays an important role in Chinese criminal policy. Chinese judicial authorities have also developed standards on applying criminal law rules on corporate crime. In this context, the primary purpose of this research is to compare the perspectives of China and Germany on the crimes committed by legal person. This paper is composed of four parts including a short Introduction and Conclusion. Part two will discuss the development of unit crimes in Chinese law. Part three will examine the substantive laws of China and Germany from a comparative perspective.

## 2. The Development of Unit Crimes in Chinese Law

The ‘legal person’ (or the unit)<sup>8</sup> was not defined in the PRC Criminal Law of 1979. At the time, China was isolated under a totally planned economy. Naturally, there was no free market and private enterprise.

In the 1980s, the free enterprise system was adopted and many private companies were established. A question arose then about what rights and obligations such private companies should have. As a result, the concept of ‘legal person’ was inserted into the General Principles of the Civil Law of 1987. Article 49 of this law provides:

Under any of the following circumstances, an enterprise as legal person shall bear liability... If the offence constitutes a crime, criminal liability shall be investigated in accordance with the law, for: (1) conducting illegal operations beyond the range approved and registered by the registration authority; (2) concealing facts from the registration and tax authorities and practicing fraud; (3) secretly withdrawing funds or hiding property to evade repayment of debts; (4) disposing of property without authorization after the enterprise is dissolved, disbanded or declared bankrupt; (5) failing to apply for registration and make a public announcement promptly when the enterprise undergoes a change or terminates, thus causing interested persons to suffer heavy losses; and (6) engaging in other activities prohibited by law, damaging the interests of the state or the public interest.<sup>9</sup>

Crimes that can be committed by legal persons were prescribed in different laws.

For example, Article 47 of Customs Law of 1987 stated: “Where an enterprise, an institution or a state organ or a social organization is guilty of smuggling, the judicial organ shall...”<sup>10</sup>

When enacting the Criminal Law of 1997, there was a heated debate on whether a legal person could commit a crime. Some scholars denied it, arguing that a crime could be committed only by a natural person.<sup>11</sup> Since the legal person has no consciousness and cannot have any criminal intention, it is incapable of committing a crime. These lawyers emphasized that any act attributed to a unit should be actually conducted by one of its members. Therefore, crimes are in fact committed by natural persons.<sup>12</sup> They further argued that even if the legal person could be regarded as independent from its members, its capacity would be limited to legal conduct. Hence, if a representative commits a crime s/he necessarily acts beyond his/her authority, so that this conduct cannot be attributed to the legal person.<sup>13</sup>

This view was, however, opposed by other scholars.<sup>14</sup> They emphasized that an organization has its own aims, interests and property, which are independent from those of its members. In order to realize the aim of the legal person and to pursue its interest, the members perform their duties. Their acts should be regarded as the behavior of the legal person.<sup>15</sup> If certain members act outside their authority, however, such behavior cannot be attributed to the legal person.<sup>16</sup>

Moreover, it was argued that a unit, like a natural person, develops its own intention.<sup>17</sup> This happens through certain processes such as board meetings and resolution. Decisions made at the collective level of the unit no longer are ideas of any single person, but a result of compromise and integration of different persons’ ideas.<sup>18</sup> When the final decision is made, it becomes the intention of the legal person. Sometimes, a legal person has also its own ‘character,’ which can be discovered through its by-laws, decision-making proceedings, and the ‘corporate’ culture evidenced in practical operation.<sup>19</sup> Such factors can have a big influence on or even control the way of thinking and the behavior of the unit’s members. This may be the case, for example, if a legal person obliges its members to look out exclusively for making profits, regardless of the legality of their activities.

Some writers further claimed that a legal person could also commit crimes negligently.<sup>20</sup> If the legal person has certain obligations, but fails to supervise its

members properly, it should be convicted when its members negligently violate such obligations and cause the harm described in the relevant criminal statute.<sup>21</sup> However, if the members either intentionally violate the regulations of the legal person, or perform their duties irresponsibly, individual members rather than the unit should be held liable.<sup>22</sup>

Regardless of the debates and challenges in both theory and practice, the legislature considered the concept of corporate crime to be a powerful tool in the fight against economic crime. It finally incorporated this concept into the Criminal Law of 1997. The general rule can be found in Article 30 of the Criminal Law of 1997, which provides: “Any company, enterprise, institution, State organ, or organization that commits an act that endangers society,<sup>23</sup> which is prescribed by law as a crime committed by a unit, shall bear criminal responsibility.” Article 31 regulates the consequences of unit crimes. It states: “Where a unit commits a crime, it shall be fined, and the persons who are directly in charge and the other persons who are directly responsible for the crime shall be given criminal punishment. Where specific provisions of this law or of other laws provide otherwise, those provisions shall prevail.”

In addition to these general rules, specific provisions on unit crimes can be found in the special part of the Criminal Law of 1997. Thus, unit crime has clearly been recognized as a special type of crime.<sup>24</sup> The list of unit crimes has continuously been extended through amendments of the Criminal Law. Based on the author’s calculation, there are now more than 100 such offences.

### **3. Substantive Law**

#### ***A. The Concept of ‘Unit’ used in Chinese Criminal Law***

During the 1980s-1990s when the privatization was going up to its peak, many transitional and temporary forms of economic actors appeared on the markets. The legislature thus decided to use the term ‘unit’ rather than ‘legal person’ in order to include all kinds of potential subjects. Moreover, it decided not to define a unit’ in the abstract manner, but just listed possible kinds of those units.<sup>25</sup> The author would conclude that the legislature mainly intended the scheme to be applied to legal persons, but the scope of the term ‘unit’ is broader than the

concept of a legal person. For example, a joint venture partnership with a foreign investor can qualify as a ‘unit’ although it is not registered as a legal person. The legislature has left to the courts the decision to apply the term ‘unit’ in individual cases.

According to Article 30 of the Chinese Criminal Law, a ‘unit’ refers to any “company, enterprise, institution, state organ, or organization.” In principle, this list includes every entity with a certain organizational structure. In 1999, however, the Supreme People’s Court issued a Judicial Explanation on unit crimes, which largely limited the application of the provisions on unit crimes to legal persons.<sup>26</sup> Article 1 of this Explanation stated that among private invested enterprises, only legal persons can commit a unit crime.<sup>27</sup> This limitation excludes partnerships, such as law firms, as well as business firms owned by only one natural person with unlimited liability, since neither of these types of firms can be registered as a legal person.<sup>28</sup> As the transitional period came to an end, these considerations lost most of their practical significance. Currently, almost all unit crimes are committed by legal persons.<sup>29</sup>

### ***B. The Relationship between the Unit and its Responsible Members***<sup>30</sup>

Article 31 of the Criminal Law states that the unit and its responsible members shall be punished together. This so-called “parallel punishment system” does not exist in crimes of natural persons. In this regard, two models have been developed to explain the rationale for punishing the unit and natural persons at the same time.

#### **1. ‘Two crimes’ Model**

According to the ‘Two crimes’ model, the unit crime consists of two independent crimes and involves two separate criminal subjects, i.e., the unit and its responsible members. According to Article 31 of the Criminal Law, both types of subjects should be punished together, but their liability is independent from the other subject’s punishability. This explains why responsible members can still be criminally liable when the unit has been dissolved.<sup>31</sup>

Supporters of this model argue that there actually are two different criminal activities.<sup>32</sup> The natural persons commit a crime based on their own motivation; they either stimulate the criminal intention of the unit, or tolerate the development

of its intention. When the unit develops its own intention and acts on it, the unit commits another crime. Since the two crimes are closely related, they should be dealt with together.<sup>33</sup>

This theory tells that it violates the principle “*nullum crimen sine lege*,” since no legislation provides that “stimulating the criminal intention of a unit” is a crime. Another objection is that the text of Article 30 describes only the unit as the subject,<sup>34</sup> whereas the “persons who are directly in charge and the other persons who are directly responsible for the crime” are only referred to in Article 31 of the Criminal Law, which deals with sanctioning. Moreover, if admitting that the natural persons are also subjects of Article 30 of the Criminal Law, this would mean that the unit and the natural persons collaborate in the criminal activity. However, this is definitely not the concept lying behind Articles 30 and 31 of the Criminal Law.<sup>35</sup>

The Supreme People’s Court has also rejected the assumption that two crimes are being committed.<sup>36</sup> The court is precluded from attributing the same activity twice.

## 2. ‘One crime’ Model

According to the competing ‘one crime’ theory, the unit is the only criminal subject in the context of Article 30 of the Criminal Law. Instead of being parallel or independent subjects of the crime, the responsible members are elements of the unit. In principle, as only the one who commits the crime should bear responsibility, only the unit is subject to punishment. The ‘parallel punishment’ system, i.e., the imposition of a fine on the unit and imprisonment of its responsible agents, means that responsibility is shared among the unit and its members. With regard to individual members, the severity of their punishment shall be decided in accordance with their contribution to the unit crime.<sup>37</sup>

Although they are not defined as ‘accessories,’ the way to identify their contributions is similar. This model has the advantage of reflecting the text of Article 30 of the Criminal Law and avoiding double jeopardy. It cannot explain, however, why the responsible members can still be convicted when the unit no longer exists, for example, because it has been dissolved or gone bankrupt.<sup>38</sup>

### *C. The Prerequisites for Differentiating Unit Crimes and Crimes of Natural Persons*

A unit crime exists only if the Criminal Law expressly states that the crime can be committed by a unit. This applies, for example, to unit corruption, financing terrorism, insurance fraud, drug trafficking, and environmental crimes. These provisions also contain the constitutive elements of each unit crime. If a special provision of the Criminal Law does not mention any crime committed by a unit, it means only natural persons can commit a crime. This applies, for example, to intentional killing, robbery, rape, and arson.<sup>39</sup> However, the author would observe that the unit crimes commonly refer to the constitutive elements of corresponding crimes of natural persons. In many situations, unit crimes and the corresponding crimes of natural persons are regulated in the same provision and share the same constitutive elements. For example, Article 152 of the Criminal Law (smuggling of wastes) provides: “Where a unit commits any of the crimes as mentioned in the preceding paragraphs, it shall be fined, and the persons who are directly in charge of the unit and the other persons who are directly responsible for the crime shall be punished in accordance with the provisions of the preceding paragraphs.”

In addition to the constitutive elements for each unit crime, some general prerequisites have been developed by the Supreme People’s Court as follows:

1. The unit must be established legally with a legal purpose. If someone registers a unit just in order to carry out criminal activities such as criminal organizations, this unit will be treated as non-existent. The natural persons will then bear full criminal liability.<sup>40</sup>
2. Even where the unit has been established legally, the crime is still regarded as being committed by natural persons if its main activities after the establishment violate the criminal law, since this removes the legality of the unit.<sup>41</sup>
3. The crime must be committed in the name of the unit which also benefits from the criminal activities. The benefits can be direct or indirect proceeds of the criminal activities. In the case of environmental pollution, for example, the unit benefits from the reduction of expenditures for environmental protection measures. If a natural person illegally uses the name of the unit, the unit will not be convicted.<sup>42</sup>



4. The unit must be able to make decisions independently from natural persons. The courts can decide on this issue by examining, for example, whether a unit has certain organs and processes to make decisions; whether it has mechanisms to implement the decisions; and whether it has a supervising organ. Problems in this process are raised by one-person companies. Such companies undoubtedly are legal persons, but it is difficult to distinguish the intention of the legal person from that of its single owner. In this situation, the application of unit sanctions will depend on the discretion of the judge in each case.<sup>43</sup>

Some scholars have criticized these conditions imposed by the Supreme People's Court because they do not cover all cases.<sup>44</sup> For instance, a member of a legal person may commit a crime in his/her own name, but actually act on behalf of the unit.<sup>45</sup> In fact, none of the prerequisites listed above by itself determines whether a unit crime has been committed. The judge has to make the decision taking all facts of the case into consideration.

#### ***D. Administrative Sanctions and Criminal Punishment Available for Units***

In Germany, as stated above, the *Gesetz über Ordnungswidrigkeiten* provides for administrative sanctions (fines) against legal persons. In China, however, various specialized laws such as the Anti-monopoly Law and the Product Quality Law also prescribe administrative sanctions for units. The systems of administrative sanctions and criminal punishment for unit crimes are separate from each other. They have been implemented by different organs with different measures following different procedures. Whereas Chinese Criminal Law provides only for fines against the unit and for imprisonment of responsible members, the administrative sanctions prescribed in various laws include the orders to cease business activities, confiscation of property, fines, temporary restraint, suspension or revocation of the business license, and dissolution of the unit.<sup>46</sup> Administrative sanctions thus offer more options and larger flexibility.

It happens frequently that a unit is confronted with both types of sanctions.<sup>47</sup> For example, when a unit has been fined in a criminal procedure it can still be dissolved by the administrative authority if necessary.<sup>48</sup> There are also administrative sanctions against responsible individuals. They may, for example, be placed on a 'black list,' which means that they can no longer be active in the relevant business area. In spite of the independence of criminal

and administrative sanctions, the criminal judgments enjoy the priority and the administrative authority is required to take the criminal process and any criminal punishment into consideration when it decides on an administrative sanction against the unit. If a criminal process is being conducted against a unit, the administrative authority should wait for the final judgment of the court,<sup>49</sup> especially if dissolution is a realistic option, because the unit's 'disappearance' would disturb the course of the trial.<sup>50</sup> If the criminal court has imposed a fine on the unit, the administrative authority should consider to impose other types of sanctions, instead of additional administrative fine.<sup>51</sup>

In practice, however, the situation is often reversed, because administrative authorities are in charge of controlling the daily operation of units and are thus in a better position to discover illegal activities. In that case, the administrative authority imposes and executes sanctions and may alert the police to potentially criminal activities at the same time.<sup>52</sup> When the criminal court eventually convicts the unit, it may take any fine imposed in administrative proceedings into consideration. If the unit has already paid the administrative fine, the paid amount should be deducted from the fine imposed by the court.<sup>53</sup>

## 4. Criminal Procedure<sup>54</sup>

### A. Defendants

There are three theories about who should be the defendant in a unit crime case. According to the first theory, only the responsible members should be defendants; the second theory claims that only the unit should be the defendant, but the responsible members should be also present before the court; and the third theory addresses that both the unit and the responsible members should be regarded as defendants.<sup>55</sup> The current practice in China follows the third theory. The court decisions often read:

The defendant company A committed XXX crime and shall be punished. The former president B of defendant company A committed XXX crime and shall be sentenced..."

The following arguments are cited in support of this practice: If both the unit and the responsible agents are listed as defendants, all of them benefit from the procedural rights accorded to defendants and can make use of these rights separately, for example,

by employing their own defense lawyers. Secondly, each responsible member may carry a different amount of responsibility for the unit crime or may have committed separate crimes individually. It is then easier for the court to decide on the sentence individually when each individual is treated as an independent defendant. Although this practice simplifies the process and the composition of judgments, it is doubtful whether it complies with the wording of Article 30 Criminal Law.<sup>56</sup>

## ***B. The Representative of the Defendant Unit in the Procedure***

### **1. Appointment of the representative**

According to Article 279 of the Supreme People's Court's Interpretation, the representative of the defendant unit in the criminal process should be the legal representative of the unit or the person mainly in charge; if these persons are also charged individually for the unit crime, or they cannot be present at the trial for good cause, the defendant unit should appoint another staff member<sup>57</sup> as its representative. According to Article 280 of the Interpretation, if no person is appointed as the unit's representative in the procedure, the prosecution office shall appoint a representative; and if the appointed representative cannot be present for good cause, the prosecution office shall appoint another one.<sup>58</sup>

### **2. The rights and obligations of the representative**

The representative is neither a defendant nor a witness. S/he is an independent participant at the trial. S/he represents the unit at the trial and is obliged to participate in the trial.<sup>59</sup> The representative can make use of all procedural rights of the unit, such as the right to defense, appeal, and silence.<sup>60</sup> His/her activities and statements in the course of the criminal process within the authority given by the unit are regarded as those of the unit.<sup>61</sup>

If the representative intentionally makes false statements and the contents of these statements fall outside the authority of the representation, s/he may lose the status of a representative and can personally be guilty of perjury.<sup>62</sup> If the statements fall within the representation, however, the statement is deemed to have been made by instruction of the unit, and the sentence against the unit will be aggravated.<sup>63</sup>

### **3. Coercive measures against the defendant unit**

Chapter VI of the PRC Criminal Procedure Law provides for five types of

coercive measures. It aims at ensuring that the proceedings can take place without interruption such as summons, bail with restriction of liberty, residential confinement, detention, and arrest. These measures are clearly applicable only to natural persons (including the responsible members of the unit), not to units. A unit under criminal investigation, however, can attempt to frustrate the process, for example, by transferring property to someone else's account. Also, it can even be dissolved by its owners in order to avoid the consequences of a financial penalty.

Yet, the law does not provide for coercive measures against units under the premise that a fine imposed on the unit can in fact be executed. In order to close this gap, the Supreme People's Court has declared in Article 285 of the Interpretation: "In order to guarantee the implementation of the decision, the court may seize, impound, or freeze the property of the unit, or order for the unit to provide other guarantees." The measures mentioned in Article 285 of the Interpretation can also be found in Chapter II of the Criminal Procedure Law. However, they are not conceived as coercive measures, but as investigative measures designed to discover the truth. The author would maintain that the Supreme People's Court may thus be criticized for having exceeded the limits of judicial interpretation and even making new law. Some scholars have argued that a separate section should be introduced into the Criminal Procedure Law, providing coercive measures especially for units such as supervision of daily management, prohibition of the deregistration of the unit, and suspension of its business.<sup>64</sup>

## 5. Conclusion

The unit crime system is an integral part of Chinese Criminal Law. Units have been recognized as independent subjects and potential offenders. Their general criminal responsibility is regulated by Articles 30 and 31 of the Criminal Law and special rules are contained in the Special Part of the Criminal Law. The basic structure of this scheme can be described as a "double parallel punishment" system. The first parallel means that the unit and its responsible members are subject to simultaneous criminal punishment,<sup>65</sup> while the second parallel refers

to the possibility of imposing criminal as well as administrative sanctions on the unit.

Although the unit crime system has been practiced for more than twenty years, some problems remain unresolved. One of these problems is a contradiction between substantive and procedural law with regard to the defendant status in a unit crime process. According to Articles 30 and 31 of the Criminal Law, only the unit is the perpetrator. However, Chinese courts list both the unit and its responsible members as defendants in criminal proceedings. The main reason for this difficulty is the lack of communication between the areas of substantive and procedural law, both on the level of legislation and scholarship.<sup>66</sup> Instead of relying largely on the Supreme People's Court's Interpretation for resolving practical procedural issues, the Criminal Procedure Law should have a separate section dealing with the process concerning unit crimes.

There exist fundamental differences between German and Chinese rules on illegal conducts of legal persons. While China recognizes the criminal responsibility of units for certain offenses, up to now only natural persons can be criminally punished in Germany. If a responsible member of a legal person commits a criminal offense, the legal person can only be sanctioned by an administrative fine according to Section 30 of *Gesetz über Ordnungswidrigkeiten*.

In spite of this essential difference, both jurisdictions share a number of legal challenges. One of them is the limitation of sanctions against legal persons to (criminal or administrative) fines, which have little preventive effect. There have been suggestions to extend the list of possible sanctions and to place an emphasis on rehabilitative measures, such as corporate probation,<sup>67</sup> and 'shaming' sanctions, such as the publication of a legal person's conviction.<sup>68</sup> In China, administrative sanctions, which are now available only to regulatory agencies, could be introduced into the Criminal Law or the Criminal Procedure Law. Both legal systems could profit from not only sharing their experiences with sanctioning corporate misconduct, but also comparing measures that might be useful for reforming legal persons and units. In this process, they would become "good corporate citizens" again.

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2. See Niederschriften über die Sitzungen der Großen Strafrechtskommission, Bd. IV, 1958, 321ff., 333 & 574; and Protokolle über die Sitzungen des Sonderausschusses für die Strafrechtsreform, 4. Wahlperiode, 397ff. & 419ff.
3. The Group of States against Corruption in the EU (GRECO) has recommended in 2005 that Germany should introduce corporate criminal responsibility, and the OECD issued a similar recommendation in 2011.
4. Most EU member states have introduced corporative criminal liability, and several EU Directives provide for sanctions against legal persons. See, e.g., Directive 2005/60/EC on the prevention of the use of the financial system for money laundering and terrorist financing, Oct. 26, 2005. However, the EU law only requires its members to take measures to ensure that legal persons are subject to deterrent sanctions but does not explicitly demand criminal sanctions to be imposed.
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23. Article 13 of Criminal Law provides the definition of ‘crime’ as: “All acts that endanger the sovereignty, territorial integrity, and security of the state; split the state ... democratic rights, and other rights; and other acts *that endanger society*, are crimes if, according to law, they should be criminally punished. However, if the circumstances are clearly minor and the harm is not great, they are not to be deemed crimes.” Thus, the words “that endangers society” in Article 30 of the Criminal Law are a general expression for all crimes and do not describe additional constitutive elements of a crime. The potential of a crime to ‘endanger society’ is deemed to exist whenever the crime is committed.
24. Xiang Li has argued that it was not necessary to include Articles 30 and 31 in the general part of the Chinese Criminal Law, because all the constitutive elements can be found in the special part. See XIANG LI, EMPIRICAL STUDY ON THE UNIT CRIME [单位犯罪司法实证研究] 26-7 (2016).
25. CCL art. 30.
26. See Judicial Explanation, available at [http://www.law-lib.com/law/law\\_view.asp?id=460](http://www.law-lib.com/law/law_view.asp?id=460) (last visited on Jan. 27. 2019).
27. The Explanations on Certain Questions Concerning Legal Applications on Unit Crimes

- Issued by the Supreme Court [中华人民共和国最高人民法院于审理单位犯罪案件具体应用法律有关问题的解释1999], art. 1.
28. A natural person or a legal person can establish a company with legal person status. In this situation, the court has to decide whether the crime is committed by the company or by the investor. In the latter case, the investor uses the company only as a tool for committing the crime.
  29. Because the concept ‘unit’ has been used for many years and has been widely accepted, the legislature has not seen any need to change the relevant term to ‘legal person.’
  30. The term “responsible members” refers to “the persons who are directly in charge and the other persons who are directly responsible for the crime” *See* CCL art. 31. These persons are as a rule personally punishable for the crime committed.
  31. The Interpretation of Chinese Criminal Procedure Law Issued by the Supreme Court (hereafter Interpretation) [中华人民共和国最高人民法院于适用 <中华人民共和国刑事诉讼法> 的解释 2013], art. 286.
  32. *Supra* note 16, at 15-7.
  33. *Id.*
  34. It reads: “Any company, enterprise, institution, State organ, or organization that commits an act ...”; “Where a unit commits a crime...”
  35. *Supra* note 16, at 19.
  36. The Supreme Court Reply on the Question whether the Persons who are Directly in Charge and the Other Persons who are Directly Responsible for the Crime Should be Defined between Main Actor and Accessory [最高人民法院 <关于审理单位犯罪案件对其直接负责的主管人员和其他直接责任人员是否区分主犯、从犯问题的批复>], Oct. 10. 2000.
  37. *Id.* *See also* The Conference Memo of the Supreme Court on the Financial Crimes [全国法院审理金融犯罪案件工作座谈会纪要2001].
  38. The Interpretation, art. 286.
  39. There can also be some boundary cases: certain act is not provided as a ‘unit-crime’ in the Criminal Law. However, it seems to have all the general characteristics of a unit-crime, for example, in the case that the company steals the electricity power in order to save costs. Article 264 of the Criminal Law provides the crime of theft, but the unit is not qualified to commit this crime. In such a situation, its responsible members shall be punished according to the corresponding crime. *See* The Interpretation of the Standing Committee of the Chinese National People’s Congress on Article 30 of the Criminal Law [全国人民代表大会常务委员会关于 <中华人民共和国刑法> 第三十条的解释] (Apr. 4, 2014), available at [http://www.npc.gov.cn/npc/xinwen/2014-04/25/content\\_1861277.htm](http://www.npc.gov.cn/npc/xinwen/2014-04/25/content_1861277.htm) (last visited on Feb. 8, 2019).
  40. The Explanation, art. 2.
  41. *Id.*
  42. *Id.* art. 3.



43. JINGHONG GAO & WANMING YANG, TEXTBOOK FOR THE JUDGES IN THE FIRST INSTANCE (Practice Part: Chapter On The Criminal Cases) [基层人民法院法官培训教材 (实务卷: 刑事审判篇)] 28-30 (2005). *See also supra* note 16, at 57-9.
44. *See, e.g.*, Guoyun Hou & Xiuyun Bai, The Analysis of the Difficult Problems and Application of New Criminal Law [新刑法疑难问题解析与适用] 177-9 (1998); Hong Li, *the Discussion on Several Questions of the Unit-crimes* [单位犯罪的若干问题新探], 4 STUD. L. & BUS. [法商研究] 44-52 (2003).
45. PENGZHAN CHEN, THE HANDBOOK ON THE PRACTICAL PROBLEMS REGARDING UNIT-CRIMES [单位犯罪司法实务问题释疑] 125-6 (2007).
46. Product Quality Law art. 50. It states: “If a producer or a seller is found adulterating their products or posing fake ones as genuine, inferior ones as superior or sub-standard ones as standard, it shall be ordered to stop production or selling; the products illegally produced or sold shall be confiscated and a fine of more than 50% but less than three times the value of the products illegally produced or sold shall be imposed; where there are illegal profits, such profits shall be confiscated; if the circumstances are serious, the business license shall be revoked; if the case is serious enough to constitute a crime, criminal responsibilities shall be investigated.”
47. Law on Administrative Penalty of China (2017), arts. 7 & 28. *See also* Provisions on the Transfer of Suspectable Criminal Cases by Administrative Organs for Law Enforcement art. 11, para. 2. It states: “The warning, order to cease production or business, or decision on the administrative penalty of temporary restraint or suspension of the permit or license, made by an administrative organ for law enforcement before it transfers the suspectable criminal case to the public security organ, shall be executed continuously.”
48. A unit may be dissolved especially when there is a probability that it will continue to commit unit crimes.
49. The Rules on the Cooperation between Administration and the Criminal Justice on food and drug-cases [关于印发食品药品行政执法与刑事司法衔接工作办法的通知] (食药监稽[2015] 271号), art. 12.
50. If the unit has been dissolved by the administrative authority, the judicial proceeding may continue, and only responsible natural persons will be convicted. *See* The Interpretation, art. 286.
51. Xiaolun Huang & Guanhong Luo, *Different Solutions for the concurrence between Administrative Sanctions and Criminal Punishment in Different Situations* [区别情形处理行政处罚与刑事处罚竞合适用], PROSECUTION DAILY [检察日报], June 26, 2017.
52. Provisions on the Transfer of Suspectable Criminal Cases by Administrative Organs for Law Enforcement, art. 11, para. 2.
53. *Id.* art. 11, para. 3. The deduction can be taken in the execution phase of the judgment. *See also* Law on Administrative Penalty of China (2017), art. 28.
54. The main legal source of the rules of criminal procedure with respect to unit crimes is

- Chapter 11 of the Supreme Court's Interpretation of 2013. *See* The Interpretation, art. 286.
55. Yeying He, The Analysis of Criminal Procedural Issues concerning Unit-Crimes [单位犯罪刑事诉讼程序问题探析] (unpublished LL.M. thesis, China University of Political Science and Law, 2011), at 14.
56. *See* pt. III. 2.2 of this paper. *See also* CHEN *supra* note 44, at 297-301.
57. The staff member whose interest will be mostly affected by the trial should primarily be appointed as the representative.
58. The Interpretation, art. 280.
59. *Id.*
60. *Id.* art. 281.
61. GUIJUN SHEN, RESEARCH ON THE CRIMINAL PROCEDURE CONCERNING UNIT CRIMES [单位犯罪诉讼程序研究] 212 (2009).
62. *Id.* at 213.
63. Ruihua Chen, *Several Questions on the Criminal Procedure on the Crimes Committed by Legal Persons* [法人犯罪案件诉讼程序的几个问题], 5 PEOPLE'S PROSECUTION [人民检察] 15 (1994).
64. Xiangxi Jiang, *Necessity of Introducing a Special Section for Unit Crimes in Criminal Procedure Law* [应当针对单位犯罪刑事诉讼增设特别程序], 5 J. Jiangxi Police Institute [江西警察学院学报] 22 (2011); Mei Liu & Dongli Hong, *On Compulsory Measures against the Crimes Committed by Danwei* [试论单位犯罪的强制措施], 5 TRIBUNE OF POLITICAL SCI. & L. [政法论坛] 96 (2001).
65. *See* pt. III.2.2 of this paper.
66. In Chinese law faculties, professors doing research on criminal law and on criminal procedure law are totally separate from each other; none of them writes on both substantive and procedural criminal law.
67. Henssler et al., *Kölner Entwurf eines Verbandssanktionengesetzes* [Cologne draft of a federation sanctions law], NEUE ZEITSCHRIFT FÜR WIRTSCHAFTSSTRAFRECHT [New Magazine for Economic Criminal Law] 1 (2018).
68. This has been suggested in the *Koalitionsvertrag*. *See supra* note 7, at 126.