The Price of Freedom

by Gerhard Strate, Attorney-at-Law
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The recent commentaries written in consideration of the one-year anniversary of the Lehman Brothers bankruptcy—available in Der Spiegel and elsewhere—and the financial crisis immediately following it instill the impression that there prevailed a situation whose realization and identity had been stripped from the responsibility of individuals. Putin himself was cited: "Individual people did not behave irresponsibly; the system itself is irresponsible." The second clause of this quotation is correct, the first false.

We live in a society beholden to freedom, a society in which the dignity of man faces its reflection in accountability. The expression of this recognition is in the public penal system, which inquires into responsibility within the framework of a statutorily devised protocol should legally protected rights have been injured. In handling the financial crisis, however, prosecutions found recourse largely in deferments or half-hearted, even lamed, presentation. The one-year anniversary of the Lehman Brothers collapse takes place in the background, in the company of the rear ranks, among those who nevertheless consistently purport themselves the cavaliers of justice. Only the prosecution in Düsseldorf took measures to insinuate itself in a scrutiny of the financial crisis: the former chief executive of the mid-sized institution IKB was arraigned on charges of market rigging and embezzlement. But not on account of the several million euro which during his tenure were sunk into derivates that today are no longer tradable. He and others were accused of embezzlement, on bank charges pointing to the purchase of an exorbitantly priced entertainment system.

Any doctor who renders a medical service without informing the patient on whom he is operating of his chances of success and associated risks is guaranteed an indictment for bodily harm, even in the case that the information was duly discharged but the patient did not give his consent. Every superintendent of a small craft enterprise acts as guarantor of the observation of health and safety regulations. Were they to be neglected and an accidental death to occur, the claim for negligent manslaughter would be flush with corroborating evidence.

Are the liable parties within the larger banks "systemically" disqualified from all criminal responsibility a priori? He who takes a closer look fast realizes that those doctrines abstracted from the words of Deutsche Bank C.E.O. Ackermann on behalf of the banks apropos the financial crisis—improvements to risk management, intensive "stress tests", an escalation in equity—, are hardly new. They were tapped quite some time ago and transcribed into detailed recommendations. Only the "guidelines for risk management in the derivatives business," distributed by the

Basel Committee on Banking Supervision already in 1994, are referred to here. A communion therewith is obligatory only if the business is "totally constituted upon a commensurate capital resource basis." The banks must accede to a regular administration of stress tests, which should include the "worst case" scenario and its effects on the state of the banking institution as a whole. Illiquidity in the market (for derivatives) is hereby also expressly named as a "worst case" scenario—precisely the situation that occurred in 2008. The guidelines of the Basel Committee were adopted almost verbatim one year later—in October of 1995—by the Federal Financial Supervisory Authority (BaFin) and upon installation of that authority remained valid in their unmodified form until December of 2005.

What then are we to winnow from the national banks, which, up until the discontinuation of guarantor liability in July of 2005, gorged themselves upon umpteen billion euro of federal bank reserves at cost and vouchsafed these surplus funds nearly in their entirety unto (predominantly American) issuers of derivatives? Those responsible were aware of the guidelines of the Basel Committee and the Federal Financial Supervisory Authority. Indeed, they did not have a risk management code capable of correcting a "worst case" scenario such as they encountered (this applies – traceably – at the very least in the instances of HSH Nordbank and SachsenLB).

The guidelines were summarily ignored. This is even more criminal, as singular eruptions within the capital market again and again exposed the danger of derivative contracts: thus the 1998 failure of the hedge fund LTCM, which even then almost precipitated the collapse of the financial system. The ensuing bankruptcy of the Texan energy company Enron—at its heart a derivatives dealer—in 2000 likewise endures as a warning signal. Evidence for a burst of the American housing price bubble too has been accumulating as of 2003 in the trade press and within the business sections of the larger daily papers.

The crisis of the financial system assumed spasmodic apocalyptic proportions. It did not emerge, however, as an unexpected earthquake or even as a tsunami. For the most part it established itself through people in positions of responsibility who behaved irresponsibly.

In comparison, the incident with erstwhile WestLB board chairman Jürgen Sengera seems almost a fossil from prehistoric times. The board of WestLB under its chair voted in favor of a financing of the British enterprise Boxclever in 1999. The feedback of the credit line was to be achieved through securitization of the small loans approved for Boxclever's clients. This failed. The debts of WestLB amounted to 400 million euro. The acquittal rendered many years later by the district court of Düsseldorf was rescinded by the Federal Supreme Court on August 13th, 2009. In the presented justification for the Court's verdict, it reads: "The denial of intended harm with the logic that the endogenous risks in your imminent executions were not concretely perceptible is circular and therefore erroneous in point of law, because

the forbearance of a risk analyst—in breach of his duty—is at any rate a near enough cause for the absence of perception."

What conceivably pertains to Sengera – that is for another main trial to resolve –, pertains all the more and truly to that banker who, without any trace of risk management, solitary in his trust in the recommendations of uncertified analysts, invested hundreds of millions of euro in securities that are today worthless. The freedom to act in this way must have its price. Even criminal.