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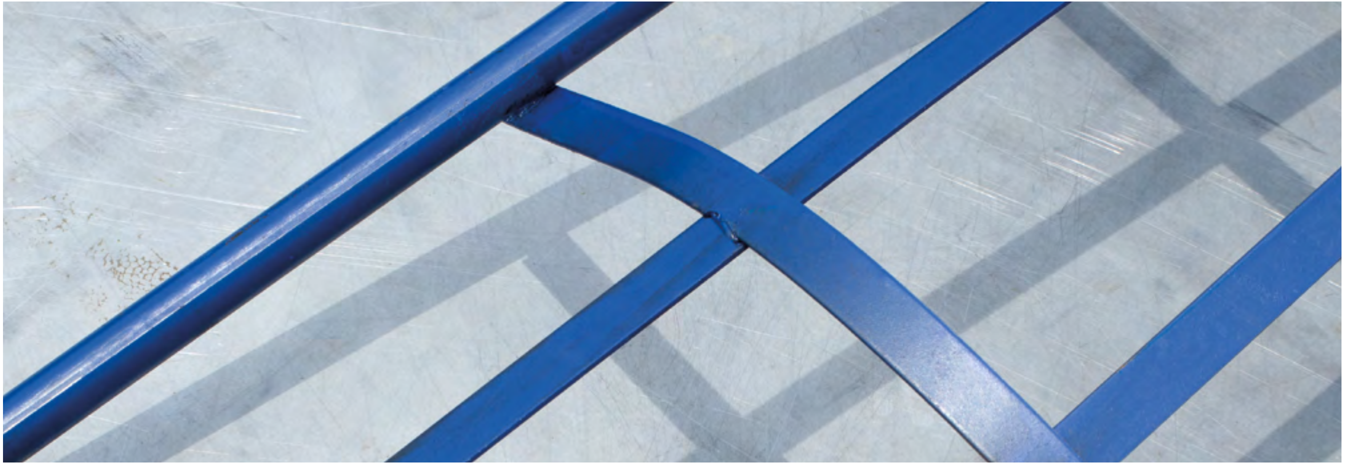

New German corporate criminal law introduced into Parliament

Key changes compared to the present legal situation

- The sanctioning of entities with commercial business operations will as a rule be mandatory where criminal offences relating to companies are committed
- Sanctions can run up to an amount of 10% of a group's annual turnover; additionally, proceeds generated from offences can be confiscated
- Public announcement of the sanctioning possible
- Internal investigation and cooperation can reduce the maximum sanction by 50%
- Search and seizure in law firms to be made easier

In August 2019, the German Federal Ministry of Justice published the draft of an act on combating corporate crime.[1] The centrepiece of that draft legislation is the new 'German Act on the Sanctioning of Entities', which creates an entirely new regime for the sanctioning of companies for corporate criminal offences: German corporate criminal law. The draft was heavily criticised at the hearing of German associations. Nevertheless, the Federal Government initiated the bill in the summer of 2020, having made only minor amendments and titling it the 'Act to Strengthen Integrity in the Economy'. Following harsh criticism from the committees on legal and economic affairs, the Bundesrat submitted its comments regarding individual aspects on 18 September 2020, but did not raise any fundamental objections. Next, the draft will be considered by the Bundestag.

The draft contains not only provisions on the sanctioning of entities (1.), but also requirements for internal investigations (2.). The draft further provides for the seizure of items that are in the possession of attorneys or other professionals who are subject to a duty of confidentiality (3.). The Bundesrat has called for the draft to be amended (4.).

1. Sanctioning of entities

The Act on the Sanctioning of Entities contained in the draft legislation is to govern the sanctioning of entities for criminal offences committed in violation of duties relating to entities, or for criminal offences by which an entity has been enriched or was to be enriched. Not just white-collar offences, but all criminal offences – even those whose definitions require merely negligence – would count as so-called corporate criminal offences. The proposed law contains the following central provisions:

1 Cf. in this regard our newsletter article 'New German Corporate Criminal Law Is Coming' from August 2019.

"Strong corporate advisory team renowned for its work on multi-jurisdictional matters for German- based corporations, particularly on investigations conducted by US government authorities. Considerable expertise relating to internal investigations into taxation on transactions, corruption and fraud."

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- The Act on the Sanctioning of Entities applies to **all legal persons** under public or private law, unincorporated associations and **partnerships** with legal capacity. Unlike in the draft of August 2019, the Federal Government's draft excludes from the Act's scope of application such entities whose purpose is not aimed at conducting commercial business operations. For these entities, the current regime is to remain in force.
- In order for an entity to be sanctioned, either a managerial person of the entity must have committed a corporate criminal offence or another person must have committed such an offence and a managerial person could have prevented or considerably impeded it through suitable precautions. Thus **a criminal offence relating to companies that at minimum would have been impeded by compliance measures** is sufficient, without the personal culpability of a managerial person (through wilful or negligent acts) being a relevant factor.
- If a corporate criminal offence has been committed to which German criminal law applies, entities may be sanctioned **regardless** of whether they have their **seat in Germany or abroad**.
- When offences are committed abroad and German criminal law does not apply to them, sanctioning entities that have their seat in Germany is still to be possible if the act were deemed a criminal offence under German criminal law and if it is also punishable at the place of the offence. This is to make it possible for **German companies** to be **prosecuted** for criminal offences committed by their **foreign employees working abroad**.
- The prosecution and sanctioning of entities are as a rule mandatory; **German public prosecutor´s offices and courts** have **no discretion** in this regard. However, the rules of criminal procedure on the **discontinuation of proceedings for reasons of expediency** (in particular due to triviality or subject to certain conditions) are also to apply to entities. In addition, the draft sets forth distinct reasons to discontinue proceedings specific to entities. For instance, a public prosecutor's office may refrain from prosecuting an entity if it expects a sanction will be imposed on the entity abroad for the corporate criminal offence.
- An entity can be prosecuted either in the same proceedings being conducted against individuals who are suspects or in proceedings conducted only against the entity. Entities have the **same rights and obligations as individuals** who are suspects. The rules applicable to defence counsel also apply accordingly.
- The draft provides for **corporate fines** and **warnings with the possibility of imposing a corporate fine** as possible sanctions. The latter is comparable to probation that can be granted subject to conditions and instructions, e.g. a monetary payment or confirmation of improvement of the compliance system by an expert (a kind of '**monitor**' based on the U.S. example). If the corporate offence has a significance going beyond the individual case, the court may also order as an incidental legal consequence that the **sanctioning** be **publicly announced** in order to inform injured parties. The dissolution of the entity, which was another sanction included in the draft from August 2019, no longer appears in the Federal Government's draft.
- The amount of the corporate fine cannot exceed **EUR 10 million** in the case of a wilful corporate criminal offence; in the case of a negligent act, the maximum amount of the fine is EUR 5 million. This is consistent with the present legal situation. Against cor-

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porate entities whose average **annual turnover** in the three financial years prior to the conviction exceeded **EUR 100 million**, however, sanctions of up to **10 per cent** of their average annual turnover can be imposed. The worldwide turnover of all corporate entities and persons that operate together with the relevant corporate entity in one economic group is decisive. A company with very little turnover can therefore also fall under this provision if its **group's turnover** is high. Since turnover is the only deciding factor, the amount of profit is irrelevant for the range of the sanction.

— The **entity's current financial situation** must be taken into account when determining the precise amount of the sanction. In case of a group loss transfer agreement, the financial situation of the group parent company is also to be considered. The **existing compliance system, measures taken to improve the system** and the **entity's efforts to detect the corporate offence** and remedy the damage must also be taken into consideration.
— **Proceeds generated from offences** can be confiscated in addition to imposing a corporate sanction in accordance with general principles. The **gross principle** applies in this respect.
— To prevent entities from being able to evade sanctioning through restructuring, imposing sanctions on an **entity's legal successors** is to be possible as well. If any intragroup restructuring or transfer of material assets were to result in no sanctioning being possible, sanctioning is to be possible on the basis of **substitute liability** of the controlling entity.
— Final and binding court decisions on the imposition of sanctions and the setting of fines pursuant to Sec. 30 of the German Administrative Offences Act (OWiG) will be entered into a **corporate sanctions register**. According to the draft's reasoning, the corporate sanctions register is an information system designed primarily for law enforcement and the judiciary.

2. Internal investigations

The draft does not contain any binding rules on internal investigations, but provides for a so-called incentive system specifically for sanctions proceedings pursuant to the Act on the Sanctioning of Entities: the court is to impose a milder sanction if either the entity itself or a third party commissioned by it has conducted an internal investigation and the following conditions are met:

— a **material contribution** must be made **to investigating** the corporate criminal offence and the entity's responsibility
— the entity's **defence counsel** or those of individuals who are suspects **cannot be involved** in the internal investigation
— the entity must **cooperate** fully and uninterrupted **with the public prosecutor's office**
— the **findings** of the internal investigation, plus all material documents and a final report, must be **produced prior to the institution of the main proceedings**

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- the **principles of fair proceedings** must be adhered to; when conducting internal interviews in particular:
  - **informing interviewees** that their statements may be used against them in criminal proceedings
  - granting interviewees the **right to request the attendance of legal counsel** or of a **member of the works council** and informing them of this right
  - granting interviewees the **right to refuse to answer questions** if the answers would expose them personally or close relatives to the risk of being prosecuted for a criminal or administrative offence and informing them of this right

Internal investigations are hence a mitigating factor, the maximum amount of the sanction is reduced to 50% (shift of the sanction range) and the public announcement of the sanctioning is no longer possible. Furthermore, if the entity consents, the sanction may only be imposed by way of a (court) fining order; this means that no public hearing will take place.

If these conditions have not been met, the fact that an internal investigation has been conducted is to be taken into consideration when the precise amount of the sanction is to be set.

If an entity notifies law enforcement authorities that it is conducting an internal investigation, and if it is becoming apparent that the conditions of the mitigating factor are being fulfilled, the authorities may temporarily refrain from prosecution to await the findings of the internal investigation.

3. Seizure in law firms

The draft legislation additionally provides for a change of the rules on the prohibition of seizures under procedural criminal law. It is intended to expand the scope of the powers to seize and confiscate attorneys' documents:

- A **debate is currently taking place** in case law and in legal literature on the extent to which **items that are subject to the attorney's right to refuse to give evidence (attorney-client privilege) may be seized**. Some argue that, based on the wording of the German Code of Criminal Procedure (*StPO*), the relationship of trust between attorneys and clients that are not suspects (e.g. witnesses or companies conducting an internal investigation and that are not suspects) is also protected.
- The draft intends to limit the prohibition of seizure expressly to cases where the relationship of trust with a suspect (individual or entity) is to be protected. **Attorney-client relationships** with persons and companies that are **not suspects** are **not to be protected**. It is also to be clarified that **searching law firms** is permissible to the extent that the rules on the prohibition of seizure very narrowly defined in the draft do not apply. It is expressly intended that the provision set out in Sec. 160a StPO, which was amended only a few years ago in order to strengthen the protection of attorneys against government investigation measures, is not applicable in the context of search and seizure measures.

- This rule affects **not just companies, but also private individuals**. The new law would permit any written or electronic correspondence with an attorney, as well as an attorney's work products and notes, about conversations with the client for instance, to be seized and used in criminal, administrative fine or sanctions proceedings provided that the specific client is not a suspect. Only the **relationship of a suspect to their attorney is protected**, not the relationship of other clients to their attorney.

4. Outlook

The draft legislation has already been criticised frequently, but that criticism has thus far been without consequence. There are doubts about the need for corporate criminal law to be a separate area of law since current criminal and administrative offences law already provide adequate means to respond to violations of law. The proposed Act would punish employees and shareholders for the misconduct of certain individuals. It has also been criticised that public prosecutor´s offices will be obliged to institute corporate sanction proceedings without any regard for the severity and significance of the criminal offence as it relates to companies. According to these critics, the resources tied up by such proceedings are needed elsewhere. Objections have also been raised against the general maximum sanction limits, against the limits being linked solely to group turnover and against the proposed separation of internal investigation and legal defence.

The Bundesrat's committees on legal and economic affairs acknowledged the criticism and recommended that the draft legislation be rejected. The Bundesrat did not follow that recommendation. However, it has commented on a number of individual aspects.

- The **public announcement** of the sanctioning is to be dropped.
- Where a corporate criminal offence is committed by persons who are not managerial persons, the entity is to be held responsible only if a managerial person **culpably (wilfully or negligently) failed to take suitable precautions** to prevent or impede the offence.
- Law enforcement authorities are to be permitted to **refrain from prosecuting** an entity if the entity's responsibility is not of considerable consequence in relation to an individual's culpability. A court's approval is not to be necessary for this course of action. Situations in which this could be possible include such in which the **focus of the reprehensibility is on individuals** or in which the **entity is by and large identical with the perpetrator** of the corporate offence.
- The wording of the law is to clarify that **sanctions against legal successors** of entities must not exceed the value of the acquired assets and the amount of a corporate sanction that can be considered reasonable in respect of the legal predecessor.
- The Act will enter into force after a **transitional of three** (rather than two) **years**.
- The Bundestag is called upon to examine if and to what extent to the responsibility and intended sanctions appear **proportionate for small and medium-sized companies** and, as far as small and medium-sized companies are concerned, certain corporate offences can be carved out entirely from the scope of the draft Act.

- It needs to be specified whether and when **precautionary measures to prevent or impede corporate offences** are deemed **sufficient**.
- To prevent German law enforcement authorities from excessively having to deal with **foreign offences** to which German criminal law does not even apply, the Bundestag is to examine whether **further requirements** are to be set down in addition to the entity having its seat in Germany, as currently proposed by the draft legislation.
- The procedural law part of the Act on the Sanctioning of Entities is to be revised with the aim of **making sanctions proceedings more effective** in order to avoid an over-burdening of law enforcement and the courts.

Now it is the Bundestag's turn to work on the draft legislation.

For any further inquiries, please do not hesitate to contact us at any time.
We will be happy to keep you informed as the legislative process progresses

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