



## New German Corporate Criminal Law Is Coming

### Key changes:

- Amount of the sanction can be up to 10% of the group's annual turnover; in addition, profits will be disgorged
- Sanctioning is to be mandatory, in principle, in cases of criminal offences relating to companies
- Public announcement of the sanctioning possible ("naming and shaming")
- Adequate compliance management system can preclude sanctioning
- Internal investigation and cooperation can reduce the maximum sanction by 50%
- Search and seizure in law firms to be made easier

The German Federal Ministry of Justice and Consumer Protection has presented the long awaited draft of an act on combating corporate crime. The draft is still being coordinated with other ministries. After that, the draft will be submitted to various stakeholder organisations for consultation and made available to the public.

The lengthy draft contains not only provisions on the sanctioning of legal persons and other entities (1), but also requirements for internal investigations (2). The draft further provides for the seizure of items that are in the possession of lawyers or other professionals who are subject to a statutory duty of confidentiality (3).

### 1. Sanctioning of entities

The new Act on the Sanctioning of Entities will provide for rules on the sanctioning of companies for criminal offences committed in violation of duties incumbent on the entity, or where the entity has been enriched or was to be enriched ("corporate criminal offence"). Such offences are not limited to just white-collar offences. The proposed law contains the following central provisions:

- 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 of the entity could have prevented or considerably impeded that offence through suitable precautions**. Thus a criminal offence that is related to the company and that could have been impeded by adequate compliance measures is sufficient. Personal fault is not a relevant factor in this regard.
- The **sanctioning of entities established outside of Germany is also possible** if a corporate criminal offence has been committed to which German criminal law applies.



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- In the case of **acts committed abroad**, however, only the sanctioning of entities having their seat in Germany is possible and only if the act were deemed a criminal offence under German criminal law and if it is also punishable at the place of the offence. The nationality of the individual committing the act in another country is irrelevant. **This is to make it possible for German companies to be prosecuted for criminal offences committed by their (group) employees working abroad irrespective of whether or not German criminal law is applicable.**
- To prevent entities from **evading sanctioning** through corporate restructuring, the draft law allows for **sanctions to be imposed on a legal successor of the entity** and provides for the **substitute liability of third parties**, which is intended to prevent the circumvention of any sanctioning by intra-group restructuring or the transfer of material assets to another corporate entity.
- **The prosecution and sanctioning of entities are mandatory if the requirements are met.** The public prosecutor’s office or the court have no discretion in this respect. 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) also apply with regard to entities.
- **Entities have the same rights and obligations as individuals who are suspects.** According to the draft’s reasoning, this is to allow for *inter alia* the rules applicable to the counsel for the defence to be applied analogously.
- The draft provides for the following **possible sanctions**: a **corporate fine**, a **warning with the possibility of imposing a corporate fine** (i.e. a “suspended sentence”) that can be issued subject to conditions and instructions, e.g. a monetary payment or confirmation of improvement of the compliance system from an expert (a kind of monitor), and the **dissolution of the entity**. The dissolution of the entity requires a particularly serious case as well as the persistent commission of significant corporate criminal offences by a managerial person and the risk that significant corporate criminal offences will continue to be committed if the entity continues to exist.
- The sanction can be imposed **in the course of the same proceedings** that are also conducted against individuals who are suspects. However, the proceedings can also be **conducted only against the entity**. Also, a **fining order** may be issued against the entity that is similar to the penal order against individuals. This decision is issued by the court **without a public hearing** taking place.
- 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. In the case of corporate entities whose **average annual turnover in the previous three financial years amounted to more than EUR 100 million**, the maximum sanction allowed is ten per cent of the average annual turnover. The worldwide turnover of all corporate entities and persons that operate together with the relevant corporate entity in one economic group is decisive.
- In the event of **several separate acts punishable under criminal law**, an overall sanction is imposed that must not exceed twice the maximum amount for an individual sanction, i.e. **EUR 20 million or 20 per cent of annual turnover**.



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- The existing **compliance system** as well as **measures taken to improve the system and the entity’s efforts to detect the act and remedy the damage *inter alia*** are to be taken into consideration when determining the amount of the sanction.
- Where there is a large number of injured parties, the court can order that the **sentencing of the entity be publicly announced**.
- **Proceeds generated from the act are confiscated** irrespective of the imposition of a corporate fine and in accordance with general principles. The **gross principle** applies in this respect.

## 2. Internal investigations

The draft does **not** provide for any **binding rules on internal investigations**. Instead, this subject is treated in the form of an **“incentive system”**. Along these lines, the section dealing with the assessment of sanctions lays down rules on **“internal investigations of entities”**, which may be conducted by the entity itself or by a third party commissioned for this purpose by the entity. **Substantive rules** on how the internal investigation must be conducted are set out as an **optional mitigating factor**: if the entity has conducted an internal investigation and has met certain conditions, the court **may** reduce the sanction of the entity. In this case, the draft provides for a **reduction of the maximum amount of the sanction to 50% (shift of the sanction range)**. Moreover, in such case, the **possible sanctions of dissolving the corporate entity and publicly announcing the sanction decision are excluded**. Finally, the sanction may only be imposed by way of a (court) fining order; this means that **no public hearing will take place**. In order for the court to be able to reduce the sanction, the following conditions must be met:

- the internal investigation must have been conducted **in compliance with applicable laws**
- a **material contribution must be made to clarifying** the corporate criminal offence
- the **defence counsel of the corporation** must not be involved in the internal investigation
- the entity must **cooperate fully** with the public prosecutor’s office
- **all material documents** and a **final report** must be produced
- the **principles of fair proceedings** must be adhered to when conducting the internal investigation. These principles are to include in particular:
  - **informing** the employees interviewed that their statements may be used against them in criminal proceedings, and
  - granting the employees interviewed the **right to request the attendance of legal counsel or of a member of the works council** and informing them of this right, and
  - granting the employees interviewed 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



If the conditions for a shift of the sanction range are not met, a conducted internal investigation may (only) be taken into account as one factor among others when determining the amount of the sanction.

### 3. Seizure in law firms

Finally, the draft 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**. It is currently the subject of debate in case law and in legal literature whether items that are subject to the attorney's right to refuse to give evidence (attorney-client privilege) are excluded from seizure only if the attorney's client is the suspect (or is an entity with a similar status) or whether the prohibition of seizure also protects the relationship of trust between the attorney and other clients that are not suspects (e.g. witnesses or relatives of the suspect, or companies conducting an internal investigation and not suspects). According to the current wording of the law, these attorney-client relationships appear to be protected from seizures as well. However, the draft intends to limit the prohibition of seizure expressly to cases where the relationship of trust between the suspect (person or entity) and the person entitled to the right to refuse to give evidence 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 of the German Code of Criminal Procedure (*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.



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