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German legislative initiative on new corporate sanctions law

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The German Federal Ministry of Justice has presented a draft bill intended to combat corporate crime. The bill has not yet been published. The most significant provisions can be found in the proposed "Association Sanctions Act" (Verbandssanktionengesetz – VerSanG), comprising 69 sections. The proposed law also provides for the broadening of jurisdiction to include cross-border cases.

The bill implements the guidelines from the coalition agreement in which it was agreed that new, more effective legislation providing sanctions against corporates would be introduced. Even before the draft bill has been published, a public discussion has begun as to whether the provisions of the planned law place a disproportionate burden on corporates.

The legislature's objectives

In Germany, corporates do not bear any criminal liability. Under the current law, in the event of unlawful acts by senior managers, a company may only have administrative fines imposed on it under Section 30 of the Regulatory Offences Act (OWiG). The principle of "discretionary investigation" applies; i.e. it is up to the competent authority to decide whether a company is to be investigated for the legal infringement and sanctioned. The objectives of the draft bill are to provide an independent legal framework for sanctioning companies and other "associations", to introduce a duty of investigation and for the provision of tougher sanctions, thereby providing an incentive for investment in compliance. In introducing this legislative initiative the Federal Ministry of Justice also seeks to comply with Germany's international treaty obligations.

If the new law is introduced, in future, the principle of mandatory investigation over the company shall apply: Authorities must initiate an investigation if there is a suspicion of a "company-related offence" and usually impose a sanction. It will be possible for an investigation to be suspended for discretionary reasons if, for example, the offence is minor, the company is already being effectively prosecuted abroad or it is complying with a court order, e.g. to improve a compliance management system or introduce such a system for the first time. The proposed changes are intended to enable appropriate sanctions to be imposed on large companies. Under the proposals, a company may be fined up to 10% of the group annual turnover for each infraction in case the group annual turnover amounts to more than 100 million euro. Where there are several infractions, a fine of up to 20% may be imposed. A discount of any sanction may be given where a company conducts an internal investigation, provided the internal investigation is conducted in accordance with the standards set by the proposed law. In procedural terms, corporates are put on the same footing as a defendant and thus are accorded equivalent procedural rights, e.g. the company should have a right to refuse to give evidence.

Higher penalties and application of sanctions in cross-border cases

Pursuant to the draft bill, a sanction against the company shall be imposed if an executive, acting in his capacity as an executive, has committed a “company-related offence”. Under the proposed bill, any criminal offence that infringes the association’s obligations or that enriches or is intended to enrich the association is a “company-related offence”. A sanction shall also be imposed if an employee acting on behalf of the company has committed a company-related offence in circumstances where an executive was in breach of supervisory duties. It is of particular significance for foreign companies operating in Germany that in a departure from the current legal position, the new law will also apply where a foreign executive or employee commits an offence abroad, provided the company has a registered office in Germany at the time of the conduct. The individual is then usually not punishable under German law. Nonetheless, pursuant to the draft bill, a sanction is to be imposed on the company, provided that the offence is “company-related”, would be regarded as a criminal offence under German criminal law (if German law was applicable) and is punishable under the laws of the state where it has been committed.

The “association sanction” is intended to be a punitive measure, attracting considerably higher penalties than the administrative fines which have been possible to date. In the case of a corporate with a group annual turnover of more than 100 million euro, a sanction of up to 10% of the group annual turnover may be imposed, and in the case of negligence up to 5%. For smaller corporates, the maximum sanction is 10 million euro. If there are several infractions, sanctions of twice as much can be imposed in each case, i.e. for large corporates up to 20% of the group annual turnover. The proceeds of the crime may also be confiscated.

Before these severe sanctions are imposed, it will be possible for more lenient action to be taken, namely a warning may be issued and the payment of the sanction suspended with conditions. Possible conditions may include, for example, improving the compliance system, proof of which must be provided by confirmation from a monitor. The existence of an effective compliance system as well as of measures to remedy compliance deficiencies, even those taken after the offence, are also to be taken into account in favour of the corporate when determining the appropriate sanction. As a means of last resort (ultimo ratio), the legislation envisages the liquidation of the association in certain cases. In addition, where a large number of people have suffered harm, the court may order the publication of its judgment.

Leniency in the event of an internal investigation

The draft bill does not satisfy the calls from the fields of academic law, legal policy and legal practice to establish binding rules for internal investigations. However, in addition to the obligations to investigate suspicions that exist under German corporate law, it provides an incentive for companies to investigate – and for any investigation to comply with specified standards.

A sanction may be reduced by up to 50% where an internal investigation is conducted by the company. However, there are strict conditions for this: Sanctions may only be reduced if the corporate or a third party instructed by it makes the result of the investigation, including all significant documents and the final report, available to the prosecution authorities. An additional requirement is full cooperation with the investigation authorities and a significant contribution to clarification of the company-related offence. Moreover, the investigation may not be carried out by lawyers who act in defence of the corporate or an accused executive or employee. Finally, the investigation must comply with the principles of due process. According to the authors of the draft bill, this includes employees being allowed “freedom from self-incrimination” during interviews and being permitted to obtain legal assistance.

The law would thus provide an incentive to take investigative actions within the company. However, this comes at a high price: A defence that is exclusively aligned to the interests of the company may then no longer be possible. The authors of the draft are focused on state criminal investigation interests.

Enhanced seizure opportunities

In June 2018, in its decision in the “Volkswagen/Jones Day” case the German Federal Constitutional Court drew public attention to one of the important legal issues in internal investigations. The essential question was whether a prohibition on legal seizure exists exclusively within the defendant/defence counsel relationship or whether the attorney/client relationship between lawyer and non-accused client is also protected from seizure measures. Unlike in common-law countries, in Germany there is no general “legal privilege” for lawyers, i.e. the attorney/client relationship is not automatically exempt from criminal investigation measures.

The draft bill is intended to remove the current legal uncertainty by restricting the prohibitions on legal seizure specifically to the relationship of trust between the defendant and defence counsel. The VerSanG does not protect internal investigative measures that take place before the investigation proceedings against the corporate are initiated. In this context, it is also important that, according to the draft bill, leniency following an internal investigation will only apply where lawyers other than the defence counsel conduct the internal investigation. The authors of the draft bill obviously wished de facto to facilitate the seizure of documents from internal investigations. Provided that they are not defence documents, documents may also be seized from parties subject to professional secrecy such as lawyers and tax advisers.

Conclusion

If the new law enters into force in its current form, it would have a significant impact on corporate practices. Investigations into corporates are likely to increase after the introduction of mandatory investigation of corporates in cases where company-related offences are suspected. It will become even more important to maintain effective compliance systems. If the proposed law comes into force, when taking the decision to carry out an internal investigation the extent to which the legal “requirements” are taken into account in order to be able to benefit from leniency will have to be evaluated. In certain circumstances this may involve abandoning other company interests.

There is already opposition, even from among the members of the German grand coalition, before the draft bill has been published. According to a press release, the CDU/CSU parliamentary group is opposed, among other things, to the sanction of liquidation of the association and the sanctioning of breaches of supervisory duties under the new law. It should be expected that the draft bill will undergo changes during the legislative process.

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