

Germany introduces a corporate criminal liability regime – Draft bill coming soon

I. Background

To date, Germany – in contrast to the U.S. and many European jurisdictions – has not introduced a genuine corporate criminal liability regime, meaning that corporations cannot be held criminally liable. Under the law in force, corporations can only be fined up to EUR 10 million for misconduct of managerial staff or deficiencies of the compliance function. In addition, law enforcement authorities can order the disgorgement of improper profits (which is often the main element of the sanction) as an element of the fine to be imposed. For a long time, these sanctions did not have any considerable deterrent effect, not least because the law enforcement authorities under the current regime have wide powers of discretion as to whether or not to initiate an investigation and to impose a fine, which means that in practice cases in which companies have actually been sanctioned are rare.

In the wake of the numerous recent corporate scandals involving German companies (e.g., the diesel emissions scandal), the German government decided to introduce a corporate criminal liability regime to more efficiently counter corporate misconduct and to sharpen the sanctions for corporations who fall foul of the new regime.

Rumors are rife that the long-awaited draft bill will be made public soon, possibly already this month. While this important law will likely reshape the German criminal law landscape and will have huge implications for companies and the way they can be sanctioned for wrongdoing, little is actually known about the law's contents.

The only source of information in this respect is the German ruling parties' coalition agreement of March 2018, which briefly outlines the following key elements as being the key principles of the new law:

- **No more Discretion for Law Enforcement Authorities:** The principle of legality for the sanctioning of companies shall be introduced. This means that the law enforcement agencies would in future be obliged to initiate investigations against corporations in the event of an initial suspicion of misconduct. As previously mentioned, so far this has been left to the discretion of the competent authority.
- **Sanctions shall be sharpened:** The amount of the fine to be imposed shall be based on the economic strength of the company, meaning that the fine shall be a percentage of the turnover (an example given in the coalition agreement is a maximum of 10% of turnover for companies with a turnover of more than EUR 100 million). Moreover, additional sanction instruments shall be created (one can only speculate here, but this may include the appointment of a monitor for a certain period of time, an instrument known from the U.S. law enforcement regime, or even the dissolution of a corporation as a last resort). The sanctions shall be made public, obviously in an effort to increase the deterrence effect (“naming and shaming”). Although this is not explicitly addressed in the coalition agreement, it is widely expected that it will be considered a mitigating factor if the corporation has established an effective compliance system (as is the case under the current legal framework for corporations).

- **Legal Certainty for Internal Investigations:** A particularly sensitive point is the legal treatment of internal investigations conducted by corporations. According to the coalition agreement, which is extremely vague in this respect, the ruling parties plan on creating (unspecified) incentives for internal investigations to be carried out and the subsequent sharing of the findings of such investigations with the authorities. Furthermore, it is intended that the procedural requirements for searches (presumably meant: “of the premises of the corporation and its legal counsel conducting an internal investigation”) and seizures of documents by law enforcement authorities be clarified in this context. The coalition agreement, however, does not specify whether the level of protection of documents - and in particular the results of an internal investigation - shall in fact be increased or whether only some clarifications are intended in light of the different positions taken by German law enforcement authorities and courts.

II. Opinion

In Germany it has been debated for a long time as to whether there is a need for a genuine corporate criminal liability regime or whether the currently available tools are sufficient to counter corporate misconduct. The proponents of the introduction of a corporate criminal liability regime have gotten the upper hand: The deficiencies of the current system have become all too obvious in recent times, in particular since public opinion has demanded stricter sanctions for corporations that are involved in and benefit from wrongdoings. The new act will likely accommodate such claims to some extent. Corporations are well advised to check and, to the extent necessary, strengthen both their compliance function and legal departments in preparation for the new age to come.

It is to be expected that German law enforcement authorities will show a dramatically increased investigative zeal in the future, given that they are now obliged to investigate corporate misconduct. Whether they have the necessary resources to handle and bring such investigations to an end within a reasonable period of time, remains to be seen. While the new sanctions system is of high relevance to corporations, in our view it is even more important that this new law intends to clarify the numerous open questions concerning internal investigations (it is the common view that corporations in Germany in principle are obliged to conduct such internal investigations in case of suspected misconduct but details are unclear in this respect). It will be key for corporations that the German legislator takes the opportunity to introduce reasonable rules in this context that both incentivize corporations to conduct proper internal investigations and protect the results of internal investigations.

We will closely monitor the developments and provide more details as soon as the draft bill has been published.

If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to reach out to:

Dr. Volker Rosengarten

Email: volkerrosengarten@quinnemanuel.com

Phone: +49 40 89728 7003

To view more memoranda, please visit <https://www.quinnemanuel.com/the-firm/publications/?type=17096>