

A hand in a suit sleeve is counting stacks of money. A magnifying glass is positioned over a document with the word 'fraud' clearly visible. The background is a blurred office setting with a computer keyboard and a telephone.

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German Corporate Sanctions
Act: Government plans
mandatory prosecution of
companies for corporate crimes

February 11, 2020

MCLE Certificate Information

- Most participants should anticipate receiving their certificate of attendance in 4-6 weeks following the webcast
- Virginia Bar Association members should anticipate receiving their certificate of attendance in 6-8 weeks following the webcast
- All questions regarding MCLE Information should be directed to Victoria Chan at +1 650-849-5378 or vchan@gibsondunn.com

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Why a new law
in Germany?

Status Quo in Germany

- **No corporate criminal liability**
- Corporations can **only** be fined under **regulatory offense law**
- **Fines** are limited to a **maximum of EUR 10 million**
(plus disgorgement of profits)
- Prosecutor has **discretion** on whether to prosecute a case against a corporation or not – prosecution of individuals is mandatory
- **Insufficient regulations** on
 - Internal investigations
 - Corporate procedural rights



Points of Criticism According to Legislature

- Regulatory offense law does **not allow for sufficient sanction** of corporate criminality; difference compared to individual wrongdoers
- In the past, discretion of prosecution led to **inconsistent application of the law**
- EUR 10 million are not sufficient to do justice to big corporations
- Precise and transparent criteria on calculating fines are missing
- Corporate crimes committed abroad often cannot be sentenced
- **No binding incentives** in the law regarding **compliance measures**
- **Missing regulations on internal investigations**
- Corporate criminal liability as international standard



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What are the most
important changes?

Most Important Changes in Law

- **Autonomous corporate sanctions law** for criminal behavior of corporations as **hybrid system** between criminal law and regulatory offense law
- **Principle of legality**
 - **Prosecution** of infringements by corporations is **mandatory**
 - Prosecution may only be waived in exceptional cases
 - However: future practice remains to be seen

Most Important Changes in Law – Sentencing Framework

Fine

Maximum of **10% of annual** – worldwide and group-wide – **revenue**, if average annual revenue of group exceeds EUR 100 million
Otherwise, still limited to **EUR 10 million**

Deferred Prosecution

Corporation will be **admonished**, whereas the fine will be determined but not imposed
May be combined with **conditions** and binding **instructions** (e.g., monitorship)

Liquidation

“Corporate Death Penalty” in case of particularly **persistent and serious criminal behavior**
This sanction might be removed from draft

Other Legal Consequences

Disgorgement of any profits gained

Publication of sanctions



Most Important Changes in Law – Compliance Measures



Can be **taken into account** when it comes to **refraining from prosecution** or **admonishing** the corporation

Can be **taken into account** in the **calculation of fines**

- As **mitigating** factor when compliance measures are implemented
- As **aggravating** factor in the absence of compliance measures

May lead to penalty notice **without public proceedings**

Most Important Changes in Law – Internal Investigations

Legal requirements regarding internal investigations

- Substantial contribution to the investigation of the offense
- Organizational separation between investigation and criminal defense
- Uninterrupted and unrestricted cooperation
- Disclosure of the investigation results to the prosecution
- Adherence to fair trial standards (e.g., interviewee's right to remain silent)
- Observance of applicable laws (e.g., EU-GDPR)



If all the requirements are met: Mitigation rule

- Maximum fine may be reduced by 50%
- Publication of sanctions and liquidation of the corporation are precluded
- Penalty notice without public proceedings

If not all the requirements are met:

Mitigating factor for calculating fines or refraining from prosecution

Most Important Changes in Law – Other

- **Protection of documents** from internal investigations **against seizure** is **limited** to documents which are part of the **relationship of trust** between defense counsel and defendant
- **Corporate sanctions register**, which contains **all final corporate sanctions** related to the new Act as well as final fines under regulatory offense law of at least EUR 300
- **Corporate legal successors** are also **subject to corporate sanctions**
- German companies can be prosecuted for **corporate crimes committed abroad**
- Corporations are **defendants** themselves, **not only (ancillary) parties** to the proceedings

Most Important Changes in Law

Please note:

- **German Corporate Sanctions Act** only applies in cases of **criminal offenses**, e.g., fraud or bribery
- **Section 30** of the German Act on Regulatory Offenses remains applicable in cases of **regulatory offenses**, e.g., certain violations of documentation or retention obligations



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What does this mean
for corporations?

Impact on Companies and Their Advisors



- Law enforcement authorities will likely increase their personnel and institutional resources
- Corporate criminal behavior will be **prosecuted mandatorily** and more **coherently** throughout Germany

Impact on Companies and Their Advisors

Organizational separation of investigation and criminal defense – Division of Labor

- **Internal investigation** must be carried out by the **company itself** or a **third person** who is **not identical** to the company's or another defendant's **defense counsel**
- Shall avoid conflicts of interest and increase credibility of investigation result



- Mandatory for **mitigation rule**
- [However, **any investigation** is a **factor of consideration** for calculating fines or refraining from prosecution – see above]

- **Reduces protection** of investigation documents **against seizure** compared to defense documents



This will not preclude hiring a single law firm if it is guaranteed that the defense counsel has no impact on the investigation or access to its results!

Impact on Companies and Their Advisors

Limited protection of internal investigation documents against seizure

- Previously, unclear whether protection against seizure requires a **relationship of trust**
- **Now necessary** according to amendment of German Code of Criminal Procedure



Protected documents

- Typical documents **related to criminal defense** of the **company**
- Documents regarding **interviews with executives** when company is under investigation



Documents probably not protected

- Documents from internal investigations **carried out for other purposes**
- Documents from internal investigations **related to other proceedings** (e.g., affiliate)
- Documents from internal investigations **carried out before company is a defendant**

Impact on Companies and Their Advisors

- **Cooperating with law enforcement authorities** vs. privilege waiver
 - Cooperating with German prosecutors is **necessary for mitigation rule**, but might result in a **privilege** waiver in US-related cases
 - Civil plaintiffs in class actions in particular may benefit from cooperation
- **Interviewees' right to remain silent** might make investigations more difficult
- **Compliance with and documentation** of all legal requirements for internal investigations is essential to ensure that law enforcement authorities **either** refrain from prosecution or at least mitigate sanctions.
- **Legal incentives** to invest in **compliance** measures

Impact on Companies and Their Advisors

- **Monitorship**

- Prosecution might be refrained or corporation admonished when company **implements measures** to prevent corporate criminal behavior that are **certified by a competent body** (monitor)
- **Potential monitors** may be lawyers, accountants, or business consultants
- Monitor will be appointed by the company at its own expense and with the court's consent



- **Higher risks regarding mergers and acquisitions**, as legal successors are also subject to new corporate sanctions

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What are criticisms
towards the law?

Criticism

- Corporations are placed under **general suspicion** regarding criminal behavior
- **Severe consequences for companies, e.g.,**
 - **Fine might amount to 10% of annual** – worldwide and group-wide – **revenue** (calculated at time of conviction)
 - **Missing regulations** regarding the implementation and contents of **compliance systems** as well as requirements on **communication with law enforcement authorities**
 - **Compliance measures may not always be considered** due to prosecutors' discretion
 - Corporate liability for **hardly controllable corporate crimes committed abroad**

Criticism

- Mandatory prosecution of corporate crimes given the current **lack of law enforcement resources and expertise**
- **Privatization of certification of compliance systems** due to monitorships
- Difficulties in differentiating between cases with and without **protection against seizure**
- **Regulations on internal investigations** are still unsatisfactory
 - Protection against seizure is still **not precise and full of gaps**
 - Required **cooperation** leads to a **de facto obligation** and expectation of an early decision on whether to cooperate or not
 - **Mandatory separation of investigation and defense** might restrict business freedom
 - **Interviewees' right to remain silent** might aggravate investigations

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When will the law apply?

When will the Act apply?



- So far, the German Corporate Sanctions Act is a **draft law**
- It is **in coordination between the ministries** and can be adopted by the German Parliament (maybe with adjustments)
- It shall enter **into force two years after its promulgation**
- It is still **uncertain when and – especially – if the Corporate Sanctions Act will be passed**, as it is **currently on hold** due to the delicate state of the German Governing Coalition

Final Thoughts

- If you have any unanswered questions, please feel free to contact any of our presenters:
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