

## Germany's Federal Ministry of Justice finalizes draft bill on new corporate sanctions regime

### I. Background

In response to the various German corporate scandals of recent times, including in particular the diesel emissions scandal that hit German carmakers, the German ruling political parties - as set forth in their coalition agreement of March 2018 - decided to substantially revamp the sanctions regime for corporations (see our previous Client Alert of April 2019 for further information, available here: <https://www.quinnemanuel.com/the-firm/publications/germany-introduces-a-corporate-criminal-liability-regime-draft-bill-coming-soon/>).

The stated goals are to (i) more efficiently combat corporate misconduct (unlike many other jurisdictions, Germany does not have a corporate criminal regime, instead corporations can only be sanctioned with relatively low fines and the disgorgement of improper profits); (ii) promote the conducting of state-of-the-art internal investigations by the affected corporations and their cooperation with law enforcement authorities; and (iii) incentivize the improvement of compliance programs. The German Federal Ministry of Justice has now finalized the long-awaited draft bill and has started the consultation process with the other bodies of the German Government regarding this important new law.

### II. Opinion

What consequences will the new act, if adopted by the German legislator, have for corporations operating in Germany? While the draft bill will not introduce a genuine corporate criminal liability regime for corporations, since the prevalent opinion in Germany is that only individuals and not legal entities can be guilty of wrongdoing, it will nonetheless introduce numerous elements characteristic of a corporate criminal liability regime, including, among other things: (i) the obligation of law enforcement authorities to investigate and prosecute corporate crimes (“principle of legality”), (ii) the obligation to grant corporations the basic rights of suspects in such investigations, and (iii) a sanctions toolkit that includes severe and deterrent instruments such as fines that take into account the financial capabilities of the respective corporation, and the dissolution of the respective corporation as a last resort. Overall, the draft bill will substantially reshape, overhaul, and tighten the sanctions regime for corporations.

### III. Significance

The following elements of the draft bill are of particular relevance in this context:

- The draft provides, above all, for a significant tightening of sanctions for corporations whose managerial staff (i) were themselves engaged in criminal misconduct that is attributable to the respective corporation (i.e. which violated the obligations incumbent on the corporation or which enriched or was meant to enrich the corporation), or (ii) failed to take appropriate supervisory measures that would have prevented such criminal acts committed by other members of the corporations staff.
- The revised and sharpened sanctions toolkit will include the following instruments:
  - A fine of up to 10% of the annual (worldwide) revenues can be imposed on corporations with an (average) annual turnover of more than EUR 100 million for intentional criminal misconduct, up to 5% for negligent criminal misconduct. For corporations with lower revenues, the maximum fine is EUR 10 million for intentional criminal misconduct and EUR 5 million for negligent criminal misconduct (these are the current maximum amounts of fines that can be imposed on any corporation, regardless of size/turnover, under the current regime).
  - The competent court can reprimand corporations and can reserve the right to impose a pre-set fine later on, if the corporation is involved in another corporate crime within a pre-set period of probation (up to five years), or does not comply with the obligations and instructions imposed on it in connection with the reprimand.
  - If a high number of persons have suffered damages by the respective corporate crimes, the conviction of the corporation can be made public by the competent court (“naming-and-shaming”).
  - In rare circumstances, corporations can also be dissolved (e.g., if the corporation has repeatedly been involved in significant material corporate crimes).
- In future, law enforcement authorities shall be obliged to investigate and prosecute corporations if there is the initial suspicion of a corporate crime, which is attributable to the respective corporations (“principle of legality”). Thus far, this was left to the discretion of the law enforcement authorities, which led to a very inconsistent law enforcement practice in Germany.
- Corporations under investigation shall in future be able to invoke the basic rights of suspects and a criminal record for corporations will be introduced, since convictions are to be recorded in a registry that will be accessible by other authorities.
- Sanctions can be reduced by the courts if the corporation under investigation has conducted a state-of-the-art internal investigation to help clarify the relevant facts and has continuously cooperated with the competent law enforcement authorities. Such cooperation includes the sharing of the findings of such internal investigation and the relevant underlying documents with the law enforcement authorities. It bears mentioning that the reduction of sanctions is only possible in this context if the internal investigation

has been conducted (i) by staff of the corporation or by external (legal) counsel who are not acting as the corporation's defense counsel, (ii) in observance of the fair trial principles (which requires the corporation to ensure that any employees questioned by the corporation's investigators are not forced to incriminate themselves), and (iii) in line with all applicable laws (e.g., data protection laws, employment laws etc.).

- The new law will clarify that the findings of internal investigations and documents produced in this context can be seized by law enforcement authorities, even if produced by lawyers or other persons bound by professional secrecy, unless the documents are prepared by the corporation's criminal defense counsel for the sole purpose of defending the corporation in a criminal investigation.

We will closely monitor the further development of the legislative process and provide an update as soon as further information is available.

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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:

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