
Newsletter: Cross-Border Investigations and Compliance

21. MAI 2014

It is often said that corporations are not criminally liable under German law. As we explain in this alert, whilst technically accurate, such a statement should be tempered by two important considerations. First, under German law corporations are currently subject to a sophisticated system of regulations and sanctions. To that extent, corporations can be heavily penalised in circumstances where compliance failings have been exposed by the discovery of criminal offences, committed by the corporation's officers and employees. Second, the Legislature is considering introducing a new statute that would establish corporate criminal liability. Although this proposal is in its infancy, corporations should closely follow its development, as any future legislation may have a serious impact on the way corporations in Germany conduct their business practices in the future.

1. The Current System of Corporate Liability for Compliance Failures

In theory, a corporation cannot be prosecuted, charged or convicted for a criminal offence in Germany. Only individuals can be considered criminally culpable under German law, and are accordingly sanctioned either by the imposition of a financial penalty or a term of imprisonment. In practice, however, a corporation must comply with strict regulatory requirements. Corporations face severe sanctions if a crime or another act of wrongdoing is committed by one of its employees and that crime or act of wrongdoing is linked to its business operations:

- The corporation can become subject to **public investigations** and prosecuting authorities will issue search warrants in order to seize documents located on its premises or information stored on its IT systems.
- The **management of a corporation must take measures to prevent or** at least impede criminal offences related to the company's business according to section 130 of the Administrative Offences Act (Ordnungswidrigkeitengesetz) (The Act). Section 130 of The Act does not specify in detail which measures must be adopted. However, it is recognized that any measure should reflect the best practices of a compliance program and be commensurate with the corporation's risk profile.
- **Failure to install** sufficient and effective compliance measures may trigger public prosecution and ultimately personal liability of the management, according to section 130 of The Act. An individual management board member may be liable to pay a fine of up to EUR 1 Million.
- The corporation itself **risks being subject to two types of sanctions** if its employees are found to have committed offences and/or its management has not implemented a sufficient and effective compliance program. Since 2013, prosecuting authorities may impose a **regulatory fine of up to EUR 10 Million** (increased from EUR 1 Million) under section 30 of The Act. In addition, the corporation may be ordered, under section 17 of The

Act, to **disgorge any profits** made from the illegal acts.

- A corporation may also be **barred from participating in public tenders** if considered untrustworthy given its past compliance failures.

In recent years, German prosecuting authorities have used the existing regulatory framework to sanction corporations. Several German companies were fined and made subject to disgorgement orders to a total value of almost EUR 900 Million. These actions resulted from the allegations that their employees had bribed domestic and foreign government officials and/or employees of their customers. Several financial institutions are currently subject to investigations concerning allegations of corporate misconduct. Moreover, prosecutors have charged high-ranking managers, including CEOs and CFOs, for their involvement in criminal wrongdoing or for failing to oversee their employees effectively.

Taken together, these developments evidence a clear policy objective to investigate and penalize wrongdoing related to corporations, even though German legislation does not provide for “criminal” corporate liability in a technical sense. It should be emphasised that the framework for corporate accountability under The Act is broader than, for example, the US Foreign Corrupt Practices Act or the UK Bribery Act, which focus on acts of bribery. It covers any kind of business-related wrongdoing—from a breach of fiduciary duties or embezzlement of funds (*Untreue*), to acts of bribery (*Bestechung*) in the public and private sector, regardless if committed in Germany or abroad, and fraud (*Betrug*), including tax fraud (*Steuerhinterziehung*)—that is covered by more specific pieces of legislation in the UK and the US.

2. Outlook on Potential Future Legislation

The current system of regulations and sanctions that affect corporations in Germany might become even more aggressive and strict in the future.

In 2013, the government of North Rhine Westphalia, one of the biggest of Germany's 16 states (*Länder*), presented a draft criminal code for corporations and associations (*Entwurf eines Verbandsstrafgesetzbuchs*) to the Bundesrat (the Upper House of the German Parliament). The draft proposes far-reaching changes to the German system of corporate criminal liability and accountability, including the following:

- **Direct liability of the corporation.** A corporation would be directly liable for criminal acts or omissions (e.g. in respect of reasonable control measure) committed by its “decision-makers” in relation to the corporation's business operations. A decision-maker would include an executive director such as a CEO or a CFO, but arguably also a chief compliance officer or other senior officers with duties of oversight.
- **No discretion of prosecuting authorities.** Prosecuting authorities would generally be under an obligation to prosecute corporate criminal offences. Under the current system, the public prosecutor's office enjoys a broad discretion to commence and discontinue corporate investigations.
- **Increased fines against the corporation.** Corporations could be subject to financial penalties of up to 10 percent of their average annual sales, or even that of the whole corporate group to which the liable corporation belongs.
- **Additional measures against the corporation.** In addition to monetary fines, a court could punish the corporation by temporarily excluding it from public tenders and/or public subsidies. In the event of persistent and repeated offences, a court could even order the dissolution of the corporation.
- **Defenses of the corporation.** The draft legislation provides that a court may refrain from sanctioning the corporation only in the following circumstances:

- **adequate procedures** – if the corporation has implemented sufficient changes in its organization and human resources so as to avoid similar offences in the future, and if there was no substantial damage or if such damage has been remediated; or
- **voluntary disclosure** – if the corporation has voluntarily disclosed the corporate criminal offence, provided the prosecuting authorities with relevant information, and implemented sufficient changes in its organization and human resources so as to avoid similar offences in the future.

The predominant reaction to the draft bill from the legal profession has been critical, and in Parliament discussions of the bill were cut short when the legislative period to allow for the Bundestag elections (the Lower House of the German Parliament) ended in the fall of 2013. In November 2013 (shortly after the elections), a majority of justice ministers of the German states declared that they were willing to pursue the legislative initiative when they convened at their semi-annual conference. At the federal level, the new grand coalition government announced in its coalition agreement that it would “examine” the need for criminal liability of multinational corporations, i.e., it first wants to canvass opinions from a wide variety of interested parties including academia, businesses, the legal profession, prosecuting authorities and non-government organizations. So far, the federal government has not given any clear indication as to whether it would support a draft bill if it were introduced to Parliament again.

We will follow closely any further developments in this important area of law.

Verfasser



Dr. Christian Crones

PARTNER

✉ christian.crones@wilmerhale.com

☎ +49 69 27 10 78 207



Dr. Jan-S. Wendler, LL.M.

PARTNER

✉ jan.wendler@wilmerhale.com

☎ +49 69 27 10 78 207