Sanctioning corporations is a never-ending theme. Various names of large companies are afflicted with negative headlines caused by offences of their employees, which resulted in fines up to billions.

The white collar crime debate in Germany is actually dominated by a draft law, which concerns the introduction of a corporate criminal law. Such a law would be a novelty for the German legal system, which, until now, only knows a factual, but not a codified corporate criminal law. The following article will show the intention of the draft and its principal risks and opportunities.

Current Legal Situation

In contrast to many other European countries, the German legal system provides the sanctioning of corporations not by a criminal sentence, but by the administrative offence law and by the possibility of recovery and forfeiture. Through these opportunities, an effective sanctioning is possible, but not by an original criminal law. Well-known example: after its bribery affair, Siemens was penalised with two fines in the amount of one million euro and 250,000 euro. But through the possibility of forfeiture Siemens had to pay additional 595 million euro (in Germany.). The arguments, that the fine itself is too small to punish the company and that the forfeiture only covers the undeserved profit, are no arguments for denying the fact, that the company is painfully punished by these sanctions.

The Draft Law's Intention

The author of the draft wants to use the effect of a criminal penalty to develop a culture of corporate compliance. For this goal, companies shall be painfully punished for company related infringements. These infringements are offences against criminal laws, committed by members of the corporation. The company's criminal offence is either the infringement of a decision maker or the infringement of an employee which was possible, because a decision maker has purposely or negligently omitted the reasonable measures which would have prevented the infringement or would have made it substantially more difficult.

In this way, the draft wants to fight the “organised irresponsibility” through forcing companies to prevent offences done by their leaders and employees. With this the draft follows the theory of increased risk, which sees the company and the persons working within as a “risk”. This results in the extremely prejudicial situation, that every infringement is seen as caused by fault in selection and/or insufficient task design on management level or in the omitting of reasonable compliance measures. A prosecutor does not have to prove the success of not-existing compliance-measures, it is sufficient to prove the possibility of risk reduction. Simply put, concerning companies the presumption of innocence will go into a presumption of blame. This applies all the more as in case of an urgent suspicion the court shall be able to order a freezing injunction with the amount of 10% of the average company's turnover of the preceding three financial years. This is suitable to drive an economically healthy enterprise into insolvency.

Following the German antitrust law, the draft provides as a sanction fines up to 10% of the company's average worldwide turnover and, as a maximum penalty, even the dissolution of the company. But in addition, the court is also able to caution the company with a guilty verdict and simultaneously reserve a fine and order obligations and instructions, which have to be fulfilled during a probation term.

This attaches to one of the central provision of the draft: the avoidance of liability through compliance. Even if there is a company related infringement, the court may refrain from sanctions at its discretion, if the company has taken the necessary personal and organisational compliance measures for preventing further comparable acts and if a serious damage did not occur or a not insignificant damage was mainly made good. The court may also refrain from sanctions, if the company has significantly contributed to the uncovering of the
offence through voluntary disclosure and has provided evidence, which are able to prove the offence. Also in this case the company must have taken the necessary personal and organisational compliance measures for preventing further comparable acts.

**Consequences**

It is obvious that the draft wants companies to implement effective (criminal) compliance systems. A company who doesn't follow this appeal will have to face a high risk of penalty. Beside the penalty, companies of all sizes will be hit with high costs. And: it is not made clear, what is meant by “necessary personal and organisational compliance measures”. Especially for small companies it will be difficult to develop a compliance system which is sufficient, but also doesn't burden the company with unreasonable costs. Large and very large companies with an existing compliance system will also have to make further investments for optimising their existing compliance-system or even to reframe them.

On the other hand, regulating the value of a compliance system by law provides legal certainty for companies. The previous legal practice of the German courts and prosecutions often refused to accept an established compliance system as a mitigating ground, because they didn't want to reward a system that has failed to prevent an offence. In future even in the case of a company related offence the company would have the opportunity of avoiding a penalty by proving their serious compliance efforts or by subsequently installing a compliance system.

That being said, the main question for companies is how they can get legal certainty. The case of Siemens shows that it already is in the interest of a company to establish a functional compliance system for preventing offences done by its members. But effective compliance requires more than a one-off measure: it is necessary to steadily check the efficiency of the CMS and, where necessary, adopt it to changing circumstances. It should be clear, that compliance as a one-off measure is nothing more than window dressing.

The draft names as an essential requirement for granting an exemption from punishment, that the company has to disclose its compliance measures. This emphasises the requirement of a dynamic compliance system: if the company is not able to disclose the compliance measures, an exemption won't be granted. If the company discloses its compliance measures and it is obvious, that the measures were insufficient, the compliance system won't provide any protection for the company. Therefore it is necessary to steadily check the CMS and especially to document its revision.

**Result**

The draft is in the early stages of the legislative procedure. But the debate about it has already shown what experts already know: compliance, especially criminal compliance, is an essential part of every company’s corporate culture.

It is the task of the specialised lawyer to find for every company the right solution. Only a fitting, efficient compliance system will protect the company from being sanctioned. This already applies for the current legal situation in Germany, a corporate criminal law demands even more caution and investment in compliance.

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