INTRODUCTION OF A GENERAL CORPORATE SANCTIONS LAW IN GERMANY

by Claus Gerber

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I.-Present Situation

Unlike other countries such as France, the United Kingdom, the United States or China, as of today Germany does not have a separate corporate criminal law or comparable act. Presently, companies in Germany regardless of their size can only be disciplined through fines up to a maximum of 10 million EUR under the Administrative Offences Act (Ordnungswidrigkeitengesetz), (Administrative Act), a general set of rules sanctioning violations of administrative law. Its enforcement lies widely within the discretion of the respective local administrative authorities.

As a result, the sanctioning of violations of law committed by legal entities is inconsistently applied and generally inadequate without an appropriate and due set of sanctions. The Administrative Act does not contain specific procedural rules for an internal investigation or incentives for the implementation of compliance-systems in order to prevent violations or non-compliance by legal entities.

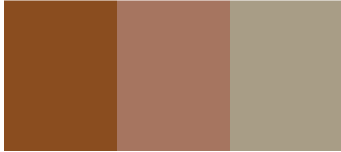
Therefore, the idea of the implementation of a Federal Corporate Sanctions Act has been discussed for some time in Germany. In response, the Federal Ministry of Justice and Consumer Protection published a draft for a Corporate Sanctions Act in August 2019 as amended in April 2020 (the Draft).

The general idea of the Draft is to allow the effective sanctioning of companies which benefit from incorrect or criminal misbehavior of their management or employees. The present situation, where administrative authorities have a wide discretion (Ermessen) will to a large extent be substituted by the principle of legality, limiting discretion of the acting authorities and bestowing German courts with the right to issue certain individual sanctions in case of violations.

A specific set of provisions will regulate the procedures of internal investigations. One further significant goal is to set incentives for the establishment of a proper compliance system.

II.-Sanction System of the Draft

Prerequisite for any sanction under the Draft is a so-called association violation (Verbandstat). Such violation is understood as criminal offence either (i) violating obligations of the company or (ii) causing enrichment or intending to cause enrichment of the respective company (Association Violation). In case either a manager of the company committed such an Association



Violation or any other employee committed an Association Violation and the management has not prevented or at least significantly hindered such Association Violation by appropriate organization, i.e. a due compliance system, courts may issue a sanction under the Draft.

The draft implements two main sanctions for Association Violations and one additional tool for courts to impose on the violating company:

1.-Monetary Penalty

2.-Warning with Reservation of Monetary Penalty and as additional tool,

3.-Public Notification

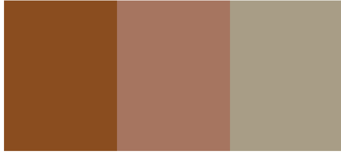
1.-Monetary Penalty

The Draft differentiates between small companies, i.e. companies with an annual revenue under 100 million EUR - and large companies with an annual revenue of more than 100 million EUR. The maximum monetary penalty for small companies amounts to 10 million EUR for an intentional and up to 5 million EUR for a negligent violation. For large companies the spread of the sanction ranges from 10,000 EUR up to 10% of the average annual revenue of the entire company group for an intentional violation and from 5,000 EUR up to 5% of the annual revenue for a negligent violation.

2.-Warning with Reservation of Monetary Penalty

Courts may abstain from enforcing a monetary penalty and may, simultaneously with the issue of such monetary penalty, reserve the right to collect and enforce such penalty for a certain probation period of up to 5 years. The warning can be combined with certain conditions and instructions to prevent further violations and to ensure due compliance. Also, the court can order the appointment of a monitor for such probation period in order to ensure compliance.

Simultaneously under separate provisions, the confiscation of company’s profits generated by a violation can be imposed as well.



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Although not a direct sanction, the consequences as to reputation and customer standing of such "naming and shaming" are considered severe for any violating company. The Draft provides further for the establishment of an Association Violation Register, i.e. a register recording any company, its Association Violation and the imposed sanction. The register is generally not open to public, but shall be accessible to administrative and enforcement agencies.

III.-Mitigation of Sanctions

The Draft aims to incentivize the implementation of effective compliance systems and differs between preventative and adaptive (compliance) actions.

In case the company can show that a comprehensive compliance system was already in place, effectively aggravating the occurrence of an Association Violation, then an Association Violation possibly cannot be established or at least, the existence of such compliance system establishes mitigating circumstances regarding the sanction imposed.

Also, the execution of internal investigations by the relevant company contributing significantly to the disclosure of the Association Violation and its circumstances establishes mitigating circumstances as to the sanction to be imposed.

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Thus, the economic risk of Association Violations for the company due to a monetary penalty combined with the risk of a confiscation of illegal profits should be sufficient incentive for the company to comply with all regulatory requirements and to establish a due corporate governance structure.

3.-Public Notification

In cases of a large number of individuals affected by such Association Violation, courts may in addition to a sanction decide on a public notification regarding the issue of the sanction.

In case the internal investigator is a lawyer or law firm, the application of the attorney client privilege is excluded, resulting in at least significant additional costs for the company and poses sometimes issues as to disclosure and confidentiality. The draft is presently under review and discussion of the German Parliament. We assume it will not become effective prior to 2021.