

# New German government plans to introduce harsher “Corporate Sanctions”

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The new German government plans to introduce harsher sanctions on companies. In addition to various new rules in the judicial sector, the governing parties CDU, CSU and SPD provide for fundamental changes to the law on corporate sanctions in their coalition agreement in order to strengthen the rule of law.

In general, German criminal law is only directed against natural persons. In case of suspicion, the prosecution authorities are obligated to initiate proceedings. Currently, however, companies are only sanctioned by administrative sanctions. The relevant provision (Section 30 Act of the Administrative Offences Act) ties in with criminal offences or administrative offences committed by company executives. As opposed to individuals, the initiation of proceedings against companies is not obligatory, but at the discretion of the authorities. The amount of the fine is up to EUR 10 million plus the levy on the obtained economic benefit. Higher fines may only be imposed in individual cases such as in antitrust and market abuse law.

The federal government’s coalition agreement goes well beyond that:

## Departure from the principle of discretionary prosecution

The coalition agreement expressly stipulates to ensure “uniform application of the law throughout Germany [...] by departing from the principle of discretionary prosecution of the so far applicable law on regulatory offences.” Due to the principle of discretionary prosecution applicable in administrative offences law (Section 47(1) of the Administrative Offences Act), it is so far at the discretion of the authorities whether proceedings are even initiated against a company, whether and to what extent a company is sanctioned or whether regulatory offence proceedings are closed. In the future, the principle of legality, which is applied in individual criminal law (Section 152(2) Criminal Procedure Code), will also apply to corporate sanctions. Accordingly, the law enforcement authorities are generally obligated to prosecute and punish criminal offences (“obligation to prosecute”).

## Clear procedural rules

The coalition agreement also provides for the creation of “specific regulations on dismissing cases” to equip judicial authorities with the



necessary flexibility in prosecution. While it remains unclear how these provisions are to be structured, it can be expected that – comparable to the individual criminal law – the limits of refraining from prosecuting and sanctioning companies will be very narrow and clearly defined. Considering recent jurisprudence of the Federal Court of Justice (May 9 2017 – 1 StR 265/16), it is to be expected that particularly existing compliance systems, the company’s participation and willingness to cooperate during the investigations, as well as compensation for damages will be favorably considered.

## Extension of sanction options

In addition, the federal government intends to expand the sanction instruments for companies. In the future, the amount of monetary fines will be based on a company’s financial strength. For smaller companies, the upper limit of EUR 10 million will continue to apply; whereas for companies with revenue in excess of EUR 100 million the upper limit will be 10% of annual revenue.

The provisions that the federal government intend to introduce correspond to the sanction rules of antitrust, money laundering, and capital market law, all of which are based on the guidelines of the European legislator. The coalition agreement further provides for the creation of comprehensible and uniform criteria for sentencing. It is additionally planned to publicly announce any sanctions imposed on companies. Such “naming and shaming” is currently only used in cases of market abuse (insider trading, market manipulation) and certain violations of the Money Laundering Act.

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### Internal investigations

In addition, the coalition also intends to provide legal incentives concerning constructive contribution to investigate the offences through internal investigations and to subsequently disclose the findings of these investigations. The discussion about internal investigations, which has been going on since the corruption trials against Siemens, MAN, and Ferrostaal, has reached its climax in the context of the “Diesel scandal”. Subject of the discussion is, in particular, the way in which the investigating authorities deal with the results of the internal investigations, which is differing from the manner that they are handled by the internal investigators. In order to ensure legal certainty for those affected, the federal government intends to create legal requirements for internal investigations, particularly with respect to confiscated documents and search options.

### Practical advises

All signs are pointing to the introduction of corporate criminal law. In contrast to 2013, the current coalition agreement provides for an explicit regulatory task for the coming legislative period. The new federal government will not only examine the option of corporate sanction law, it will also codify it. Against the background of upcoming harsher sanctions, companies should review their compliance measures today and adapt and/or extend them if necessary.

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