Chambers

GLOBAL PRACTICE GUIDE

Definitive global law guides offering comparative analysis from top ranked lawyers

White-Collar Crime

Germany
Heuking Kühn Lüer Wojtek

2019

chambers.com

Law and Practice

Contributed by Heuking Kühn Lüer Wojtek

Contents

1. Legal Framework p.3

1.1 Classification of Criminal Offences p.3
1.2 Statute of Limitations p.3
1.3 Extraterritorial Reach p.4
1.4 Corporate Liability and Personal Liability p.4
1.5 Damages and Compensation p.4
1.6 Recent Case Law and Latest Developments p.5

2. Enforcement p.5

2.1 Enforcement Authorities p.5
2.2 Initiating an Investigation p.5
2.3 Powers of Investigation p.5
2.4 Internal Investigations p.6
2.5 Mutual Legal Assistance Treaties and Cross-Border Co-operation p.6
2.6 Prosecution p.7
2.7 Deferred Prosecution p.7
2.8 Plea Agreements p.7

3. White-Collar Offences p.7

3.1 Criminal Company Law and Corporate Fraud p.7
3.2 Bribery, Influence Peddling and Related Offences p.8
3.3 Anti-bribery Regulation p.8
3.4 Insider Dealing, Market Abuse and Criminal Banking Law p.9
3.5 Tax Fraud p.9
3.6 Financial Record Keeping p.10
3.7 Cartels and Criminal Competition Law p.10
3.8 Consumer Criminal Law p.10
3.9 Cybercrimes, Computer Fraud and Protection of Company Secrets p.10
3.10 Financial/Trade/Customs Sanctions p.11
3.11 Concealment p.11
3.12 Aiding and Abetting p.11
3.13 Money Laundering p.12

4. Defences/Exceptions p.12

4.1 Defences p.12
4.2 Exceptions p.12
4.3 Co-operation, Self-Disclosure and Leniency p.13
4.4 Whistle-blowers' Protection p.13

5. Burden of Proof and Assessment of Penalties p.13

5.1 Burden of Proof p.13
5.2 Assessment of Penalties p.13

Heuking Kühn Lüer Wojtek is a partnership of more than 400 lawyers, tax advisers and civil law notaries with eight offices in Germany as well as offices in Brussels and Zürich, making it one of the major commercial law firms in Germany. It supports international clients and co-ordinates work in various jurisdictions. Internationally, it collaborates with leading law firms on a "good friends" basis. About 14 lawyers at the firm deal with white-collar crime issues on a regular basis covering the entire range of white-collar, tax and corporate criminal law. The team advises and defends companies and senior managers in all criminal matters and situations. Additionally, it assists in establishing and optimising compliance management systems and conducting internal investigations in cases of suspected wrongdoing.

Authors

André-M. Szesny heads the white-collar and criminal compliance practice group of Heuking Kühn Lüer Wojtek. He advises listed, medium-sized and municipal companies and their executives on all questions of criminal law and compliance. He defends corporate executives in white-collar proceedings regarding, for example, tax evasion, (foreign) corruption, market manipulation and insider trading, or withholding social security contributions. Szesny conducts internal investigations and advises companies and municipalities on the introduction and optimisation of compliance management systems.

Anna-Lena Glander is an attorney at Heuking Kühn Lüer Wojtek and a member of the white-collar and criminal compliance practice group. She advises companies on all questions of white-collar criminal law and defends executives in public prosecutions and investigations.

1. Legal Framework

1.1 Classification of Criminal Offences

According to German law, criminal offences are divided into administrative offences, offences and crimes. The latter are punishable by a minimum term of imprisonment of one year under the Criminal Code (*Strafgesetzbuch* ; StGB), while offences are punishable by a lower minimum term of imprisonment or fines.

For a criminal offence, both the objective elements (eg, crime-object and crime-action) and the subjective elements of a criminal norm of the Criminal Code or other laws that standardise criminal offences must be fulfilled. The subjective element is considered fulfilled if the offender acts with (at least conditional) intent or negligence (if the law provides a punishment for negligence).

There is also the possibility of criminal liability for attempting to commit a criminal offence, provided that the offence is a crime in the aforementioned sense or the relevant criminal law expressly provides for criminal liability in that case.

Administrative offences lead to fines, not to imprisonment.

1.2 Statute of Limitations

According to German law, the statute of limitations for the prosecution of white-collar crime depends on the punishment threatened for the relevant crime. For example, the limitation period is 20 years for offences punishable by a maximum term of imprisonment of more than ten years, ten years for offences punishable by a maximum term of imprisonment of more than five years to ten years, five years for offences punishable by a maximum term of imprisonment of more than one year to five years and three years for other offences. The time limit is determined by the threat of punishment, regardless of any penalties or mitigation provided for in the provisions of the General Part of the German Criminal Code (eg, in the case of attempted or assisted conduct) or the severity of the case.

According to German law, the statute of limitations begins as soon as the offence has ended. If a successful act, forming part of the offence, occurs later, the statute of limitations begins at this point in time.

Under certain conditions, the statute of limitations can be suspended (Section 78b of the Criminal Code) or interrupted (Section 78c of the Criminal Code). The latter is, in particular, the case with regard to various measures taken by the criminal prosecution authorities, such as interrogations or searches; and the courts, such as the scheduling and opening of the main proceedings. However, it should be noted that although the statute of limitations begins anew after each interruption, criminal prosecution is statute-barred at the latest if twice the statutory statute of limitations has elapsed since the beginning of the statute of limitations, or, if the statute of limitations is shorter than three years under special laws, after at least three years.

1.3 Extraterritorial Reach

There are several provisions of the German Criminal Code which claim extraterritorial validity. This depends in general on the type of the punishable offence.

For example, German criminal law – irrespective of the law of the place where the offence was committed – applies to the offences under Section 5 of the Criminal Code committed abroad, insofar as these are considered to have a domestic connection. This is the case, for example, in accordance with Section 5(12) and 5(13) of the Criminal Code for offences committed by a German public official or a person with a special obligation in the public service during a period of service or in relation to the service, or to offences committed by a foreigner as an official or a person with a special obligation in the public service. Pursuant to Section 5(15), German law also applies, for example, to corruption offences if the offender is German at the time of the offence or the offender is a European public official at the time of the offence and his place of business is located in Germany, if the offence is committed against an official, a person with a special public service obligation or a soldier of the German Armed Forces or the offence is committed against a European official or arbitrator who is German at the time of the offence.

Irrespective of this, German criminal law shall apply, irrespective of the law of the place where the offence was committed, to the offences under Section 6 of the Criminal Code committed abroad, since the legal interests mentioned are regarded as internationally protected. This includes, for example, subsidy fraud pursuant to Section 6(8) of the Criminal Code.

Finally, German criminal law can also apply to other offences (irrespective of the type of offence). This is the case pursuant to Section 7(1) of the Criminal Code for offences committed abroad against a German, if the offence is punishable at the scene of the offence or if the scene of the offence is not subject to criminal power.

In accordance with paragraph 2 of this norm, this also applies to other offences committed abroad whether or not the offence is punishable at the scene of the offence if the offender was German at the time of the offence or became German after the offence or was a foreigner at the time of the offence, is effected in Germany and, although the Extradition Act would permit his extradition according to the type of offence, is not extradited because an extradition request is not made or refused within a reasonable period of time or the extradition is not executable.

1.4 Corporate Liability and Personal Liability

At this point in time only natural persons are subject to German criminal law. In the current absence of corporate criminal law, legal entities may be prosecuted only via administrative offence law. Pursuant to Section 30 of the Act on Administrative Offences, companies are accessorily liable for criminal offences and administrative offences committed by their executives.

In such cases Section 130 of the Act on Administrative Offences may be applied. Section 130 sanctions the violation of a supervisory duty as an administrative offence. Under Section 130, management must take supervisory measures to prevent the commission of criminal offences within the company. This means that a company must take all appropriate, necessary and reasonable supervisory measures to prevent criminal offences. If these supervisory measures are omitted and, as a result, criminal offences are committed within the company, the company is liable under Section 30 of the Act on Administrative Offences.

Obviously, only a fine can be imposed on legal entities. Alternatively or cumulatively, the secondary sanction of confiscation known from criminal law (Sections 22 et seq of the Act on Administrative Offences) may be ordered.

On the basis of this legal situation, the sanctioning of a legal successor in accordance with Section 30 of the Act on Administrative Offences is permitted if there is almost identity between the former and the new asset relationship from an economic point of view.

It is likely, that the legal basis for sanctioning companies will change in the foreseeable future. The German Federal Ministry of Justice and Consumer Protection has presented its long-awaited draft of a Corporate Criminal Act. In the case of association-related offences, this draft provides for independent prosecution of the association in addition to prosecution of the individual offender. The draft law proposes an association Criminal Code which establishes the criminal liability of associations for offences committed by their employees or members against the criminal laws, if these offences have violated obligations which affect the association, or if the association has been or should be enriched by them. The prosecution of associations on suspicion should no longer – as it is currently the case – be at the discretion of the criminal prosecution authorities (so-called opportunity principle), but rather mandatory (legality principle). Monetary sanctions of up to 10% of the turnover may be imposed, or in the worst cases, liquidation. This Act also regulates the legal succession to the corporate sanctions, which is considered possible in the case of universal succession and partial universal succession.

1.5 Damages and Compensation

Victims of white-collar offences may claim compensation for their loss before the competent civil courts in accordance with general civil law provisions, and possibly also in conjunction with criminal law provisions.

However, in order to simplify and shorten court proceedings, victims of criminal offences may also assert their claims by means of so-called adhesion proceedings *(Adhäsionsverfahren*), civil proceedings connected with the criminal proceedings. In this case, the court responsible for the criminal proceedings decides on the victim's claims for damages under civil law, Section 403 of the Criminal Procedure Code. Class actions or comparable procedural means are not provided for in this respect.

Furthermore, there is also the possibility of voluntary compensation for damages by the offender, which is taken into account to mitigate the offender's punishment, but which is not mandatory and to which the victim has no claim.

1.6 Recent Case Law and Latest Developments

In August 2019, the German Federal Ministry of Justice and Consumer Protection presented its long-awaited draft of a Corporate Criminal Act. In the case of association-related offences, this draft provides for independent prosecution of the association in addition to prosecution of the individual offender. The prosecution of associations on suspicion should no longer ––as it is currently the case – be at the discretion of the criminal prosecution authorities (so-called opportunity principle), but rather mandatory (legality principle).

The new law shall apply for legal entities under public or private law, associations with no legal capacity and partnerships with legal capacity. These associations are to be sanctioned if a leading person commits a so-called "association offence" himself or herself or – if someone else commits it – has not prevented it or made its commission considerably more difficult through supervision.

An offence committed by an association is an offence which violates the duties of the association or enriches or should enrich the association. This includes all punishable violations of applicable law – such as tax evasion, corruption, fraud of customers or business partners, competition offences, market manipulation and money laundering. Foreign offences are also covered if the offence would be punishable under German law and the association is domiciled in Germany. If a company "smears" abroad in order to obtain an order and the offence is not punishable under German law because it is not committed in Germany, an association sanction must nevertheless be imposed.

Leaders are members of the executive board or the management, general representatives, authorised signatories, authorised agents and other persons with management duties, including supervisors. Members of the Supervisory Board are thus included.

Monetary sanctions of up to 10% of the turnover may be imposed, or in the worst cases, liquidation. In the case of a large number of injured parties, in addition to the imposition of the association sanction, the conviction should be made public according to the draft. The court should be able to determine the method of publication. Publications on the Internet are expressly provided for.

2. Enforcement

2.1 Enforcement Authorities

The law enforcement authorities and the courts are responsible for investigating and prosecuting white-collar offences. In all German states, there are special public prosecutor's offices for white-collar crime.

There are also specialised criminal courts for white-collar crime, which are in charge where Section 74c of the Court Constitution Act applies.

2.2 Initiating an Investigation

The initiation of a white-collar investigation generally presupposes that a law enforcement authority has knowledge of facts which give rise to suspicion that a white-collar criminal offence has been committed or is ongoing. This information may be obtained in response to a criminal complaint lodged by a citizen, not necessarily the person injured by the offence. However, it is equally possible that the prosecuting authority may learn of the facts giving rise to the suspicion through a newspaper publication or that a public prosecutor may make observations of his or her own.

In principle, not only the primarily appointed public prosecutor's office but also any other criminal prosecution authority, in particular the police, can initiate an investigation procedure. To do so, the other law enforcement authorities have the "right of first access", which entitles them, but also obliges them, to investigate the facts of the case on their own initiative and to carry out all investigations that cannot be postponed.

The initiation of investigations does not require a formal act, especially not a written one, and can also be implied by the first act of evidence gathering, such as interviewing witnesses, visiting the scene of the crime or securing traces.

2.3 Powers of Investigation

Investigation authorities are entitled to the general investigation powers of Section 100 et seq of the Criminal Procedure Code in white-collar criminal cases. Under the conditions set out therein, they can, for example, seize objects and documents, carry out searches and collect further data, such as telecommunications data.

The law enforcement authorities can raid companies and seize documents. The prerequisites for these investigative measures are set out in Section 102 et seq of the Criminal

Procedure Code, the prerequisites for seizure can be found in Section 94 of the Criminal Procedure Code.

Searches of the home and other rooms as well as of the person and the objects belonging to him or her may be carried out on the person suspected of being the offender or participant in a criminal offence of data theft, preferential treatment, prevention of prosecution or receiving of stolen data, both for the purpose of arresting him or her and if it is suspected that the search will lead to the discovery of evidence. Searches of other persons shall be permitted only for the purpose of seizure of the accused or for the purpose of prosecution of traces of a criminal offence or for the seizure of certain objects, but only if there are facts from which it may be inferred that the wanted person, trace or object is located in the premises to be searched. It should be noted that searches may only be ordered by a judge or, in cases of imminent danger, also by the public prosecutor's office and its investigators (police).

The investigative authorities can demand that a company under investigation produce confiscated documents under the conditions laid down in the Sections 94 and 95 of the Criminal Procedure Code. The precondition for the sequestration and the request for surrender is that the documents are objects which may be of significance as evidence for the investigation. In this case, the authorities may demand the surrender, after confiscation, even against the owner's will. The request for surrender can be filed not only by the court, but also – without danger in delay – by the police and the public prosecutor's office.

The law enforcement authorities can also demand an employee, officer or director of an investigated company or third party submit to questioning under the measures set out in Sections 136 and 163a of the Criminal Procedure Code for the accused suspect, and in Sections 161a and 163 of the Criminal Procedure Code for witnesses. According to this, both accused persons and witnesses are obliged to appear before the public prosecutor's office and also before the police on summons, insofar as the summons of the police is based on an order of the public prosecutor's office. Witnesses are obliged to testify if they do not have the right to refuse to testify.

2.4 Internal Investigations

As of 2019, internal investigations are not required by law and do not need to be considered by law enforcement authorities or courts. Because of this, internal investigations have recently led to considerable controversy due to a lack of legal regulation in Germany. For example, various courts, not least the Federal Constitutional Court (*Bundesverfassungsgericht*; BverfG), have taken different positions on the question of the possibility of seizing files compiled in the course of internal investigations. In order to put an end to the existing legal uncertainty in this area, the grand coalition agreed, in the current coalition agreement, to create legal requirements for the area and in particular with regard to confiscated documents and search possibilities and at the same time to provide incentives for clarification, assistance and disclosure.

As a consequence, the Federal Ministry of Justice and Consumer Protection's draft of a commercial criminal law contained relevant provisions. According to the draft, an association's efforts to uncover the offences and remedy the damage, as well as the precautions taken to prevent and uncover offences committed by the Association, after the offence shall have a mitigating effect on the level of sanctions. If, for example, the association takes the association penalty as an opportunity to carry out internal investigations and introduce a compliance management system or to optimise its existing compliance management system, it can expect a considerable reduction in sanctions.

However, internal investigations will only be recognised as a reason for mitigating sanctions if they contribute significantly to clarification, if the association or its representative for internal investigations co-operates "uninterruptedly and without restriction" with the prosecuting authorities, provides the authorities with a report of results together with associated documents, and if the internal investigations are conducted fairly. Before they are questioned, employees should be made aware that their information can be used in criminal proceedings against them and that they have the right to seek assistance and refuse to provide information if there is a risk of self-incrimination. While internal investigations are being conducted, the prosecuting authority should be able to temporarily refrain from prosecution.

2.5 Mutual Legal Assistance Treaties and Cross-Border Co-operation

Responsibilities for extradition, enforcement assistance and other mutual assistance in criminal matters is governed by the Act on International Mutual Assistance in Criminal Matters (IRG) in conjunction with an agreement on jurisdiction concluded between the Federal Government and the Germanstates. In addition to the IRG, the legal basis for international criminal law is provided by numerous bilateral or multilateral agreements that apply in co-operation between the Federal Republic of Germany and the requesting or requested state. The multilateral agreements are those of the European Union, the Council of Europe and the United Nations.

According to the principles of the IRG, extradition is only permissible if the offence also constitutes a criminal offence under German law, or if it would be such an offence under German law if the facts of the case were changed mutatis mutandis.

Extradition for prosecution is permissible if the offence is punishable under German law by a maximum term of imprisonment of at least one year or if it would be punishable under German law by such a sentence if the facts of the case had been changed mutatis mutandis.

Extradition for enforcement is only admissible if extradition for prosecution would be admissible because of the offence and if a sanction involving deprivation of liberty is to be enforced. It is also only permissible if it is expected that the sanction involving deprivation of liberty is still to be enforced or the sum of the sanctions involving deprivation of liberty still to be enforced will be at least four months.

However, some exceptions must also be taken into account. For example, extradition is not permitted because of a political act or because of an act connected with such an act, in the case of a military offence or in the case of an imminent death penalty in the other state.

The various extradition treaties differ from country to country. These regulate in principle the offences for which a suspect is to be extradited and the punishment to be expected.

2.6 Prosecution

If a white-collar crime is suspected, the public prosecutor's office is obliged (no discretion) to intervene.

An exception in this respect exists if a penal provision contains a formal criminal complaint (*Strafantrag*). There are both criminal provisions which require a criminal complaint by the victim in order to open an investigation and criminal provisions which allow the public prosecutor's office to open an investigation even without a criminal complaint if it considers the prosecution to be in the public interest.

However, the legal requirement of a criminal complaint for white-collar crimes is the exception rather than the rule.

2.7 Deferred Prosecution

There are different possibilities for the resolution, without a trial, of criminal investigations in Germany. These are the so-called penalty order *(Strafbefehl*), pre-trial settlements and settlements according to Sections 153 et seq of the Code of Criminal Procedural before and during the trial:

The procedure of the penalty order is standardised in Sections 407 et seq of the Code of Criminal Procedure. This is a purely written procedure (as long as there is no objection by the accused), which can be carried out before a criminal judge and a court of lay assessors in the case of offences with a maximum prison sentence of no more than one year, which is suspended on probation. It is also necessary for the Public Prosecutor's Office not to consider a trial to be necessary.

There are also pre-trial settlements. According to German law, under Section 257c of the Code of Criminal Procedure for natural individuals and under Sections 46 and 71(1) of the Act on Administrative Offences in conjunction with Section 257c of the Code of Criminal Procedure for associations, it is possible to negotiate an agreement during the fine proceedings. The defendant or the company may reach an agreement with the public prosecutor's office that a confession will be rewarded with discontinuation of the proceedings or the prospect of an upper or lower limit in the assessment of the fine. An agreement on the exact amount of the fine is inadmissible, however.

Furthermore there is also the possibility according to Sections 153 et seq of the Code of Criminal Procedure, that (with or without obligations and instructions), the prosecution will be exempted under certain conditions, as for example in the case of insignificance. In practice, these rules are the most important rules for the discontinuation of criminal proceedings.

2.8 Plea Agreements

According to German law, for natural persons under Section 257c of the Code of Criminal Procedure and for companies under Sections 46 and 71(1) of the Act on Administrative Offences in conjunction with Section 257c of the Code of Criminal Procedure, it is possible to negotiate an agreement during the proceedings. The defendant or the company may reach an agreement with the public prosecutor's office that a confession will be rewarded with discontinuation of the proceedings or the prospect of an upper or lower limit in the assessment of the fine. An agreement on the exact amount of the fine is inadmissible, however.

3. White-Collar Offences

3.1 Criminal Company Law and Corporate Fraud

As of 2019, there are no criminal company laws or corporate frauds in Germany.

In the absence of corporate criminal law, companies in Germany may be sanctioned only by Section 30 of the Act on Administrative Offences. If the perpetrator of a white-collar offence is the chairperson, director or manager or a company, that company can be held liable for his or her misconduct on the basis of current legislation under Section 30(1) of the Act on Administrative Offences. Prerequisite for this is that the offender has committed the crime, such as fraud, in the course of his or her managerial functions.

If an employee has committed a crime such as fraud, the company is not directly liable for this misconduct. Liability can be considered only via Sections 30 and 130 of the Act on Administrative Offences. A fine may be imposed on an

undertaking only if a breach of the supervisory duty of a manager is established.

This legal situation is expected to change slightly as a result of the Corporate Criminal Act in Germany, which has currently been published in draft form only.

According to this, the punishment of offences committed by associations will be placed on a new, independent legal basis. The aforementioned proposed law regulates the sanctioning of associations for criminal offences by which obligations affecting the association have been violated or by which the association has been or should be enriched. An association sanction will be imposed on an association in accordance with the regulations if someone, as a leader of this association, has committed an association offence or has otherwise committed an association offence in the exercise of the affairs of the association, if leaders of the association could have prevented the offence or made it considerably more difficult by appropriate precautions for the avoidance of association offenses such as, in particular, organisation, selection, guidance and supervision.

3.2 Bribery, Influence Peddling and Related Offences

In Germany, the fight against corruption is primarily governed by criminal law. The acceptance of bribery, benefits, passive corruption and the granting of benefits are punishable under Sections 331 to 335a of the Criminal Code. However, these criminal offences relate only to corruption involving public officials. Sections 299, 299a and 299b of the Criminal Code govern criminal offences sanctioning corruption in business dealings and in the healthcare system. In addition, bribery of voters and members of (Federal, State and local) parliaments is sanctioned under Sections 108b and 108e of the Criminal Code.

Passive corruption and bribery in business transactions are governed by Section 299 of the Criminal Code. Accordingly, it is a criminal offence to demand, be promised or accept benefits in business transactions as an employee or representative of a business enterprise in an unfair manner. Conversely, the offering, promising or granting of such a benefit is also punished.

The wording "in an unfair manner" clarifies that injustice is the central element of corruption in business transactions. The provision of a benefit itself is not punishable by law. It is important that the grantor and the recipient of the benefit agree that an inappropriate decision should be taken on the basis of the benefit.

In addition to corruption of public officials and business transactions, passive corruption and bribery in the healthcare sector (Sections 299a et seq of the Criminal Code) are also punishable by law. The bribery of voters and members of Parliament is further sanctioned under Sections 108b and 108e of the Criminal Code.

Corruption offences committed with the help of intermediaries are subject to the general rules on perpetration and aiding and abetting corruption. Depending on the contribution to the offence, intermediaries are liable as accomplices, instigators or accomplices.

Difficulties in establishing the criminal liability of intermediaries arise in the case of bribery in business transactions pursuant to Section 299(1) of the Criminal Code. The use of intermediaries to pay bribes does not avoid criminal liability for the employer. Especially when bribes are paid by the intermediary out of his or her compensation, the employer remains punishable if he or she was aware of this. But the intermediary can also be held liable for aiding and abetting bribery.

If the perpetrator of the corruption offence is a chairperson, director or manager, the company can be held liable for his or her misconduct on the basis of current legislation under Section 30(1) of the Act on Administrative Offences. Prerequisite for this is that the offender has committed the act of corruption in the course of his or her managerial functions.

If an employee has committed an act of corruption, the company is not directly liable for this misconduct. Liability can be considered only via Sections 30 and 130 of the Act on Administrative Offences. A fine may be imposed on an undertaking only if a breach of the supervisory duty of a manager is established.

A group's liability under Sections 30 and 130 of the Act on Administrative Offences for corrupt acts by employees of subsidiaries is controversial. The decisive factor is whether the group can be considered the owner of the company. The courts have not issued any relevant rulings to date.

The German criminal provisions for corruption under Sections 331 et seq of the Criminal Code also provide for extraterritorial validity if the offender is German at the time of the offence; or the offence is committed against a European public official or a foreign or international official within the meaning of Section 335a of the Criminal Code (assuming German nationality) (Section 5(15) of the Criminal Code).

3.3 Anti-bribery Regulation

A company's obligation to implement anti-corruption compliance programmes is not explicitly governed by German law. In particular, there are no corruption-specific regulatory provisions.

A direct obligation to introduce a compliance programme exists only for credit institutions and financial services institutions pursuant to Section 25a of the Banking Act.

For other companies, Section 130 of the Act on Administrative Offences merely obliges them to take appropriate and reasonable precautions to avoid legal infringements within the company. The measures to be taken in individual cases depend on the size of the company and the respective risks. In the opinion of the Federal Court of Justice, the entrepreneurial organisational obligation to set up a compliance programme may be stronger in the case of a correspondingly hazardous situation. But it is unclear under which circumstances such a hazardous situation is to be presumed.

In addition to the repressive regulatory provisions listed above, there are few preventive, corruption-specific provisions. Standardised rules to prevent corruption exist for the public sector only. In the healthcare and private sectors, obligations are mainly organisational. For example, associations of social-health-insurance-accredited physicians and statutory health insurance funds are obliged, under Sections 81a(4) and 197a(4) of the Social Code, to set up bodies to combat misconduct in the healthcare system.

Other companies are only required to implement compliance measures to prevent corruption under Sections 30 and 130 of the Act on Administrative Offences.

There is no universal recipe for a successfully way to prevent corruption. The compliance measures, which are necessary, are company-specific. Key factors include the size of the company, the industry in which it operates, suspected cases from the past and its national or international orientation.

However, there is a basic set of measures for prevention that all companies should implement:

A risk analysis should be carried out to identify particularly risky business areas. Based on this risk analysis, appropriate measures should be implemented in the company's organisation, such as the double-checking principle. Particular attention should also be paid to ensuring that the corporate culture rejects corruption. A company should take a clear stand against corruption through measures such as employee training, anti-corruption guidelines and the introduction of an internal sanctioning system. To ensure the effectiveness of anti-corruption measures, regular checks and spot checks should be carried out.

Companies are also advised to properly record the compliance measures they have taken. If corruption does occur despite the existence of a compliance measures, the documentation may be sufficient to exonerate the company.

Inadequate anti-corruption compliance programmes are sanctioned on a case-by-case basis. The company is liable for omitted compliance measures under Section 30 of the Act on Administrative Offences only if acts of corruption occur as a result of a breach of the supervisory duty of a manager.

Comparable regulations apply to corporate crimes according to the draft of the Corporate Criminal Act. Although a missing compliance programme does not constitute a specific criminal and/or administrative/civil offence, the draft promotes compliance measures and provides incentives for companies to use internal investigations to help clarify criminal offences. It provides that the association's participation in the proceedings, by conducting internal investigations, should be regulated and combined with a reduction in sanctions.

3.4 Insider Dealing, Market Abuse and Criminal Banking Law

The offence of insider trading is governed by Section 119(3) of the German Securities Trading Act in conjunction with Article 14 Market Abuse Regulation (MAR). According to these provisions, anyone who conducts insider trading, recommends the conduct of insider trading to a third party, or induces a third party to do so, or discloses insider information, is liable to prosecution. This offence is punishable by imprisonment for up to five years or by a fine.

Market manipulation is punishable under Section 119(1) of the German Securities Trading Act in conjunction with Section 120 (2) No 3 or Section 120 (15) No 2 of the German Securities Trading Act and in conjunction with Article 15 MAR. The activities covered by the offence of market manipulation are varied and are described in Article 12 MAR (not exhaustive). Sanctions for market manipulation shall be imposed with imprisonment for up to five years or with a fine if the offender influences, for example, the domestic stock exchange price or market price of a financial instrument through market manipulation.

With regard to insider trading and market manipulation, the attempt is as punishable as the completed action. In addition, the law provides for various mitigating grounds and particularly severe cases which have an influence on the punishment.

Section 54a of the German Banking Act *(Kreditwesengesetz)* also contains penal provisions. Under this provision, a prison sentence of up to five years or a fine is imposed on anyone who, contrary to the provisions of the aforementioned law, does not ensure that an institution or a group of institutions does not have a strategy, process, procedure, function or concept specified in Section 25c of the aforementioned law, and thereby jeopardises the continued existence of the institution, the parent company or an institution belonging to the group. Negligent action is also possible in this context.

3.5 Tax Fraud

Tax evasion is regulated in the German legal system by Section 370 et seq of the German tax code. According to this, a person is liable to prosecution and is punished with a prison sentence of up to five years or with a fine if he or she

provides the tax authorities or other authorities with incorrect or incomplete information about significant tax-related facts, leaves the tax authorities unaware of significant tax-related facts (tax evasion by omission) or neglects the use of tax symbols or tax stamps in breach of duty and thereby reduces taxes or obtains unjustified tax benefits for himself or herself or another person. The provision also provides for particularly serious cases as presumptive examples, such as large-scale tax evasion, where a penalty of imprisonment of between six months and ten years is provided for.

German law, however, provides for an exception in the case of a self-reporting offence, through which impunity can occur. Anyone who fully corrects the incorrect details, supplements the incomplete details or makes up for the omitted details in relation to the tax authorities for all their tax offences will not be punished under Section 370 of the Tax Code because of these offences.

However, this does not apply if one of the counter-exceptions of Section 371(2) of the tax code applies. Accordingly, impunity does not apply, inter alia, if there is a serious case, if an examination order or the initiation of criminal proceedings or administrative fine proceedings has been announced before the correction, supplementation or rectification, if an examination by a public official is imminent, or if one of the tax offences was already discovered in whole or in part at the time stated and the offender knew this or had to reckon with it, and if the reduced tax or the unjustified tax advantage obtained for himself or herself or another exceeds an amount of EUR25,000 per offence.

The attempt is also punishable by law.

3.6 Financial Record Keeping

In the German Criminal Code, the violation of the obligation to keep records in accordance with Section 283b of the Criminal Code is a criminal offence.

According to this, it is a criminal offence to refrain from keeping commercial books, which a person is legally obliged to keep, or to keep or change them in such a way that it is difficult to keep track of the assets. In addition, it is punishable to set aside, conceal, destroy or damage commercial books or other documents, for the storage of which a person is obliged under commercial law before the expiry of the statutory storage periods, and thereby complicate the overview of his or her assets. Anyone who, contrary to commercial law, prepares balance sheets in such a way that an overview of his or her assets is made more difficult, or who fails to prepare the balance sheet of his or her assets or the inventory within the prescribed period, is also subject to the offence.

However, these acts are only punishable if the perpetrator has suspended his or her payments or if insolvency proceedings have been opened against his or her assets or if the application to open insolvency proceedings has been rejected for lack of assets.

In this context, the law provides for sanctions with imprisonment for up to two years or a fine.

Negligent conduct is also punishable by imprisonment for up to one year or a fine with regard to some of the alternative courses of action.

3.7 Cartels and Criminal Competition Law

The most important fine provision of antitrust law is standardised in Section 81 of the Cartel Act.

Sections 81(1) to 81(3) of the Cartel Act define various offences against the provisions of European and German antitrust law as administrative offences in the form of blanket provisions. The vast majority of these offences are special offences that violate rules or regulations directed at companies or associations of companies. In this respect, a punishment in accordance with Section 30 of the Administrative Offences Act can also be considered directly against the company. In addition, the prosecution of natural persons is also possible on the basis of Section 9 of the Administrative Offences Act.

Paragraphs 4 to 7 of the Cartel Act contain provisions on the imposition of the fine offered for punishment.

Section 81(10) of the Cartel Act regulates the responsibility for prosecution in antitrust fine proceedings. Depending on the circumstances, the Federal Network Agency, the Federal Cartel Office and the supreme state authority are responsible.

3.8 Consumer Criminal Law

There is no specific Consumer Criminal Law in Germany. In this context, the general penal provisions, such as fraud, bribery and corruption in commercial dealings, personal injury offences, etc, apply.

3.9 Cybercrimes, Computer Fraud and Protection of Company Secrets

There are many penal provisions under German law that subordinate cybercrime (crimes in connection with the use of computers). These are crimes in the field of violation of the personal and private life, in the field of falsification of documents as well as in the field of damage to property. These include, for example, the spying on and interception of data as well as the preparation of such offences in accordance with Section 202a et seq of the Criminal Code, the falsification of evidence-relevant data in accordance with Section 269 of the Criminal Code, deception in legal transactions in data processing in accordance with Section 270 of the Criminal Code and data modification in accordance with Section 303a of the Criminal Code.

Computer fraud is regulated in Section 263a of the Criminal Code. According to this, it is punishable to, with the intention of obtaining an unlawful pecuniary advantage for oneself or a third party, damage the property of another party with the effect that the result of a data processing process is influenced by incorrect configuration of the program, by the use of incorrect or incomplete data, by unauthorised use of data or otherwise by unauthorised influence on the process. This offence is punishable by a fine or imprisonment for up to five years. Anyone who prepares a criminal offence in the aforementioned sense by producing, procuring, displaying, safekeeping or transferring to another person computer programs, the purpose of which is the commission of such an offence, shall also be punished with a custodial sentence of up to three years or with a fine. The attempt is punishable and the provision also provides for particularly severe cases which may lead to increased punishment. In the case of low value items, a criminal complaint is required for prosecution.

Under Section 23 of the Law on the Protection of Trade Secrets (*GeschGehG*), anyone who illegally acquires a trade secret, illegally uses or discloses a trade secret, or illegally (as a person employed by an undertaking) discloses a trade secret which has been entrusted to him or her or made available to him or her in the course of his or her employment during the period of validity of the employment relationship, in order to promote his or her own or another person's competetive status, for his or her own benefit, for the benefit of a third party or with a view to harming the proprietor of an undertaking, shall be punished with imprisonment for up to three years or with a fine. Similarly, a person who uses or discloses a trade secret obtained through a third-party act in the aforementioned sense in order to promote his or her own or another's competetive status, for his or her own benefit, for the benefit of a third party or with the intention of causing damage to the owner of an enterprise shall be punished.

This shall apply correspondingly to secret documents or regulations of a technical nature. The provision provides for increased sanctions for cases of commercial activity and use abroad.

The attempt is also punishable in this respect. Aid measures by holders of professional secrets are not illegal if they are limited to the receipt, evaluation or publication of the trade secret.

This act will also only be prosecuted upon application, unless the prosecution authority considers intervention to be necessary ex officio because of the special public interest in the prosecution.

3.10 Financial/Trade/Customs Sanctions

Regarding financial/trade/customs sanctions, the German Foreign Trade Act provides for various criminal offences in Sanctions 17 and 18. Section 19 of the Foreign Trade and Payments Act also lays down various rules on fines.

It is a criminal offence, for example, to contravene a prohibition on the export, import, transit, transfer, sale, acquisition, supply, provision, transfer, service, investment or disposal of frozen funds and economic resources, of an act of the European Communities or of the European Union which is directly applicable and published in the Official Journal of the European Communities or of the European Union, when that act serves the purpose of implementing an economic sanction measure adopted by the Council of the European Union in the field of the common foreign and security policy. Any person who infringes an authorisation requirement for the export, import, transit, transfer, sale, acquisition, supply, provision, transfer, service or investment, or the disposal of frozen funds or economic resources, of an act of the European Communities or of the European Union which is directly applicable and published in the Official Journal of the European Communities or of the European Union, which is intended to implement an economic sanction measure adopted by the Council of the European Union in the field of the common foreign and security policy, shall also be liable to prosecution.

Violations of the Export Regulation are also punishable. The Foreign Trade and Payments Ordinance also provides for various criminal offences in Section 80 of the Foreign Trade and Payments Ordinance and various administrative offences in Sections 81 and 82 of the Foreign Trade and Payments Ordinance, with regard to which it refers to the Foreign Trade and Payments Act.

3.11 Concealment

Any person who deliberately or knowingly prevents, in whole or in part, another from being punished under the Criminal Code for an unlawful act or from being subjected to a criminal procedural measure shall be punished. Similarly, any person who intentionally or knowingly prevents, in whole or in part, the execution of a penalty or measure imposed on another shall be punished.

The sanction is imprisonment for up to five years or a fine. However, the penalty may not be more severe than the penalty threatened for the predicate offence.

The attempt is also punishable.

3.12 Aiding and Abetting

A person who conspires with or assists another to commit a corporate offence can also held liable under the German legal system.

In this case, both criminal liability for perpetration and participation can be considered.

If more than one person commits a crime jointly, everyone will be punished as a perpetrator (accomplice), pursuant to Section 25(2) of the Criminal Code.

A participant (accomplice) will be punished if he or she has deliberately assisted another person in committing an unlawful act intentionally. The punishment for the accomplice depends on the threat of punishment for the offender, but must be reduced in accordance with Section 49(1) of the Criminal Code.

The delimitation, whether perpetration or participation is present, is made both on the basis of the subjective will of the persons involved and on the basis of the perpetration, in other words the "holding in the hands" of the course of events (then perpetration).

3.13 Money Laundering

The punishability of money laundering and asset concealment is regulated by Section 261 of the Criminal Code.

Under the Criminal Code, it is a criminal offence to hide; disguise the origin of; or thwart or jeopardise the identification, tracing, confiscation, or seizure of an object arising out of a particular unlawful act (crime and certain offences such as property offences) mentioned in the provision. The act is punishable with a prison sentence of three months to five years.

These money-laundering objects are equivalent to those objects that originate from a money-laundering offence committed abroad, even if the offence is punishable at the scene of the offence.

Also punished is anyone who procures or holds such an object for himself or herself or a third party or uses it for himself or herself or a third party if he or she knew the origin of the object at the time when he or she obtained it. This does not apply if a third party has previously obtained the object without committing a criminal offence.

In particularly serious cases, the penalty is a prison sentence of between six months and ten years. Such a particularly serious case usually exists if the perpetrator is acting commercially or as a member of a gang that has joined forces to commit money laundering.

The attempt is also punishable.

Anyone who does not recognise that the object stems from an illegal money laundering act in the aforementioned cases will be punished with imprisonment for up to two years or with a fine.

In the case of money laundering, German law also provides for the possibility of impunity through voluntary reporting. No penalty is imposed on anyone who voluntarily reports the offence to the competent authority or voluntarily initiates such a report, unless the offence was already discovered in whole or in part at that time and the perpetrator knew this or had to expect it in a reasonable assessment of the facts, and the object to which the offence relates is seized.

4. Defences/Exceptions

4.1 Defences

If a company is liable under Section 30 of the Act on Administrative Offences, it is possible, as a defence, to refute the existence of a breach of supervisory duty. Where a supervisory measure has been omitted, it must be demonstrated that the supervisory measure in question was either inappropriate to prevent the act of corruption or was not necessary or reasonable.

The prevailing view (which is also shown in the draft of the new Corporate Criminal Act) is that an anti-corruption compliance programme that meets the respective operational requirements reduces liability. Because, under this condition, neither the company, nor its management, has violated its supervisory duties under Section 130 of the Act on Administrative Offences.

In practice, however, it is difficult to determine retrospectively which supervisory measures a company was obliged to take. The fact that corruption has occurred despite the existence of a compliance programme may lead the court and the public prosecutor to presume prematurely that the compliance programme did not meet the company's operational requirements and it may not serve to reduce liability.

Such a conclusion is unlikely, however, because the assessment should be based on a fictitious view prior to the act of corruption. If the anti-corruption compliance programme satisfies the operational requirements in a fictitious 'ex ante' view, the fact that corruption nevertheless occurred should not affect the ability of the compliance system to reduce liability.

If an appropriate compliance programme is maintained, a company will not normally be liable. Should liability be affirmed in an individual case, the existence of a compliance system programme may at least have an advantageous effect of reducing the fine. However, there is no guarantee with regard to appropriate handling.

4.2 Exceptions

There are no exceptions or de minimis exceptions for white-collar offences in Germany. Also there are no exempt industries or sectors.

4.3 Co-operation, Self-Disclosure and Leniency

Both confessions and co-operation with the criminal prosecution authorities, such as the release of information, are factors that must be taken into account in mitigating punishment in the court's sentencing according to Section 46 of the Criminal Procedure Code.

This also applies according to the draft of the Corporate Criminal Act on corporate crimes.

4.4 Whistle-blowers' Protection

As of 2019, Germany has an inadequate whistle-blower protection.

There are no legal regulations for the protection of whistle-blowers. Since anonymous whistle-blowers frequently provide the decisive clues and thus enable investigations into corruption cases in the first place, it was recommended that whistle-blower protection be improved to ensure a more effective fight against white-collar crime.

Because of this, and on the basis of the draft EU directive on whistle-blower protection from 2018, it is to be expected in the medium term that Germany will align the level of protection afforded to anonymous whistle-blowers with EU requirements. The expectation is that whistle-blowers will then increasingly decide to report legal violations.

5. Burden of Proof and Assessment of Penalties

5.1 Burden of Proof

The burden of proof in German criminal proceedings is generally carried by the prosecution authorities.

These authorities can initiate investigations if there are sufficient actual indications for the existence of a prosecutable criminal offence.

Subsequently, the public prosecutor's office can only bring a public action if the conviction of the accused is more probable than an acquittal in the preliminary assessment of the offence – ie the probability of conviction is at least 50%. The public prosecutor's office also bears the burden of proof in this respect.

Heuking Kühn Lüer Wojtek

Georg-Glock-Straße 4
40474 Düsseldorf

HEUKING KÜHN LÜER WOJTEK

Tel: +49 211 600 55 00
Fax: +49 211 600 55 050
Email: a.szesny@heuking.de
Web: www.heuking.de

The court can only convict the defendant if it is convinced of the defendant's guilt. If this proof of conviction is not exceeded and there are still reasonable doubts about his guilt, the accused must be acquitted in accordance with the principle "in dubio pro reo".

In Germany there is no presumption mechanism.

5.2 Assessment of Penalties

According to German law, the sentencing of the accused in the individual case is based on his or her guilt.

In doing so, the competent court weighs the circumstances that speak for and against the offender against each other, Section 46 of the Criminal Code. These are, for example, the perpetrator's motives and aims, the attitudes that can be determined from the act, the intention used in the act, the degree of breach of duty, the manner of offence and the culpable effects of the act, the perpetrator's past life, his or her personal and economic circumstances as well as his or her behaviour after the offence, in particular his or her efforts to make good the damage, as well as the perpetrator's efforts to achieve a settlement with the injured person.

The above-mentioned sentencing shall also take into account the special cases of sentencing as defined in Sections 46a et seq of the Criminal Code, such as the compensation of damages, assistance in clarification and special legal grounds for mitigating the offence.

Only in the case of certain criminal offences, such as tax evasion, do guidelines exist on the basis of which the court can orient itself in the sentencing. In this case, the amount of tax evaded has an impact on the type and amount of the penalty.

Comparable provisions also apply under the draft of the Corporate Criminal Act, Section 16 et seq of the draft. In particular, the association's participation in the proceedings by conducting internal investigations is to be combined with a reduction in sanctions.

The German law doesn't know any deferred prosecution agreements or non-prosecution agreements.

Plea agreements, according to German law, are provided for in Section 257c of the Code of Criminal Procedure. It is possible to negotiate an agreement during the fine proceedings. It is possible for a natural person or a company to reach an agreement with the public prosecutor's office that a confession will be rewarded with discontinuation of the proceedings or the prospect of an upper or lower limit in the assessment of the fine. An agreement on the exact amount of the fine is inadmissible, however.