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Contents

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 Zurich, 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, they assist in establishing and optimising compliance management systems and conduct internal investigations in cases of suspected wrongdoing.

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1. Offences

1.1 Legal Framework for Offences

1.1.1 International Conventions

To fight cross-border corruption effectively, Germany supports the implementation of and compliance with international standards against corruption through active participation in the United Nations, the World Bank, the G7/G20 and the Organisation for Economic Co-operation and Development (OECD).

In Germany, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions applies. In addition, Germany has acceded to the UN Convention against Corruption. The Criminal Law Convention on Corruption of the Council of Europe and a supplementary protocol were further ratified by Germany on 10 May 2017.

As Germany is an EU Member State, European legal instruments to combat corruption also apply in Germany. Germany has transposed into national law the Protocol of 27 September 1996 to the Convention on the Protection of the European Communities' Financial Interests and the Convention of 26 May 1997 on the Fight against Corruption Involving Officials of the European Communities or officials of Member States of the European Union. The Directive of 5 July 2017 on the Fight against Fraud to the Union's Financial Interests by Means of Criminal Law must also be taken into account.

1.1.2 National Legislation

In Germany, the fight against corruption is primarily governed by criminal law. The acceptance of benefits, passive corruption, granting of benefits and bribery are punishable under Sections 331 to 335a of the Penal Code (Strafgesetzbuch). However, these criminal offences relate only to corruption involving public officials. Sections 299, 299a and 299b of the Penal Code govern criminal offences sanctioning corruption in business dealings and in the healthcare system. In addition, bribery of voters and members of parliaments (not only Federal Parliament, but also State and Local Parliaments) is sanctioned under Sections 108b and 108e of the Penal Code.

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

1.1.3 Guidelines for the Interpretation and Enforcement of National Legislation

In Germany, there is no directive or guidance comparable to the guidance on the UK Bribery Act. Binding guidelines for the prevention of corruption exist only for the public sector. The interpretation of the national legislation follows a case-to-case-assessment oriented on court decisions.

1.1.4 Recent Key Amendments to National Legislation

Sections 299a and 299b of the Penal Code were implemented in 2016 and govern criminal offences sanctioning corruption in the healthcare system. In addition, the provisions regarding bribery of voters and members of parliaments (Sections 108b and 108e of the Penal Code) and bribery of foreign and international officers were revised in 2015 and 2019.

1.2 Classification and Constituent Elements

German criminal law on corruption differentiates between public officials, European public officials and foreign and international public officials.

Corruption offences relating to public officials are governed by Sections 331 and following of the Penal Code. Accordingly, it is a punishable offence for a public official wilfully to demand, to allow himself or herself to be promised or to accept a benefit for the discharge of an official duty, even if he or she does not violate any duties. Furthermore, individuals who wilfully offer, promise or grant an official a benefit for the discharge of a duty are also punished.

It is sufficient if the advantage in connection with the performance of the service is offered/granted or demanded/received. A service obligation violation is not required for a punishability according to Sec 331, 333 of the Penal Code. However, if the benefit is promised or granted for the violation of a duty, there will be a harsher punishment Sec 332, 334 of the Penal Code).

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

The wording "in an unfair manner" clarifies that injustice is once again the central element of corruption in business transactions. Accordingly, the provision of a benefit in itself

is not punishable by law. What is important is that the grantor and the recipient of the benefit agree that an appropriate 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 and following of the Penal Code) are also punishable by law. The bribery of voters and members of Parliament is further sanctioned under Sections 108b and 108e of the Penal Code.

Bribery

The colloquial term "bribe" is used in Sections 299, 299a, 299b, 331 and following of the Penal Code under the concept of a "benefit". A "benefit" is any tangible or intangible benefit to which there is no entitlement and which objectively improves the beneficiary's economic, legal or personal situation. Benefits that are granted to third parties are also covered by this concept.

The granting of benefits is not classified as corruption if the benefits are not granted in expectation of consideration and are socially adequate. As no injustice exists in such cases, gifts, entertainment, invitations and expense allowances may be permitted in individual cases.

The decisive factor is that the gift is both socially customary and generally approved. Against this backdrop, the donation of cash is prohibited.

The assessment of the social adequacy of the benefit depends in particular on the role of the beneficiary, the relationship between the giver and the beneficiary, the procedure of the giver and the nature, value and timing of the gift.

If the beneficiary is a public official, a stricter measure of social adequacy applies. Under no circumstances may a gift convey an impression of the public official's bias or purchasability towards third parties. The hierarchical position of the beneficiary can also provide clarification on whether a gift is admissible. For example, invitations of representatives are more socially adequate than invitations of simple administrators.

The admissibility of a gift may be contradicted by enduring points of contact between the parties involved. In addition, a clandestine approach by the giver indicates the inadmissibility of the gift.

As far as the admissibility of gifts is concerned, low-value gifts are generally admissible, although different value limits may apply in this regard.

The admissibility of dinner invitations or event invitations depends on the value, the specific relation to the invited person and other particular circumstances in each case.

Other contributions, such as donations and sponsorship, frequently give rise to an unspecified presumption of undue influence on the beneficiary's decisions. To avoid this, companies should allow such support only on the basis of clear guidelines. In particular, the donation should always be transparent to the public.

The obligation for companies to implement an anti-corruption compliance programme is not explicitly governed by German law. In particular, there are no corruption-specific regulatory provisions.

Pursuant to Section 25a of the Banking Act, a direct obligation to introduce a compliance programme exists only for credit institutions and financial services institutions. 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 corresponding hazardous situation; however, it is unclear under which circumstances such a hazardous situation is to be presumed.

Inadequacies in the compliance management system can be considered a breach of the supervisory duty within the meaning of Sec 130 of the Administrative Offences Act and lead to an association fine within the meaning of Sec. 30 Administrative Offences Act (see below for further details).

There is no universal recipe for successfully preventing corruption. The necessary compliance measures are always 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 prevention measures that all companies should normally implement.

First, 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 document the compliance measures they have taken properly. If corruption does occur

despite the existence of a compliance programme, the documentation may be sufficient to exonerate the company.

The term "public official" is legally defined in Section 11(1)(2) of the Penal Code. Accordingly, public officials are to be considered civil servants or judges under German law, and individuals who are in another official relationship under public law or are otherwise appointed to perform public administration duties at or on behalf of an authority or other body, without prejudice to the organisational form chosen to perform their duties. Employees of state-controlled companies may under certain conditions be qualified as public officials.

Pursuant to Section 11(1)(2a) of the Penal Code, 'European public officials' are persons who are members of the European Commission, the European Central Bank, the Court of Auditors or a court of law of the European Union; and officials or other civil servants of the European Union or of a body established on the basis of EU law, or who are responsible for carrying out tasks of the European Union or tasks of a body established on the basis of EU law.

Section 335a of the Penal Code designates judges of foreign or international courts and certain employees of foreign or international authorities as suitable beneficiaries of an act of corruption. It also covers soldiers and certain officials of the troops of non-German state parties to the North Atlantic Treaty stationed in Germany.

Influence-peddling

In Germany, influence on the decision-making process of a public official is punishable by criminal law for both the beneficiary and the provider of the benefit.

According to Section 332(1), a public official, a European public official or a person with a special public service obligation who claims, obtains a promise of, or accepts an advantage for himself, herself or for a third party in return for such an advantage is liable to prosecution if he or she has performed or will perform an official act and thereby violates or would violate his or her official duties. The same applies, in accordance with Section 332(2), to judges, members of a court of the European Union or arbitrators who infringe their judicial duties by the offence.

According to Section 334, anyone who offers, promises or grants an advantage to a public official, a European public official, a person with a special public service obligation or a soldier of the German Armed Forces in return for that person or a third party is liable to prosecution if he or she has performed or will perform an official act and thereby violates or would violate his or her official duties. This also applies to acts of bribery against a judge, a member of a court of the European Union or an arbitrator who has violated or would violate the duties of a judge as a result of the act by the judicial act.

However, these provisions apply not only - as explained - to German and European public officials, but also to foreign public officials under the conditions of Section 335a of the Criminal Code: accordingly, for the purposes of applying Section 332 and Section 334 of the Criminal Code, the following foreign persons are treated in the same way as the persons named in the aforementioned provisions: German judges shall be placed on an equal footing with members of foreign and international courts. The provisions on other German public officials apply to employees of foreign states and persons charged with performing public duties for a foreign state, to employees of international organisations and persons charged with performing duties for international organisations, as well as soldiers of a foreign state and soldiers charged with performing duties for an international organisation.

Financial Record-keeping

There is no statutory reporting obligation to the authorities in the event that internal company irregularities pointing to corruption become apparent. Irrespective of any non-existent disclosure obligation, the company must put an end to the misconduct and initiate the necessary actions under employment law against the employee concerned.

However, companies are obliged to correct wrongful tax declarations from the past (Section 153 Tax Act). Wrongful tax declarations may occur in connection with corruption. Additionally, the Commercial Code and the Companies Act contain criminal offences related to incorrect accounting, false financial statements and intentional accounting errors.

Public Officials

A public official who deliberately and without authorisation wastes public funds is liable to prosecution for disloyalty to his or her office (§ 266 StGB).

Merely conflicts of interest among public officials are not punishable. However, if advantages flow, this can result in corruption. If a conflict of interest leads to damage to the public purse, criminal liability for disloyalty to office may be considered.

The preference or discrimination of bidders in award or concession procedures against unjustified advantages can be prosecuted according to the general criminal provisions on corruption. If the error also leads to an economic disadvantage for the public sector, criminal liability for breach of trust may also be considered.

Intermediaries

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.

However, difficulties in establishing the criminal liability of intermediaries arise in the case of bribery in business transactions pursuant to Section 299(1) of the Penal 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 that. However, the intermediary can also be held liable for aiding and abetting bribery.

1.3 Scope

1.3.1 Limitation Period

Pursuant to Section 78(3)(5) of the Penal Code, corruption offences expire three years after the end of the offence.

The limitation period with respect to the association fines imposed on companies pursuant to Section 30 of the Act on Administrative Offences is governed by Section 31(2)(1) of the Act on Administrative Offences. The limitation period for prosecution is three years after the end of the last business-related act of corruption committed in the company.

1.3.2 Geographical Reach of Applicable Legislation

The geographical applicability of German criminal law depends on the territorial principle: the offence must have been committed in Germany if German criminal law is to apply. The place of the offence is the place where the offence was committed or the place where the offence took effect (eg, the place where the damage occurred). Under certain circumstances, foreign offences may also be subject to German criminal law.

The German criminal provisions for corruption under Sections 331 and following of the Penal Code claim extra-territorial 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 Penal Code (assuming German nationality) (cf Section 5(15) of the Penal Code).

1.3.3 Corporate Liability

Only natural persons are addressees of German criminal law. In the 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. If the perpetrator of the corruption offence is a chairman, director or manager, the company can be held liable for his or her misconduct under Section 30(1) of the Act on Administrative Offences. The prerequisite for this is that the manager etc, has committed an act of corruption in the course of his or her managerial functions. The operational nature of the breach of duty required for the determination of a fine is to be affirmed in the case of corruption, since the criminal offences in Sections 299 and 331 and following of the Penal Code affect the business sphere and sphere of activity of the company.

As in many cases it is not an executive, but rather an ordinary employee who bribes or is bribed, and it is frequently not the corruption itself that can be considered as a connecting offence. In such cases, however, 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. With respect to corruption, this means that a company must take all appropriate, necessary and reasonable supervisory measures to prevent corruption.

Foreign companies can be prosecuted pursuant to Section 30 of the Act on Administrative Offences only to the extent that:

- the connecting act constitutes a criminal offence or administrative offence under German law;
- German criminal law or administrative offence law is applicable; and
- the legal form of the foreign company is comparable to that of a German legal entity or association of persons.

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.

A company is liable for legal violations committed by its legal predecessor under two conditions:

- The former legal entity is a member of the group of addressees set out in Section 30 of the Act on Administrative Offences.
- The new legal entity is either identical to the former legal entity from an economic point of view or its legal successor within the meaning of Section 30(2a), sentence 1 of the Act on Administrative Offences.

According to the jurisprudence of the Federal Court of Justice, economic identity is to be presumed if the liable

assets continue to be used in the same or similar manner as previously and constitute a substantial part of the new legal entity's total assets. It is sufficient that the assets taken over have retained an economically independent position that characterises the new legal entity. Section 30(2a), sentence 1 of the Act on Administrative Offences covers cases of universal succession and partial universal succession by division. Spin-offs, demergers and transfers of individual rights are not included.

2. Defences and Exceptions

2.1 Defences

A company's liability for corruption violations is based on breach of its supervisory duty within the meaning of Section 130 of the Act on Administrative Offences, for which the company is liable under Section 30 of the Act on Administrative Offences. To avoid liability, the existence of a breach of supervisory duty must therefore be refuted. Where a supervisory measure has been omitted, it must be demonstrated that the supervisory measure in question either was inappropriate to prevent the act of corruption or was not necessary or reasonable.

However, there is also another possible defence: an anti-corruption compliance programme that meets the respective operational requirements reduces liability according to prevailing opinion, because under these conditions it can be put forward that the company or its management has not 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 that it may not serve to reduce liability.

Such a conclusion is difficult, 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.

After what has been said, a company will normally not be liable for corruption violations of its employees if an appropriate compliance programme is maintained. 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.

2.2 Exceptions

There are no exceptions for corruption defences in Germany.

2.3 De Minimis Exceptions

There are no minimis exceptions for corruption offences in Germany. However, if the advantage provided seems to be "socially adequate" (*sozialadäquat*), the behaviour is not punishable.

2.4 Exempt Sectors/Industries

There are no exempt industries or sectors exempt from corruption offences.

2.5 Safe Harbour or Amnesty Programme

There is no leniency programme with respect to corruption offences. Disclosure of violations and co-operation with investigating authorities can nevertheless be worthwhile for a company. For example, administrative offence proceedings initiated against the company may be discontinued for reasons of expediency pursuant to Section 47 of the Act on Administrative Offences.

If the proceedings are not discontinued, the public prosecutor's office has several options to reward the company's willingness to co-operate. It may take co-operation into account when calculating the fine in accordance with Section 30 in conjunction with Section 17(3) of the Act on Administrative Offences; or, in accordance with Section 30(4) of the Act on Administrative Offences, it may even refrain entirely from issuing a fine and instead merely skim off the economic advantage obtained through corruption.

Even in the case of extensive co-operation, however, the company is not entitled to such relief. Therefore, disclosure should be considered well in advance.

3. Penalties

3.1 Penalties on Conviction

Natural persons who commit a corruption offence can be sanctioned with a fine or imprisonment up to five years.

Companies held responsible for acts of corruption under Section 30 of the Act on Administrative Offences may in particular be subject to monetary fines. Pursuant to Section 30(2)(1) of the Act on Administrative Offences, 'association fines' may amount to up to EUR10 million; while fines imposed pursuant to Section 30(3) in conjunction with Section 17(4) of the Act on Administrative Offences may be considerably higher.

In addition, as with natural persons, it is also possible to confiscate the proceeds of the offence.

The "naming and shaming" method of sanctioning can be particularly sensitive for companies. Sections 3 and 2(1)(3) of the Competition Register Act provide that final decisions imposing fines pursuant to Section 30 of the Act on Administrative Offences are to be entered in the Competition Register. As contracting authorities are obliged to consult the register, registration of the company may exclude it from public procurement procedures.

Comparable penalties for companies are also provided for in the above mentioned draft law of the new draft of a Corporate Criminal Act, which still may be subject to changes. According to this monetary sanctions of up to 10% of the turnover may be imposed, or in the worst case, 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.

3.2 Guidelines Applicable to the 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 Penal Code. These are, for example, the perpetrator's motives and aims, the attitudes that speak 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. Also, the fact of repeated offences is a really important indicator in this context.

The above-mentioned sentencing shall also take into account the special cases of sentencing as defined in Sections 46a et seq of the Penal 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, exist guidelines or limits developed in practice 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 law on corporate crimes, Section 16 following 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.

4. Compliance and Disclosure

4.1 National Legislation and Duties to Prevent Corruption

The prevailing view is that an anti-corruption compliance programme that meets the respective operational requirements reduces liability. The reason for this is that the company or its management has not 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 courts and public prosecutor's offices to presume prematurely that the compliance programme did not meet the company's operational requirements and it thus may not serve to reduce liability.

Such a conclusion is out of the question, 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.

A company's liability for corruption violations is based on breach of its supervisory duty within the meaning of Section 130 of the Act on Administrative Offences, for which the company is liable under Section 30 of the Act on Administrative Offences. To avoid liability, the existence of a breach of supervisory duty must therefore be refuted. Where a supervisory measure has been omitted, it must be demonstrated that the supervisory measure in question either was inappropriate to prevent the act of corruption or was not necessary or reasonable.

4.2 Disclosure of Violations of Anti-bribery and Anti-corruption Provisions

There is no obligation to disclose violations. However, companies have an obligation to correct wrong tax declarations.

4.3 Protection Afforded to Whistle-blowers

Germany does not have any general whistle-blower legislation. However, provisions regarding the banking sector contain obligations to set up a whistle-blower hotline.

4.4 Incentives for Whistle-blowers
So far, German law has not provided for incentives for whistle-blowers to report bribery or corruption.

4.5 Location of Relevant Provisions Regarding Whistle-blowing
At present, German law hardly provides for any rules governing the handling of whistle-blowing.

As there are also no legal regulations for the protection of whistle-blowers, 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 regulate certain content in relation to whistle-blowing in accordance with the EU requirements. The expectation is that whistle-blowers will then increasingly decide to report legal violations.

5. Enforcement

5.1 Enforcement of Anti-bribery and Anti-corruption Laws
In Germany the criminal law enforcement authorities and the courts are responsible for enforcing the criminal anti-bribery and anti-corruption laws. 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 in the cases of Section 74c of the Court Constitution Act.

5.2 Enforcement Body
The law enforcement authorities and the courts are responsible for enforcing the anti-corruption legislation. In all German states, there are special public prosecutor's offices for white-collar crime, in which special departments are set up to combat corruption. In some states, there are also specialised public prosecutor's offices for corruption offences.

If corruption is suspected at the outset, the public prosecutor's office is obliged to intervene. An exception in this respect exists under Section 299 of the Penal Code. Since this provision governs a relative offence on complaint, corruption in business transactions requires a formal criminal complaint (*Strafantrag*).

If the suspected corruption is confirmed, the public prosecutor's office will file charges. If the culpable offence can be proven, the offender will be sentenced to a fine or imprisonment by the court.

Under certain conditions, however, the public prosecutor's office may waive the prosecution (cf Sections 153 and following of the Code of Criminal Procedure (*Strafprozessordnung*)). In the event of suspension under Section 153a(1) of the Code of Criminal Procedure, the public prosecutor's office may order the defendant to pay a fine.

To ensure that corruption offences are not worthwhile for offenders, Sections 73 and following of the Penal Code provide for confiscation of the proceeds of the offence. Confiscation is ordered by the court.

According to German law, 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 fine proceedings. The company may reach an agreement with the public prosecutor's office that an accommodation by the company (eg, in the form of 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.

In the absence of corporate criminal law, companies in Germany may be sanctioned only by Section 30 of the Act on Administrative Offences. The public prosecutor's office is responsible for prosecution (cf Section 131(3) 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 and following of the Act on Administrative Offences) may be ordered.

5.3 Process of Application for Documentation
Section 147 of the Code of Criminal Procedure regulates the defendant's right to inspect files. According to this provision, the defence counsel is authorised to inspect the files that are available to the court or would have to be presented to the court if the accusation had been brought, and to inspect officially held pieces of evidence on behalf of the accused.

Furthermore, there is also a right of private persons and other bodies to inspect files and to obtain information on files in accordance with § 475 of the Code of Criminal Procedure. According to this provision, lawyers can obtain information from files for a private person and for other bodies which are available to the court or which would have to be submitted to the court in the event of a public action being brought, provided that a legitimate interest can be shown for this. This often lies in the preparation of the assertion of claims for damages. In these cases, however, information must be refused if the person concerned has a legitimate interest in the refusal.

5.4 Discretion for Mitigation
Both the public prosecutor's office and the court have various options to continue or terminate the proceedings at their discretion, both during the investigation and during the trial.

For example there are also pre-trial settlements at the discretion of the law enforcement authorities:

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 the Sections 153 following of the Code of Criminal Procedure, that (with or without obligations and instructions), the prosecution is exempted under certain conditions as for example in the case of insignificance. In practice, these rules are the most important rules for the diversified discontinuation of criminal proceedings.

Finally, the level of the penalty for a conviction is also at the discretion of the court. Pursuant to Section 46 of the Criminal Code, the court must be guided by the guilt of the accused. In doing so, the court weighs the circumstances that speak for and against the offender against each other. This can also be a confession, for example.

According to the law, however, self-reports must be taken into account in advance on a regular basis and are exempt from punishment if they are correct and complete.

5.5 Jurisdictional Reach of the Body/Bodies

German law enforcement authorities are first of all responsible for criminal prosecution and thus also for investigative measures and convictions on German territory.

If further criminal prosecution measures are to be taken abroad, for example because the offender is abroad or the offence is punishable in Germany despite being committed abroad, the prosecution authority is dependent on legal assistance from the other state.

5.6 Recent Landmark Investigations or Decisions Involving Bribery or Corruption

At EU level, the European Parliament and the Member States agreed on minimum standards for the protection of whistleblowers in April 2019, thus removing the final hurdles to an EU whistle-blower directive. Since then, many companies in Germany have had to prepare themselves to set up a whistleblower system.

The directive will oblige Member States to introduce rules requiring public and private bodies to introduce whistleblower systems. This affects companies in the financial services sector or those with 50 or more employees or over EUR10 million in turnover. While whistle-blower systems are only mandatory in isolated cases today, in future every at least medium-sized company will have to provide a whistleblower hotline.

The directive primarily regulates the protection of whistleblowers from civil and labour law consequences. Whistleblowers should not have to fear negative consequences if they disclose grievances.

5.7 Level of Sanctions Imposed

Natural persons who commit a corruption offence can be sanctioned with a fine or imprisonment (of up to five years).

Companies held responsible for acts of corruption under Section 30 of the Act on Administrative Offences may in particular be subject to monetary fines. Pursuant to Section 30(2)(1) of the Act on Administrative Offences, "association fines" may amount to up to EUR10 million; fines imposed pursuant to Section 30(3) in conjunction with Section 17(4) of the Act on Administrative Offences may be considerably higher.

In addition, as with natural persons, it is also possible to confiscate the proceeds of the offence.

The "naming and shaming" method of sanctioning can be particularly sensitive for companies. Sections 3 and 2(1)(3) of the Competition Register Act provide that final decisions imposing fines pursuant to Section 30 of the Act on Administrative Offences are to be entered in the Competition Register. As contracting authorities are obliged to consult the register, registration of the company may exclude it from public procurement procedures.

6. Review and trends

6.1 Assessment of the Applicable Enforced Legislation

The German judiciary finds it difficult to combat corruption effectively. This is due in particular to the fact that insufficient judicial resources are available to resolve these often very complex issues.

Corruption criminal law has undergone several legislative changes in recent years. It cannot be ruled out that there will be additional changes in the foreseeable future. For example, changes to Sections 331 and following of the Penal Code may be necessary on the basis of the Directive on the Fight against Fraud affecting the Union's Financial Interests. In addition, legal restrictions are being discussed due to the breadth of some corruption offences. Proposals include the

introduction of a self-reporting system exempting corruption offences and a corruption amnesty.

It is also possible that the legal basis for sanctioning companies will change in the foreseeable future. In the coalition agreement for the 18th parliamentary term, the parties have agreed to expand the administrative offence law. It is to be expected that in the future, companies will not be held exclusively liable for breaches of supervisory duties by management personnel, but that direct corporate liability will be introduced.

On the basis of the recently published draft EU directive on whistle-blower protection, 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 such as corruption.

6.2 Likely Future Changes to the Applicable Legislation or the Enforcement Body

In August 2019, 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 prosecution of associations on suspicion should no longer - as is currently the case - be at the discretion of the criminal prosecution authorities (so-called opportunity principle), but rather mandatory (legality principle).

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The new law is to apply to 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 it considerably more difficult due to lack of 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, money laundering. Foreign offences are also covered if the offence would also 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 case, 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. The court should be able to determine the method of publication. Publications on the internet are expressly provided for.