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Germany Proposes New Corporate Sanctions Act with Global Reach



The German Federal Ministry of Justice and Consumer Protection recently presented draft legislation to Parliament that could pose a marked shift in how corporate crimes are sanctioned in Germany.

If enacted, this draft legislation, titled the Corporate Sanctions Act ("CSA"), would permit the criminal prosecution and conviction of a corporate entity in circumstances where the entity's directors or officers committed corporate crimes, and where the entity failed to take reasonable precautions to prevent employees or agents from engaging in criminal wrongdoing. Companies based or doing business in Germany will be subject to the law. Under the draft CSA, intentional criminal offenses warrant penalties up to €10 million for companies with annual global sales of less than €100 million. For companies with average sales of €100 million or more, monetary fines could reach up to 10% of the entity's worldwide annual sales, and for multiple offenses, the fines could increase to 20%. In cases involving a large victim class, courts may order the publication of the company's sentence. Finally, in egregious cases of corporate misconduct, a court could order the company's dissolution. These sanctions are subject to mitigation under limited circumstances. If the company conducts an internal investigation that meets the CSA's standards and substantially or materially contributes to the prosecution authorities' fact-finding mission, the company may mitigate its damages up to 50%, avoid publication of its sentence, and/or avoid dissolution. For mitigation to apply, the internal investigation must be conducted in accordance with certain fairness principles—for example, organizations must clearly notify employees of their rights in an internal investigation, including that they may be subject to personal criminal liability based on information they provide and can refuse to answer questions that would incriminate them personally. Additionally, in determining a sentence, a court can consider whether the entity had a compliance management system in place leading up to the criminal offense. The draft CSA also clarifies which documents related to corporate wrongdoing are considered privileged. Under the draft CSA, only those communications made between an accused corporation and the corporation's criminal defense counsel are privileged—the CSA does not deem privileged those communications made in the context of an internal investigation. Along with the draft CSA's mitigation provisions, this codification of when privilege applies is a strong incentive for companies accused of corporate misconduct to hire separate investigation and defense counsel, and to keep their

investigation counsel walled off from their defense counsel. It will also likely have the practical effect of significantly reducing the nature and frequency of sensitive communications between attorneys conducting the investigation and the client, given that they will not be shielded from discovery. Although the CSA is only in draft form at present, Germany's Parliament is expected to adopt the legislation in the current term, which extends until the autumn of 2021. Accordingly, many companies based or doing business in Germany are preparing for the CSA and assessing measures to limit their exposure under the new law.

Authors

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