

DRAFT BILL ON GERMAN CORPORATE SANCTIONS ACT

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ABSTRACT

After long discussions about the introduction of corporate criminal liability, the German Federal Ministry of Justice and Consumer Protection presented a first draft bill for a new Corporate Sanctions Act in August 2019. The act introduces a major shift in German Criminal law by proposing severe sanctions on companies for corporate criminal offenses. It includes regulations on internal investigations, compliance management systems and legal privilege. Since it was published, the act is discussed intensely among legal experts, politicians and the public. The following article presents the most important provisions of the draft bill. In addition, the authors compare the act to further jurisdiction's legislation, discuss potential impacts on companies, and provide proposals for improvements for the further legislative process

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I. INTRODUCTION

On August 22, 2019, the German Federal Ministry of Justice and Consumer Protection (Bundesministerium der Justiz und für Verbraucherschutz) presented a first draft bill on a Corporate Sanctions Act. The draft introduces severe sanctions on companies for corporate criminal offenses and includes regulations on internal investigations, compliance management systems and legal privilege.

The draft also introduces a major shift in German criminal law. Under existing German law, companies cannot be held criminally responsible. The German Act on Regulatory Offenses (*Ordnungswidrigkeitengesetz* - OWiG) permits corporate fines for offenses committed by certain personnel in managerial positions pursuant to § 30 OWiG¹ or by other employees if the person responsible for ensuring fulfilment of supervisory duties incumbent on the company itself violates these duties (§ 130 OWiG)². Although being part of the regulatory law which historically was designed for minor offenses beyond the radar of criminal law, there could be severe sanctions imposed on companies and individuals - even under current law. The amount of the fine may be up to EUR 10 million. In special cases the amount may be significantly higher, e.g. § 56 of the German Banking Act (KWG): the higher of 20 million Euros or 10 percent of the total turnover achieved by the legal entity or association in the financial year preceding the decision of the authorities. In addition, there is the possibility of skimming off the profit achieved in full (confiscation).

However, the prosecution practice in Germany has been inconsistent due to the unregulated discretion of public prosecutors, with major regional differences in the number of investigations initiated by public prosecutors as well as in the amounts of fines imposed.³ Moreover, the German system does not have anything comparable to the U.S. Sentencing Guidelines (USSG), which seek to impose similar sanctions for similar conduct.

After long discussions⁴ about the introduction of corporate criminal liability, the German Federal Ministry of Justice and Consumer Protection presented a draft bill for a new

¹ For an overview on § 30 OWiG see Charlotte Schmitt-Leonardy, *in*: *Ordnungswidrigkeitengesetz*, § 30, marginal no. 1 et seqq. (Heribert Blum et al eds., 1st ed., 2016).

² For an overview on § 130 OWiG see Susanne Beck, *in*: Beck'scher Onlinekommentar *Ordnungswidrigkeitengesetz*, § 130, marginal no. 1 et seqq. (Jürgen Graf, 23rd edition 2019).

³ Elisa Hoven & Thomas Weigend, *Der Kölner Entwurf eines Verbandssanktionengesetzes*, ZEITSCHRIFT FÜR RECHTSPOLITIK, 30, 31 (2018); Thomas Kutschaty, *Deutschland braucht ein Unternehmensstrafrecht*, ZEITSCHRIFT FÜR RECHTSPOLITIK, 74, 74 et seq. (2013).

⁴ Cf. Carsten Beisheim & Laura Jung, *Unternehmensstrafrecht: Der neue Kölner Entwurf eines Verbandssanktionengesetzes (VerbSG-E)*, CORPORATE COMPLIANCE ZEITSCHRIFT, 63 (2018); Alexander Baur, *Kommt jetzt das „Unternehmensstrafrecht“?*, DIE AKTIENGESELLSCHAFT, 457 (2018); Rolf Köllner & Jörg

Corporate Sanctions Act. This draft is not yet final and may be modified in the legislative process. However, it portends significant change in Germany, and we describe below the most important provisions of the draft bill as well as their potential impact on companies.⁵

II. OVERVIEW ON MAIN REGULATIONS

A. Duty to Investigate Corporate Criminal Offenses

Under the existing Act on Regulatory Offenses, it is at the public prosecution's discretion to initiate preliminary proceedings against companies (facultative prosecution). This is the main reason for the existing inconsistent investigation practice described above. The new draft bill plans to introduce the so-called principle of legality (mandatory prosecution), meaning that public prosecutors will be obliged to investigate possible corporate criminal offenses under the new Corporate Sanctions Act. A corporate criminal offense under the drafted Corporate Sanctions Act would be a criminal offense by which the company's duties are breached or by which the company was or was intended to be enriched (§ 2 (1) draft bill).

B. Monetary Sanctions up to 10 percent of Revenue

The existing German Act on Regulatory Offenses provides for an absolute upper limit of EUR 10 million per offense regarding administrative fines on companies, though it does permit confiscating illegal gains, which sometimes resulted in a greater sanction.⁶ Pursuant to § 9 (2) of the new draft bill, this upper limit for fines would be raised significantly, up to 10 percent of the company's average revenue over the last three years (if it exceeds EUR 100 million). The relevant revenue would be comprised of the world-wide revenue made by all companies or individuals operating within the same business unit. If the average revenue was below EUR 100 million, the absolute upper limit would remain at EUR 10 million (§ 9 (1) of the draft bill).

Mück, *Praxiskommentar zum Kölner Entwurf eines Verbandsanktionengesetzes – VerbSG-E*, NEUE ZEITSCHRIFT FÜR INSOLVENZ- UND SANIERUNGSRECHT, 311 (2018); Klaus Leibold, *Unternehmensstrafrecht – Eine rechtspolitische Notwendigkeit*, ZEITSCHRIFT FÜR RECHTSPOLITIK, 34 (2013).

⁵ For an overview on the key regulations and a first assessment see Björn Gercke & Andreas Grözinger, *BMJV-Entwurf zu Verbandsanktionene: Zuckerbrot und Peitsche*, LEGAL TRIBUNE ONLINE (Sep. 5, 2019, 03:06 PM), <https://www.lto.de/recht/hintergruende/h/verbandssanktionengesetz-entwurf-bmjv-compliance-interne-untersuchungen-trennung-straferverteidigung-gastkommentar/>; Alexander Ignor, *Privatisierung der Strafverfolgung*, FRANKFURTER ALLGEMEINE ZEITUNG – Einspruch (Sep. 9, 2019, 02:25 PM), <https://www.faz.net/-irf-9qzju>.

⁶ E.g., EUR 531 million were confiscated from Porsche, cf. Stefan Mayr, *Mit der Geldbuße ist der Dieselskandal noch lange nicht abgeschlossen*, SÜDDEUTSCHE ZEITUNG (May 7, 2019, 04:00 PM), <https://www.sueddeutsche.de/wirtschaft/porsche-dieselskandal-strafe-1.4435894>; EUR 995 million were confiscated from Volkswagen, cf. report by Frankfurter Allgemeine Zeitung, *Volkswagen muss eine Milliarde Euro Bußgeld zahlen*, FRANKFURTER ALLGEMEINE ZEITUNG (Jun. 13, 2018, 06:34 PM), <https://www.faz.net/-i9d-9b6ss>.

In addition, prosecutors will retain the ability to seek to confiscate value of the proceeds of the offense in addition to the monetary sanction.⁷ There is no limit on the amount of values that can be confiscated.

C. Non-Monetary Sanctions

The draft bill proposes a variety of non-monetary sanctions against companies that the existing law does not contain:

- The court may impose the duty to provide restitution to victims of the corporate criminal offense, § 12 draft bill.
- The court may also order a company to implement an effective compliance management system. The draft bill does not explicitly foresee the installation of a monitor as is sometimes ordered settlements with the U.S. Department of Justice or U.S. Securities and Exchange Commission.⁸ However, the court may order the company to prove the installation and effectiveness of its compliance system by a certification of competent authority, i.e. attorneys, auditors or business consultants, § 13 draft bill.
- The court can issue a warning with a monetary fine to be imposed only if another corporate criminal offense is committed within a certain period of time or if the company repeatedly or severely disregards the court's order to compensate victims or to implement an effective compliance management system, § 10 draft bill.
- Lastly, and only in extraordinarily severe cases, the court may order a company's liquidation, § 14 draft bill.

D. Naming and Shaming

Under existing law, corporate sanctions are generally not publicly disclosed. § 15 of the draft bill proposes that, in cases where there are a large number of aggrieved parties, the court may publicly disclose the sanctions imposed on a company.

Generally, the draft imposes a non-public sanction register to be set up by the Federal Ministry of Justice and Consumer Protection (pursuant to §§ 55 et seqq. of the draft bill, containing information such as the imposed sanctions and details on the respective companies).

⁷ Under existing law, this is possible pursuant to § 30 (3) in conjunction with § 17 (4) OWiG; see Klaus Rogall, *in: Karlsruher Kommentar zum OWiG*, § 30, marginal no. 140 et seqq. (Wolfgang Mitsch, 5th ed., 2018); Carsten Krumm, *Gewinnabschöpfung durch Geldbuße*, NEUE JURISTISCHE WOCHENSCHRIFT, 196 (2011).

⁸ See Vikramaditya Khanna & Timothy L. Dickinson, *The new corporate monitor: the new corporate czar?*, 105 MICHIGAN LAW REVIEW, 1713 (2007).

E. Concluding Investigations without Criminal Charges

The draft bill also provides for several possibilities for the public prosecution to terminate preliminary proceedings without charging the company:

- First, while the draft bill mandates investigation, a prosecutor could terminate preliminary proceedings where the offense does not warrant criminal charges, § 36 draft bill.
- Second, the public prosecution would also be able to terminate preliminary proceedings and impose, with consent of the court, the duty to compensate victims or set-up an effective compliance system, § 37 in conjunction with §§ 12, 13 draft bill.
- Third, the public prosecution may terminate preliminary proceedings in case of anti-trust corporate criminal offenses (due to specific jurisdiction of the Federal Cartel Office) pursuant to § 43 draft bill, in case of the company's insolvency (§ 40 draft bill) and if the company is expected to be held liable for the offense in foreign countries (§ 39 draft bill). The latter is the case if the sanction that could be imposed by the German public prosecution was relatively low compared to the sanction expected to be imposed by the foreign state, or if the foreign sanction is expected to have a sufficient influence on the company's measures to prevent future corporate criminal offenses.
- Lastly, the public prosecution could temporarily suspend the preliminary proceedings pursuant to § 42 draft bill, and await the results of the company's independent internal investigation, if the company notifies the prosecution about its own ongoing internal investigation.

All these possibilities are not included in the existing law.

F. Mitigating Effect of Compliance Management Systems and Internal Investigations

The draft bill stipulates in § 18 that establishing compliance management systems and conducting internal investigations can be taken into account for sentencing purposes. This is intended to create an incentive to set up such compliance management systems or to conduct internal investigations which aid in detecting and remedying misconduct.⁹ As a consequence, the court may reduce the sentence by up to half the upper limit of the monetary fines (§ 19 draft bill).

§ 19 draft bill, while outlining ways in which the prosecution might resolve a case without charges, does not provide guidance as to how the company might seek to achieve a reasonable settlement. It is therefore somewhat surprising that the Ministry of Justice and Consumer Protection has not taken the opportunity to introduce Non-Prosecution

⁹ Explanatory memorandum for the draft bill, p. 99.

Agreements (“NPAs”) or Deferred-Prosecution Agreements (“DPAs”) into the law. This could have created a regulated procedure to negotiate the benefits of cooperation between the prosecutors and the company. The draft bill would also have benefited from provisions guiding the exercise of discretion by the prosecution when determining sanctions. The UK approach to DPAs in combination with the sector-specific Sentencing Guidelines could have served as a model.¹⁰ In the United Kingdom, law enforcement agencies can only negotiate DPAs with companies, not with individuals.¹¹ As a rule, the agreed conditions relate to fines, recompense obligations, the absorption of profits, if any, and a tightening of the company's internal compliance management system. The prerequisites for the conclusion of DPAs are set out in Schedule 17 to Section 45 of the Crime and Courts Act (2013). In addition, a Code of Practice (“CoP”) was established for the purpose of uniform application of the law.¹²

If the law enforcement authorities and a company agree on a DPA for the time being, its draft will be discussed in a public hearing, i.e. in court. The DPA must be approved by the negotiating court. The DPA will then also be published.¹³

As the UK Bribery Act includes the offense of failure to prevent bribery, there is a particularly wide scope for DPAs. DPAs provide companies and prosecutors with an opportunity to resolve cases where there remain certain disputes – e.g., whether the compliance management system already provided for “adequate procedures” to prevent bribery. This, generally mutual uncertainty whether an existing compliance management system will be qualified as having already provided for “adequate procedures”, offers considerable scope for the conclusion of DPAs.¹⁴

However, internal investigations only mitigate sanctions if they have been carried out successfully and lawfully, and in full cooperation with the public prosecution.

- To be considered successful, the internal investigation must have made a significant contribution to solving the offense.
- To be considered lawful, the investigation must be conducted in accordance with the applicable law. This might particularly refer to data protection and labor law provisions, and the basic principle of fair trial (§ 18 (1) (6) draft bill). When conducting internal investigations, employees need to be notified on the possibility

¹⁰ *Schorn/Sprenger*, Deferred Prosecution Agreements nach neuem britischen Recht - Perspektiven für unternehmensinterne Compliance und Investigations, *CORPORATE COMPLIANCE ZEITSCHRIFT*, 211 ff.; (2014) CINDY ALEXANDER & MARK COHEN, TRENDS IN THE USE OF NON-PROSECUTION, DEFERRED PROSECUTION, AND PLEA AGREEMENTS IN THE SETTLEMENT OF ALLEGED CORPORATE CRIMINAL WRONGDOING (April 2015).

¹¹ See Part. 1, Schedule 17 zu § 45 Crime and Courts Act (2013).

¹² (Sep. 5, 2019, 03:17 PM) https://www.cps.gov.uk/publications/directors_guidance/dpa_cop.pdf.

¹³ DPAs are published on the Serious Fraud Office website, (Sep. 5, 2019, 03:16 PM) <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/>.

¹⁴ CARSTEN MOMSEN, CORINNA HELMS & SARAH WASHINGTON, *WIRTSCHAFTS- UND STEUERSTRAFRECHT* (2nd ed.) 2019.

that their statements could be used in criminal proceedings, on their right to be accompanied to interviews by an attorney (or a member of the workers' council), and on their right to remain silent, i.e. not to self-incriminate. Special attention should also be paid to the requirements of the EU General Data Protection Regulation (General Data Protection Regulation – GDPR¹⁵). Providing kind of a general allowance, Section 35 of the draft states the use of personal data from investigative measures within investigative procedure and court trial.¹⁶ Whether this general rule can suspend the restrictions of the GDPR appears to be doubtful.

- To be considered in full cooperation with public prosecution, the company must make the results of the internal investigation as well as all relevant documents available to the public prosecution.

Furthermore, the draft bill includes rules about how investigations should be conducted and by whom. To be considered in full cooperation, internal investigations must be conducted by an attorney that is different from the company's defense attorney in order for the company to profit from the mitigating effect. It seems that the authors of the draft bill believe that full cooperation is only possible where the attorney conducting the investigation is independent of the company's defense to any criminal charges.¹⁷

Furthermore the draft does not address whistleblower protection. This omission may turn out as a crucial deficit. Since the provisions on witness protection in the Criminal Procedure Code do not fit whistleblowers and a Ruling like RICO (Racketeer Influenced Corrupt Organizations Act) is very much alien to German law, a provision is urgently needed. At present, however, it is not even clear whether a protection concept is intended or whether a reward scheme is to be the main focus. A combination would make more sense.

¹⁵ On the impact of the GDPR on internal investigations see Lukas Ströbel, Wolf-Tassilo Böhm & Christina Breunig & Tim Wybitul, *Beschäftigtendatenschutz und Compliance: Compliance-Kontrollen und interne Ermittlungen nach der EU-Datenschutz-Grundverordnung und dem neuen Bundesdatenschutzgesetz*, CORPORATE COMPLIANCE ZEITSCHRIFT, 14 (2018); Dorothee Herrmann & Finn Zeidler, *Arbeitnehmer und interne Untersuchungen – ein Balanceakt*, NEUE ZEITSCHRIFT FÜR ARBEITSRECHT, 1499 (2017).

¹⁶ According to § 18 (1) draft bill personal data obtained as a result of measures taken to clarify the offence committed by the Association or an administrative offence connected with the offence committed by the Association pursuant to Section 130 of the Act on Administrative Offences may be used in sanction proceedings.

Whereas § 18 (2) draft bill clarifies Personal data being obtained as a result of measures to investigate other criminal offences or under other laws may be used in sanction proceedings if, under the Code of Criminal Procedure, they may also be used in proceedings relating to the offence committed by the Association. It is unclear if this can be seen as consent under GDPR as well concerning delivering the data to e.g. US agencies or the company's headquarter if located outside Germany. If not, the Company bears a significant risk, since the fines under GDPR are similarly high as the maximum amounts that can be imposed with the criminal sanctions, cf. Thomas Grützner & Carsten Momsen, *Gesetzliche Regelung unternehmensinterner Untersuchungen – Gewinn an Rechtsstaatlichkeit oder unnötige Komplikation?*, CORPORATE COMPLIANCE ZEITSCHRIFT, 242 ff. (2017).

¹⁷ Nevertheless, it seems possible that both attorneys work for the same law firm. Talking about minimizing conflicts of interests this is surprising.

G. Company's Rights and Legal Privilege

Pursuant to the draft, companies would be given the same legal protections as accused persons (§ 28 draft bill). This would include the right on fair hearing, the right on motions in the proceedings, the right to an attorney and the right to remain silent for the company's legal representatives.¹⁸

Furthermore, the principles of legal privilege apply. However, in Germany legal privilege does not exist in the same way as in Common Law countries, but only in a few cases regulated expressly by criminal procedural law.¹⁹ While all attorneys have the right to refuse testimony concerning information that was entrusted to them or became known to them in this capacity pursuant to § 53 (1) sentence 1 no. 3 StPO (*Strafprozessordnung* - German Code of Criminal Procedure)²⁰, documents or data containing such information might be subject to seizure, especially if they are not part of the company's defense.

As stated above, the draft bill stipulates that the company's defense attorney and the attorney conducting an internal investigation must not be identical. While for the defense attorney, all attorney-client communication and all attorney work products would be subject to the prohibition of seizure, communication with and work products from the attorney conducting the internal investigation are privileged only under the following limited circumstances²¹:

- Preliminary proceedings have already been initiated by the public prosecution.
- Documents or data need to be subject to a special relationship of trust between the company and its attorney, which requires the company itself (and not, e.g., its mother company) to mandate the attorney to conduct the internal investigation. The draft bill does not provide in detail which kind of documents or data are subject to this relationship of trust.
- Documents or data need to be in the possession of the attorney. An investigation report or attorney-client communication referring to the internal investigation could always be seized in the company's premises.

The draft bill's explanatory memorandum explicitly excludes internal investigations from the application of legal privilege and the prohibition of seizure, if the investigation is conducted solely for internal compliance reasons and does not relate to any potential offence

¹⁸ Cf. explanatory memorandum for the draft bill, p. 110 et seq.

¹⁹ Markus S. Rieder & Jonas Menne, *Internal Investigations – Legal Situation, Possible Options And Legal-Political Need For Action*, 5 COMPLIANCE ELLIANCE JOURNAL, 20, 29 (2019); Thomas Grützner & Alexander Jakob, *in: Compliance von A-Z, Anwaltsprivileg (Allgemein)* (Thomas Grützner & Alexander Jakob, 2nd ed., 2015).

²⁰ Cf. Markus Bader, *in: Karlsruher Kommentar zur Strafprozessordnung*, § 53, marginal no. 16 (Rolf Hannich, 8th ed., 2019); Percic, *in: Münchener Kommentar zur StPO*, § 53, marginal no. 20 (Christoph Knauer et al eds., 1st ed., 2014).

²¹ Cf. Explanatory memorandum for the draft bill, p. 137.

punishable under the Corporate Sanctions Act.²² In addition, business documents that a company is legally required to retain are exempted from the prohibition of seizure, since an attorney shall not—intentionally or unintentionally—act as a “safe harbor” for such documents.²³

It is disappointing that the Federal Ministry of Justice and Consumer Protection decided against a broader protection of legal privilege, which can have adverse effects on how investigations are conducted in Germany and particularly for cross-border investigations subject to different legal regimes and privilege protections. The draft bill follows the Federal Constitutional Court’s 2018 decisions on complaints against the search of a law firm and the securing of documents and data in the firm’s premises. The Court’s decisions had declared those measures to be in accordance with the constitution and therefore severely limited legal privilege in Germany. The Court and the Federal Ministry of Justice and Consumer Protection both justify the limitation of legal privilege with the “effectiveness of criminal prosecution”. However, the effectiveness of the criminal prosecution is complemented and contrasted by the constitutional requirement for an effective and orderly administration of justice and the requirement of a fair trial. Both require a corresponding protection of legal privilege. Moreover, the allegation that a comprehensive legal privilege would lead to numerous lawyers being used as a “safe harbor” for certain documents or even incriminating evidence is shortsighted and completely disregards the serious professional and criminal consequences of such conduct.²⁴

A broader legal privilege that properly protects the attorney-client-relationship between a company and its lawyers would have been preferable. In particular, it is not comprehensible why the draft bill rigorously differentiates between defense counsel and other lawyers conducting internal investigations, as the whole process of conducting internal investigations should serve to detect and remedy misconduct, in ways that are not inconsistent with the company’s potential defense. It also remains unclear why legal privilege should only apply if preliminary proceedings have already been initiated by the public prosecution. Such an arbitrary lean creates a disincentive for companies to proactively initiate internal investigations to detect and remedy misconduct, but subjecting them to privilege only if the government has already started investigating.

In an inquisitorial system, it is solely the prosecution’s responsibility to investigate and collect evidence. It is under current law not the business of the defense. The draft bill tries to out-source internal investigations according to adversarial systems, but lacks adequate

²² Explanatory memorandum for the draft bill, p. 137.

²³ Critical on the regulations on internal investigations Stefan Kirsch, *Entwurf zum Unternehmensstrafrecht: Affront für Verteidiger*, FRANKFURTER ALLGEMEINE ZEITUNG – Einspruch (August 16, 2019, 01:05 PM), <https://www.faz.net/einspruch/entwurf-zum-unternehmensstrafrecht-affront-fuer-verteidiger-16352605.html>.

²⁴ Markus S. Rieder & Jonas Menne, *Internal Investigations – Legal Situation, Possible Options And Legal-Political Need For Action*, 5 COMPLIANCE ELLIANCE JOURNAL, 20, 37 et seq. (2019).

adjustments of legal privilege. The public prosecutor's office is given more extensive discretionary powers and approaches for investigative measures. On the other hand, the defense is still not granted its own investigative rights or provided with appropriate instruments. The latter must be made up for with increasing urgency in order to restore at least some equality of the arms in the investigation procedure.

H. Offenses Committed in Foreign Countries and by Foreign Companies' Employees

The legal consequences of offenses committed abroad and the sanction of foreign companies proposed by the draft bill would depend on whether the act for which the company is held liable is governed by German criminal law or not. German criminal law contains various constellations of extraterritorial application such as offenses involving German citizens or infringing domestic legal interests (cf. §§ 3 et seqq. StGB (*Strafgesetzbuch* – German Criminal Code)).²⁵

If German criminal law applies to the act, foreign companies could be sanctioned if their legal typology was comparable to a German legal entity or partnership. German companies could be held liable without further requirements.²⁶ This is equivalent to the legal situation under existing law. However, the enforcement of an imposed fine against a foreign company could be an obstacle, if the concerned company does not have a seat or assets in Germany.²⁷

Under existing law, no sanctions can be imposed if German criminal law does not apply to the act.²⁸ The Corporate Sanctions Act would, pursuant to § 2 (2), apply to such an act, if it were a criminal offense under German criminal law, if it is a criminal offense at the place of the offense and if the company has a seat in Germany. This applies to both German and foreign companies. The draft bill does not provide for any restrictions as for the place of the offense or the nationalities of either offender or victim. However, as stated above, investigation proceedings could be terminated without bringing charges against the company if the company is held liable for the act in a foreign country.

²⁵ For an overview, see Jürgen Rath, *Internationales Strafrecht (§§ 3 ff. StGB)*, JURISTISCHE ARBEITSBLÄTTER, 26 (2007).

²⁶ Markus Rübenthal, Frank Saliger & Michael Tsambikakis, *in*: *Wirtschaftsstrafrecht*, § 30 OWiG, marginal no. 19 (Robert Esser et al eds., 1st ed., 2017).

²⁷ Cf. Lars Niesler, *in*: *Wirtschafts- und Steuerstrafrecht*, § 30 OWiG, marginal no. 8 (Jürgen Graf et al eds., 2nd ed., 2017).

²⁸ Alexander Meyberg, *in*: *Beck'scher Online Kommentar OWiG*, § 30, marginal no. 28 (Jürgen Graf, 23rd ed., 2019).

III. CONCLUSION

Overall, the draft provides prosecutors with effective tools to prosecute corporate crime. Deficits appear mainly due to the mixing of the historically inquisitorial German system with the reality of a partially adversarial procedure in white-collar crime. Areas that should be revisited before the draft bill becomes law include:

- Considering regulated instruments such as NPAs and DPAs into German law.
- Providing guidance for how sanctions will be determined, either on the model of the English Sentencing Guidelines or with a set of instruments comparable to the DOJ Principles.
- Not limiting the maximum mitigation to 50 percent, as extraordinary cooperation may justify a greater reduction in sentencing.
- Conceptualizing whistleblower protection
- Finally, a broader legal privilege would be desirable to properly protect the attorney-client relationship during internal investigations, appropriately recognize the position of lawyers as independent organ of the administration of justice, and better align with other major enforcement authorities in the U.S. and U.K.