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DEVELOPMENT

"Verbandssanktionengesetz" — Corporate Liability for Germany?

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Abstract
Criminal offenses committed by legal persons or associations of individuals can only be punished in Germany with a regulatory fine under the German Act on Regulatory Offenses (Gesetz über Ordnungswidrigkeiten; OWiG). As the current governing parties (2017–2021)—the CDU, the CSU and the SPD—did not deem this to be an appropriate response to corporate misconduct, the Act to Strengthen the Integrity in the Economy (Gesetz zur Stärkung der Integrität in der Wirtschaft) was set to introduce the Corporate Sanctions Act (Verbandssanktionengesetz; VerSanG), which would have provided a new framework for the punishment of unlawful corporate actions. This legislative project, however, collapsed in the summer of 2021 following years of work. After a brief introduction to the development of corporate criminal liability in Germany, this article outlines the current legal situation under the OWiG before presenting the development and the main contents of the Government Draft of the VerSanG. Subsequently, a more in-depth review of specific—particularly controversial—regulations is provided, which addresses and analyzes the criticism that has been voiced with regard to these provisions. Lastly, the failure of the draft bill, the prospective developments, and the continuing relevance of the Government Draft are considered.

Keywords: Corporate Sanctions Act; financial sanctions; regulatory offenses; corporate criminal liability; criminal procedure; compliance

A. Introduction: Development of Corporate Liability in Germany

Societas delinquere non potest. For centuries, the question of whether—and if so, how—misconduct by associations or legal entities should be sanctioned under German law, has been the subject of controversial debate.[1] Whether corporations could be held criminally liable under Roman law still remains unclear, as the current state of sources and research renders this question

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[1]Christian Laue, *Die strafrechtliche Verantwortlichkeit von Verbänden*, 32 JURISTISCHE AUSBILDUNG [JURA] 339, 339 (2010).

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practically impossible to answer definitively.[2] Consequently, it cannot be clearly stated either whether the Latin expression at the beginning—ascribed to Roman law and stating that a corporation cannot make itself criminally liable—was truly valid.[3]

In the Middle Ages, however, canon law established the concept of sanctioning corporations.[4] It was not until the end of the 18th century that the medieval dogma faced considerable opposition from renowned legal scholars such as Malblanc and Feuerbach, both of whom challenged, among other issues, the criminal liability of corporations.[5] Furthermore, this fundamental shift was significantly influenced by Savigny, who understood corporations to be a fiction and consequently denied them the capacity to act under criminal law.[6] This change was also reflected in the penal legislation of the 19th century, as Article 49 of the Bavarian Penal Code of 1813 explicitly refuted the criminal liability of corporations.[7] Neither the Prussian Criminal Code of 1851 nor the Imperial Criminal Code of 1871 contained any provisions regarding the sanctioning of corporations, as this appeared to be superfluous given that the concept of guilt and punishment was perceived to be geared towards the individual, thus rendering a deviating interpretation virtually impossible.[8]

After 1945, when the Anglo-American-influenced law of occupation provided for criminal penalties against corporations in certain cases, the discussion concerning penalties against corporations once again gained significant momentum.[9] Contrary to the views in legal literature, Germany's Federal Court of Justice (*Bundesgerichtshof*; BGH) ruled that corporations can be held criminally liable under the law of occupation.[10] For the first time, the Economic Offenses Act of 1949 (*Gesetz zur Vereinfachung des Wirtschaftsstrafrechts*; WiStG) introduced a distinction between criminal offenses punishable by a criminal penalty and administrative offenses punishable by a regulatory fine (*Geldbuße*).[11] This established the concept of a regulatory fine for corporations, for which—in contrast to criminal penalties against corporations—predominantly no dogmatic obstacles were seen.[12] In order to contain the large number of individual regulations that followed, and the risks this entailed, the individual regulations were repealed in 1968 and replaced by Section 26—since 1975: Section 30—of the Act on Regulatory Offenses (*Gesetz über Ordnungswidrigkeiten*; OWiG).[13] This created the present-day legal framework.

B. Current Legal Situation

The current legal situation only allows the sanctioning of corporations under the Act on Regulatory Offenses (OWiG). In accordance with Section 30 OWiG, a fine can be issued against a corporation when a manager has committed a criminal or regulatory offense by which a related

[2]Egon Weiss, Institutionen des römischen Privatrechts als Einführung in die Privatrechtsordnung der Gegenwart 122 (2d ed. 1949).

[3]*See* Ernst Heinitz, *Empfiehlt es sich, die Strafbarkeit juristischer Personen gesetzlich vorzusehen? Gutachten für den 40. Deutschen Juristentag*, *in* 1 Verhandlungen des Vierzigsten Deutschen Juristentages 65, 67 (Ständige Deputation des Deutschen Juristentages ed., 1953).

[4]*See* Ernst Hafter, Delikts- und Straffähigkeit der Personenverbände 11-20 (1903).

[5]*Id.* at 20–28.

[6]*See id.*; Friedrich Carl von Savigny, System des heutigen römischen Rechts 2, 310-16 (photo. reprt. 2016) (1840).

[7]Hafter, *supra* note 4, at 23 & 27.

[8]Richard Busch, Grundfragen der strafrechtlichen Verantwortung der Verbände 49-50 (1933); Steffi Kindler, Das Unternehmen als haftender Täter 25 (2008).

[9]Kindler, *supra* note 8, at 31.

[10]Bundesgerichtshof [BGH] [Federal Court of Justice] Oct. 27, 1953, 5 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHSt] 28, 32-34.

[11]*Id.* at 35.

[12]Klaus Tiedemann, *Die "Bebußung" von Unternehmen nach dem 2. Gesetz zur Bekämpfung der Wirtschaftskriminalität*, 41 Neue Juristische Wochenschrift [NJW] 1169, 1170 (1988).

[13]*See id.*

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corporate duty was violated. Furthermore, in most cases, the offense committed is a violation of the supervisory responsibilities by the owner of the corporation under Section 130 OWiG, which can also result in a regulatory fine. This responsibility can also be violated by persons who are acting in the name of the owner—Section 9 OWiG. The responsibility of supervision is violated when an employee of the corporation committed a corporate-related crime or regulatory offense which could have been prevented or impeded by sufficient monitoring.

The law defines a range within which the level of the fine can be set and can be up to ten million Euros if the offense is an intentional criminal offense. Other ways of sanctioning, such as a warning, do not exist under the Act on Regulatory Offenses. Pursuant to Section 30 III OWiG in conjunction with Section 17 IV OWiG, the fine imposed shall exceed the financial benefit which the perpetrator obtained by committing the offense. For this reason, the predefined scope of the penalty can be surpassed until the corporation has lost all the benefits which it acquired by committing the offense. If a fine has not been assessed, the confiscation of that which was obtained may be ordered—Sections 73, 73b of the German Criminal Code (*Strafgesetzbuch*; StGB), Sections 29a, 30 V OWiG. The extent of the confiscation is calculated using the 'gross principle', meaning that expenses which were incurred in order to gain the benefits are not deducted from the penalty.[14] In the event of a universal succession and partial universal succession, the regulatory fine can also be imposed against the legal successor—Section 30 OWiG.

C. Development of the Draft Bill

The draft bill published in 2013 by North Rhine-Westphalian Minister of Justice Thomas Kutschaty—also referred to as the 'Kutschaty draft' (*Kutschaty-Entwurf*)—[15] and the socalled 'Cologne draft' (*Kölner Entwurf*),[16] which was presented in 2017 by a research group from the University of Cologne in cooperation with a number of experts from practice and academia, formed the foundation for an intensive exchange. In March 2018, the grand coalition of CDU, CSU and SPD announced in its Coalition Agreement the legal policy objective of revising the law on corporate sanctions to ensure that white-collar crime is effectively prosecuted and appropriately sanctioned.[17] The Federal Government honored its promise and in August 2019 the Federal Ministry of Justice and Consumer Protection (*Bundesministerium der Justiz und für Verbraucherschutz*; BMJV) provided a corresponding draft bill for coordination with the other ministries. Although this draft was not intended for publication, it was nevertheless leaked to the public, fueling debates and generating criticism. On April 22, 2020, the BMJV officially published the Draft Bill to Strengthen the Integrity in the Economy (*Referentenentwurf eines Gesetzes zur Stärkung der Integrität in der Wirtschaft*),[18] Article 1 of which contains the draft of the Corporate Sanctions Act (*Verbandssanktionengesetz*; VerSanG). This official draft, however, contained barely any changes in relation to the first "leaked" draft. The draft bill was subsequently circulated for consultation purposes to various associations and institutions who were thereby

[14]*See* Alexander Meyberg, Beck'scher Online-Kommentar, § 29a OWiG, para. 44 (27th ed. 2020).

[15]Gesetzesantrag des Landes Nordrhein-Westfalen, Entwurf eines Gesetzes zur Einführung der strafrechtlichen Verantwortlichkeit von Unternehmen und sonstigen Verbänden [Draft bill of the State of North Rhine-Westphalia] (Sept. 18, 2013), https://www.landtag.nrw.de/portal/WWW/dokumentenarchiv/Dokument/MMI16-127.pdf (Ger.).

[16]Martin Henssler, Elisa Hoven, Michael Kubiciel & Thomas Weigend, *Kölner Entwurf eines Verbandssanktionengesetzes*, 7 Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht [NZWiSt] 1 (2018).

[17]Koalitionsvertrag der 19. Legislaturperiode zwischen CDU, CSU und SPD, Ein neuer Aufbruch für Europa. Eine neue Dynamik für Deutschland. Ein neuer Zusammenhalt für unser Land. [Coalition Agreement of the 19th legislative period], 126 (Mar. 12, 2018), https://www.bundesregierung.de/resource/blob/975226/847984/5b8bc23590d4cb2892b31c987ad672b7/2018-03-14-koalitionsvertrag-data.pdf?download=1 (Ger.).

[18]Referentenentwurf des Bundesministeriums der Justiz und für Verbraucherschutz, Entwurf eines Gesetzes zur Stärkung der Integrität in der Wirtschaft [Draft bill of the Federal Ministry of Justice and Consumer Protection] (Apr. 20, 2020), https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_Staerkung_Integritaet_Wirtschaft.pdf?__blob=publicationFile&v=1 (Ger.).

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given the opportunity to express their views on the draft and to make representations by June 12, 2020; and indeed they did, a number of them quite critically in some cases.[19] Nevertheless, the Federal Government did not appear to be swayed by this, because as early as June 16, 2020—only four days after the consultation period had expired—the Cabinet adopted its virtually identical Government Draft[20] (*Regierungsentwurf*).[21] In August 2020, pursuant to Article 76 II of the Basic Law (*Grundgesetz*; GG), the Draft Bill to Strengthen Integrity in the Economy was submitted to the Federal Council (*Bundesrat*).[22] While the Legal Committee and the Economic Committee of the Federal Council recommended that the Bill be rejected in its entirety,[23] the majority, by a vote on September 18, 2020—merely—called for amendments.[24] Following this, the Government Draft was introduced to the *Bundestag*—the Lower House of the German Parliament—by the Federal Government on October 21, 2020, where several of the proposed amendments were due to be discussed in more detail in the course of the legislative procedure.[25]

D. Main Contents of the Draft

I. Key Terms and Scope of Application

The Corporate Sanctions Act is built around the key term of *Verbandstat*—an 'unlawful corporate act'—which triggers sanctions against corporations as soon as the *actus reus* is fulfilled. Pursuant to Section 2 I No. 3 of the draft, such a corporate act is a criminal offense through the commission of which duties of the corporation were violated or by which the corporation was enriched or by its very commission the company attempted to enrich itself. In the case that German criminal law is not applicable because the act was committed in foreign countries, the draft provides that the unlawful act is equivalent to a corporate act, if the act were a crime under German law, the act is punishable at the crime scene and the corporation has its registered office within the jurisdiction of Germany.

The draft defines a corporation in Section 2 I No. 1 as 'a private or public legal entity, a society with no legal capacity or a partnership with legal capacity'. Naturally, a whole corporation cannot be made liable for an act which has been committed by a trainee, for example. Therefore, Section 3 of the draft restricts the circle of persons who can commit unlawful corporate acts, for which the corporation can be held liable, to managers. The only exceptions are offenses which have been committed by non-management employees if the crime could have been prevented by a manager or at least impeded in some way.

In accordance with Section 8 of the draft, a corporate fine (*Verbandsgeldsanktion*) or a warning with the caveat of a fine (*Verwarnung mit Verbandsgeldsanktionsvorbehalt*) are the two possible sanctions which a court could impose. There are certain conditions (*Auflagen*) and directions (*Weisungen*) which can be coupled to a warning—Sections 10, 12, 13 VerSanG. The court can, for instance, under Section 12 VerSanG, require the corporation to compensate for the injustice or to pay a specific amount of money to the public coffers (*Staatskasse*). If the corporation

[19]The associations' statements are available at: *Gesetzgebungsverfahren: Gesetz zur Stärkung der Integrität in der Wirtschaft*, Bundesministerium der Justiz und für Verbraucherschutz [BMJV] (June 22, 2020), https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/DE/Staerkung_Integritaet_Wirtschaft.html.

[20]Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Stärkung der Integrität in der Wirtschaft [Government Draft] (June 16, 2020), https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RegE_Staerkung_Integritaet_Wirtschaft.pdf?__blob=publicationFile&v=2 (Ger.).

[21]*See, e.g.*, Annelie Kaufmann, *Regierungsentwurf zu Unternehmenssanktionen: Keine Änderungen trotz heftiger Kritik*, Legal Tribune Online (June 16, 2020), https://www.lto.de/persistent/a_id/41914/ (Ger.).

[22]Gesetzentwurf der Bundesregierung [Government Draft], Bundesrat Drucksachen [BR] 440/20 (Ger.).

[23]Regierrungsentwurf [Cabinet Draft], Deutscher Bundesrat: Drucksachen [BR] 440/1/20 (Ger.).

[24]Regierungsentwurf [Cabinet Draft], Deutscher Bundesrat: Drucksachen [BR] 440/20 (Beschluss) (Ger.).

[25]Gesetzentwurf der Bundesregierung [Government Draft], Deutscher Bundestag: Drucksachen [BT] 19/23568 (Ger.) [hereinafter Government Draft].

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does not fulfil the requirements within a specific timeframe, which is generally set by the court at a maximum of five years, the fine will be imposed—Section 10 II, V VerSanG.

Section 9 VerSanG contains rules which govern the level of the corporate fine. It sets minimum and maximum fines and differentiates between whether a corporate act was committed intentionally or negligently. The statute also considers the average annual turnover of the corporation so as to be able to adapt the punishment to its respective economic performance. In the case of a negligent offense committed by a corporation with an annual turnover of less than one hundred million Euros, the fine ranges from 500 Euros to five million Euros. If the unlawful corporate act was committed intentionally by a corporation which has an average annual turnover above one hundred million Euros, the fine can lie anywhere between 10,000 Euros and a maximum of ten percent of the corporation's average annual turnover. The average annual turnover is calculated on the basis of the average worldwide turnover of the past three years, starting when the unlawful corporate act was committed. Turnover gained by corporations which constitute one economic entity with the corporation concerned is thereby included and if there are insufficient indicators available in order to effectively calculate the turnover, it can be estimated.

Pursuant to Section 17 of the draft, the court has the ability to mitigate the corporate sanction if the corporation instigates an internal investigation which contributes to an effective resolution of the case. This internal investigation may be conducted by the corporation itself or by a third party instructed by the corporation—Section 16 VerSanG. If the court does indeed decide to mitigate the sanction, Section 18 VerSanG stipulates that the maximum punishment set by law will be halved and the minimum punishment will not be applicable at all. Furthermore, Section 14 VerSanG provides the court with the opportunity to order the corporation's conviction to be publicly announced if a large number of people or institutions suffered loss or damage as a consequence of the unlawful corporate act. The purpose of this provision, however, is not to pillory the corporation, but rather to provide relevant information to the individuals affected by the unlawful corporate act, for example, to allow them to prepare further legal action.[26] Section 21 VerSanG regulates when an unlawful corporate act is statute-barred and therefore a sanction can no longer be imposed, and Section 22 VerSanG adds that a sanction which has been imposed cannot be enforced after the expiry of the limitation period, which ranges from anywhere between ten and twenty years.

II. Rules of Procedure

Section 24 VerSanG stipulates that—unless otherwise provided by the VerSanG—the German Code of Criminal Procedure (*Strafprozessordnung*; StPO) and the Courts Constitution Act (*Gerichtsverfassungsgesetz*, GVG), shall apply accordingly to the prosecution of corporations. Consequently, a far-reaching amendment is going to be the introduction of the principle of mandatory prosecution (*Legalitätsprinzip*). As a result, the public prosecution service (*Staatsanwaltschaft*) is generally obliged to take action in relation to all prosecutable offenses, provided that there are sufficient factual indications to enable them to do so—Section 152 II StPO. This represents a shift from the principle of discretionary prosecution (*Opportunitätsprinzip*), applicable in the OWiG, whereby the prosecution of regulatory offenses is within the duty-bound discretion of the prosecuting authority—Section 47 I OWiG. Nevertheless, merely declaring the StPO as applicable is not sufficient to meet all the needs which the establishment of corporate sanctions raises. Therefore, the Government Draft includes a number of procedural rules that react to the particularities which the sanctioning of corporations carries in its wake. In particular, the fact that corporations are not natural persons—for whom the StPO was originally drafted—raises numerous difficulties which the additional rules intend to solve.

Pursuant to Section 23 VerSanG, the prosecution authority which is responsible for prosecuting distinct crimes committed by a natural person is also responsible for prosecuting these

[26] *Id.* at 75–76.

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distinct crimes if they are committed by a corporation. In accordance with Section 27 VerSanG, the accused corporation has the same rights which the StPO grants to a natural person. In particular, this includes the right to request evidence to be taken in their defense—Sections 136 I 5, 166 I StPO—as well as the right to remain silent—Section 136 I 2 StPO[27]. As the current version of the StPO lacks general rules on how corporations are represented in a criminal court, Section 28 VerSanG attempts to fill this lacuna by ruling that corporations are represented by its legal representatives except when these representatives themselves are involved in the case. Section 43 VerSanG fills a further lacuna by ruling that a corporation with more than one legal representative is considered to be present if merely one of them appears at the trial. If, under Section 44 VerSanG, none of the legal representatives of the corporation appears to the trial, the court can order the representative to appear in court personally. If the person concerned does not appear, regardless of the order, the court may force this person to attend the hearing. Section 45 VerSanG, however, determines that the trial can also be held without the presence of the person concerned if certain conditions are fulfilled. Furthermore, the draft adds numerous provisions that describe situations in which the prosecution authorities can indeed refrain from investigating. In accordance with Section 35 VerSanG, the prosecution authority can abstain from prosecution if the significance, as well as severity and extent of the unlawful corporate act, is viewed as being minor and furthermore requires that there is no public interest in the prosecution of the offense.

A further reason for not conducting further investigations against a corporation can be found in Section 36 VerSanG. The provision partially refers to Section 153a I StPO which determines that the prosecution authorities are able to provisionally refrain from instigating proceedings when there is no public interest in bringing the case to court and the perpetrator fulfils certain requirements which the prosecutor imposes. The draft does not, however, refer to the requirements which are listed in the StPO but instead refers to its Sections 12 and 13. These sections list several requirements including the necessity to make payments to the public coffers or take the requisite precautions to impede further violations of the law. In addition to this, Section 37 VerSanG affords the prosecution the opportunity to refrain from prosecution if consequences which have arisen through the perpetration of the unlawful corporate act are so intense that any further punishment would evidently be inappropriate.

A further need for regulation exists in the area surrounding the use of personal data which has been gathered as a result of other investigations. In this connection, it is necessary to distinguish between investigations which are aimed specifically at clarifying the unlawful corporate act itself and those investigations which are aimed at revealing other crimes. As long as the investigations are directed towards the unlawful corporate act, personal data can be used without any restrictions. If the source of the personal data is, however, an investigation targeting another crime, the general rules apply, with the consequence that personal data often cannot be used.

Moreover, Section 49 VerSanG rules a further procedural specialty regarding corporate sanctioning: the corporation has an obligation to provide information concerning its turnover which is necessary in order to be able to determine the scope of the sanction.

III. Influence on the Code of Criminal Procedure

The establishment of corporate sanctioning is not only adding new procedural rules; it is also amending existing rules which are contained within the StPO. For example, Section 97 I No. 3 StPO will be extended to the point that other objects, including medical examination results, cannot be confiscated when they belong to the relationship of trust of the accused—Section

[27]Particularly with regards to legal practice, it is very important to establish who—besides the legal representatives entitled by Section 33 VerSanG—may exercise the right to remain silent—on behalf of the corporation—and, furthermore, how to proceed if out of several legal representatives, one or more persons wish to testify while others refuse to do so. As these issues have not yet been clarified, one has to await clarification from the legislature or the courts.

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53 I StPO—and are protected by the right to refuse to testify. Besides that, one provision will be added to Section 97 II 2 StPO which determines that records and objects which must be stored by the merchant are not protected by the confiscation restrictions.

IV. Amendments to other Statutes

Besides the amendments which the Government Draft makes to the StPO, it also makes amendments to other statutes which are mainly of an administrative nature. Among other things, corresponding positions are to be added to the German Court Costs Act (*Gerichtskostengesetz*) and to the German Attorney Remuneration Act (*Rechtsanwaltsvergütungsgesetz*).

V. Corporate Sanctions Register

The Government Draft intends to establish a register which lists legally binding convictions—Section 54 II No. 1 VerSanG—as well as details of regulatory fines—Section 54 I No. 2 VerSanG—against a corporation. The register will be called the *Verbandssanktionenregister*—the Corporate Sanctions Register—and it will be maintained by the Ministry of Justice—Section 54 I VerSanG. The deletion periods of registrations are staggered, the regular deletion period being ten years—Section 57 II No. 1b VerSanG. Registrations made due to regulatory fines will be deleted after five years—Section 57 II No. 2 VerSanG. In accordance with Section 55 VerSanG, a registration contains *inter alia* the name, the legal form and the address of the registered office or the principal place of business of the corporation. Furthermore, it details the date of the first conviction as well as the date of its legal effect. Additional to the key data, the register also reveals the scope of the sanction and whether the judgment was made public.

The draft states that the purpose of the sanctions register is mainly to serve as a source of information for prosecutors and the courts. The knowledge of previous convictions is important in order to be able to determine the scope of further sanctions.[28] Section 58 VerSanG grants the corporation concerned the right to gain access to its own information which is stored in the register. Except for academic research—Section 62 VerSanG—the Corporate Sanctions Register will not be accessible to the public. Notwithstanding, in accordance with Section 63 VerSanG, authorities from foreign states can access information which is stored in the register if a treaty grants them the right to do so.

Pursuant to Section 65 VerSanG, the Ministry of Justice logs certain details about the recipients of information from the Corporate Sanctions Register. The data logged includes *inter alia* the name of the recipient, the reason why the recipient has requested the data and the date when the Ministry provided the information. Through this measure, it becomes traceable whether and, if so, how, unauthorized parties had access to information sourced from the register.[29]

E. Assessment of the Regulations and Criticism

I. Shortcomings Regarding the Provisions on Internal Investigations

While the vast majority of experts agree that regulations governing internal investigations are necessary and long overdue, the actual provisions under Section 17 VerSanG are, however, subject to increasing criticism.[30]

[28]Government Draft, *supra* note 25, at 105–06.

[29]Government Draft, *supra* note 25, at 112.

[30]*See, e.g.,* Bundesrechtsanwaltskammer [BRAK], *Stellungnahme Nr. 32 zum Regierungsentwurf eines Gesetzes zur Stärkung der Integrität in der Wirtschaft* [Statement 32/2020 of the German Federal Bar] (July 2020), https://www.brak.de/zur-rechtspolitik/stellungnahmen-pdf/stellungnahmen-deutschland/2020/juli/stellungnahme-der-brak-2020-32.pdf [hereinafter BRAK, *32/2020*]; BRAK, *Stellungnahme Nr. 33 zum Regierungsentwurf eines Gesetzes zur Stärkung der Integrität in der Wirtschaft* [Statement 33/2020 of the German Federal Bar] (July 2020), https://www.brak.de/zur-rechtspolitik/

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1. Significant contribution, Section 17 I No. 1 VerSanG

Section 17 I No. 1 VerSanG stipulates that the corporation shall make a significant contribution towards the clarification of the corporate act and the corporation's responsibility (*wesentlicher Aufklärungsbeitrag*) in order to qualify for a mitigation of sanctions. This wording, however, appears rather too vague to be able to determine the required quality, content, and influence of the contribution to be qualified for mitigation, thus leading to legal uncertainty.[31] It is merely established that a mitigation of sanctions pursuant to Section 17 I VerSanG can no longer be granted if the prosecuting authorities have already resolved the matter themselves.[32]

Furthermore, the wording conveys the impression that the majority of the matter is to be resolved by the company itself, suggesting a privatization of the investigation proceedings, which—in view of the principle of mandatory prosecution (*Legalitätsprinzip*) and a criminal justice system governed by the rule of law—neither can nor should be the case.[33] For these reasons, the German Federal Bar (*Bundesrechtsanwaltskammer*; BRAK) proposed a litotic amendment to the wording to: "*the corporation must have made a not insignificant contribution which was suitable to further the clarification* ...."[34]

2. Independent Investigation, Section 17 I No. 2 VerSanG

Another and probably the most strongly criticized requirement for the reduction of sanctions is the functional separation of internal investigation and criminal defense pursuant to Section 17 I No. 2 VerSanG. This is to increase the credibility of the investigation results, as, according to the draft, only an independent investigator is able to penetrate into the core of the offense and seriously consider possible involvement of the company management.[35] This conflict, however, is, at least with regard to the company's defense counsel, not understandable, as both the defense counsel and the investigator are commissioned by the company management and depend significantly on the access granted to information and documents.[36] A greater independence of a separate investigator is therefore not evident given the lack of autonomous powers to which only public investigating authorities are entitled. In fact, this conflict appears to be rather fabricated given the already existing professional duties of lawyers and regulations concerning conflicts of interest—see Section 43a III, IV of the Federal Lawyers' Act (*Bundesrechtsanwaltsordnung*; BRAO), Section 356 StGB.[37] Furthermore, no empirical evidence with regard to the above-mentioned concerns is provided to suggest the necessity for such a separation.[38] This regulation and the respective justification in the explanatory memorandum to the VerSanG rather express an

stellungnahmen-pdf/stellungnahmen-deutschland/2020/juli/stellungnahme-der-brak-2020-33.pdf [hereinafter BRAK, *33/2020*]; Deutscher Anwaltverein (DAV), *Stellungnahme des Deutschen Anwaltvereins durch die Ausschüsse Strafrecht, Arbeitsrecht, Berufsrecht und Handelsrecht zum Referentenentwurf eines „Gesetzes zur Stärkung der Integrität in der Wirtschaft"*, SN 39/2020 [Statement of the German Lawyers' Association] (June 15, 2020), https://anwaltverein.de/de/newsroom/sn-39-20 (Ger.).

[31]Denis Lanzinner & Martin Petrasch, *Die Milderung nach §§ 17 f. VerSanG – ein "Anreiz" für den Verband als Arbeitgeber?*, 13 Corp. Compliance Zeitschrift [CCZ] 109, 111 (2020).

[32]*See* Government Draft, *supra* note 25, at 83.

[33]BRAK, *32/2020*, *supra* note 30, at 12-13.

[34]*Id.* at 13.

[35]Government Draft, *supra* note 25, at 83.

[36]BRAK, *32/2020*, *supra* note 30, at 14.

[37]DAV, *supra* note 30, at 18; *See* BRAK, *32/2020*, *supra* note 30, at 15; *Cf.* BRAK, *33/2020*, *supra* note 30, at 20 (arguing that internal investigations are always purposeful and geared towards a particular objective and interest, thus not being completely objective).

[38]Dirk Uwer & Ralf van Ermingen-Marbach, *Bundesverfassungsgericht: Kein Vertraulichkeitsschutz für interne Untersuchungen?*, 68 Anwaltsblatt [AnwBl] 470, 472 (2018); Janine Winkler, *BVerfG zu Jones Day – wie sicher sind die Ergebnisse einer internen Untersuchung?*, Strafverteidiger Forum [StraFo] 464, 470 (2018).

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unfounded general mistrust of the legal profession and, in particular, of defense counsels, as it appears that unfair intervention by the defense is perceived as a potential risk.[39]

The functional separation under Section 17 I No. 2 VerSanG continues to have extensive consequences in practice. An appropriate criminal defense in line with the interests of the company requires both knowledge of the matter and the conduct of its own investigations. Therefore, investigations would have to be carried out twice, thus multiplying the costs involved; unless one waits for access to the files of the—concluded—independent internal investigation. Both scenarios, however, constitute a considerable, if not unreasonable, impediment to the effectiveness of the defense and pose a—financial—challenge, especially for small and medium-sized companies. Furthermore, this provision fails to recognize that internal investigation and criminal defense are usually jointly necessary for a cooperative defense strategy, which is already a significant and frequently used strategy.[40] A further consequence of this artificial separation in terms of criminal procedure is that the findings and working results of the internal investigation are subsequently not protected by a ban on seizure.[41] Consequently, the results of the investigation can be seized and incorporated into the proceedings of the public prosecution authorities, which is often understood to be the actual goal of and the reason for the regulation and the fabricated conflict of interest.[42] In light of the issues mentioned, the German Federal Bar is calling for a reduction in sanctions pursuant to Section 17 I No. 2 VerSanG, irrespective of the investigative personnel.[43]

3. Continuous and Full Cooperation, Section 17 I No. 3 VerSanG

The wording "continuous and full cooperation" (*ununterbrochene und uneingeschränkte Zusammenarbeit*) in Section 17 I No. 3 VerSanG is also open to various interpretations. According to the explanatory memorandum, the specific details of the respective cooperation are at the discretion of the prosecuting authority.[44] It therefore remains unclear which actions will constitute satisfactory and sufficient cooperation with the prosecuting authorities, and at which point there will be a risk that it is considered to be insufficient. In addition, the courts could consider this to be a duty to cooperate unconditionally, which would inevitably mean that companies will be compelled to do everything that is asked of them in order not to risk the significant reduction of sanctions.[45] This potential development is compounded by the fact that the corporation, which is generally free to decide whether and when to cooperate with the prosecuting authorities, must cooperate '*unverzüglich*' —without undue delay—if the authorities approach the company in the course of the investigations; otherwise a mitigation of sanctions cannot be granted.[46] Given the extent of such a decision—both in terms of a possible mitigation of sanctions, on the one hand, and in terms of the management's duty to avert any damage and act on the basis of adequate information and in the best interests of the company as well as the associated liability risk—so called Business Judgement Rule; see Section 93 I 2 of the Stock Corporation Act (*Aktiengesetz*; AktG)[47]—on the other hand—demands have become loud for the management to be provided with a sufficient basis of information and ample time for a faithful decision.[48]

[39]Mathias Priewer & Lukas Ritzenhoff, *Das Verhältnis von interner Untersuchung und (Unternehmens-)Verteidigung*, 8 J. DER WIRTSCHAFTSSTRAFRECHTLICHEN VEREINIGUNG E.V. [WiJ] 166, 167 (2019).

[40]BRAK, *32/2020*, *supra* note 30, at 16; BRAK, *33/2020*, *supra* note 30, at 22.

[41]BRAK, *33/2020*, *supra* note 30, at 22; Lanzinner & Petrasch, *supra* note 31, at 111.

[42]BRAK, *33/2020*, *supra* note 30, at 22; DAV, *supra* note 30, at 17-18; Lanzinner & Petrasch, *supra* note 31, at 111.

[43]BRAK, *32/2020*, *supra* note 30, at 16-17.

[44]Government Draft, *supra* note 25, at 83.

[45]*See* Lanzinner & Petrasch, *supra* note 31, at 111.

[46]Government Draft, *supra* note 25, at 83.

[47]Aktiengesetz [AktG] [Stock Corporation Act], Sept. 6, 1965, BGBl. I at 1089, last amended by Gesetz [G], Dec. 12, 2019, BGBl I at 2637, (Ger.), http://www.gesetze-im-internet.de/englisch_aktg/englisch_aktg.html#p0465.

[48]*See* BRAK, *32/2020*, *supra* note 30, at 13.

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Furthermore, the procedural rights granted, such as the applicability of the provisions of the StPO regarding the accused—Section 27 VerSanG—or the right of legal representatives to refuse testimony—Section 33 VerSanG—are *de facto* undermined in practice by the demand for continuous and full cooperation.[49]

4. Essential Documents, Section 17 I No. 4 VerSanG

The term "essential documents" (*wesentliche Dokumente)* used in No. 4 also represents a vague legal concept, from which it cannot be deduced whether, for example, the submission of the entire data on which the investigation is based can be demanded. Due to the ensuing legal uncertainty, it is by no means unreasonable to demand a substantiation of this specific provision.[50]

5. Conflict Between Section 17 I No. 1 and No. 5 VerSanG

As criminal offenses committed by employees and executive bodies are attributed to the corporation, the corporation first must seek clarification as it lacks sufficient knowledge. Typically, this is predominantly undertaken by means of employee interviews,[51] which now must be performed in accordance with Section 17 I No. 5 VerSanG, adhering to the principles of a fair trial. However, the rights of the interviewees stipulated in No. 5 may entail problems, as the company must effect a successful clarification in order to benefit from a reduction in sanctions—Section 17 I No. 1 VerSanG. This can, however, greatly depend upon whether the employees exercise their right to refuse to provide information. Therefore, it is possible that a reduction in sanctions fails despite all efforts of the company for want of employee cooperation or successful clarification of the matter. Consequently, this constitutes a dependence of the company on the interviewees' cooperation.[52] Theoretically, the company could also be extorted, for instance, by demanding financial compensation or the coverage of legal expenses in exchange for the employee's testimony or confession, as this could be far more financially advantageous than the potential forfeiture of the reduction of sanctions.[53]

Moreover, contrary to its intention, this regulation provides inadequate employee protection. If the employee decides to testify, there is the risk of a criminal investigation proceedings being instigated. Should the employee, by contrast, exercise their right to refuse to provide information, a dismissal on the grounds of suspicion may ensue.[54] This also raises the as yet unresolved question of whether claims for damages could be asserted against the employee if the reduction of sanctions were to be forfeited—solely—due to their refusal to testify.[55]

A possible solution to this problem would be an amendment to Section 17 I No. 1 VerSanG to the effect that serious efforts to clarify the matter shall suffice for a mitigation under Section 17 I VerSanG.[56] Consequently, the undertaking would not be so greatly dependent upon the employees' willingness to provide information. Therefore, corporations would have no reason to urge their employees to give evidence, thereby avoiding a dilemma for their employees.

[49]DAV, *supra* note 30, at 19.

[50]*Cf.* Nicolas Ott and Cäcilie Lüneborg, *Das neue Verbandssanktionengesetz – Fragen und Auswirkungen für die Compliance-Praxis*, 22 Neue Zeitschrift für Gesellschaftsrecht [NZG] 1361, 1366-1367 (2019) (elaborating on further potential risks with regard to § 17 I No. 4 VerSanG).

[51]Burkard Göpfert, Frank Merten and Carolin Siegrist, *Mitarbeiter als "Wissensträger" – Ein Beitrag zur aktuellen Compliance-Diskussion*, 61 Neue Juristische Wochenschrift [NJW] 1703, 1705 (2008).

[52]*See* BRAK, *33/2020*, *supra* note 30, at 17.

[53]*Id.*

[54]Luís Greco & Christian Caracas, *Internal Investigations und Selbstbelastungsfreiheit*, 35 Neue Zeitschrift für Strafrecht [NStZ] 7, 9 (2015).

[55]DAV, *supra* note 30, at 21.

[56]BRAK, *33/2020*, *supra* note 30, at 18.

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In addition, such an approach appears to be just and reasonable if the company has done everything in its power.[57]

II. Shortcomings Regarding Corporate Sanctions

The possibility of imposing a corporate fine of up to ten percent of the average annual turnover of the economic unit upon a company with an average annual turnover of more than one hundred million Euros, as provided for in Section 9 II VerSanG, has also reaped considerable criticism. The purpose of this is to enable a fine to be imposed in relation to the company's economic performance.[58] In light of this, however, the decision to use the turnover as a point of reference is surprising at the very least, as it does not reflect the performance and profitability of a company and can consequently result in disproportionately large fines.[59] This issue is further aggravated by the fact that the average annual turnover of the entire group is taken as a reference, although the individual companies generally do not have access to the turnover of the other companies, not to mention the fact that the parent company is generally not responsible for the conduct of the individual company.[60] Therefore, it is also conceivable that the fine imposed may significantly exceed the turnover of the individual company in question. Indeed, Section 15 II VerSanG provides for a correction for this scenario, however, the group turnover as a reference shall not be affected by this; a limitation of the fine to a reasonable amount does not result from this in any way.

It must also be noted that the so-called *Ausfallhaftung*[61] of the group, as stipulated in Section 7 I No. 1 VerSanG, also undermines fundamental principles of company law, as the recoverable assets of companies are generally separated and the *Ausfallhaftung* of the parent company is not the norm under company law.[62]

Looking at the wide range of fines, it is also worth mentioning that while the responsibility regarding the corporate act lies with the management of the company, the fine directly affects the shareholders as well as the employees, despite these parties usually not being responsible for the act committed.[63] In addition, due to the very large framework of sanctions and the lack of quantitative guidance, the assessment criteria for corporate fines in Section 15 III VerSanG can neither contribute significantly to establishing a uniform interpretation in case law nor to rendering the expected level of fines predictable.[64]

III. Softening of Prohibitions of Seizure—Attorney-Client Privilege

The planned amendment to the statute on the prohibition of seizure under Section 97 I No. 3 StPO raises major concerns, as it entails serious consequences and applies not only to corporations but

[57]*Id.*

[58]Government Draft, *supra* note 25, at 72.

[59]BRAK, *33/2020*, *supra* note 30, at 11. *See also* Tobias Brouwer, *Objektive Gefährdungshaftung mit Zwang zur Kooperation? Anmerkungen zum geplanten Verbandssanktionengesetz aus gesellschaftsrechtlicher Sicht*, 64 DIE AKTIENGESELLSCHAFT [AG] 920, 922 (2019).

[60]DAV, *supra* note 30, at 13-15; BRAK, *32/2020*, *supra* note 30, at 5.

[61]The term *Ausfallhaftung* generally refers to the substitute liability for a debtor from whom payment cannot be obtained. Section 7 I No. 1 VerSanG states that if the corporation ceases to exist after its prosecution has been announced or if assets are transferred after this date with the consequence that an appropriate corporate fine cannot be imposed on the corporation or its legal successor or cannot be expected to be fully enforced, a liability amount in the amount of the corporate fine may be imposed against corporations which formed an economic unit with the corporation concerned and directly or indirectly exercised a decisive influence on the corporation concerned or its legal successor.

[62]Die Deutsche Kreditwirtschaft (DK), *Stellungnahme zu dem Referentenentwurf eines Gesetzes zur Stärkung der Integrität in der Wirtschaft* [Statement of the German Banking Industry Committee], 12 (June 11, 2020), https://die-dk.de/media/files/200611_DK-Stellungnahme_Verbandssanktionengesetz-VerSanG.pdf (Ger.).

[63]*See* Alexander Reuter, *Unternehmensgeldbußen – Ein verfassungsrechtlicher Holzweg*, 40 ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT [ZIP] 2298, 2299 (2018).

[64]BRAK, *32/2020*, *supra* note 30, at 7-8; BRAK, *33/2020*, *supra* note 30, at 12.

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to criminal defense in general. Firstly, it remains unclear what the minimum requirements for the relationship of trust necessary for the protection against seizure are, meaning that all professional activities of lawyers outside of the criminal defense could potentially be exposed to a risk of seizure.[65] The explanatory memorandum states in this regard that a relationship of trust is established, for example, in the case of documents which serve to prepare the defense, or where documents have been handed over to a lawyer, tax advisor or auditor by the accused with regard to a specific consultancy activity.[66] Although this remark may be helpful, it does not completely eliminate the legal uncertainty that exists with regard to the specific nature of the relationship of trust. Furthermore, the separation of defense and internal investigation pursuant to Section 17 I No. 2 VerSanG, which facilitates the seizure of documents, is an indication that the prohibition of seizure could thereby be significantly restricted.[67] Moreover, the relationship of trust must be between the accused and the person subject to professional secrecy. Thus, documents based upon the relationship of trust between a person who is not yet accused and the person subject to professional secrecy, as well as those items which are based upon the relationship of trust between the person subject to professional secrecy and a third party—so-called third-party secrets—would be excluded from the prohibition of seizure.[68] Apart from this serious consequence—which will have a huge influence on the legal advice of lawyers—it should also be noted that it is often difficult to determine whether or when a company will obtain the status of an accused[69], especially if internal investigations are conducted—on the company's own initiative—at an early stage.[70] The transition from legal advice and consultancy to legal defense is therefore often rather fluid. As such, the amendment also results in the documents of an internal investigation being subject to seizure, unless it is carried out by the defense counsel as part of the criminal defense. Companies are thus deprived of the possibility of having important matters investigated independently without the risk of seizure and a limitation of the defense options thereby results from this. In light of these significant changes and the inherent risks, such a drastic limitation of the protection against seizure appears unreasonable.

F. Developments in 2021 — End of the Line

After the Government Draft was introduced to the *Bundestag* in fall 2020, upon approval by the Federal Council, it appeared as if it was only a matter of time until the Act to Strengthen the Integrity in the Economy would be adopted. All the more surprising were the subsequent developments—or lack thereof—because following months of standstill, in early June 2021, CDU politician and legal expert Jan-Marco Luczak publicly stated that the Government Draft would no longer be supported by the CDU and CSU.[71] The decisive factor for the failure of the draft bill was, in particular, the widely criticized provisions on internal investigations, which in his view would have been neither acceptable nor expedient.[72] In addition, there had purportedly been no willingness whatsoever in the course of the legislative procedure to negotiate the objections

[65]*See* DAV, *supra* note 30, at 22; DK, *supra* note 62, at 10. *See also* Martin Lawall & Andreas Weitzell, *Die Bekämpfung der Unternehmenskriminalität durch ein Verbandssanktionengesetz – Der Weisheit letzter Schluss?*, 9 Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht [NZWiSt] 209, 214 (2020).

[66]Government Draft, *supra* note 25, at 114.

[67]BRAK, *32/2020*, *supra* note 30, at 19.

[68]*See* BRAK, *33/2020*, *supra* note 30, at 24.

[69]The StPO differentiates between the three terms "accused" (*Beschuldigter*), "indicted accused" (*Angeschuldigter*), and "defendant" (*Angeklagter*). According to Section 157 StPO the "indicted accused" is an accused person against whom public charges have been preferred, and the "defendant" is an accused person or indicted accused in respect of whom a decision has been taken to open the main proceedings.

[70]BRAK, *33/2020*, *supra* note 30, at 25. *See also* Lawall & Weitzell, *supra* note 65, at 214.

[71]Corinna Budras, *Skandale ohne Folgen*, Frankfurter Allgemeine (June 9, 2021), https://www.faz.net/-gqe-acjbs.

[72]*Id. See also* Heike Anger & Dietmar Neuerer, *Superministerin zwischen den Fronten*, Handelsblatt, June 2, 2021, at 11.

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expressed.[73] Federal Minister of Justice Christine Lambrecht—SPD—who had already previously criticized the standstill and the refusal of parliamentary discussions by the CDU/CSU, calling it a breach of the coalition agreement[74]—once again expressed her displeasure with this conduct while adding that this demonstrated how little the CDU/CSU had learned from previous scandals.[75] In light of the upcoming federal elections on September 26, 2021, the legal policy objective of revising the law on corporate sanctions to ensure that white-collar crime is effectively prosecuted and appropriately sanctioned, as envisaged in the coalition agreement, has ultimately failed.

G. Forecast

Nevertheless, the failure of the Government Draft should not be misinterpreted given that the issue of corporate sanctions remains more relevant and important than ever amid incidents such as the Volkswagen emissions scandal, cum-ex deals or fraud in relation to Coronavirus assistance programs and private Covid-19 test-centers. In addition, at the beginning of 2021 the Organization for Economic Co-operation and Development (OECD) once again called on Germany to implement appropriate legislative reforms regarding the liability of legal persons.[76] As for the next legislative period, the SPD parliamentary group expressed its continued belief that honest companies must be protected by extending the possible sanctions for the black sheep.[77] Similarly, the CDU/CSU parliamentary group stated that it would be open and willing to discuss a regulatory framework that creates incentives for corporations to act lawfully and cooperate with the prosecuting authorities, without, however, creating excessive burdens as a result of disproportionately high sanctions or legal uncertainties regarding the attribution and assessment of sanctions.[78] Furthermore, the Alliance90/The Greens outlines in its manifesto for the 2021 parliamentary elections—as opposed to the CDU/CSU and SPD—how it intends to take action against white-collar crime using comprehensive legislation.[79]

Consequently, it suggests that corresponding legislative reforms will be introduced in the forthcoming legislative period as well. In this respect, the current Government Draft is indeed usable for the future government—provided that some details, in particular the regulations on internal investigations, are amended—according to Prof. Dr. Dr. h.c. Michael Kubiciel, Head of the Research Center for Corporate Criminal Law at the University of Augsburg.[80] Therefore, notwithstanding its failure, the future significance of the Government Draft is not to be underestimated because, all in all, the Corporate Sanctions Act appears to be a step in the right direction in helping overcome the issues which the current legal situation has not been able to address appropriately.

[73]Anger & Neuerer, *supra* note 72.

[74]Heike Anger & Dietmar Neuerer, *"Veränderungen für uns alle"*, HANDELSBLATT, May 14, 2021, at 10, 11. While the legal nature of coalition agreements is not undisputed, it is nearly unanimously acknowledged that they are not legally actionable or enforceable, with the result that non-compliance entails merely political consequences. *See, e.g.*, Georg Hermes, *Art. 63 GG*, *in* 2 GRUNDGESETZ-KOMMENTAR, para. 14-15 (Horst Dreier ed., 3d ed. 2015).

[75]Budras, *supra* note 71.

[76]ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION: PHASE 4 TWO-YEAR FOLLOW-UP REPORT: GERMANY 3, 4, 10 (2021), https://www.oecd.org/daf/anti-bribery/germany-phase-4-follow-up-report.pdf.

[77]Heike Anger, *Sanktionen werden kommen*, HANDELSBLATT (Aug. 17, 2021), at 14.

[78]*Id.*

[79]BÜNDNIS 90/DIE GRÜNEN, MANIFESTO FOR THE 2021 PARLIAMENTARY ELECTIONS 192 (2021), https://cms.gruene.de/uploads/documents/Wahlprogramm_Englisch_DIE_GRUENEN_Bundestagswahl_2021.pdf.

[80]Anger, *supra* note 77.

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