COMPLIANCE ELLIANCE JOURNAL

DISCIPLINE AND PUNISH

The Draft of the Act on Combating Corporate Crime

Prof. Dr. Hendrik Schneider

AUTHORS

Hendrik Schneider, Founder and Content Curator of CEJ, is presently the head of the department of Criminal Law, Criminal Procedure, Criminology, Juvenile Law, and Sentencing at the University of Leipzig, Faculty of Law. His current practice includes serving as legal counsel on corporate- and medical- criminal cases and advising on criminal matters surrounding issues of economic transactions and forensic investigations. Additionally, he acts as a compliance consultant with particular emphasis on the healthcare industry, including risk analysis, development and implementation of internal guidelines, change management, employee training, and sustainable protection.

ABSTRACT

In August 2019, the Federal Ministry of Justice submitted a draft for a corporate crime act. This draft will end a decade-long debate on the criminal liability of legal persons and profoundly change the criminal prosecution in the area of economic criminal law. The article classifies the legislative project in the current discourse on criminal policy, reports on the content of the draft and gives a critical commentary on individual points.

TABLE OF CONTENTS

I. PROSECUTION OF CORPORATE CRIME IN GERMANY *DE LEGE LATA* AND *DE LEGE FERENDA*

In August 2019, the Federal Ministry of Justice, headed by Christine Lambrecht (SPD, Social Democratic Party of Germany), presented a draft Act on Combating Corporate Crime (hereinafter referred to as the "Draft Act"). The implementation of the project in the legislative procedure is expected, subject to possible changes in the details. The Act will fundamentally change the prosecution and defense of associations (that is, legal entities under public or private law, associations without legal capacity and partnerships with legal capacity[1]). Knowledge of the new legal material is relevant to economic players around the world, to the extent that they establish or operate subsidiaries in Germany or are active abroad on behalf of German companies.

According to current German law, companies can already be held liable if, for example, the executive board or another management body of the company has committed a criminal offense that enriched the company or resulted in a breach of the company's duties[2]. Since 1968, the statutory provision has been found in § 30 of the Administrative Offenses Act (*Gesetz über Ordnungswidrigkeiten*, "OWiG").[3] The OWiG is regarded as the "little brother" of criminal law. To be sure, the procedure is modeled on criminal proceedings, but the fines do not constitute criminal penalties. The imposition of penalties is reserved for the judge. By contrast, fines on the basis of the OWiG are imposed by the administrative authorities responsible for punishing administrative offenses. Recourse to the courts against this is possible.

Through the 8th Act amending the Act against Restraints of Competition (*8. Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen*) of June 26, 2013, the fine framework of § 30 OWiG was increased from 1 million euros to 10 million euros. This framework may be exceeded if the economic return of the act exceeds the statutory fine limit (§ 17 (4) OWiG). The fine of the association to be assessed by the court must include a "punishment share" and a "confiscation share." For years, fines in the hundreds of millions have thus been established (Siemens - 201 million euros, 2007[4]; Audi - 800 million

1 See § 1 (1)(1) VerSanG-E.

2 More specifically: Imme Roxin, *Compliance-Maßnahmen und Unternehmenssanktionierung de lege lata*, 9, ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK, 341 et seq. (2018).

3 For historical development see: HAUKE BRETTEL & HENDRIK SCHNEIDER, WIRTSCHAFTSSTRAFRECHT, §1 Rn.45. (2nd ed., 2018).

4 LG München I, Beschluss vom 04.10.2007- 5 KLs 563 Js 45994/07, (Oct. 15, 2019, 02:33 PM), https://openjur.de/u/748600.html.

euros, 2018[5]). In the VW case, the fine in the "Dieselgate" scandal amounts to 1 billion euros[6].

The introduction of corporate criminal law was already being discussed in the 1950s[7]. Proposals in this regard were not acceptable to the majority. In particular, German criminal law scholars saw the principle of guilt as an insurmountable bulwark against the imposition of criminal penalties on companies.[8] Moreover, they are only capable of acting through their governing bodies, and the social and ethical condemnation found in punishment is meaningless for companies [9]. Policy ultimately followed suit.[10]

The internationally relevant scandals regarding the exhaust gas manipulations of well-known German automobile manufacturers, which lend emphasis to demands for a tougher approach and make it acceptable to the majority, are certainly responsible for today's change of opinion[11]. Reference should also be made to the political framework con-

---

5 Staatsanwaltschaft II München, *Ermittlungsverfahren gegen Verantwortliche der AUDI AG - Bußgeldbescheid gegen die AUDI AG*, Pressemitteilung 7 vom 16.10.2018 (Oct. 15, 2019, 02:33 PM), https://www.justiz.bayern.de/gerichte-und-behoerden/staatsanwaltschaft/muenchen-2/presse/2018/13.php.

6 Staatsanwaltschaft Braunschweig, *VW muss Bußgeld zahlen*, Pressmitteilung vom 13.06.2018 (Oct. 15, 2019, 02:35 PM), https://staatsanwaltschaft-braunschweig.niedersachsen.de/startseite/aktuelles/presseinformationen/vw-muss-bugeld-zahlen-174880.html.

7 See Ernst Heinitz, *Empfiehlt es sich, die Strafbarkeit der jursitischen Person gesetzlich vorzusehen?, in:* Verhandlungen des 40. Deutschen Justistentages Band I, 84ff (ed Ständige Deputation des Deutschen Juristentages, 1953); Karl Engisch, *Empfiehlt es sich, die Strafbarkeit der jursitischen Person gesetzlich vorzusehen?, in:* Verhandlungen des 40. Deutschen Juristentages Band II, E. 22 et seq. (ed. Ständige Deputation des Deutschen Juristentages, 1953); overview by Bernd Schünemann, *Der Kampf ums Verbandsstrafrecht in dritter Neuauflage, der „Kölner Entwurf eines Verbandssanktionsgesetzes" und die Verwandlung von Kuratoren in Monitore – much ado about something*, 8, STRAFVERTEIDIGER FORUM, 317 et seq. (2018)

8 Bernd Schünemann, *Die aktuelle Forderung eines Verbandsstrafrechts – Ein kriminalpolitischer Zombie*, 1, ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK, 1 et seq. (2014); Günther Jakobs, *Strafbarkeit juristischer Personen?, in:* Festschrift für Klaus Lüderssen : zum 70. Geburtstag, 559 et seq.(ed. Prittwitz, 2002) Klaus Leipold, *Unternehmensstrafrecht – Eine rechtspolitische Notwendigkeit?*, 2, ZEITSCHRIFT FÜR RECHTSPOLITIK, 34 et seq. (2013).

9 HANS-HEINRICH JESCHECK & THOMAS WEIGEND, LEHRBUCH DES STRAFRECHT - ALLGEMEINER TEIL, p. 227 (1995).

10 In 1999, a Hessian legislative initiative to introduce responsibility under criminal law for legal persons and associations of persons in the Bundesrat (BR-Drs. 690/98) was withdrawn again (BR-Drs. 385/99); this was followed by a rejection of the introduction of criminal liability for companies by the Commission for the Reform of the Criminal Sanction System in Germany in 2000; finally, in 2013, at the suggestion of the Ministry of Justice of the State of North Rhine-Westphalia, a draft act of the 84th Conference of Ministers of Justice of the Länder followed, which, however, also failed; for details, see Matthias Jahn, *"There is no such thing as too big to jail" – regarding the constitutional objections to an association criminal code under the Basic Law, in*: Corporate criminal law and its alternatives, 8 *et seq.* (eds. - Matthias Jahn, Charlotte Schmitt-Leonardy, Christian Schoop, 2015).

11 As such, it comprises symbolic ad hoc legislation, which often represents the engine of a tightening of criminal law, see HAUKE BRETTEL & HENDRIK SCHNEIDER, WIRTSCHAFTSSTRAFRECHT, §1 Rn.69 et seq. (2end ed., 2018); along with Mohamad El-Ghazi, *Das schweizerische Unternehmensstrafrecht – Lehren für ein mögliches*

ditions (see II). Furthermore, there is a lack of fundamental resistance on the part of criminal science today[12]. Rather, the concerns regarding corporate criminal law resulting from the basic principles of criminal law are being suborned in favor of pragmatism in terms of criminal policy[13]. Traditional European principles are no longer perceived as contemporary[14]. "Modern criminal law" should be elastic, effective and not limited to "minimally invasive" interventions [15]. As a whole, it has become obvious that the days when progress in criminal law was seen in its abolition[16] or at least in decriminalization[17] are over.

II. POLITICAL BACKGROUND OF THE DRAFT ACT ON COMBATING CORPORATE CRIME

Since 2013, Germany has been governed by a "grand coalition" of the CDU/CSU (union of Christian democratic parties) and the SPD. Angela Merkel, who has been Chancellor of the Federal Republic of Germany without interruption since Nov. 22, 2005, likewise governed in the 16th legislative period with a grand coalition and in the following official phase with a Black-Yellow coalition together with the FDP (Free Democratic Party, the liberal political party in Germany).

After the federal elections in 2013, the Black-Yellow coalition of the 17th legislative period was not able to continue, because the FDP was no longer represented in the Bundestag. For the first time since the founding of the Federal Republic of Germany in 1949, the party had not passed the so-called "5-percent hurdle." The CDU/CSU (Christian Democratic Union) had just missed an absolute majority.

Subsequently, the CDU/CSU and SPD, which had already put into effect some topics of criminal policy from the spectrum of economic criminal law, formed a government. Such

---

deutsches Verbandsstrafrecht, ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT, 1, 254 (2018) on the introduction of corporate criminal law in Switzerland in 2003. The discussion regarding the necessity of corporate criminal law was triggered by a major fire near Sandoz, during which fire-fighting water contaminated with pesticides reached the Rhine and caused the death of fish.

12 Criticism is mainly limited to individual specific points and does not consist of fundamental criticism, see for example: Alexander Baur, *Kommt jetzt das "Unternehmensstrafrecht"?*, DIE AKTIENGESELLSCHAFT, 13-14, 2018, 457 et seq. (2018).; Katharina Beckemper, *Der Kölner Entwurf eines Verbandssanktionengesetzes – Sanktionen und Einstellungsmöglichkeiten*, 10, NEUE ZEITSCHRIFT FÜR WIRTSCHAFTS-, STEUER- UND UNTERNEHMENSSTRAFRECHT, 420 et seq. (2018).

13 Similarly: Urs Kindhäuser, *Straf-Recht und ultima-ratio-Prinzip*, ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT,129 382 (385) (2017)

14 For example: Michael Kubiciel, *Kriminalpolitik und Strafrechtswissenschaft*, JURISTENZEITUNG, 4, 171 (176) (2018).

15 Michael Kubiciel &Elisa Hoven*, Gründe für die Reform des Verbandssanktionenrechts*, JURISPR-STRFR, 23, 2017, Anm. 1 (2017).

16 ARNO PLACK, PLÄDOYER FÜR DIE ABSCHAFFUNG DES STRAFRECHTS (1974).

17 Hendrik Schneider, *Vom bösen Täter zum kranken System. Perspektivenwechsel in der Kriminologie am Beispiel von Psychoanalyse und Kriminalsoziologie, in:* Recht und Justiz im gesellschaftlichen Aufbruch (1960-1975). Bundesrepublik Deutschland, Italien und Frankreich im Vergleich, (ed. Jörg Requate) 275-293 (2003).

topics include a tightening of the offenses of "passive and active corruption in the course of business" by the second "Act on Combating Corruption," which entered into force on November 26, 2015, the "Act on Combating Corruption in Health Care" of June 4, 2016[18], and the "Act on Reform of Asset Skimming under Criminal Law" of July 1, 2017. The latter is continuing the trend towards a "fiscalization of criminal law"[19] with impressive clarity, as the metaphor of "skimming off" simply shows. Whereas, in everyday life, this term refers, for example, to the delightful process of removing cream from milk or spooning milk froth from cappuccinos, the skimming of assets as early as the preliminary proceedings (that is, prior to conviction) makes it possible to seize assets according to the so-called "gross value principle."[20]. This means that not only the profit from the act, but also the entire amount obtained, without any deduction of expenses, is subject to recovery in favor of the state treasury[21]. If the measure is directed against individuals or smaller companies, this creates a perfect situation at an early stage of the proceedings, because the coercive measures on the part of the state often lead to insolvency and bankruptcy. In accordance with applicable law, the relevant proceedings are already directed against a company if the financial advantages of the illegal transaction did not arise for the perpetrator, but for the company. This is intended to achieve preventive successes according to the credo "crime may not pay."[22]

Moreover, in the current 19th legislative period, after a lengthy struggle and weighing of various alternatives for forming a government, a coalition agreement was concluded between the CDU/CSU and the SPD, which is also picking up measures from the spectrum

---

18 See Hendrik Schneider & Claudia Reich, *Honorarkooperationsarztverträge im Spagat zwischen Korruptionsstrafrecht, Arbeits- und Sozialversicherungsrecht*, MEDSTRA, 1, 11 *et seq.* (2019); Hendrik Schneider & Thorsten Ebermann, *Der Begriff der Zuführung von Patienten in den Tatbeständen Bestechlichkeit und Bestechung im Gesundheitswesen*, MEDSTRA, 2, 76 *et seq.* (2018); Hendrik Schneider, *Das Gesetz zur Bekämpfung der Korruption im Gesundheitswesen und die Angemessenheit der Vergütung von HCP*, MEDSTRA, 4, 195-203 (2016).

19 On the subject of fiscalization, see Monika Frommel, *Im ideologischen Labyrinth. Was erwarten Demonstrantinnen, wenn sie "Weg mit dem Werbeverbot für Schwangerschaftsabbrüche" rufen?,* NEUE KRIMINALPOLITIK, 300 *et seq* (2018).

20 Regarding the overview of the reform of asset skimming under criminal law: Gerson Trüg, *Die Reform der strafrechtlichen Vermögensabschöpfung*, NEUE JURISTISCHE WOCHENSCHRIFT, 1913 *et seq* (2017).

21 According to Jürgen Taschke, *Neue Entwicklungen im Wirtschaftsstrafrecht*, NEUE ZEITSCHRIFT FÜR WIRTSCHAFTS-, STEUER- UND UNTERNEHMENSSTRAFRECHT, 274 *et seq.* (2017), such measures are sufficient to combat corporate crime and the sanctions imposed under German law are no less intrusive than the legal consequences imposed in countries with corporate criminal law: "In the major corruption criminal proceedings against leading industrial companies and automobile manufacturers, sanctions and – economically even more significant – profit skims have been imposed at levels unknown up to now. German sanctions law in no way lagged behind American sanctions, which are generally regarded as extremely strict – the criminal sanctions imposed on the industrial company Siemens in Germany, for example, were higher than those imposed in the U.S."

22 See speech by Bundestag parliamentarian Luczak (CDU): https://www.cducsu.de/themen/innen-recht-sport-und-ehrenamt/verbrechen-darf-sich-nicht-lohnen (Nov. 18, 2019, 02:26 PM)..

of economic crime policy. The CDU/CSU had recorded considerable losses of votes. Although the FDP is once again represented in the Bundestag,[23], it refused, after failed coalition negotiations, to participate in a government with the party Alliance 90 / The Greens (the largest green party in Germany) within the framework of a so-called "traffic light coalition.".

Under the heading "Pact for the Rule of Law" and amid a commitment to a "strong state"[24] and a "modern law,"[25] the CDU/CSU and SPD have formulated the political goal of reforming the "sanctions law for companies"[26] as follows:

> "We want to ensure that economic crime is effectively prosecuted and adequately punished. For this reason, we are reorganizing the law regarding sanctions for companies. We shall ensure that, in principle, companies that benefit from the misconduct of their employees are also subject to stronger sanctions in the event of economic crime. [...] By means of clear procedural rules, we shall also increase the legal certainty of the companies concerned. At the same time, we shall establish specific rules on the suspension of proceedings in order to give the judiciary the necessary flexibility in prosecution. We shall expand the range of sanctions available - the current maximum fine of up to ten million euros is too high for smaller companies and too low for large corporations. We shall ensure that, in the future, the amount of the fine is based on the economic strength of the company. For companies with a turnover of more than 100 million euros, the maximum limit is to be ten percent of turnover. We shall also create additional sanction instruments. In addition, we shall create concrete and comprehensible assessment rules for monetary sanctions for companies. The sanctions are to be made public by appropriate means. In order to create legal certainty for all parties involved, we shall create legal requirements for internal investigations, especially with regard to seized documents and options for engaging in searches. We shall create legal incentives for clarification assistance

23 The FDP received 10.7% of the votes cast.

24 Similarly Koalitionsvertrag der Bundesregierung der 19. Legislaturperiode p. 123; available at: https://www.bundesregierung.de/resource/blob/656734/847984/5b8bc23590d4cb2892b31c987ad672b7/2018-03-14-koalitionsvertrag-data.pdf?download=1, (Nov. 18, 2019, 02:28 PM).

25 Similarly Koalitionsvertrag der Bundesregierung der 19. Legislaturperiode S. 130; abrufbar unter: https://www.bundesregierung.de/resource/blob/656734/847984/5b8bc23590d4cb2892b31c987ad672b7/2018-03-14-koalitionsvertrag-data.pdf?download=1, (Nov. 18, 2019, 05:21 PM).

26 Further legal policy background to the Coalition Agreement, Emanuel Ballo & Marcus Reischl, *Der Koalitionsvertrag 2018 – Neue Impulse für die Reform des Sanktionsrechts für Unternehmen*, COMBLIANCE BERATER, 189 *et seq* (2018).

> by means of 'internal investigations' and subsequent disclosure of the findings made."[27]

The bill now presented by the office of Justice Minister Christine Lambrecht (SPD) is continuing the criminal policy line of the SPD. The invented word "*Verbandssanktionengesetz*" (Associations Sanctions Act), with which the draft of the Act on Combating Corporate Crime was overwritten, is merely an attempt at verbal appeasement[28]. It disguises the fact that this comprises criminal sanctions and criminal proceedings against companies.[29]

In the last elections to the Bundestag in 2017, the SPD achieved its worst result in a Bundestag election (with 20.5 percent of the votes cast) and since that time has been anxious about its status as the people's party. The question of whether another grand coalition led by the CDU/CSU should be formed was controversial within the party. The demand for a tough crackdown on economic crime represents an attempt to occupy a topic relevant to voters and to make visible the influence of the SPD on the policies of the federal government. Traditionally, there have been relevant differences between the parties in terms of criminal policy positions. While left-wing parties demand a sense of proportion in the prosecution of criminality based on misery, street crime and juvenile delinquency and advocate subject-specific (for example, fare evasion, shoplifting or drug-related crime) alternatives to criminal law and decriminalization , they see a need to catch up in the fight against crime by persons with high status and the prosecution of companies, and put more emphasis on prosecution and sanctioning. The opposite is true for conservative parties. These follow the maxim "tough on crime" with "crimes in the streets." On the other hand, with the pursuit of "white-collar-crime," greater restraint is touted. The pivot of the CDU/CSU to the criminal policy line of the SPD[30] is explained as a concession to the coalition partners and as a bow to the zeitgeist. The concern is to show the muscles of a strong state and a powerful judiciary in the face of general social insecurity.[31]

---

27 Similarly Koalitionsvertrag der Bundesregierung der 19. Legislaturperiode p. 126; available at: https://www.bundesregierung.de/resource/blob/656734/847984/5b8bc23590d4cb2892b31c987ad672b7/2018-03-14-koalitionsvertrag-data.pdf?download=1, (Nov. 18, 2019, 05:23 PM).

28 Similarly, Ralf Kölbel, *Kriminologischer Kommentar zum Kölner Entwurf eines Verbandssanktionengesetzes*, NEUE ZEITSCHRIFT FÜR WIRTSCHAFTS-, STEUER- UND UNTERNEHMENSSTRAFRECHT, 407 (411) *et seq.* (2018), regarding a Cologne draft of an association sanctions law submitted by criminal law scholars: " terminologische Kaschierung"; Elisa Hoven & Thomas Weigend justify the wording in the Cologne draft with "the fact that the less controversial term is expected to be more accepted in legal policy regards," in: Elisa Hoven & Thomas Weigend, *Der Kölner Entwurf eines Verbandssanktionengesetzes*, ZEITSCHRIFT FÜR RECHTSPOLITIK, 30 (31) (2018).

29 The draft sees itself as a "third lane" between criminal and administrative offenses law, see Draft Act, p. 56, 70, see also Alexander Baur & Philipp Maximilian Holle, *Entwurf eines Verbandssanktionengesetzes – Eine erste Einordnung*, ZEITSCHRIFT FÜR RECHTSPOLITIK, 186, 189f. (2019).

30 See the 2013 draft from North Rhine-Westphalia under Justice Minister Kutschaty (SPD).

31 More specifically on this: TOBIAS SINGELNSTEIN & PEER STOLLE, DIE SICHERHEITSGESELLSCHAFT: SOZIALE KONTROLLE IM 21. JAHRHUNDERT (3rd end. 2012); ORTWIN RENN, GEFÜHLTE WAHRHEITEN. ORIENTIERUNG IN ZEITEN POSTFAKTISCHER VERUNSICHERUNG (1st end. 2019).

III. CONTENT OF THE DRAFT ACT

A. Expansion of German Corporate Criminal Law in Foreign Matters

In 69 paragraphs, the draft contains provisions in the areas of sanctions, procedural law and register law. The starting point for the liability of associations under criminal law is the association offense. This is given, comparable to the previous provision in § 30 OWiG, if a criminal offense has been committed in accordance with the provisions of German core and secondary criminal law and either the association has been enriched or is to be enriched or duties that affect the association have been violated (§ 2 (1)(3) Draft Act).

As such, the Act does not extend the catalog of possible offenses. In this respect, the same conditions that are applicable to proceedings against natural persons apply. Moreover, according to the general rules (territoriality principle, § 3 of the German Criminal Code (*Strafgesetzbuch*, "StGB"); personality principle, § 7 StGB), German criminal law must be applicable to begin with. With regard to criminal jurisdiction, the Draft Act goes one step further than the criminal prosecution of natural persons. According to § 2 (2) Draft Act, an association offense is to be equivalent to an act "to which German criminal law is not applicable, if the act would be a criminal offense under German criminal law, if the act is liable to criminal penalties at the site of the act or if the site of the act is not subject to penal power" and "the association at the time of the act has a registered office in Germany [...]." The reason given for this extension of German penal power to foreign circumstances is that multinational corporations based in Germany should not be able to evade punishment for foreign offenses committed by foreign employees. This gap in the existing law must be closed.

B. Attribution

Not every association offense committed by an employee leads to criminal liability on the part of the association. An offense is attributed to an association only if it was committed by a "person in leadership position" (*Leitungsperson*) (§ 3 (1)(1) Draft Act) or "if managing persons of the association could have prevented the offense or made it considerably more difficult by taking appropriate precautions to avoid association offenses, such as in particular organization, selection, instruction and supervision" (§ 3 (1)(2) Draft Act).

C. Competence

The public prosecutors' office, which is also responsible for prosecuting offenses committed by an association, is responsible for prosecuting association offenses falling within the scope of the Act (§ 24 Draft Act). The principle of legality applies (§ 25 (1), § 36 *et seq.* Draft Act). As such, the prosecution of a company is not left to the discretion of the criminal prosecution authority, but takes place *ex officio* if there is an initial suspicion. The provisions of the opportunity principle apply accordingly (§ 37 Draft Act). In the proceedings, the association assumes the role of the defendant (§ 28 Draft Act).

D. Sanctions

The draft also provides for a comprehensive catalog of sanctions. The focus is on the "association monetary sanction" (§ 8 (1) Draft Act), the amount of which differentiates according to intent and negligence and the annual turnover (§ 9 (1), (2) Draft Act). In the case of an average annual turnover of more than 100 million euros, the association monetary sanction in the case of an intentional association offense amounts to at least 10,000 euros and a maximum of 10 percent of the average annual turnover (§ 9 (2) Draft Act). In accordance with § 9 (2) Draft Act, the following applies: "In determining the average annual turnover, the worldwide turnover of all natural persons and associations of the last three fiscal years preceding the conviction shall be taken as the basis, to the extent that such persons and associations operate with the association as one economic unit." Under certain conditions, § 14 of the draft also provides for the "dissolution of the association." Furthermore, § 15 Draft Act provides for the public announcement of the conviction "in the case of a large number of injured parties."

E. Monitoring Measures

As an alternative to a conviction of an association sanction, the law also provides for a warning with the reservation of a penalty (§ 10 Draft Act). In such a case, the court can issue conditions and instructions. The instructions pursuant to § 13 Draft Act may include taking compliance measures to prevent future association offenses and proving such "precautions by certification of an expert body" (§ 13 (2) Draft Act). The provision is based on U.S. criminal law and the prosecution of FCPA violations. In the relevant proceedings of the Department of Justice (DOJ), a settlement (deferred prosecution agreement) is often reached. The company has clarified the facts through an internal investigation submitted to the DOJ and is urged, among other things, to improve its compliance management system as part of the settlement. In doing so, the company is provided with an "independent compliance monitor," which accompanies and monitors the implementation of the measures. If the requirements are fulfilled, the company is certified as compliant by the monitor and the measure is deemed to be terminated.[32]

According to the provisions of the Draft Act, the company is to select the "competent body." However, the appointment requires the consent of the court (§ 13 (2) Draft Act). The costs are borne by the company, with which a mandate agreement is concluded.

---

32 For the figure of the "monitor" in U.S. law, see Benno Schwarz, *FCPA Compliance Monitorships - US Marotte or Flavor of the New Times? Practical experience with FCPA compliance monitorships*, CORPORATE COMPLIANCE ZEITSCHRIFT, 189 – 193 (2019).

F. Internal Investigations

Several provisions are dedicated to internal investigations.[33] The conducting of internal investigations is rewarded with an optional mitigation of penalties, § 18 Draft Act. The conducting of internal investigations, which can lead to a reduction in penalties, is then linked to conditions that are described by indefinite legal terms. The internal investigation must have "essentially" contributed to the fact that the act was cleared up. Cooperation with the investigating authorities within the framework of the internal investigation must have been "unrestricted." The "essential" documents must have been made available after the completion of the internal investigation. Furthermore, the mitigation of penalties presupposes that the person carrying out the work has not at the same time assumed the role of defense counsel for the company or individual. According to § 42 Draft Act, the conducting of an internal investigation may also lead to a suspension of the prosecution for the time being.

G. Procedural Provisions

For legal practice, it is highly problematic that, in Germany, there is no wide-ranging "legal privilege" and no freedom from seizure according to the "work product doctrine."[34] Under the current legal situation, only communication between the defense counsel and his client is subject to wide-ranging freedom from seizure pursuant to § 97 (1)(1) of the German Code of Criminal Procedure (*Strafprozessordnung*, "StPO"). Records of the defense counsel's communications entrusted to him by his client can likewise not be seized, § 97 (1)(2) StPO. Other objects, for example documents handed over to the defense counsel by third parties, are also not subject to seizure, § 97 (1)(3) StPO.

From the principle of the freedom from seizure of "other" documents just mentioned, a practice-relevant exception is made simply according to the applicable legal situation. According to prevailing opinion, documents relating to internal investigations (for example, reports, interview minutes and other evidence) are not subject to the protection of § 97 (1)(3) StPO[35], because the client of the internal investigation is usually not the defendant, and there is no relationship of trust between the defendant and the law firm conducting the internal investigation. After the planned legal changes in the course of the Draft Act,

---

33 On the topic of internal investigations, see Folker Bittmann, *Internal Investigations Under German Law*, COMPLIANCE ELLIANCE JOURNAL, 1 (1), 74 *et seq.* (2015); Christian Pelz, *Ambiguities in International Internal Investigations*, COMPLIANCE ELLIANCE JOURNAL, 2 (1), 14-25 (2016); Sascha Süße & Carolin Püschel, *Collecting Evidence in Internal Investigations in the Light of Parallel Criminal Proceedings*, COMPLIANCE ELLIANCE JOURNAL, 2 (1), 26-58 (2016); Hendrik Schneider, *The enterprise in testudo formation*, COMPLIANCE ELLIANCE JOURNAL, 3 (1), 43-62 (2017).

34 Hendrik Schneider, *The enterprise in testudo formation*, COMPLIANCE ELLIANCE JOURNAL, 3 (1), 43-62 820179; The differences between German and U.S. criminal proceedings are illustrated by Edward B. Diskant, *Comparative Corporate Criminal Liability: Exploring the Uniquely American Doctrine Through Comparative Criminal Procedure*, THE YALE LAW JOURNAL, 118 (1), 126 (150) *et seq* (2018).

35 BVerfG, Beschluss vom 27.6.2018 – 2 BvR 1405/17, 2 BvR 1780/17; MICHAEL GREVEN, KARLSRUHER KOMMENTAR ZUR STPO (8th eds., Rolf Hannich), § 97, Rn. 14a (2019).

this legal view,[36] which was recently confirmed by federal constitutional law in the "Jones Day proceedings," is now to be enshrined in the Act. This is because, according to the new version of § 97 (1)(3) StPO, the scope of application of the law is to be limited to documents relating to a relationship of trust between the client and the defense counsel.

The Draft Act leaves open the conclusions to be drawn from this legal situation in the event that the company is in the role of defendant. To be sure, § 25 (1) Draft Act states that the provisions of the German Code of Criminal Procedure must be applied to proceedings against the company. If the company makes use of a company defense counsel, it can therefore be assumed that the protection against seizure provided by § 97 StPO also applies in proceedings against the company. However, it can be presumed that the legislator does not assume that the documents relating to internal investigations are seizure-free, even in proceedings against the company. In any event, a distinction is to be drawn in this respect between the internal investigation carried out by the company defense counsel who is commissioned, and the investigation carried out by the law firm commissioned to cooperate with the public prosecutors' office. Since, according to the concept of Draft Act, the latter acts as an "extended arm" of the public prosecutors' office, there will be no relationship of trust between it and the company in the role of defendant.

It follows from this that, although the company enters into the status of defendant and becomes the object of preliminary proceedings, the Draft Act does not grant it an equality of arms within the scope of its defense. In summary, it can in fact be assumed that interview records, compilations of documents and summary factual presentations in corresponding "internal investigation reports" are subject to the access of the investigating authority if they were not prepared directly by the company defense counsel, but by the persons with a duty of professional secrecy commissioned for the internal investigation. Moreover, the company's primary documents are not subject to freedom from seizure (see § 97 (2)(2) StPO in the version of the Draft Act).

IV. OPINION

A. Absence of Fundamental Criticism

Since the publication of the Draft Act within the framework of a press conference of the Ministry, the reports and information events regarding the draft Act have been overwhelming, although it is only to enter into force two years after its pronouncement. So far, fundamental criticism of the project as such has largely failed to materialize.[37] This is

36 BVerfG, Beschluss vom 27.6.2018 – 2 BvR 1405/17, 2 BvR 1780/17; MICHAEL GREVEN, KARLSRUHER KOMMENTAR ZUR STPO (8th eds., Rolf Hannich), § 97, Rn. 14a (2019).

37 See, for example, the rather positive first classification in the operative part of Alexander Baur & Philipp Maximilian Holle, *Entwurf eines Verbandssanktionengesetzes – Eine erste Einordnung*, ZEITSCHRIFT FÜR RECHTSPOLITIK, 186 (2019).

easy to understand among the voices from the legal profession, because, from the perspective of the compliance and internal investment industry, the Act represents a gift from the legislator in the form of a gigantic market.

This is because the comments on the deficits with regard to freedom from seizure alone show that, in the future, a company will be well advised to conduct two internal investigations relating to the initial suspicion of the investigating authority. In an initial procedure, which may be conducted under the direction of the company defense counsel, the company clarifies the dimension of the compliance violation and compares the findings with the suspected situation according to the records. On this basis, it will decide whether to conduct a second internal investigation, the results of which will be made available to the investigating authorities in the hope of mitigating the penalty. In addition, companies will protect themselves – in the form of compliance management systems – against attribution according to the model of breach of supervisory duty and, in the event of criminal proceedings against the company, will need one or more company defense counsels in addition to the individual defense counsels.

Even from the camp of university lecturers, criticism comes only sporadically.[38] Insofar as German criminal science is concerned with the draft, its deals the details of individual provisions.[39] In publications prior to the announcement of the Draft Act, only a few authors, such as the emeritus Munich criminal law teacher Schünemann[40], still offer resistance to "overkill" in criminal law, and refer to the marketing strategies used by the apologists of corporate criminal law to advance their project. The sources from which the new "belief in criminal law" of criminal law scholars is feeding itself is unclear.[41] In particular, the reason for which individuals are to be prevented from committing criminal offenses by the punishment imposed on the employer remains unclear. Whether preventive effects can be derived from the severity of the sanctions should also be clarified. This is because, as stated at the outset, companies are already subject to severe sanctions under the current legal situation[42]. It is possible that the preventive considerations with which the drafts of the most recent discussion phase and the present Draft Act are justified are merely pretext,

---

38 Frank Saliger & Michael Tsambikakis, *Verbandssanktionen: Reform mit Augenmaß*, BETRIEBSBERATER, 40, cover, I (2019).

39 For example. Bartosz Makowicz, *Die Reform des Rechts der Unternehmenssanktionen: Was ist Compliance? Das ist hier die Frage!*, BETRIEBSBERATER, 39, cover, I (2019).

40 Bernd Schünemann, *Der Kampf ums Verbandsstrafrecht in dritter Neuauflage, der „Kölner Entwurf eines Verbandssanktionengesetzes" und die Verwandlung von Kuratoren in Monitore – much ado about something*, STRAFVERTEIDIGERFORUM, 317 *et seq* (2018).

41 A critical examination of this new belief in criminal law can be found in Ralf Kölbel, *Die dunkle Seite des Strafrechts – Eine Kriminologische Erwiderung auf die Pönalisierungsbereitschaft in der strafrechtlichen* Kriminalpolitik, NEUE KRIMINALPOLITIK, 249 *et seq.* (2019).

42 See Ralf Kölbel, *Kriminologischer Kommentar zum Kölner Entwurf eines Verbandssanktionengesetzes*, NEUE ZEITSCHRIFT FÜR WIRTSCHAFTS-, STEUER- UND UNTERNEHMENSSTRAFRECHT, 407 *et seq.* (2018); according to which the criminal policy program of the association sanctions act (in this respect it refers to the so-called " Kölner Entwurf eines Verbandssanktionengesetzes") is based on a "rather weak empirical basis."

and that the real issue is retaliation or adaptation to the "need for punishment of the people." Approaches in this regard are once again being advocated today in German criminal science, as if the critical discussion in the 1960s and 1970s had never existed (see Walter: "The law demands retaliation – the citizens as well").

B. Assessment of Penalties

The draft is also open to challenge at the level of the assessment of penalties. The penalty range is linked to the economic performance of the company and therefore relates to its annual turnover. The fact that this is not sufficient as a limitation principle is shown by the comparison with fines in the StGB, which can be imposed – in lieu of imprisonment – for certain criminal offenses and is calculated according to the daily rate principle (§ 40 StGB). According to its system, individual performance in the form of monthly income, which is taken into account at the level of the daily rate, is also important (§ 40 (2) StGB). In addition, however, the number of daily rates refers to another measuring principle, because a daily rate corresponds to one day's imprisonment in the correctional facility (§ 43 StGB). The number of daily rates depends in turn on the penalty range of the criminal law put into effect and the guilt expressed in the criminal offense. This may not be exceeded with the number of daily rates.[43]

Such a measuring principle is missing in the Draft Act. To put it bluntly, the principle of arbitrariness applies to the imposition of fines on associations, because, in particular, there is no provision for a link to the penalty range of the offenses committed by the offender. For negligent water pollution according to § 324 StGB, for which natural persons can be punished with imprisonment for up to three years or a fine, in principle, the same fine on the association can be considered as for manipulations according to the *modus operandi* of Dieselgate.

C. Lack of Equality of Arms between Defense Counsel and Public Prosecutors' Office

As already shown above, the Draft Act opens up far-reaching possibilities for the criminal prosecution and sanctioning of companies, which possibilities are oriented in principle to U.S. models. However, these far-reaching investigative and sanctioning powers of the state do not correspond to the respective far-reaching protection under U.S. law in accordance with "legal privilege" and the "work product doctrine." Therefore, as the Jones Day case impressively demonstrates, it is possible, both under current and future law, for law firms that have conducted internal investigations to be subject to searches, in order to seize the relevant documents[44].

---

43 In depth on the scope and determination of fines: FRANZ STRENG, STRAFRECHTLICHE SANKTIONEN: DIE STRAFZUMESSUNG UND IHRE GRUNDLAGEN (3rd eds.), 63-80 (2012).

44 Comprehensive classification of the legal situation in Markus Rieder & Jonas Menne, Internal Investigations – Legal Situation, Possible Options and Legal-Political Need for Action, COMPLIANCE ELLIANCE JOURNAL, 5 (1), 20 *et seq* (2019).

Accordingly, the "powerfulness" of the upcoming German corporate criminal law is obviously asserting itself against the rule of law of proceedings. Therefore, those who let the company assume the role of the defendant on the basis of questionable arguments should at least grant it adequate opportunities for defense.