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COMPLIANCE & INVESTIGATIONS

CORPORATE SANCTIONING ACT CLEARS NEXT HURDLE

The government draft of the Corporate Sanctioning Act (*Verbandssanktionengesetz*, “VerSanG”) has found the support of a majority of *Bundesrat* members at its session of 18 September 2020. The draft bill had been proposed by the Federal Ministry of Justice and Consumer Protection in June.

Despite the recommendations of the leading legal committee and of the economic committee, the *Bundesrat* did not principally oppose the draft bill. This finally clears the way for the Corporate Sanctioning Act.

Although the *Bundesrat* generally approved the Corporate Sanctioning Act, it did heavily criticise – to some extent, justifiably – the current version of the draft bill in its opinion, and recommended substantial changes be made:

- › The public naming and shaming of corporate groups as provided for in the government draft (section 14 VerSanG) is to be deleted. The *Bundesrat* expressed concern about the shaming effect of any publication with regard to constitutional principles.
- › It questioned the proportionality of the Corporate Sanctioning Act with regard to small and medium-sized enterprises (“SMEs”) and suggested reviewing whether SMEs should be exempt from certain corporate group offences. The *Bundesrat* also recommended relaxing SME compliance measures geared to prevent corporate group offences.
- › According to the *Bundesrat*, the legal representative’s right to silence (prescribed in section 33 VerSanG) should be eliminated. This could otherwise significantly hamper effective law enforcement.
- › The *Bundesrat* wants to prevent German prosecuting authorities from being overburdened by the Corporate Sanctioning Act. It therefore recommended reviewing whether further conditions need to be imposed on the criterion of a place of business in Germany (section 2(2), no. 3 VerSanG) which is required for applying the Corporate Sanctioning Act to matters with a foreign dimension (among other things). The *Bundesrat* suggested material business operations or significant damage suffered in Germany as possible additional criteria.
- › In order to prevent overloading the judicial system, the *Bundesrat* also suggested revising the procedural rules provided for in the Corporate Sanctioning Act. In particular, courts should be given more powers to discontinue proceedings, e.g. in the case of offences committed abroad or impending insolvency of a corporate group.
- › It should only be possible to attribute actions of non-managerial staff to the group if managers have either intentionally or negligently failed to put in place suitable compliance measures to prevent such offences. Under the current version of the Corporate Sanctioning Act offences can even be attributed to corporate groups if managers have objectively failed to prevent corporate group offences, i.e. without requiring a subjective component such as intent or negligence on the part of the manager.
- › The two-year transitional period up until the Corporate Sanctioning Act takes effect should be extended to three years. This would allow companies to adequately prepare for the extensive changes to come.

The *Bundesrat*’s proposed changes are to be welcomed – for the most part. They include, in particular, the proposed abolishment of any public disclosure of corporate sanctions, the restrictions regarding the attribution of corporate group offences, possible sanctioning of SMEs and foreign matters as well as the broadened powers for discontinuing proceedings. The *Bundesrat* ignored other pressing issues, such as adequate protection from seizure, excessive requirements placed on internal investigations and the question of proportionate sanctions as a

whole (i.e. extending beyond SMEs). This is unfortunate and considerably lessens the chances of adjusting the government draft in this regard. However, the *Bundesrat's* proposed abolishment of the right of silence for legal representatives of a corporate group is a step in the wrong direction and reinforces the already existing imbalance in the current version of the Corporate Sanctioning Act between mandatory prosecution on the one hand and withdrawn protective rights under the rule of law.

The *Bundesrat's* general approval of the government draft means the Corporate Sanctioning Act has cleared another key obstacle in the legislation process. It remains to be seen which proposed changes and recommendations by the *Bundesrat* will make it into the final statute. Now that the way is clear, it is possible that the Corporate Sanctioning Act can be enacted during the current legislative period. As a result, it is essential for companies operating on the German market to prepare for the Corporate Sanctioning Act now.

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Dr. Eike Bicker

Dr. Christoph Skoupil

Felix Wrocklage