

Global Investigations Review

The Practitioner's Guide to Global Investigations

Volume II: Global Investigations
around the World

Fourth Edition

Editors

Judith Seddon, Eleanor Davison, Christopher J Morvillo,
Michael Bowes QC, Luke Tolaini, Ama A Adams, Tara McGrath

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Part II

Investigations Country by Country

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Germany

Eike Bicker, Christian Steinle, Christoph Skoupil and Marcus Reischl¹

General context, key principles and hot topics

- 1 Identify the highest-profile corporate investigation under way in your country, describing and commenting on its most noteworthy aspects.

The diesel emissions cases involving several German carmakers continue to be the highest-profile corporate investigations in Germany. The automotive industry is one of the key German industries and the emission investigations against several major German car manufacturers have therefore attracted a lot of public attention. Furthermore, the high volume of damage allegedly suffered by customers, investors and others, and the technical and regulatory complexity of the topic, are remarkable. The criminal investigations by various German public prosecutor offices focus on individual criminal liability of managers, including former chief executive officers, while at the same time leading to triple-digit millions of euros in fines against the companies involved.

- 2 Outline the legal framework for corporate liability in your country.

Even though strict corporate criminal liability is under discussion *de lege ferenda* and may be introduced within the next year, under current German law, companies are technically not criminally liable. Instead, companies whose employees have committed criminal or administrative offences face the risk of an administrative fine or a confiscation order.

These administrative fines are capped at €10 million, though this amount can be – and, in practice, frequently is – exceeded by the financial benefit the company has obtained from committing the offence (i.e., profit disgorgement). This legal mechanism (administrative fines plus profit disgorgement) have led to quite significant fines in the past, as in

¹ Eike Bicker and Christian Steinle are partners and Christoph Skoupil and Marcus Reischl are associated partners at Gleiss Lutz.

the following cases: *Siemens* (€395 million), *MAN* (€150 million), *Ferrostaal* (€140 million), *Volkswagen* (€1 billion) and *Audi* (€800 million).

As an alternative to an administrative fine, a confiscation order can be imposed on a company if an unlawful act has been committed. The maximum amount for a confiscation order is the entire gross value of the proceeds from the respective criminal offence, and the fined party (i.e., the company) is not permitted to deduct any costs it incurs.

Recently a draft bill concerning corporate criminal liability (Draft Corporate Sanctioning Act) became public. The new law will change the landscape for compliance and investigations in Germany significantly. Penalties are being increased to up to 10 per cent of the group's global turnover, although they may be reduced if the company has initiated an independent and state-of-the-art internal investigation, and co-operates fully with the investigating authorities. The Draft Corporate Sanctioning Act further introduces an alternative for ending proceedings, similar to a deferred prosecution agreement or non-prosecution agreement, including the possibility for the court to order the appointment of a compliance monitor.

3 Which law enforcement authorities regulate corporations? How is jurisdiction between the authorities allocated? Do the authorities have policies or protocols relating to the prosecution of corporations?

Various law enforcement authorities, at both federal and state levels, regulate corporations, including, among others, the public prosecutors offices, antitrust authorities, tax authorities, financial regulators and customs authorities.

The matter of jurisdiction between the authorities depends on the scope of the potential investigation. To this extent, various areas of responsibility are assigned to specialist authorities. It is important to understand that all 16 German states have their own prosecutors, and thus some of them are more active in prosecuting corporations (e.g., Munich, Frankfurt and Stuttgart) than others.

There are no guidelines for the investigation of corporations in the form of laws or legal regulations. However, we are aware of some internal guidelines drafted to assist authorities when investigating corporations.

4 What grounds must the authorities have to initiate an investigation? Is a certain threshold of suspicion necessary to trigger an investigation?

The public prosecutor's office is generally obliged to take action in relation to all prosecutable criminal offences, provided there are sufficient factual indications (or initial suspicion). However, this duty of legality pertains only to criminal offences. Therefore, the public prosecutor has discretion whether to open administrative proceedings against a corporation (see also the mechanisms of corporate fines described in question 2).

This would change with the Draft Corporate Sanctioning Act and the mandatory prosecution principle would also apply to the prosecution of companies.

5 How can the lawfulness or scope of a notice or subpoena from an authority be challenged in your country?

Enforcement measures taken by authorities against suspects or witnesses (e.g., search warrant, confiscation) can be subject to, inter alia, judicial review. This applies to the order itself as well as to the manner of execution.

Subpoenas as such are not challengeable. However, potential enforcement measures or court decisions following a subpoena may be challenged. In German criminal proceedings, the defendant is not obliged to co-operate with the authorities or to provide information about evidence-relevant facts.

6 Does your country make use of co-operative agreements giving immunity or leniency to individuals who assist or co-operate with authorities?

Generally, the public prosecutor cannot grant immunity or leniency to individuals who assist or co-operate with investigations. However, prosecutors and courts regard co-operation as a major factor in determining the level of sentences. Furthermore, in certain cases, prosecutors have some discretionary powers to dispense with the prosecution with the consent of the accused and of the court, and co-operation is certainly a factor in this decision.

The German antitrust authorities can grant cartel participants who co-operate, and thereby contribute to uncovering a cartel, immunity from or a reduction of fines. This leniency programme is available to individuals as well as companies. Full immunity will be granted to cartel participants if they are the first to disclose the cartel and fully co-operate with the antitrust authority throughout the proceedings.

7 What are the top priorities for your country's law enforcement authorities?

Corporations in Germany are most severely prosecuted for antitrust violations and corruption. The highest fines are regularly imposed in both these areas. In the recent past, fraud and tax fraud proceedings have also been a priority (for instance, alleged irregularities regarding diesel engine emissions and cum/ex or cum/cum trading patterns of banks and financial institutions). We expect data protection violations and the betrayal of business and company secrets to attract more enforcement activity as a result of stricter legal regulations and increased sanctions.

Cyber-related issues

8 Does your country regulate cybersecurity? Describe the approach of local law enforcement authorities to cybersecurity-related failings.

Since 2015, the issue of cybersecurity has been addressed by various laws and regulations in both German and European legislation, including the German IT Security Act, the EU Directive on Network and Information Security and the EU Cybersecurity Act. This legislation addresses the cybersecurity landscape without imposing any specific duties on individuals or companies.

Under the EU General Data Protection Regulation (GDPR), companies that are processing personal data must implement appropriate technical and organisational measures

to ensure a level of security that is appropriate to the risk. A violation of this duty can trigger administrative fines and claims for damages. As regards data breaches, companies may be obliged to notify supervisory authorities and the individual data subjects.

9 Does your country regulate cybercrime? What is the approach of law enforcement authorities in your country to cybercrime?

Cybercrime, that is criminal activities carried out by means of computers or the internet, is covered by general German criminal law pursuant to a variety of specific provisions regarding data espionage, computer fraud, data forgery, deception in the context of data processing and data tampering.

Cybercrime investigations are seldom only national in scope. They call for coordinated action at international level and require a high level of cross-border co-operation. As an EU Member State, Germany is a signatory to the Convention on Cybercrime, which includes provisions on international co-operation with the other EU members and further signatories, such as the United States, Japan and Australia.

On the practical side, law enforcement authorities have implemented cross-border communication networks and coordination units, including the Interpol Global Complex for Innovation, the European Cybercrime Centre at Europol, and others.

Cross-border issues and foreign authorities

10 Does local criminal law have general extraterritorial effect? To the extent that extraterritorial effect is limited to specific offences, give details.

German criminal law is generally applicable if either the offender acted in Germany or the offence had a consequence in Germany. Furthermore, Germany implemented the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of the Organisation for Economic Co-operation and Development in 1999. Since then, the German Criminal Code prohibits illicit payments to foreign public officials, in a similar way to the US Foreign Corrupt Practices Act and the UK Bribery Act. In addition, bribery payments in the private sector that exclusively affect foreign competition, are covered by German law.

Furthermore, German criminal law is applicable, among other reasons, if the offence is committed abroad against a German or if a German commits an offence abroad and the act is a criminal offence at the place where it was committed as well.

Under the Draft Corporate Sanctioning Act, a corporation could be sanctioned for corporate crimes abroad if the corporation is registered in Germany.

11 Describe the principal challenges that arise in your country in cross-border investigations, and explain whether and how such challenges depend on the other countries involved.

Cross-border investigations generally demand a high level of sensitivity with regard to the different expectations of the authorities involved and the different legal frameworks applicable to investigative steps in different countries.

If an investigation has links to a common law jurisdiction, privilege is often a topic because the principles of legal privilege differ. As the concept of pretrial discovery does not exist under German law, privilege is only relevant in relation to law enforcement authorities. Under German law, communication between a company and its legal advisers is not generally privileged, but the concept of legal privilege is limited – in most cases – to communication with the criminal defence counsel. The disclosure of separate information to public authorities does not generally put the legal privilege at risk.

To ensure that privilege is adequately protected, cross-border investigations require clear processes in line with the privilege provisions of all the jurisdictions involved.

Differences in data protection laws are relevant in cross-border investigations outside the European Union where the GDPR is not applicable. In cross-border investigations, information is gathered in and transferred from and to different jurisdictions, and breaches of applicable data protection laws must be avoided.

When interviewing employees, employment law has to be observed. In Germany, broadly scoped investigative measures may require the involvement of the works council.

12 Does double jeopardy, or a similar concept, apply to prevent a corporation from facing criminal exposure in your country after it resolves charges on the same core set of facts in another? Is there anything analogous in your jurisdiction to the ‘anti-piling on’ policy as exists in the United States (the Policy on Coordination of Corporate Resolution Penalties) to prevent multiple authorities seeking to penalise companies for the same conduct?

Companies are not protected, in principle, from sanctions in Germany after having resolved charges on the same core set of facts in another country outside the European Union (see, for example, the fines imposed against Volkswagen in the emission matter in the United States and Germany, or the fines imposed by German and other antitrust authorities in cross-border cartel cases based on the local effect in their respective jurisdictions). In addition, confiscation orders and similar measures against companies are not recognised as ‘sanctions’ in the sense of double jeopardy, so that companies are not yet effectively protected in this regard even within the European Union. Often, however, authorities consider a (potential) foreign sanction at their discretion when determining a (national) sanction.

To avoid double jeopardy, the Draft Corporate Sanctioning Act provides for the possibility to refrain from national prosecution if sanctions by foreign authorities are expected and the potential sanctions in Germany do not carry substantial weight or are not necessary from a preventive point of view.

13 Are ‘global’ settlements common in your country? What are the practical considerations?

There is no legal framework for ‘global’ settlements under German law. However, as co-operation between authorities across borders generally increases, ‘global’ settlements with German authorities are generally achievable, at least to some extent. In the past, German authorities sometimes took account of foreign sanctions when determining a (national) fine (e.g., the *Siemens* case).

14 What bearing do the decisions of foreign authorities have on an investigation of the same matter in your country?

In principle, the decisions of foreign authorities have no (legal) effect on an investigation of the same matter in Germany (see question 5). In some cases, however, German and foreign authorities coordinate with each other to avoid duplicate investigations.

Economic sanctions enforcement

15 Describe your country's sanctions programme and any recent sanctions imposed by your jurisdiction.

Authorities are making increased use of the sanction options described in question 2. In 2018 and 2019, fines of €1 billion, €800 million and €535 million were imposed on Volkswagen, Audi and Porsche, respectively, in connection with potential irregularities regarding diesel emissions. Further, significant fines were imposed in antitrust proceedings and cases of corruption (*Siemens*, €395 million; *MAN*, €150 million; *Ferrostaal* €140 million).

16 What is your country's approach to sanctions enforcement? Has there been an increase in sanctions enforcement activity in recent years, for example?

Sanctions enforcement activities have steadily increased in recent years, although there are still considerable differences across the 16 German states. We expect a further increase in the intensity of prosecution if corporate criminal liability legislation is passed, whereby the mandatory prosecution principle would be extended to the prosecution of corporate offences.

17 Do the authorities responsible for sanctions compliance and enforcement in your country co-operate with their counterparts in other countries for the purposes of enforcement?

In some cases, there is co-operation between national and foreign authorities. This possibility has been codified in the form of mutual legal assistance, within the framework of which formal enquiries can be made.

In our experience, there is also an informal exchange between national and foreign authorities. However, there is often no such co-operation because of the effort involved and the sometimes low yield.

18 Has your country enacted any blocking legislation in relation to the sanctions measures of third countries? Describe how such legislation operates.

According to German law, a boycott declaration is prohibited (this does not apply to resolutions of the United Nations, the European Union or Germany).

In addition, the EU Blocking Regulation applies in Germany. The Regulation prohibits all companies registered in the European Union from complying with the US acts listed in the Annex to the Regulation (which are currently mainly US sanctions against Iran), unless exceptionally authorised to do so by the European Commission. Furthermore, the Regulation enables such companies to seek compensation if they suffer damage as a result of

those US acts. In addition, judgments by foreign courts (in particular those of the United States) that are imposed to enforce the sanctions are not recognised in the European Union.

19 To the extent that your country has enacted any sanctions blocking legislation, how is compliance enforced by local authorities in practice?

A violation of the national and European blocking legislation is punishable by fines of up to €500,000. Furthermore, there is the risk that legal transactions in violation of the EU Blocking Regulation may be null and void or that violations of that Regulation may trigger contractual claims for damages by the affected business partner.

So far, the Regulation has not been applied in practice. There is therefore no known case in which administrative offence proceedings have been initiated for an infringement.

Before an internal investigation

20 How do allegations of misconduct most often come to light in companies in your country?

Allegations of misconduct come to light in many ways. In practice, investigations into serious wrongdoing are most often initiated by whistleblowers or as a side effect of running internal investigations.

Information gathering

21 Does your country have a data protection regime?

Yes. Data protection law in Germany is regulated by the GDPR and the national German Data Protection Act. Further, there are various provisions on data protection law in sector-specific legislation (e.g., the German Telecommunications Act).

22 To the extent not dealt with above at question 8, how is the data protection regime enforced?

With the introduction of the GDPR, the situation for companies in the European Union has changed substantially. Previous to that, only a limited number of fines were imposed for data protection breaches. Now, companies can face a maximum fine of €20 million or 4 per cent of their annual global turnover, whichever is higher. Although authorities have so far not exhausted this penalty range, the level of company fines has increased significantly since the introduction of the GDPR in May 2018.

23 Are there any data protection issues that cause particular concern in internal investigations in your country?

The collection and use of personal data from employees during internal investigations has to be in line with the GDPR and the German Federal Data Protection Act, and this applies in particular to email and data reviews as well as interviews. For each investigative step involving the processing of personal data, one must assess whether the processing is necessary for the purposes of the legitimate interests pursued by the company and whether those interests of

the company are overridden by the interests or rights of the respective data subject. Specific requirements apply with regard to employees when the private use of company information technology is allowed. Furthermore, affected employees have to be informed about the subject and purpose of the investigation, and their rights under the applicable data protection laws, unless doing so would interfere with the integrity of the internal investigation. The involvement of entities other than the employing entity typically requires the conclusion of data protection agreements. Works council agreements (concluded to comply with German labour law) can stipulate further requirements.

24 Does your country regulate or otherwise restrict the interception of employees' communications? What are its features and how is the regime enforced?

The live monitoring of employees' communications is not explicitly prohibited under German data protection, criminal and labour laws, but the threshold for justifying measures of this kind is high and requires, inter alia, a thorough weighing of the company's interests – including the possibility of less invasive measures – against the rights and interests of the respective employee.

The review of historic email and other communication data is generally permitted if justified by legitimate interests of the company and if there are no overriding interests of the respective employee. To preserve proportionality, some specific rules for data reviews have to be observed, such as the exclusion of private data, search term filters and independent reviewers obliged to secrecy. The employee's prior consent would only justify the processing of the data if it is given freely on an informed basis, which can generally be disputed in hierarchical structures.

Dawn raids and search warrants

25 Are search warrants or dawn raids on companies a feature of law enforcement in your country? Describe any legal limitations on authorities executing search warrants or dawn raids, and what redress a company has if those limits are exceeded.

In the course of criminal or cartel proceedings, companies are often subjected to search and seize measures. The relevant orders must, inter alia, include the facts giving rise to the suspicion and be proportionate.

Affected companies can, among other remedies, apply for a judicial review of such a measure or defend themselves against it by means of a judicial complaint. In practice, however, such legal remedies are mostly unsuccessful.

26 How can privileged material be lawfully protected from seizure during a dawn raid or in response to a search warrant in your country?

The conditions under which documents from internal investigations in Germany are exempt from seizure are largely unclear. To protect (potentially) privileged documents, the following measures, among others, may be taken:

- enter into an attorney–client relationship with the company affected by an investigation (and not, for example, its holding company) and document that the purpose of the mandate is (at least) to defend the company;

- do not establish client's possession of work products at risk of seizure;
- take organisational measures to separate documents that are expected to be seizable from documents that are expected to be privileged; and
- label correspondence and documents as 'privileged' or similar.

The Draft Corporate Sanctioning Act could have a significant effect on the protection of attorney work-product. According to the official explanation to the draft bill, documents from internal investigations shall be seizable, even if they are held in the custody of lawyers, unless the client is formally a defendant in criminal proceedings and there is a 'relationship of trust' with regard to the documents. Practitioners in Germany have – rightly – criticised this interpretation and it is possible that it will be changed in the course of the further legislative proceedings.

27 Under what circumstances may an individual's testimony be compelled in your country? What consequences flow from such compelled testimony? Are there any privileges that would prevent an individual or company from providing testimony?

Defendants have the right to remain silent towards the authorities and do not need to actively participate in the investigation (i.e., the right not to incriminate oneself).

Witnesses (at least in public prosecutors' offices and courts) are obliged, in principle, to provide information. As an exception, they may refuse to testify if (1) they are related to the defendant or (2) their testimony would expose them or a relative to the risk of prosecution.

If the witness is subject to the obligation of professional secrecy (as are lawyers), testifying may be refused in this regard.

Whistleblowing and employee rights

28 Describe the whistleblowing framework in your country. What financial incentive schemes exist for whistleblowers? What legal protections are in place for whistleblowers?

There is currently no general legal framework for whistleblowing in Germany. In April 2019, the European Parliament passed the EU Whistleblowing Directive, and the European Council is expected to confirm it in the near future. The EU Member States will then have two years to implement laws aimed at strengthening whistleblower protection in line with the Directive. From then on, at least larger companies will have a duty to implement whistleblowing systems. Whistleblowers who act in good faith will be protected from any retaliation if they report misconduct to the company or the competent authority.

Until this legislation has been passed, German law provides protection for whistleblowers under general labour law principles and some specific provisions, such as with respect to the reporting of safety-at-work issues and prohibited uncovered short sales.

Currently, there is no general duty on German companies to implement whistleblowing structures under German law except for financial institutions (section 25a of the German Banking Act).

Financial incentive schemes for whistleblowers are not common in Germany and are not expected to be implemented in the near future. However, as already discussed (see question 6),

if the whistleblower is one of the perpetrators, disclosure to the authorities may well reduce a potential sentence significantly (see section 46b, German Criminal Code). In cartel cases, the fine to be imposed on a cartel participant is even waived if he or she is the first to contact the German cartel authorities to uncover the cartel.

29 What rights does local employment law confer on employees whose conduct is within the scope of an investigation? Is there any distinction between officers and directors of the company for these purposes?

Employees are generally obliged to co-operate with internal investigations and no distinction is made here between employees who are suspected of having committed a wrongdoing and those who have potential knowledge about a wrongdoing or just the circumstance surrounding it. Employees are obliged to co-operate even if their co-operation could result in them being convicted for specific crimes.

If an employee co-operates with an internal investigation, the company may have to cover the costs of the employee's legal counsel, subject to a case-by-case analysis.

German data protection laws impose specific information duties on employers that process employees' information in the course of an internal investigation. Affected employees have to be informed about the subject and purpose of the investigation and their rights under the applicable data protection laws unless doing so would interfere with the integrity of the internal investigation.

The duty to co-operate applies in the same way whether the individual is an employee, an officer or a director. However, directors are not just obliged to co-operate with internal investigations but may be obliged to actively initiate and conduct them.

30 Do employees' rights under local employment law differ if a person is deemed to have engaged in misconduct? Are there disciplinary or other steps that a company must take when an employee is implicated or suspected of misconduct, such as suspension or in relation to compensation?

Although there is no general differentiation between employees under suspicion and others, German labour and data protection laws require the weighing of the employee's interests against those of the company's before measures are taken that affect the employee's rights. The degree of suspicion against an employee may tip the scales in this context.

Under German corporate law, a company's management board must investigate potential misconduct and must put a stop to any misconduct discovered, revise the compliance programme and the internal controls affected and take steps, including relating to personnel, as a result of the misconduct. Therefore, the management board may be required to transfer or even give certain employees their notice, based on a thorough case-by-case analysis.

31 Can an employee be dismissed for refusing to participate in an internal investigation?

In general, employees are obliged to co-operate with internal investigations, even if this could incriminate themselves. Depending on the specific case and the impact of the refusal, an employee may be dismissed if he or she refuses to co-operate.

Commencing an internal investigation

- 32 Is it common practice in your country to prepare a document setting out terms of reference or investigatory scope before commencing an internal investigation? What issues would it cover?**

Yes, an investigation plan is key to an efficient and successful investigation. An investigation plan would normally include the scope of the investigation, the respective responsibility of the company and the law firm, the steps to be taken, the data and documents to be collected and the custodians.

The investigation plan is an important starting point and requires ongoing revision subject to the findings made and the obstacles encountered.

- 33 If an issue comes to light prior to the authorities in your country becoming aware or engaged, what internal steps should a company take? Are there internal steps that a company is legally or ethically required to take?**

The concrete steps to be taken in this situation really depend on the nature of the issue discovered. Generally, German corporate law imposes certain duties on the company's management board if there are indications of misconduct. First, the management board has to investigate the potential misconduct and put a stop to it. Second, the management board has to revise the compliance programme and the internal controls affected and take action, potentially including relating to personnel, as a result of the misconduct.

To a certain extent, the management board can delegate those obligations to internal department (e.g., compliance). However, to fulfil the board's supervisory duty, regular reporting to the management board of incidents handled by the internal departments is required. If an issue comes to light that points to severe misconduct or a matter that is potentially of high risk for the company, the management board should be notified immediately.

Although there is no general duty to report misconduct to the competent authority, reporting may be required in some specific cases. In particular, misconduct with a tax implication for the company has to be reported to the tax authorities in the vast majority of cases.

- 34 What internal steps should a company in your country take if it receives a notice or subpoena from a law enforcement authority seeking the production or preservation of documents or data?**

First, it is generally advisable to enforce a litigation hold and to collect the respective data. This step should further be extended to documents and data in the relevant context and should not be restricted to the documents and data requested by the law enforcement authority.

In a second step, the company will have to assess whether it is actually obliged to produce the requested data and documents. Independently of the result of this assessment, the company will have to answer the question whether it is willing to co-operate and will have to find a strategic position regarding the authority. In many cases, it is advisable to co-operate with the authority to prevent coercive measures and reputational damage.

35 At what point must a company in your country publicly disclose the existence of an internal investigation or contact from a law enforcement authority?

In general, there is no duty to publicly disclose the existence of an internal investigation or contact from a law enforcement authority. Whether a disclosure is made or not largely depends on the interests of the company in the specific case.

Exceptionally, stock listed companies may be subject to a disclosure requirement if the investigation has an effect on the company that would be likely to have a significant effect on the company's stock price (ad hoc announcements).

36 How are internal investigations viewed by local enforcement bodies in your country?

Especially in larger and complex proceedings, authorities welcome internal investigations as part of a company's pledge to co-operate with a criminal investigation. In our experience, in most cases, authorities take into account the costs of an internal investigation when it comes to sanctions and fines if the internal investigation is done properly and the company has co-operated fully with the authority.

As far as possible, the measures to be taken as part of an internal investigation conducted in parallel with an official investigation should be coordinated with the authorities. Otherwise, there is a risk that an authority might feel obstructed by an internal investigation and that a possible bonus could turn into a handicap.

Attorney–client privilege

37 Can attorney–client privilege be claimed over any aspects of internal investigations in your country? What steps should a company take in your country to protect the privilege or confidentiality of an internal investigation?

German case law is inconsistent on this issue. In principle, protection against seizure depends on whether (1) the company is already under an official investigation or at least objectively likely to be officially investigated and (2) the relevant documents are drafted for defence purposes.

To protect potentially privileged materials, the protective measures described in question 26 may be taken.

38 Set out the key principles or elements of the attorney–client privilege in your country as it relates to corporations. Who is the holder of the privilege? Are there any differences when the client is an individual?

The key principles are as described in question 37. In general, these principles are true for both companies and individuals.

39 Does the attorney–client privilege apply equally to in-house and external counsel in your country?

The exemption from seizure as outlined in question 37 applies in principle only to defence communication with external counsel.

40 Does the attorney–client privilege apply equally to advice sought from foreign lawyers in relation to (internal or external) investigations in your country?

Protection from seizure can also cover work-product of foreign lawyers drafted in their capacity as defence counsel. International attorneys, however, may be subject to restrictions as to their ability to appear in court.

41 To what extent is waiver of the attorney–client privilege regarded as a co-operative step in your country? Are there any contexts where privilege waiver is mandatory or required?

The disclosure of privileged documents is generally regarded as a co-operative step by national authorities. However, there is no general concept of waiving privilege under German law.

42 Does the concept of limited waiver of privilege exist as a concept in your jurisdiction? What is its scope?

There is no concept of limited waiver of privilege in Germany.

43 If privilege has been waived on a limited basis in another country, can privilege be maintained in your own country?

Waiving privilege in another country has no direct legal effect on privilege claims in Germany. However, it is possible that the waived documents may be seized from the third person abroad if he or she does not enjoy protection against seizure under German law.

44 Do common interest privileges exist as concepts in your country? What are the requirements and scope?

The concept of common interest privilege does not exist in Germany.

45 Can privilege be claimed over the assistance given by third parties to lawyers?

The question as to the extent to which assistance should also be included in protection against seizure has not yet been conclusively clarified by case law. As a rule, the further documents leave the sphere of an external counsel, the weaker their protection.

Witness interviews

46 Does your country permit the interviewing of witnesses as part of an internal investigation?

Interviews are an important and common part of internal investigations in Germany.

47 Can a company claim attorney–client privilege over internal witness interviews or attorney reports?

National case law is inconsistent on this issue. In principle, protection against seizure depends on whether (1) the company is already under an official investigation or at least

objectively likely to be officially investigated, and (2) the relevant documents are drafted for defence purposes.

In the case of interview protocols and attorney reports, it should be argued that these work-products also serve as preparation for corporate defence and are therefore privileged.

48 When conducting a witness interview of an employee in your country, what legal or ethical requirements or guidance must be adhered to? Are there different requirements when interviewing third parties?

An employee is generally obliged to co-operate with internal investigations and to tell the truth even at the risk of self-incrimination. This may not apply to interviews of third parties, such as former employees.

As many employees are not aware of their duty to tell the truth, it is customary to inform them about it in an introduction. Other customary elements of the introduction, if applicable, are:

- information that the legal counsels conducting the interview are lawyers of the company and are not acting for the interviewee;
- the possibility of an employee engaging his or her own attorney and clarification about the costs (if relevant and to prevent disruption, this information may already be provided in the invitation to the interview);
- the company may choose to share parts or all information provided in the interview with national or foreign courts, or law enforcement authorities;
- refusing to co-operate may lead to disciplinary action;
- the modus of the protocol, whether the employee will be granted access to it and whether he or she will have to confirm its content; and
- the employee's data protection rights, ideally accompanied by such information in writing.

Essentially, this information is very similar to the *Upjohn* warning concept developed in the United States.

49 How is an internal interview typically conducted in your country? Are documents put to the witness? May or must employees in your country have their own legal representation at the interview?

A state-of-the-art interview in Germany usually begins with a briefing about, inter alia, the subject of the interview and the interviewee's rights as set out under question 48. The interview environment should be appropriate (e.g., a neutral meeting room on the company's premises or at the law firm's offices) and – depending on the duration of the interview – sufficient breaks, drinks and food should be offered.

Depending on the stage of the internal investigation, documents may well be shown to witnesses during interviews.

German case law is not yet settled on the question of whether an employee has the right to be accompanied at an interview by his or her own counsel and who has to bear the costs. However, companies usually allow interviewees to have a legal representative of their own in attendance, at least in cases where the company is represented as well. In the recent past, there have been discussions as to whether an employee's right against self-incrimination in

internal investigations shall be introduced into German law. According to the new Draft Sanctioning Act, employees may (indirectly) be granted the right to remain silent if they risk self-incrimination.

Reporting to the authorities

50 Are there circumstances under which reporting misconduct to law enforcement authorities is mandatory in your country?

In principle, there is no obligation in Germany to report misconduct to law enforcement authorities. Exceptionally, however, individual statutory regulations may require a report. This applies, *inter alia*, in connection with incorrect tax returns and in the field of money laundering.

51 In what circumstances might you advise a company to self-report to law enforcement even if it has no legal obligation to do so? In what circumstances would that advice to self-report extend to countries beyond your country?

This depends on a comprehensive analysis in each particular case. Generally, in cases where there is a high risk that the competent authorities may get hold of the information, or the company's future business may be compromised as a consequence of the undisclosed misconduct (e.g., if a declaration of honour cannot be signed), disclosure may be advisable.

52 What are the practical steps you need to take to self-report to law enforcement in your country?

First, you should make sure you have the right timing, in particular with respect to the ongoing investigations. Then, the company representative should contact the competent authority and set a meeting for initial discussions based on a summarised set of facts, including evidence. During this meeting, the further proceedings should be agreed mutually.

Responding to the authorities

53 In practice, how does a company in your country respond to a notice or subpoena from a law enforcement authority? Is it possible to enter into dialogue with the authorities to address their concerns before or even after charges are brought? How?

This will depend on the status of the investigation and the negotiations. It is generally possible to discuss requests made by the authorities. It is important to understand that, although there is no legal duty to reply to requests for information in criminal investigations, refusal to do so is likely to lead to a raid by the law enforcement authority.

54 Are ongoing authority investigations subject to challenge before the courts?

The investigation itself cannot be challenged in court.

- 55 **In the event that authorities in your country and one or more other countries issue separate notices or subpoenas regarding the same facts or allegations, how should the company approach this?**

Preventing inconsistent communication with different authorities is certainly important. However, it should be considered that, in particular in complex investigations, different authorities develop different focus areas, for example as a result of a different legal assessment.

- 56 **If a notice or subpoena from the authorities in your country seeks production of material relating to a particular matter that crosses borders, must the company search for, and produce material, in other countries to satisfy the request? What are the difficulties in that regard?**

In principle, companies are legally not obliged to produce any material from abroad. However, refusal to do so could lead to legal assistance requests from German authorities to their foreign counterparts and would be seen as unco-operative, thus jeopardising any co-operation bonus. Therefore, it might be advisable to produce the documents outside Germany, provided the company has the power to do so under company law. In situations such as this, the company is also obliged to respect local laws, in particular data protection laws.

- 57 **Does law enforcement in your country routinely share information or investigative materials with law enforcement in other countries? What framework is in place in your country for co-operation with foreign authorities?**

As already discussed in question 9, law enforcement authorities have implemented cross-border communication networks and coordination units to co-operate effectively, and we have seen a rise in international co-operation. The legal framework is fragmented and includes EU regulations as well as bilateral and multilateral treaties.

- 58 **Do law enforcement authorities in your country have any confidentiality obligations in relation to information received during an investigation or onward disclosure and use of that information by third parties?**

Generally, investigating officers are bound by confidentiality with respect to information received in the course of an investigation. However, third parties may have a right to access the investigation file or parts of it, for instance to prepare civil claims against the perpetrator.

Public officials in the tax authorities are additionally obliged to observe tax secrecy (under section 30, German Fiscal Code).

- 59 **How would you advise a company that has received a request from a law enforcement authority in your country seeking documents from another country, where production would violate the laws of that other country?**

Subject to a thorough assessment of the local law prohibiting the production, we would generally advise complying with applicable law and trying to convince the German authority either to forego the requested documents or to seek administrative co-operation to formally seize the documents locally.

60 Does your country have secrecy or blocking statutes? What related issues arise from compliance with a notice or subpoena?

See questions 18, 19 and 59. We would generally advise engaging with the investigating authorities to evaluate alternatives.

61 What are the risks in voluntary production versus compelled production of material to authorities in your country? Is this material discoverable by third parties? Is there any confidentiality attached to productions to law enforcement in your country?

Before voluntarily producing documents, privilege issues in cross-border situation have to be considered. In addition, in the case of voluntary production, increased attention should be paid to data protection aspects. With respect to confidentiality, there are no relevant distinctions between voluntary production and compelled production under German law.

Prosecution and penalties

62 What types of penalties may companies or their directors, officers or employees face for misconduct in your country?

Individuals can, in particular, be sanctioned by fines or imprisonment. They may also be banned from carrying on their profession.

For companies, fines and profit confiscation are particularly relevant. In addition, exclusion from (public) tenders can have a significant negative effect on companies (see questions 2 and 65 regarding potential changes that may be introduced with the Draft Corporate Sanctioning Act).

63 Where there is a risk of a corporate's suspension, debarment or other restrictions on continuing business in your country, what options or restrictions apply to a corporate wanting to settle in another country?

A debarment under German public procurement law can also be based on misconduct of the company or its employees abroad. To mitigate this risk, a settlement abroad should be accompanied by self-cleansing and remediation measures by the company in Germany. These may include, inter alia, disciplinary measures against the individuals involved, compensation for damage sustained, co-operation with investigating authorities, and strengthening of the compliance management system.

64 What do the authorities in your country take into account when fixing penalties?

Authorities take into account, inter alia, the degree and extent of the misconduct committed, the subjective accusability of the misconduct, economic circumstances and the extent to which the parties concerned have co-operated with the investigating authorities. In addition, the Federal Supreme Court recently decided that the design of a compliance management system and the extent to which it was adapted at the time of the misconduct, and the improvements implemented after the misconduct, must also be taken into account.

The Draft Corporate Sanctioning Act, in particular, and in addition to the criteria set out above, allows for a reduction in sanctions imposed on corporations if the company initiates an internal investigation and fully co-operates with the authorities. To be eligible for such a reduction, the internal investigation must (1) be independent (i.e., not conducted by the company's defence counsel), (2) be fair and (3) make a material contribution to clarifying the corporate misconduct. Further, the company must co-operate continuously and unrestrictedly with the prosecuting authorities, and the results of the internal investigations, the essential documents and the final report on the internal investigations must be disclosed to the prosecuting authorities.

Resolution and settlements short of trial

65 Are non-prosecution agreements or deferred prosecution agreements available in your jurisdiction for corporations?

Not at the moment. Currently, settlements with authorities are reached via a 'negotiated' fine or confiscation order where the misconduct and the facts are described. Under German law, neither the order nor the statement of facts are public. Nevertheless, in high-profile cases, the authorities usually issue a short press release summarising the facts and the case (approximately one to two pages). The settlement need not be approved by the court, but lies in the discretion of the public prosecutor. German authorities often expect the company under investigation to improve their internal structures before a settlement is made in order to achieve a decent deal.

The current German federal government seeks to revise the corporate sanctions regime.

The Draft Corporate Sanctioning Act offers the alternative of ending proceedings by warning the undertaking, reserving the right to impose penalties and, in some cases, tied to conditions and directives during the period for which such a right is reserved. In such cases, the court may additionally order the appointment of a compliance monitor.

66 Does your jurisdiction provide for reporting restrictions or anonymity for corporates that have entered into non-prosecution agreements or deferred prosecution agreements until the conclusion of criminal proceedings in relation to connected individuals to ensure fairness in those proceedings?

No.

67 Prior to any settlement with a law enforcement authority in your country, what considerations should companies be aware of?

Companies should consider in particular the economic and reputational effects of the settlement itself, the (regularly positive) consequences of terminated investigations for the operational capacities of the company, the consequences for public procurements (e.g., potential debarments in Germany or abroad), further co-operation with investigations against individuals and the structural consequences to be drawn to prevent similar misconduct in the future.

68 To what extent do law enforcement authorities in your country use external corporate compliance monitors as an enforcement tool?

See question 65. At the moment, corporate compliance monitors are not foreseen by the law and are therefore not used in Germany. However, the Draft Corporate Sanctioning Act, if enacted, would introduce compliance monitors as a procedural instrument to enable deferred prosecution.

69 Are parallel private actions allowed? May private plaintiffs gain access to the authorities' files?

Parallel private actions are allowed. In some cases, however, civil courts tend to suspend proceedings until criminal proceedings on the same subject have been completed.

Private plaintiffs may have the right to access criminal files if, inter alia, they present a legitimate interest in this, and if this is not opposed by the overriding interests of the defendant or other persons who are worthy of protection.

Publicity and reputational issues

70 Outline the law in your country surrounding publicity of criminal cases at the investigatory stage and once a case is before a court.

In principle, investigations are not public. However, they regularly become publicly known if the case is interesting enough. Apart from a few exceptions, criminal trials are public.

71 What steps do you take to manage corporate communications in your country? Is it common for companies to use a public relations firm to manage a corporate crisis in your country?

This depends on the specifics of the case and the in-house capabilities of the company. In larger cases where public opinion is of an elevated relevance, the engagement of public relations consultants is quite common. The communication strategy needs to be fully aligned with the company's internal findings and legal defence strategy. In our experience, the communication strategy should strike a balance between 'litigation language' and frank and honest communication.

72 How is publicity managed when there are ongoing related proceedings?

Usually, no substantial public statements on the allegations should be made while the facts are still under investigation. If possible, next steps can be communicated.

Duty to the market

73 Is disclosure to the market in circumstances where a settlement has been agreed but not yet made public mandatory?

This must be assessed on in each particular case, taking into account all rights and legitimate interests of the company, its shareholders and the authorities involved.

Anticipated developments

74 Do you expect to see any key regulatory or legislative changes emerge in the next year or so designed to address corporate misconduct?

Following a programmatic agreement of the grand coalition, Germany's Federal Ministry of Justice has unveiled the draft of a new Corporate Sanctioning Act, introducing corporate criminal liability in Germany and significantly ratcheting up corporate liability for business-related criminal offences. The draft bill:

- raises possible penalties significantly, to up to 10 per cent of group turnover;
- creates incentives to invest in corporate compliance programmes;
- facilitates penalty reductions when an independent internal investigation is conducted and the company in question co-operates with the investigating authorities;
- significantly limits legal privilege (not only for internal investigations);
- offers the alternative of ending proceedings by warning the undertaking, reserving the right to impose penalties and, in some cases, tied to conditions and directives during the period for which such a right is reserved; and
- permits a court to order the appointment of a compliance monitor.

Currently, the draft is still under wraps. It may be passed by the German Bundestag following deliberation by the cabinet and any necessary amendments.

Appendix 1

About the Authors

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Dr Eike Bicker is a partner and co-head of the compliance and investigation practice of Gleiss Lutz. Eike advises national and international clients on corporate law and compliance. He is a specialist in strategic compliance advisory and compliance investigations. He has particular expertise in corporate governance issues, board matters and company group law issues.

Eike studied at the universities of Saarbrücken, Freiburg and Cambridge (LLM 2005). He has been with Gleiss Lutz since 2015. Eike was previously a partner at a prestigious compliance boutique firm in Frankfurt. In 2014, Eike took up a lectureship in compliance at the University of Bayreuth. Eike speaks German and English.

cases and supervised the investigation of liquidity auctions run by the Bank of England during the financial crisis of 2007 and 2008.

He was appointed Queen's Counsel in 2014, while working at the SFO, a rare achievement for a lawyer in public service.

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Dr Christian Steinle is a partner and co-head of the compliance and investigation practice of Gleiss Lutz. Christian has considerable experience in European and international antitrust law and compliance investigations. He focuses on cartel cases and private antitrust litigation, merger control, online and distribution antitrust law, antitrust compliance programmes and internal investigations.

Christian studied in Tübingen, Fribourg (Switzerland), Bonn and Speyer. He has been a partner at Gleiss Lutz since 2008. In 2004, he was seconded as in-house counsel to a multinational group, where he specialised in international antitrust litigation. He is a member of the Association for the Study of Antitrust Law, the International Bar Association (IBA) and the American Bar Association, and belongs to the IBA Merger Working Group. Christian speaks German, English and French.

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