KNOW-HOW

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COMPLIANCE AND INVESTIGATIONS

THE 2018 COALITION AGREEMENT – COMPLIANCE & INVESTIGATIONS

Following tough negotiations, Germany's Christian Democratic Union/Christian Social Union (CDU/CSU) and the Social Democratic Party (SPD) have reached a coalition agreement. The 177-page long paper is optimistically entitled: "New horizons for Europe, a new dynamic for Germany and new cohesion for our country". Given that the CDU/CSU and SPD intended to review a "corporate law for multinational groups" following the federal parliamentary elections in 2013, the coalition agreement now provides for projects with extensive provisions on corporate sanctions for infringements. In this article, we wish to give you a brief summary of the envisaged main changes to the Compliance & Investigations sector.

1. Abolition of the opportunity principle in proceedings against companies

"Hitherto it was within the discretion of the competent authority to prosecute the company concerned. By departing from the opportunity principle in the existing applicable law governing regulatory offences we are ensuring that the law will be applied more consistently throughout Germany."

Gleiss Lutz commentary

The departure from the opportunity principle in favour of the principle of legality does not necessarily indicate that corporate criminal law will be introduced. What it does make clear is the fact that the opportunity principle under the law governing regulatory offences will no longer apply (alone) in the future. The principle of legality largely prevents the competent authorities from refraining from cartel proceedings at their discretion and obliges them to intervene and initiate investigations. The point of this is to ensure that the law is applied uniformly.

In practice, this change is likely to affect the regions in Germany that have largely refrained from prosecuting companies to date. In our experience, most public prosecutors had the prosecution of companies on their agenda anyway and imposed multi-million fines and forfeiture orders while the opportunity principle applied. It would be far more problematic if the statement were to mean that companies would even be prosecuted where they informed the authorities of misconduct on their own initiative and fully cooperated with them. In such cases it would not, as a rule, appear justified to impose sanctions on the company.

2. Clear procedural rules and specific provisions on closing proceedings

"Clear procedural rules enable us to enhance legal certainty for affected companies. At the same time we will create specific provisions for closing proceedings to give the judicial system the flexibility it needs for prosecution purposes."

Gleiss Lutz commentary

As of today, the legislation governing regulatory offences gives no specific indication of how the penalties imposed on a company are to be calculated and structured. The sole express provision is the penalty or collection notice. The closing of proceedings by means of settlement between the prosecuting authority and the company, something which is nowadays frequently possible, is not laid down in detail in the law and requires negotiation and communication skills.

This situation is to change in future for economic crime. Clear procedural rules are to be introduced, including as regards flexibility in closing proceedings. The coalition agreement does not provide more exact details. The identified goals, however, might indicate the introduction of procedural instruments comparable to the Deferred

Prosecution Agreements (DPAs) or Non-Prosecution Agreements (NPAs) that are familiar from Anglo-Saxon countries. These kinds of agreements provide the law enforcement authorities with an opportunity to close, respectively delay, prosecution subject to the proviso that the company satisfies a number of conditions. These often include payment of a fine and/or disgorgement, admission of certain facts about the infringements, ongoing cooperation with the law enforcement authority, and the improvement of the existing compliance management system in order to avoid comparable future infringements. In the case of the US authorities, it is sometimes also agreed to appoint a compliance monitor, whose function is to monitor the company's compliance efforts over a certain period. Where a DPA is concluded, the appointment of such a monitor is increasingly the rule (as is presently the case, for example, at VW).

By introducing such an instrument, Germany would bring itself into line internationally. With the recent introduction of its Sapin II law, France has the opportunity to conclude what are known as Convention judiciaire d'intérêt public (CJIP), these being similar to a US-style DPA. This has already been used in practice in France (see the CJIP between HSBC Private Bank Suisse SA and Parquet National Financier). DPAs are also familiar in the UK, but are presently only applied by the competent British Serious Fraud Office with restraint.

Were German law enforcement authorities to be provided with comparable instruments, this would on the one hand be welcome, as court proceedings could then be avoided. On the other hand, in that case German companies would have prepare themselves for the possibility that prosecuting authorities could make the conclusion of proceedings subject to conditions and also formulate ongoing duties of the companies. Whether the concept of a compliance monitor will also become a reality in Germany, however, does not yet appear to be determined. Such a "privatisation" of the supervisory role would be difficult to fit into our system and most likely trigger constitutional concerns.

3. Considerable increase in fines for infringements: up to 10% of the group turnover for larger companies

"The current ten million euro limit on fines is too high for small companies and too low for large groups. We will ensure that in the future the amount of the monetary sanctions is based on the economic strength of the company. In the case of companies with more than 100 million euro in turnover, the upper limit should be ten percent of the turnover."

Gleiss Lutz commentary

The currently applicable fine limit of EUR 10 million under the law governing regulatory offences is considered to be insufficient for appropriately penalising misconduct in some cases. Law enforcement authorities in major cases are therefore already focusing on the disgorgement of pecuniary benefits which were unlawfully obtained by criminal or administrative offences (e.g. breaches of duty of supervision), without any limitations on the amount involved.

The planned increase in the fine limit to ten percent of the turnover bears a risk of disproportionately high fines, particularly in cases in which the financial benefits gained by a company due to the misconduct of its own employees were indefinite or slight.

The law governing regulatory offences would thereby be adopting the fine limit in competition/antitrust law, where fines of up to ten percent of the worldwide group turnover can be imposed. This is already under criticism from many quarters on the grounds that the amount of the fine would be set without taking the economic benefit of the company into account, and thus in many cases would be disproportionately high. The planned new regulation is in any case likely to result in a tangible increase in the amount of the fines imposed.

4. Public announcement of sanctions on a company

"The sanctions should be announced to the public in a suitable manner."

Gleiss Lutz commentary

Along with the increase in fines on companies and the introduction of more stringent criminal laws for managers, the public announcement of sanctions is meant to further raise awareness with regard to compliance. According to Volker Ullrich (CSU), for example, sanctions on listed companies should be collected in a data base comparable to the competition register that has recently been introduced. Recording the company or its management in such a database would, as with the competition register, lead to its possible exclusion from competing for public contracts. A public announcement of sanctions would most likely result in considerable reputational risks for the affected companies and serious disadvantages in international procurement procedures.

5. Establishment of legal requirements for internal investigations

“In order to create legal certainty for everyone involved, we will establish legal requirements for internal investigations, in particular with regard to seized documents and possibilities for conducting searches.”

Gleiss Lutz commentary

More legal clarity would be welcome in the future with regard to protection from seizure of lawyers’ work products in the course of internal investigations (e.g. reports, interview records). There has been conflicting case law in Germany to date as to whether, and if so to what extent, work results in internal investigations enjoy legal privilege. Although German public prosecutor’s offices tend to take a restrained approach when searching law firms, it cannot be presumed that all work products of lawyers are comprehensively protected from seizure.

Legal certainty on this point would set an important trend for the investigation practice in Germany and all of Europe. In this connection, there is also considerable interest in how the Federal Constitutional Court will rule on the searches at Jones Day/Volkswagen.

6. Incentives for aiding clarification by means of internal investigations

“We will establish statutory incentives to aid clarification by means of internal investigations and subsequent disclosure of the findings achieved thereby.”

Gleiss Lutz commentary

Currently, whether and in what way cooperation with criminal prosecution authorities will be “rewarded” is largely left to the discretion of the authority involved. Some public prosecutor's offices accept that if cooperation is provided, the costs of the internal investigations can be deducted (e.g. in the regulatory fining notice against Siemens AG of 15 December 2008). The Federal Court of Justice very recently ruled that the compliance efforts of a company (before and after disclosure of an offence) must also be taken into account when the amount of the fine or the disgorgement is set (cf. Federal Court of Justice decision of 9 May 2017 – 1 StR 265/16). Additional legal certainty as to what advantages companies can expect in return for cooperating and disclosing the findings from internal investigations is therefore to be welcomed. In this connection, however, it is important to recognise that companies also still need to have a choice as to what defence strategy is called for in their best interests. Moreover, cooperation and disclosure may not be accompanied by a loss of legal privilege should the strategy change in the course of a proceeding.

With this venture, the German legal situation would also be approaching that in the US. For example, the sentencing guidelines of the US-DOJ determine what advantages and discounts can be expected for individual cooperation measures.

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