Newsletter, 17 June 2020

Draft Bill on Corporate Criminal Liability in Germany: The "Association Sanctions Act"

Preliminary thoughts from a competition lawyer's perspective

Yesterday, the German Federal Government has adopted the draft for the introduction of an *Association Sanctions Act* presented by the German Federal Ministry of Justice in April 2020.[1] According to the draft bill, a company can be held liable for criminal offences committed by its management/ employees. The draft bill not only provides guidance on the competent prosecution office in case of offences which meet the requirements for both a cartel infringement and a criminal offence (such as bid-rigging cases), but also takes into account the relevance of compliance measures and internal investigations. The Government adopted the draft proposal without further amendments, thereby ignoring the criticism voiced by many stakeholders. It is now for the *Bundestag* and *Bundesrat* to decide whether it will pass the law.

Background and key aspects of the draft bill

In its draft form, the Association Sanctions Act („*Verbandssanktionengesetz*") aims at remediating the sanctions system with regard to companies. In short, the draft bill will introduce a new type of offence, the so-called "association offence" that will allow to impose high fines on companies in instances where the criminal conduct of individuals, managers in particular, can be attributed to the company.

The key aspects of the draft bill can be summarized as follows:

- An association offence means any criminal offence, which meets the criteria for enrichment by the company or a breach of its duties. This includes not only financial and tax duties, but also criminal offences against competition (such as bid-rigging).

- The company will be held liable if an association offence has been committed and the conduct can be attributed to the company either because a manager acted on behalf of the company or failed to supervise his/her employees.[2]

- The draft bill covers all legal entities governed by public or private law as well as industry/trade associations – and will thus concern not only multinational corporations, but also small and medium-sized enterprises, as long as they are operating as a commercial entity.[3]

- As a result, a criminal court will either impose a fine on the company or – in the case where the court will consider a fine for being disproportionate – issue a "*warning with reservation*".[4] Fines generally go as high as EUR 10 million but may be increased to up to 10 % of the annual group turnover for companies with annual turnover of more than EUR 100 million.

- In case of a suspicion of an association offence, the public prosecutor's office is required to initiate an investigation – leaving no room for discretion.

Also, the draft bill promotes compliance measures and provides incentives to conduct internal investigations.

For instance, where an effective compliance management system ("**CMS**") is implemented, any sanction imposed may be mitigated.[5] The draft bill does, however, not contain any guidelines with respect to the substantive requirements or the implementation process of the CMS. This lack of more detailed guidance is one of the (many) points of criticism of the draft bill since it might result in small and medium-

[1] *See* the Draft of the German Federal Government on the "Law to strengthen the integrity in the economy", including the "Association Sanctions Act" of 16 June 2020.
[2] Cf. Sec 2, 3 Draft Association Sanctions Act.
[3] Cf. Sec 1, 2 Draft Association Sanctions Act.
[4] Cf. Sec 8 et seq. Draft Association Sanctions Act.
[5] Cf. Sec 15 Draft Association Sanctions Act.

sized companies feeling forced to implement 'oversized' compliance programs.

Furthermore, the draft bill explicitly provides that internal investigations can lead to a 50 % reduction of a fine – provided that the internal investigations were conducted by the company in the manner described by law.[6] In particular, the draft bill requires that if the internal investigations are conducted by a third party, the same person cannot act as defendant for the company. Furthermore, the questioning of employees must comply with the principle of fair trial, *i.e.* the employees need to be informed prior to the interview that they have the right to refuse testimony and to seek separate legal advice. Finally, the result of the internal investigations, including all relevant documents, must be made available to the public prosecutor's office.

Implications on competition law

Under German law, most cartel infringements do not constitute criminal offences – insofar the draft bill will be of no relevance. However, illegal agreements in the context of tender processes constitute a cartel infringement subject to fines by the competition authorities on the companies participating in this conduct – while at the same time, the conduct also represents a criminal offence (bid-rigging).[7] As a consequence, this leads currently to parallel proceedings: whereas the *company* is generally investigated and fined by the (exclusively competent) competition authority for the cartel infringement,[8] parallel criminal proceedings can also be conducted by the public prosecutor's office against the *individuals* involved in the bid-rigging.

For such scenarios the draft bill now provides that the public prosecutor can only open proceedings against the company, where the competition authority (German Federal Cartel Office ("**FCO**") or the European Commission), which has the discretion whether or not to initiate investigations for cartel infringements, remains inactive.[9] If the competition authority decides to investigate the company, the public prosecutor's office can only conduct proceedings against the individuals involved in the cartel infringement. Previously, such conflict did not exist, since the public prosecutor was not competent to initiate proceedings against the company in its own right.

If the draft bill became law, it is rather unlikely that the FCO will not investigate companies in bid-rigging cases itself but leave it to the public prosecutor instead, given that these types of infringements are viewed as hard-core and are part of the FCO's key investigatory expertise.

Comment

Despite the headwind, the German Government adopted the draft proposed by the Ministry of Justice without any further amendments to the proposal. However, it remains to be seen if and to what extent the provisions will survive the legislative process.

Even though the draft bill currently foresees certain standards for conducting internal investigations in order to profit from a reduction of the fine, these standards are not applied by the FCO in cartel proceedings. Given that the FCO will most likely maintain its competence to investigate and fine companies in bid-rigging cases there is no apparent need to deviate from the current internal investigation practice in case of competition law infringements.

As regards the compliance programs, they should equally be recognized as mitigating factor in cartel proceedings. This is however currently not the practice of the FCO. Also the 10th amendment of the Act against Restraints of Competition does not foresee any amendments in that regard. The legislator should thus bear in mind that in view of the draft bill a double standard would be applied in criminal and cartel law proceedings. This cannot be the right outcome.

Julia Sagasser

Isabel Oest

Commeo LLP
Rechtsanwälte und Notar
Speicherstraße 55
60327 Frankfurt am Main
www.commeo-law.com

Commeo LLP is an independent law firm specialized in competition law. We are an established team of experienced lawyers advising clients on all aspects of German and European competition law.

This publication is intended to highlight issues. It is not intended to be comprehensive nor to provide legal advice. Any liability which might arise from the reliance on the information is excluded.

[6] Cf. Sec 17, 18 Draft Association Sanctions Act.
[7] Cf. Sec 289 German Penal Code.
[8] Cf. Sec 82 Act against Restraints of Competition.
[9] Cf. Sec 42 (3) Draft Association Sanctions Act.