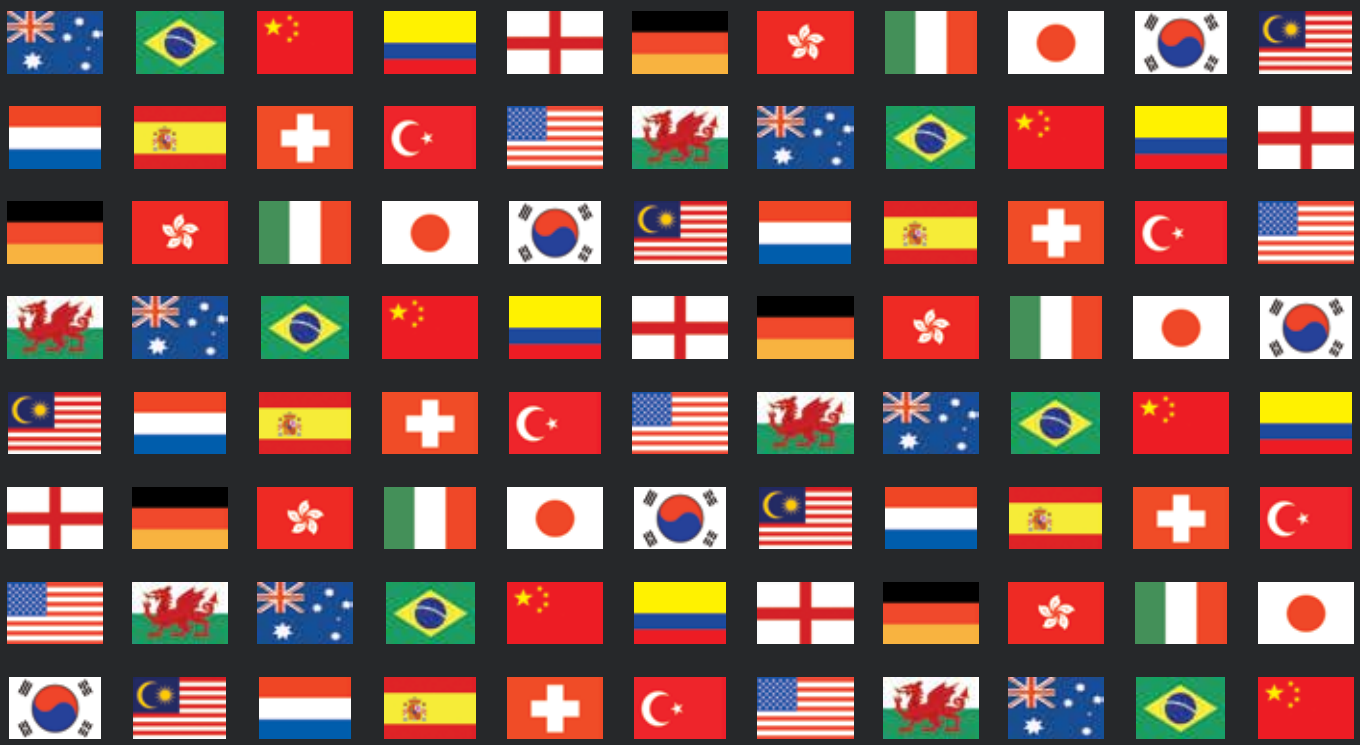
Government Investigations

Contributing editors
David M Zornow and Jocelyn E Strauber



2018

GETTING THE DEAL THROUGH

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Government Investigations 2018

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Germany

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Enforcement agencies and corporate liability

1 What government agencies are principally responsible for the enforcement of civil and criminal laws and regulations applicable to businesses?

In the German legal system the Public Prosecutor's Office and various administrative or regulatory authorities are the responsible agencies for the enforcement of laws and regulations applicable to businesses. These laws are administrative laws only.

As a matter of principle, criminal law is not applicable to legal persons. German criminal law is conceived to determine and punish individual guilt. Individual guilt is closely connected to the human freedom of will. Therefore, corporations cannot be guilty of a criminal offence. Corporations can commit unlawful acts, constituting an administrative offence. These are enforced by state authorities, including the public prosecutor. Criminal offences committed by individual employees of a corporation can constitute an administrative offence by the corporation and lead to a fine against it.

Also as a matter of principle, state authorities cannot use civil law for enforcement. Enforcement measures such as fines and forfeiture are provided by each specific administrative act, such as the Banking Act (KWG), the Anti-Money Laundering Act (GWG), the Fiscal Code or the Foreign Trade and Payments Act. The authorities can also use the general Administrative Offences Act (OWiG) or Administrative Enforcement Act.

Important administrative authorities are the local Public Prosecutor's Offices, the local Tax Offices, and the Federal Financial Supervisory Authority (BaFin). These agencies conduct investigations in their specific subject area. If these authorities identify infringements that can lead to criminal punishment of an individual, the responsible Public Prosecution Office will be informed. The competent prosecutor will then commence a regular criminal investigation if there is the suspicion that an offence has been committed.

2 What is the scope of each agency's enforcement authority? Can the agencies pursue actions against corporate employees as well as the company itself? Do they typically do this?

Public Prosecutor's Offices typically pursue actions against corporate employees as well as the company itself. Public prosecutors often initiate criminal investigations against individuals first and, at a later stage, initiate administrative investigations against the corporation.

Regulatory authorities usually focus on enforcing the laws regarding corporations. Where the respective acts stipulate requirements for individuals, the regulatory authorities will also enforce these against the individuals. An example is the KWG, which sets out certain prerequisites that Bank managers must fulfil.

3 Can multiple government entities simultaneously investigate the same target business? Must they coordinate their investigations? May they share information obtained from the target and on what terms?

Yes, multiple government agencies can investigate the same target business simultaneously. Each government authority can conduct its own investigation. The agencies often coordinate their investigations, although they may impose different sanctions.

4 In what fora can civil charges be brought? In what fora can criminal charges be brought?

As noted above, the administrative authorities cannot file civil lawsuits against companies in order to enforce regulations applicable to business. Administrative sanctions such as fines can be imposed by the respective authority and may be subject to judicial review by the competent court. Administrative and criminal courts can be competent for reviewing administrative enforcement measures and, particularly, fines and forfeiture.

5 Is there a legal concept of corporate criminal liability? How does the government prove that a corporation is criminally liable for the acts of its officers, directors or employees?

No – see question 1. German scholars and politicians have been discussing multiple approaches to introducing a code of corporate criminal liability, but none of the concepts have been implemented. It is disputable what value such a corporate criminal code (which would be contrary to traditional legal principles, as explained above) would add to Germany's legal system. Several companies report that harsher penalties have been imposed under German administrative law than under foreign criminal law (eg, in multi-jurisdictional corruption cases).

6 Must the government evaluate any particular factors in deciding whether to bring criminal charges against a corporation?

As noted above, the authorities do not bring criminal charges against corporations. They exercise a wide range of discretion in their decisions on the initiation and conclusion of administrative investigations. Factors such as the pervasiveness of wrongdoing, corporate history of misconduct, timely and voluntary disclosures, effectiveness of a pre-existing compliance programme and collateral consequences to a corporate prosecution may be considered in the exercise of administrative discretion.

Initiation of an investigation

7 What requirements must be met before a government entity can commence a civil or criminal investigation?

Initial suspicion of an offence is required for commencing a criminal investigation against a natural person or an administrative investigation against a corporation. Initial suspicion means that there must be concrete factual indications according to which a violation of law appears possible. The competent public prosecutor is obliged to initiate an investigation in the event of initial suspicion of a criminal offence. If the initial suspicion relates to an administrative offence, the competent authority may take a discretionary decision regarding the initiation of an investigation.

Administrative authorities enforce all aspects of the specific law or regulation they are competent for. The specific requirements are set out in these acts or regulations.

8 What events commonly trigger a government investigation? Do different enforcement entities have different triggering events?

Typically, investigations are triggered by criminal complaints and voluntary declarations, whistle-blowing, newspaper articles or information forwarded by other authorities. Also, the company's auditors may forward information that leads to an investigation.

9 What protections are whistle-blowers entitled to?

Whistle-blower protection is stipulated in specific acts. Under the KWG, the Insurance Undertakings Supervisory Act (VAG) and the GWG, whistle-blowers must have the option to file their reports anonymously. Companies are prohibited from retaliating against whistle-blowers. The majority of legal experts also hold that general labour law prohibits retaliating against whistle-blowers.

Anonymity can be revoked if a whistle-blower is an indispensable witness in criminal court proceedings.

10 At what stage will a government entity typically publicly acknowledge an investigation? How may a business under investigation seek anonymity or otherwise protect its reputation?

Public authorities generally do not disclose investigations against corporations. An exemption to this rule is the new GWG, which implements 'naming and shaming': at the end of an investigation, the competent authority will disclose the offences committed and the penalties imposed.

Public authorities can release press statements in case of public interest. The standards for the release of such statements vary from state to state. Investigations can also become known through investigative journalism or leaks within the company or authority.

Evidence gathering and investigative techniques

11 Is there a covert phase of the investigation, before the target business is approached by the government? Approximately how long does that phase last?

There is no standard covert phase. Government authorities such as BaFin or tax offices often openly request information from the target business on a certain topic. Covert investigations are often conducted if there is a danger of collusion. The covert operation of the investigation is subject to the authorities' discretion and investigation tactics.

12 What investigative techniques are used during the covert phase?

Covert measures are provided by the Code of Criminal Procedure. These include telephone and computer surveillance, video observations and deployment of covert investigators. These techniques must comply with a strict principle of proportionality and often are allowed only if the investigated offence is a serious criminal offence. Many covert investigation techniques require approval by competent courts.

13 After a target business becomes aware of the government's investigation, what steps should it take to develop its own understanding of the facts?

There is no standard solution to this situation. Many companies decide to start their own internal investigation if an investigation is conducted by the government. This can be important to stay ahead of the government investigation.

Companies may also decide to cooperate with the authorities without engaging in their own internal investigation. Companies may decide to monitor the government investigation closely and frequently request access to the investigation file to receive all information collected by the authority.

Companies should carefully assess the situation to determine what steps are required, efficient and sensible. The standards may vary under corporate, criminal or administrative law. The company should carefully choose trusted and experienced advisors regarding all relevant legal and strategic questions.

14 Must the target business preserve documents, recorded communications and any other materials in connection with a government investigation? At what stage of the investigation does that duty arise?

Statutory retention periods exist independently of government investigations in various areas, ranging from more general commercial and tax law requirements to specific duties, for example under the KWG and the GWG.

A specific duty to preserve documents can arise if the investigating authority and competent courts order the search and seizure of specific documents. The documents indicated in the order must then be preserved and made available to the authorities.

In such situations, many target businesses decide to issue a retention notice to their employees asking the employees not to alter, move or delete any documents that may be related to the transactions underlying the search and seizure order. Target businesses often also retain a copy of all documents handed over to the authorities to enable an internal investigation if such investigation has not already been initiated prior to the search and seizure.

15 During the course of an investigation, what materials – for example, documents, records, recorded communications – can the government entity require the target business to provide? What limitations do data protection and privacy laws impose and how are those limitations addressed?

In a criminal proceeding, the enforcement authorities may order an individual to produce and provide any existing documents, records and recorded communications, and in fact all objects that can be of importance as evidence for the investigation. If a person refuses to comply, a court or – in exigent circumstances – the public prosecution office may order seizure, after having balanced the public interest in the investigation and the private interests of the person involved.

General limitations to this process are set out, particularly, in the German Code of Criminal Procedure. A number of limitations follow from the German constitution; for example, where the core area of privacy is touched upon. In the context of an investigation into businesses, however, most documents, records and recorded communications will be subject to search and seizure.

Communications between an accused and defence counsel are generally exempt from seizure. Corporations can qualify as accused in administrative investigation proceedings, so that communications with corporate defence counsel may be exempt from search and seizure.

Specific administrative investigations may follow specific procedural rules. Under the Banking Act, for example, BaFin may request a business to provide information about all business activity and submit documents to BaFin and the German Central Bank (Deutsche Bundesbank). The GWG requires that businesses produce certain documents, particularly SARs (suspicious activity reports).

16 On what legal grounds can the target business oppose the government's demand for materials? Can corporate documents be privileged? Can advice from an in-house attorney be privileged?

Documents, records and recorded communications can be privileged. However, companies cannot rely on privilege if the company itself is not an accused party. If the company is or may become accused in administrative investigations, it may retain defence counsel and invoke privilege regarding communications with its defence counsel. Privilege may even apply before proceedings are formally initiated.

Privilege is very limited under German law: it generally does not apply to in-house counsel or to materials created by corporate counsel that is not, at the same time, criminal counsel.

17 May the government compel testimony of employees of the target business? What rights against incrimination, if any, do employees have? If testimony cannot be compelled, what other means does the government typically use to obtain information from corporate employees?

In criminal proceedings, employees may be compelled to testify as witnesses before the competent authority and are under an obligation to tell the truth. Under the German Code of Criminal Procedure, they

Update and trends

Three overarching trends can be observed in Germany: enforcement is internationalised and strengthened; companies are expected to upgrade their internal controls; and the authorities are not focusing only on the banking sector.

Enforcement in Germany is shaped by international trends. In February 2017, BaFin issued new sentencing guidelines for violations of the WpHG. These guidelines specify how BaFin will use its discretion in determining fines. These guidelines were issued as a reaction to the EU's Market Abuse Regulation, which partly replaced substantive provisions of the WpHG. A similar trend can be observed for the new rules of enforcement regarding violations of the new GWG of 26 June 2017. This act is based on the respective Anti-Money Laundering directive of the EU. Both sentencing regimes significantly increase the maximum penalties that the competent authorities can impose.

These sentencing regimes also implement the 'naming and shaming' approach, which is contrary to traditional German law principles. Competent authorities will be able to publicly disclose breaches of law and the respective fines imposed. This unorthodox penalty is a result of the internationalisation of enforcement.

Companies are expected to upgrade their internal controls. More and more industry-specific laws require the obliged entities to implement specific forms of internal control. Most recently, the new GWG requires all obliged entities to implement whistle-blower procedures that allow employees to report (alleged) misconduct through an independent, protected and anonymous channel. Failure to implement such procedures constitutes an administrative offence. Similar obligations were introduced into the KWG and the VAG in 2016. The GWG also requires companies to submit information regarding their ultimate beneficial owner to a newly established 'transparency register'.

Finally, the focus of government enforcement is broadening. Since the financial crisis starting in 2007, many authorities have focused on the financial industry and have investigated numerous cases of alleged misconduct. Financial institutions remain under scrutiny, but other regulated industries are also more and more in scope, and not just since the beginning of the diesel investigations in the US. The overall observation is that the German regulatory authorities are upgrading their capacities in more and more industries, investigations are intensifying and penalty fines are rising. Companies should therefore emphasise strengthening their controls and preparing themselves to react properly to allegations of misconduct.

may refuse to answer any questions to which the reply would subject themselves, or one of their relatives, to the risk of being prosecuted. This concept is based on the fundamental principle of nemo tenetur se ipsum accusare (nobody is bound to accuse him or herself).

The specific administrative proceedings follow these fundamental principles. The KWG and the GWG, for example, both require that all employees shall, upon request, provide the competent authority with information about all business activities. Employees may refuse to do so in respect of questions to which the answers would place themselves or their relatives at risk of criminal prosecution or proceedings under the General Administrative Offences Act.

18 Under what circumstances should employees obtain their own legal counsel? Under what circumstances can they be represented by counsel for the target business?

Each employee should decide individually whether he or she prefers being represented by individual counsel. It is generally advisable to retain defence counsel if the individual is targeted directly by the investigations as an accused. Employees should consider that their status may change, and individuals who are interviewed as a witness first may later become an accused.

It is not advisable for individuals to be represented by corporate counsel. Such representation is likely to create conflicts of interests. In addition, defence counsel may not represent more than one accused person in the same proceedings.

Many companies decide to offer their employees cost coverage for individual counsel. The management of a company can decide to cover the defence costs of their employees under the general prerequisites of the business judgment rule, ie, cost coverage must serve the benefit of the company.

19 Where the government is investigating multiple target businesses, may the targets share information to assist in their defence? Can shared materials remain privileged? What are the potential negative consequences of sharing information?

Where legal privilege applies, documents are protected irrespective of whether they are in possession of the defence attorney or the client. Sharing such documents with other businesses does not, in principle, constitute a waiver of an existing legal privilege.

While it is not prohibited under German law for target businesses to share information to assist in their defence, doing so will result in a loss of control over the information. This means that businesses should carefully consider the benefits of working together in this way, especially because cooperation with enforcement authorities may help to minimise fines.

20 At what stage must the target notify investors about the investigation? What should be considered in developing the content of those disclosures?

There is no general obligation for companies to notify investors about investigations conducted against or in connection with the company at a specific stage of an investigation.

The Market Abuse Regulation stipulates certain disclosure requirements for publicly traded companies. Issuers of shares generally must inform the market of circumstances within their 'sphere of influence' that may affect the market price of their shares. Such disclosures, generally, must be made immediately after the issuer becomes aware of the relevant facts.

A major investigation that could lead to substantial fines and other adverse consequences, including damage to the company's reputation, may influence the share price and thus trigger the obligation for an ad hoc disclosure.

Specific circumstances, such as M&A transactions, can also require a company to disclose information to third parties such as potential investors.

Cooperation

21 Is there a mechanism by which a target business can cooperate with the investigation? Can a target notify the government of potential wrongdoing before a government investigation has started?

Companies must generally comply with all (legal) orders that the competent authorities issue to the company. Companies are free to cooperate beyond their legal duties to the extent that the company does not violate any other legal or contractual duties. Companies dealing with sensitive customer data, particularly banks, should carefully assess the legal limitations to cooperation.

Many companies decide to pro-actively support the competent authorities with voluntary disclosure of information and prompt, comprehensive submission of documents.

22 Do the principal government enforcement entities have formal voluntary disclosure programmes that can qualify a business for amnesty or reduced sanctions?

Formal voluntary disclosure programmes are the exception, not the rule, under German law. One example is the Leniency Programme for cartel proceedings, which has been in place since 2000 and was fundamentally revised in 2006. The programme allows cartel participants to contribute to uncovering a cartel. If the participant is the first to contact the Federal Cartel Office, the fine is waived. Full immunity can also be granted at a later stage if case-decisive evidence is provided, unless the company was the sole ringleader or coerced others to participate in the cartel. For other applicants under this programme, fines may be reduced by up to 50 per cent.

In tax-related criminal proceedings, targeted persons will not be punished if the persons voluntarily disclose the respective wrongdoing. Tax law stipulates very strict requirements for such voluntary declaration, and it does not necessarily lead to an amnesty or reduced sentence for the company. Companies must, however, correct any incorrect tax declarations to avoid coercive measures by the tax authorities.

In addition to specific leniency programmes, competent authorities and courts will consider cooperation in all discretionary decisions. This includes the calculation and determination of fines against a company. Therefore, companies can generally assume that it is economically sensible to cooperate with the authorities, even if there is no formalised leniency programme.

23 Can a target business commence cooperation at any stage of the investigation?

Companies can commence cooperation at any stage. In many cases, companies cooperate from the start of the investigation. Open and comprehensive cooperation from the outset may help to establish trust between the company and the involved authorities, speed up their investigations and reduce potential adverse effects from negative media coverage. In almost all cases it will be considered in favour of the company when potential fines are calculated.

24 What is a target business generally required to do to fulfil its obligation to cooperate?

Companies must comply with (legal) investigative measures, which particularly includes that the companies do not hinder searches and do not delete any documents covered by a search and seizure order.

It is a discretionary decision of the management whether and to what extent the company intends to cooperate beyond the scope of its legal obligations.

25 When a target business is cooperating, what can it require of its employees? Can it pay attorneys' fees for its employees? Can the government entity consider whether a business is paying employees' (or former employees') attorneys' fees in evaluating a target's cooperation?

The company may ask its employees to participate in an internal investigation and, particularly, attend employee interviews. The resulting interview memos may then be submitted to the authorities.

The company may decide to cover the legal fees incurred by the employees. This is a discretionary decision that is reviewed by courts according to the business judgment rule (see question 18).

Criminal and administrative authorities generally consider the efforts a company takes to cooperate in the investigation of the facts. It is helpful in this regard if employees participate and cooperate in the investigation. Covering their fees can be seen as a supporting measure conceived to motivate as many employees as possible to assist in the investigation.

26 What considerations are relevant to an individual employee's decision whether to cooperate with a government investigation in this context? What legal protections, if any, does an employee have?

Employees are not free to decide whether or not they cooperate with government investigations. If summoned as a witness, they are obliged to appear on the date set for their examination and they have the duty to testify, unless the law provides a specific exception. Accused employees have the right to remain silent.

Employees are generally also obliged to cooperate with internal company investigations. This obligation follows from the duty of loyalty that they owe their employer. The consequences of violating this duty depend on the specific circumstances in each single case. It cannot be excluded that an employee is dismissed for violating her or his duty of loyalty.

27 How does cooperation affect the target business's ability to assert that certain documents and communications are privileged in other contexts, such as related civil litigation?

German law does not apply a concept of privilege in the same way that common law countries do. The rules of privilege follow from the rules of professional secrecy. Companies can invoke privilege in the defence against search and seizure by government authorities. Cooperating companies can waive privilege with respect to these authorities.

Whether a document is privileged in other contexts, such as civil litigation, must be assessed independently and according to the rules of professional secrecy applying in this respective context.

Resolution

28 What mechanisms are available to resolve a government investigation?

Most investigations can be terminated in one of three ways: (i) by public charges, ie, moving the case before the competent court; (ii) by a fine against the company without public court proceedings; or (iii) by conclusion for lack of suspected wrongdoing.

Criminal public charges can only be preferred against individuals, but the respective company can be ordered to participate in the proceedings as a secondary participant. This can be the case if the company is suspected to have enabled the alleged criminal conduct due to a lack of oversight. The court's sentence can include a fine against the company.

Prosecutors can also issue fine orders without public court proceedings. The prosecutor can terminate the proceedings based on the evidence collected during the investigation. Since no court is involved, this evidence is not binding, but considered as factual assumptions only. The fine order still has the effect that further investigation against the company is barred (ne bis in idem). The fine order may be subject to the company's consent. The company may also appeal any fine order to the competent court.

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If the prosecutor, based on the evidence collected, comes to the conclusion that no criminal or unlawful act has been committed, the investigations are terminated without further ado.

29 Is an admission of wrongdoing by the target business required? Can that admission be used against the target in other contexts, such as related civil litigation?

No. The company's consent to a fine order does not imply that the company agrees with the prosecutor's factual assumptions.

30 What civil penalties can be imposed on businesses?

As noted above, under German law no civil penalties can be imposed on businesses.

Administrative fines under the general OWiG can amount to up to €10 million per infringement. Competent authorities can also order the forfeiture of any profits resulting from the unlawful acts. Profit in this context is interpreted as revenue. Forfeiture, therefore, can result, and has resulted, in total amounts of hundreds of millions of euros.

Specific administrative acts can provide specific penalty mechanisms. BaFin can impose fines up to 15 per cent of the total company-wide annual revenues, or up to twice the company's profits made through the unlawful acts. Similar mechanisms have been implemented for the calculation of fines for violations of the GWG.

31 What criminal penalties can be imposed on businesses?

None. Criminal law is not applicable to legal persons.

32 What is the applicable sentencing regime for businesses?

German law has no general formalised sentencing guidelines. BaFin published sentencing guidelines for violations of the Securities Trading Act (WpHG). The German antitrust authority also did so with regard to cartel violations.

Fines must comply with certain limits set by the applicable laws. When determining the specific amount within these limits, courts and authorities exercise discretion. They must consider all relevant circumstances for their respective discretionary decision. Specific aspects to consider are: the nature and 'weight' of the breach of law, the motives of the company, the (lack of) ethical standards, the methods applied for the breach of law, potential previous unlawful conduct and, particularly, the company's behaviour after the unlawful act. Here, courts and authorities will place much emphasis on the company's cooperation during the investigation and the company's efforts to mitigate and remedy any potential flaws.

33 What does an admission of wrongdoing mean for the business's future participation in particular ventures or industries?

German law does not specifically set out the consequences of an admission of wrongdoing or of fine orders issued to companies. In some regulated industries, however, companies can be barred from public contracts for a specified period of time.

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