3 Corporate Criminal Liability : a Comparative Approach Between Germany and France

Salomé LEMASSON,
Of Counsel, Rahman Ravelli

1 - Germany remains one of the few European countries not to have implemented the concept of criminal liability for corporations (alongside Bulgaria, Greece, Croatia, Latvia, Sweden and Slovakia) [1]. Whereas in France legal entities can be held criminally liable since 1994, Germany traditionally relied on administrative law to sanction uncompliant behaviors.

2 - Despite the current pandemic crisis, Germany's grand coalition government brought the question back at the center of public debate and introduced, on June 16, 2020, a draft bill reshuffling the current *status quo* on corporate criminal liability in Germany (the *Verbandssanktionengesetz* or « **VerSanG** »).

3 - The draft bill was submitted to the Bundesrat for review in August 2020, which then issued its amendments in September 2020. The draft bill is now pending approval by the Bundestag. Once final, the bill shall enter into force within two years of its publication. [2]

4 - This article aims at presenting the main provisions of this new law (**1**), comparing the proposed system to be implemented with what other European countries, such as France, have already implemented (**2**). Using a comparative approach, this article further describes the main criticisms voiced against the draft bill and raises potential legal questions German legal professionals may face in the future (**3**).

1. Corporate criminal liability in Germany

A. - Administrative liability currently in place

5 - Under German law, there is no criminal liability for legal entities or corporations as the German Criminal Code (*Strafgesetzbuch* or « **StGB** ») applies to individuals only. However, corporations incur administrative liability when infringing the Act on Regulatory Offenses (*Ordnungswidrigkeitengesetz* or « **OWiG** »). [3]

6 - While company directors and officers may face criminal charges in parallel, corporations can only be punished with administrative fines. Under the current OWiG, legal entities incur up to €10 million for intentional regulatory offenses and up to €5 million for regulatory negligence. [4] In addition to regulatory fines *per se*, the OWiG provides that corporations may also be punished with significant amounts to be disbursed in profit disgorgement.

7 - Under German law, regulatory offenses are not mandatorily prosecuted as per the « principle of opportunity » (*Opportunitätsprinzip*). The switch from the « principle of opportunity » applicable to regulatory offenses to the « principle of legality » (*Legalitätsprinzip*), which makes it mandatory for the prosecutor to prosecute criminal offenses, is put forward as one of the positive innovations to be introduced by the draft bill. Indeed, scholars argue that this switch will enhance the law's deterrence effect by preventing the lack of prosecution of economic crimes on grounds of low opportunity. Yet, although prosecutors are in theory bound to investigate criminal offenses under the « principle of legality », the law provides for several criteria according to which a case may be closed before appropriate sanction is reached. One may therefore wonder whether the switch will have the appropriate deterrence effect in practice, as a number of proceedings could be ended this way before any sanction is reached.

B. - Proposed legal definition of corporate criminal liability in Germany

8 - As currently drafted, companies would face criminal liability when committing so-called « company offenses » (*Verbandstat*). A company offense is defined as a criminal offense by which company obligations or duties have been violated or by which the company has been or should be enriched. [5] Company offenses would not be limited to corruption, money laundering or tax offenses but would also cover any criminal offense that would result in a purported enrichment for the company, hence potentially covering human rights violations, economic or competition crime.

9 - Corporate criminal liability would be incurred under two circumstances [6] :

- Where the legal entity's executive committed a corporate offense (e.g., directors, officers, CEO, authorized signatories holding a managerial position (*Prokuristen*)) ;

- Where a corporate offense has been committed by an employee or agent and the legal entity did not take reasonable precautions to prevent employees or agents from engaging in criminal wrongdoing within the scope of their employment or agency (e.g., appropriate compliance organization, guidance or supervision of such person). This may include persons who are not company employees and may also cover relations with third party business partners.

C. - A contemplated broad scope of application

10 - The VerSanG provides for a rather broad outreach of the law.

1. Wissenschaftlicher Dienst des deutschen Bundestages, Eine Übersicht zum Unternehmensstrafrecht in den Mitgliedsstaaten der Europäischen Union, Az. WD 7 – 3000 – 162/13, August 1, 2013.
2. Article 15 of the draft bill. However, in its statement of September 18, 2020, the Bundesrat suggested to increase the transition period from two to three years so as to give more time to companies to adapt their compliance system in accordance with the new law, especially given the ongoing sanitary and economic crisis.
3. Dr. Andreas Lohner and Dr. Nicolai Behr, *Corporate liability in Germany*, Global compliance News, March 9, 2016.
4. A. R. Jevtic, *Corporate criminal liability in Germany : an overdue reform ?*, AJSP, November 1, 2020.
5. § 2 section II clause 1 no. 3 of the VerSanG-E.
6. § 3 section I of the *VerSanG-E*.

11 - First, companies of all size should, in theory, be exposed to potential criminal liability when committing company offenses. [7]

12 - Second, the draft bill would apply to all legal entities based or doing business in Germany, regardless of their seat of incorporation. As such, foreign companies with operations in Germany could be subject to criminal liability in Germany.

13 - Third, the draft bill expressly provides that companies can be sanctioned for offenses committed abroad whereby German criminal law would normally not apply (*Auslandstaten*). [8]

14 - The broad scope of the current draft has been extensively criticized by the Bundesrat, which suggested imposing some limitation to exclude small and medium size companies. [9] Furthermore, the Federal Council advised to limit its extraterritorial application to avoid an over-excessive handling of foreign cases by German courts.

D. - Incurred sanctions and mitigating factors provided by the draft bill

15 - As currently drafted, the bill differentiates the maximum sanctions incurred depending on the size of the defendant company.

16 - Similarly to what is currently provided by the OWiG, the draft bill distinguishes between voluntary offenses, for which companies would face up to EUR 10 million in criminal fine, and involuntary offenses (e.g., negligence), for which companies would face up to EUR 5 million in criminal fine. [10] However, the draft bill significantly increases large companies' financial exposure for criminal offenses : companies with an annual worldwide turnover exceeding EUR 100 million may face up to 10% of their average annual worldwide turnover in criminal fine. [11]

17 - The bill also includes additional types of penalties not limited to criminal fines, including *inter alia* : judicial warning with suspended fine (close to a deferred prosecution agreement), company criminal record, public disclosure of the court's decision.

18 - When determining sanctions, courts shall take into account, *inter alia*, the significance of the offense, the severity and the extent to which supervisory duties were violated, as well as the overall economic circumstances and financial situation of the company. [12]

19 - The draft bill also provides for considerable sanction rebates (up to 50% of the contemplated sanction) or defer sanctions when the company undertakes to conduct a robust internal investigation and significantly contributes to the clarification of the offense. [13] Five cumulative criteria are provided in the draft bill to assess the seriousness of the internal investigation and its impact as a mitigating factor. [14]

20 - However, the draft bill expressly states that there shall be no reduction in sanction for conducting an internal investigation if the company does not disclose its findings before the opening of official proceedings. [15]

2. Corporate criminal liability in France

A. - Brief overview of corporate criminal liability under French law

21 - Article 121-2 of the French Criminal Code provides that « *legal entities other than the* [French] *State are criminally liable for criminal offenses committed on their behalf by their organs or representatives* ».

22 - Though initially limited to specific offenses, corporations may since 2004 be held criminally liable for all criminal offenses except if such liability is expressly excluded by law.

23 - Under French criminal law, corporations can only be held criminally liable for offenses committed by their organs or representatives on their behalves. French case law holds a rather broad approach to the notion of « organ or representative », covering situations where employees or third parties entrusted with delegations of power have been qualified as such.

24 - Traditionally, the French Supreme Court held that if a company were to disappear, e.g., after a merger, the absorbing company would not face criminal lability for the offenses committed by the absorbed company. The French Supreme Court recently reversed decades long of established case law, holding that from now on, absorbing companies may be held criminally liable for offenses committed by the absorbed company prior to the merger. [16] Interestingly, the German VerSanG provides for a similar solution whereby legal successors may be held, under specific conditions, criminally liable for offenses committed by the dissolved company. [17]

B. - Criminal sanctions incurred by legal entities

25 - Whenever facing criminal liability in France, legal entities incur up to five time the amount of the criminal fine provided for against individuals by the French Criminal Code. [18]

26 - Certain offenses are punished by criminal fines indexed on the proceeds derived from the criminal offense. In particular, corruption can be punished by up to twice the proceeds derived from the offense. [19] Legal entities therefore face up to ten times the proceeds of the offense in criminal fine when convicted on counts of corruption.

27 - Recently, the so-called Sapin II Law [20] introduced the possibility for legal entities to close criminal proceedings with the conclusion of a deferred prosecution agreement commonly referred to as *CJIP* (*convention judiciaire d'intérêt public*). A CJIP can only be entered into by legal entities before formal proceedings are launched against them on counts of corruption, influence peddling, tax fraud and money laundering of tax fraud only. [21] In such a case, the public interest fine to be paid by the legal entity may reach up to 30% of the company's average annual turnover.

28 - In addition to criminal fines, legal entities face a wide range of ancillary penalties [22], including *inter alia* : compliance monitorship [23], debarment from public tenders, confiscation [24], dissolution of the company, publication of the judicial decision, etc.

3. A critical approach through comparative law

A. - An overall innovative VerSanG

29 - The VerSanG has been heavily criticized by various stakeholders in Germany, be it politicians, industry representatives or the legal profession.

30 - Stakeholders have notably criticized the draft bill's overall lack of innovativeness, in particular since it merely assigns crimi-

7. The Bundesrat however suggested to limit the material scope of the law to exclude.
8. § 2 section 2 VerSanG-E.
9. I.e., companies with less than 250 employees and which annual turnover is lower than EUR 50 million or which balance sheet is lower than EUR 43 million.
10. § 9 section I VerSanG-E.
11. Cf. Section 9, VerSangG-E.
12. § 18 VerSangG-E.
13. § 18 VerSanG-E.
14. § 17 section I no. 1 – no. 5 VerSanG-E.
15. §17 (3) VerSanG-E.
16. Cass. crim., November 25, 2020, No. 18-86.955.
17. Cf. Sections 6 and 7 of the VerSanG.
18. Art. 121-38, French Criminal Code.
19. Art. 433-1, French Criminal Code.
20. Law No. 2016-1691 of December 9, 2016 relating to transparency, the fight against corruption and the modernisation of economic life.
21. Art. 41-1-2, French Code of Criminal Procedure.
22. Art. 131-39, French Code of Criminal Procedure.
23. Art. 131-39-2, French Code of Criminal Procedure.
24. Art. 131-39 and 131-21, French Code of Criminal Procedure.

nal offenses initially created for individuals to legal entities. Criticisms have further pointed at the fact that significant fines are already incurred by corporations under the current OWiG for regulatory offenses, hence the VerSanG would not radically change corporations' overall exposure to judicial sanctioning. Looking at foreign examples, one could argue that although these criticisms may be grounded, the draft bill's deterrence effect will in any event depend on Germany's political determination to set a strong criminal policy against corporate crime. A symbolic example is the US Foreign Corrupt Practices Act (*FCPA*), which was enacted in 1977 but only enforced after 2010. Similarly, France criminalized corrupt practices as early as 1994 but only increased its enforcement trend with the enactment of the Sapin II Law in 2016.

31 - Furthermore, critics tend to forget that the draft bill does contain innovating mechanisms. Indeed, providing for internal investigations as a potential mitigating factor is an approach that is usually better known in common law countries as opposed to civil law traditions. In addition, introducing a quasi *de facto* liability for failure to implement efficient policies and procedures designed to detect, prevent and deter criminal wrongdoing resembles the solution enacted pursuant to Section 7 of the UK Bribery Act *(UKBA)* under which companies can be held liable for failure to prevent bribery by those associated with them.

B. - The ever-fading principle of attorney-client privilege under German law

32 - From a French perspective, the German concept of attorney-client privilege already appears extremely narrow. In France, all communications and exchanges between an attorney and his/her client are protected by privilege regardless of their format. This protection applies to all communications with outside counsel, whether acting as defense counsel or legal advisor. The French Code of Criminal Procedure includes specific provisions aimed at protecting privilege during dawn raid or seizure, in particular when conducted at a lawyer's office. [25]

33 - To the contrary, attorney-client privilege only applies in connection with criminal defense work in Germany.

34 - In practice, this means that internal investigations conducted by outside counsel would not be protected by privilege given that the draft bill expressly precludes defense counsel from undertaking this role. Similarly, privilege would not apply to communications between outside counsel and persons involved in the investigation (e.g., whistleblower, company directors and officers, staff, etc.).

35 - The shrinking principle of attorney-client privilege, along with the significant stretching of the prosecutor's investigation powers introduced by the VerSanG, pose significant challenges from a defense perspective. Indeed, the draft bill puts corporate defendants in a rather uncomfortable position : they are both required to conduct an internal investigation and disclose its findings before any official proceedings are launched to gain cooperation credits despite that information exchanged in the process is not covered by privilege and could potentially be seized (and used) in case of dawn-raid.

C. - Criminal vs. regulatory proceedings : the *non bis in idem* principle

36 - *Prima facie*, the scope of corporate criminal liability seems close to that of the OWiG regulation currently in place, thus raising the question of how regulatory and criminal prosecution channels will cohabit going forward.

37 - In France, a similar question was raised with the dual prosecution options available to sanction insider trading, either administratively or criminally. Until 2016, both venues were concurrently available thus resulting in the possibility for defendants to be prosecuted and sanctioned twice for the same underlying facts, both criminally (*délit d'initié*) and administratively (*manquement d'initié*). With the groundbreaking decision issued on March 18, 2015 on the EADS litigation [26], the French Constitutional Council ruled that this dual prosecution was contrary to the *non bis in idem* principle according to which no legal action can be open twice for the same cause of action. Since then, while both channels remain open, authorities have to choose between criminal and administrative proceedings. Nowadays, the prosecutor and the regulator can no longer impose both criminal and administrative sanctions for similar facts of insider trading.

38 - Such a case law could give ideas to German lawyers whose clients would be confronted with dual prosecution under the OWiG and the VerSanG. Along the same lines, the draft bill currently provides that prosecution may be adjourned in Germany if a company is already being (or about to be) prosecuted abroad. [27]

***

39 - The new VerSanG is expected to have a significant impact on corporations' criminal exposure in Germany once implemented. The emphasis on an efficient and effective compliance system, as well as the importance of conducting serious and thorough internal investigations, should urge companies to take this opportunity to review (and potentially enhance) their current compliance management system.

40 - In addition, foreign examples could be a source of inspiration for German legal experts when handling cases of corporate criminal liability, in particular on the *non bis in idem* principle.■

25. Cf. in particular Articles 56 and 56-1 *et seq*., French Code of Criminal Procedure.

26. Cf. Decision No. 2014-453/454 QPC and 2015-462 QPC of March 18, 2015.

27. § 38 section I VerSanG-E.