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Preliminary and criminal proceedings against legal persons and associations of persons – on the legal situation in Germany**

ABSTRACT: This article is based on a lecture given on 29 November 2021 at the II Conference of the Universities of Heidelberg and Miskolc within the framework of the Humboldt Institute Partner Project "Systematising criminal responsibility of and in corporations". It presents the procedural law applicable in Germany and the intended changes within the framework of the so-called Association Sanctions Act, dealing with questions of conducting internal investigations in the company and the associated obligations to submit documents and to disclose other circumstances relevant to criminal proceedings. The question of whether the prohibition of self-incrimination is to be recognised for legal persons and to what extent internal investigations can constitute grounds for a mitigation of sanctions is also examined.

KEYWORDS: Association Sanctions Act, sanctioning of corporate bodies and associations, nemo tenetur, prohibition of self-incrimination.

1. Introduction

German criminal law and criminal procedure law is in a phase of upheaval regarding the sanctioning of corporate bodies and associations. Beginning in 2013, various proposals for the codification of a corporate sanctions law were presented. This development reached a preliminary climax with the draft of a corporate sanctions law by the Federal Government in 2020 (VerSanG-E)[1].

However, the draft law was not implemented in the 19th legislative period. The extent to which the draft law will be continued and implemented

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[1] VerSanG-E = Entwurf eines Gesetzes zur Sanktionierung von verbandsbezogenen Straftaten (Draft of a Law on the sanctioning of association-related offences).

by the new federal government cannot be assessed at present. Under current law, sanctions against associations for criminal offences and misdemeanours committed by association leaders or by which the association was intended to be enriched are only possible through the so-called association fine on the basis of section 30 OWiG.[2]

2. Possibilities of sanctions against legal persons and associations of persons under current law

If leaders of associations commit criminal offences or administrative offences in this function, or if the association should be enriched by such acts, the prosecuting authorities can apply for a so-called association fine against the association under section 30 OWiG.

2.1. Main features of the procedure

It is at the discretion of the criminal prosecution authorities whether to impose a fine on associations for offences committed for their benefit or by their leaders. In this respect, the principle of opportunity applies. If an association fine is to be imposed, it is usually to be negotiated together with the punishment of the individual defendants. However, according to section 30 (4) OWiG, there is also the possibility of independent proceedings. This is usually considered if the individual defendants are not prosecuted according to the principles of expediency or if a defendant cannot be individualised as a responsible person of the association, but it is established that an offence was committed by a management person ("anonymous" association fine).

The main proceedings in court are governed by section 444 of the Code of Criminal Procedure (StPO). According to this, the association has the status of a secondary party. However, it essentially has the rights of an accused or defendant. In particular, the association has the right to be heard[3]; the provisions on the hearing of accused persons apply accordingly to the hearing of the association[4]. In the court hearing, the association has

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[2] OWiG = Deutsches Gesetz über Ordnungswidrigkeiten (German Administrative Offences Act).

[3] Section 444 (2) in conjunction with section 426 (1) sentence 1 of the Code of Criminal Procedure.

[4] Section 444 (2) in conjunction with section 426 (2) of the Code of Criminal Procedure.

the powers of an accused.[5] The rights are exercised by the legal representatives of the association. If they are individually accused, a defence counsel shall be appointed for the association.

In addition, the provisions of the Code of Criminal Procedure apply mutatis mutandis to preliminary proceedings against associations under section 46 OWiG. Accordingly, the association is entitled to the right to remain silent under section 136 of the Code of Criminal Procedure. The representatives of the association cannot be forced to give information that could lead to the imposition of a fine on the association. In order to clarify the facts of the case, searches may be ordered under sections 102 and 105 of the Code of Criminal Procedure. Sections 94 et seq. of the Code of Criminal Procedure apply accordingly regarding seizure. Accordingly, under section 97 of the Code of Criminal Procedure, documents in the custody of a mandated professional secrecy holder may not be seized if these documents - to put it briefly - relate to the association's communication with the professional secrecy holder.[6]

2.2. Safeguarding the "nemo-tenetur" principle

Beyond the aforementioned procedural rights, there is no further legal protection of the principle of nemo-tenetur in proceedings against associations. According to the case law of the Federal Constitutional Court, the principle of "nemo tenetur" is by its very nature not applicable to legal persons.[7] This can be particularly significant if the service providers of a company are not the legal representatives of an association and do not themselves have the status of defendants. In terms of procedural law, they have the status of witnesses and are therefore in principle under an unlimited obligation to provide information. This applies even if they are able to provide more information than the legal representatives, who have the right to remain silent, due to their position in the company.

The question arises, however, as to how far special legal rules, which as an outflow of the nemo-tenetur principle provide for a prohibition of use of such information which has a self-incriminating effect but which the person concerned is obliged to provide for other reasons (e.g. Section 97 (1)

[5] Section 444 (2) sentence 1 in conjunction with section 427 (1) of the Code of Criminal Procedure.

[6] Compare this in particular in connection with internal investigations: BVerfG, Order of 27.6.2018 – 2 BvR 1405/17 – Jones Day.

[7] BVerfG, Oder of 26.2.1997 – 1 BvR 2172/96.

sentence 3 Insolvency Code or Section 43 (4) Federal Data Protection Act), can be applied in favour of associations. In my opinion, these simple statutory provisions can already be applied to companies without any problems according to their wording, but undoubtedly in view of the purpose they pursue, even if the application of the principle of nemo-tenetur is not required by the constitution.

2.3. Leniency rules and Sanction Reductions

With the exception of the bonus rules in §§ 81h et seq. of the Act against Restraints of Competition, German fine law does not know any leniency rules. However, cooperation and clarification assistance can be taken into account when calculating the fine according to section 17 (3) OWiG.

The cooperation of the association will reduce the fine, especially in complicated cases, if the cooperation makes it possible to clarify the offence. However, there is no obligation to cooperate. Failure to do so must not lead to an increase in the fine.[8]

3. On the planned changes through the Association Sanctions Act

In the draft Association Sanctions Act of the Federal Government in 2020 (VerSanG-E), in addition to the existing provisions, there are, in particular, provisions on the conduct of internal investigations as well as the possibility of mitigating sanctions if the associations make the results of the internal investigations available to the state investigating authorities.

3.1. Procedural law

The most significant difference envisaged by the VerSanG-E in connection with the sanctioning of associations is that if leaders of associations commit criminal offences and administrative offences in this function or if the association is to be enriched by such acts, the prosecution authorities are now to be obliged to take action against the association. In doing so, however, the legislator creates a confusing juxtaposition of exceptions and the application of different procedural rules, which complicate the application of the law.[9]

[8] Mitsch, 2018, § 17 point 65.

[9] Critical also the Wissenschaftliche Vereinigung für Unternehmens. Und Gesellschaftsrecht in "Die Aktiengesellschaft - Zeitschrift für Aktienrecht" Vol. 2020, pp. 618-619.

Apart from that, the VerSanG-E does not significantly change the procedural law compared to the previous legal situation. The relevant provisions are §§ 27, 33 VerSanG-E. Section 27 of VerSanG-E provides for the corresponding application of the provisions of the Code of Criminal Procedure on the accused in favour of the association against which proceedings are being conducted for so-called association offences. § Section 33 of the VerSanG-E provides that the association is to be granted a legal hearing in the proceedings through the questioning of the legal representative, who, however, also has the right to remain silent.

In the course of the VerSanG-E, however, section 97 of the Code of Criminal Procedure is to be amended. According to this, there is to be no prohibition of seizure of records and objects in the custody of professional secrecy holders, which a businessman is legally obliged to keep. Thus, the professional secrecy holder cannot serve as a safe harbour for these records. A hitherto controversial question is thus clearly regulated by law.

3.2. Mitigation of sanctions

The VerSanG-E also does not provide for a leniency programme. However, § 15 (3) no. 7 alt. 1 VerSanG-E explicitly mentions "the association's efforts to uncover the association's offence" for the first time as a general assessment rule in favour of the association. In addition, §§ 17, 18 VerSanG-E provide for special mitigations if the association has conducted internal investigations and left them to the prosecution authorities. The mitigations provide for the omission of the minimum fine and the reduction of the maximum fine by half. In addition, the – in principle obligatory – publication of the association's conviction is excluded. However, the VerSanG-E does not compel the association to carry out internal investigations or even to comply with the provisions of the law.

3.3. Regulations for internal investigations

In connection with the possibility of mitigating sanctions when conducting internal investigations, section 17 VerSanG-E establishes various standards that must be met in order to merit mitigation. These include, in particular, the fair-trial principle, the scope of employers' rights to information and requirements for documentation obligations. In this respect, the legislator hopes that the judicial authorities will be supported by the companies concerned.

Insofar as the legislator regulates the manner of internal investigations, there is undoubtedly a practical necessity in this respect. However, this is initially a matter of company law or labour law. In this respect, the Association Sanctions Act does not seem to me to be a suitable place for regulation.

Moreover, it seems questionable whether the expected support of the judicial authorities can be achieved. In this respect, it must be seen that the official duty of the investigative bodies to investigate remains unaffected. On the other hand, there is definitely the danger that the association - even if subconsciously - shapes the investigations in a tendentious manner. As a result, the results of the investigations provided by the association must be evaluated with particular care by the prosecuting authorities. Noticeable relief is not to be expected in this respect.

4. Conclusion

In my view, the current legal situation in Germany already provides a sufficient possibility to effectively punish criminal offences and administrative offences committed by leaders of associations in this function. Possibly, certain procedural circumstances could be regulated more clearly, and the sanction framework could be tightened. In particular, the assessment of sanctions based on the earnings situation of the association could be a preferable approach. However, in my view, the changes intended by the VerSanG-E do not lead to the desired results.

Bibliography

[1] Mitsch, W. (ed.) (2018) *Karlsruher Kommentar zum Gesetz über Ordnungswidrigkeiten.* München: C. H. Beck.