REVISTA DE DIREITO COMERCIAL

The Company as Perpetrator

Compliance and M&A under the Planned Corporate Criminal Sanctions Code

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1. Introduction

Offences committed by individual persons can be attributed to the business enterprise. Think of the offer to pay a certain sum to a foreign public official in exchange for the initiation of a weapons purchase by the government of that country[3]. This action is punishable according to Sections 334 Abs. 1, 335 Abs. Nr. 2 a) StGB

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[3] Cf. the facts on which the judgment of the Federal Court of Justice (BGH), 9 May 2017, Ref. 1 StR 265/16, is based.

(German Criminal Code)[4]. Under the existing law, a fine may be imposed on the business enterprise since the offence was committed on its behalf (Section 30 OWiG (Administrative Offences Act), principle of discretion, *Opportunitätsprinzip*). The fine amounts to a maximum of EUR 10 million. With the draft law on the sanctioning of business-related offences (Draft Business Crime Law - DBCL)[5], the Federal Government now plans to introduce criminal law for business enterprises for the first time in Germany. Crimes must be prosecuted. The sanctions are much more far-reaching and can amount to up to 10% of the worldwide group turnover, in extreme cases the company can even be dissolved. Corporate compliance is becoming even more important, as preventive measures and measures investigating the suspected or actual individual case may have a mitigating effect on sanctions. The sanction can also be postponed during a probationary period or even be dropped altogether, subject to appropriate conditions and instructions to the business enterprise concerned. In our case of corruption, an internal control system or, for example, internal investigations accompanying or preceding examinations made by the public prosecutor in individual cases, can significantly influence the level of sanctions imposed on the business enterprise.

[4] If the requirements under Section 2 (2) DBCL are fulfilled, an offence committed by an association is also deemed to have been committed if the offence was committed abroad.

[5] No yet published, dated as of August 15, 2019.

1.1. Typical situations in M&A transactions regarding corporate criminal liability

In the context of M&A transactions, the following cases in particular are relevant in the context of corporate criminal liability: On the one hand, sanction may have been imposed on the target company of an acquisition even before the execution of the company purchase agreement. Public prosecutor investigations against the target company may also have been initiated prior to the execution of the contract. Then the buyer has a strong interest in participating in how the outcome of the public investigation can be positively influenced, for example through cooperation with the investigating authorities. For the seller, the results are of less interest unless they affect his own reputation in the market. The same interests basically also exist in the third typical situation: before the execution of the contract, the target company has conducted internal investigations regarding a potential criminal act. None of this preliminary work may have been disclosed during the due diligence, because in corruption offences only little if no documentation exists. In practice, whether this circumstance is discovered during the due diligence depends crucially on the way the interviews with the management of the target company are being conducted. Finally, internal or external investigations may have been initiated only after the acquisition had been closed[6]. The seller or the target company may already have suspected this beforehand. However, such cases can hardly be uncovered in due diligence.

[6] Detailed information on the closing of a company acquisition Becker/Voß, in: *Knott*, Unternehmenskauf, 6th ed. 2019, margin. no. 1421 ff.

1.2. Key issues with regard to M&A transactions

The violations of the law discovered within the scope of the M&A due diligence and the related internal investigations prior to the opening of any official inquiry by the state prosecutor are generally excluded from the prohibition of seizure according to the provisions of the DBCL[7]. This means for the legal consulting practice that the lawyer's privilege does not apply[8] in German criminal proceedings before the opening of an official investigation against the business enterprise. Therefore, the relevant documents and records can be confiscated from the lawyer by the investigating authorities. The issue of seizure will therefore be discussed in more detail below.[9]

A further focus of our analysis will be on the liability of the acquirer for the sanctions as legal successor or by way of subsidiary shortfall liability ("*Ausfallhaftung*")[10]. In this context, group or successor liability and the planned closing of a liability loophole, known as "*Wurstlücke*" (sausage gap) in (antitrust) practice, will be presented.[11]

Finally, the planned far-reaching cooperation obligations of the companies in the clarification of the facts in the case of sanctions against businesses and the effects on the criminal liability of businesses and individuals resulting from fulfilling these duties to

[7] In the regulations for the change of Section 97 STPO (Code on Criminal Procedure).

[8] See Momsen/Grützner, CCZ 2017, 242, 248, below (item 4.3) on relevant US laws granting more comprehensive protection against seizure.

[9] See the explanations under item 4.3.

[10] See also Sections 6 and 7 DBCL.

[11] See the explanations under 7.

cooperate will be further analyzed.[12]

In order to be able to take the envisaged corporate criminal law into account when advising on M&A transactions, one must be familiar with the procedures and sanctions provided for in the DBCL. The next three chapters serve this purpose.

2. Fundamentals of DBCL relevant for M&A transactions

Until now, German criminal law has been unfamiliar with the criminal liability of companies. According to existing law, criminally relevant acts committed by companies can only be punished as administrative offences.[13] These sanctions are perceived as insufficient in view of the stronger responsibility for criminal behaviour at company level as well as in international comparison.[14] In addition, current law does not provide clear guidance as to when a fine should be imposed on an undertaking and how it should be calculated. For example, it is not at all clear that the authority must intervene if there is a relevant act attributable to the undertaking. This is because under the law of administrative offences authorities are not obliged to intervene (principle of discretion). This leads to a rather inconsistent practice of imposing fines on companies which are imposed not often enough.[15] However, sufficient consideration should also be given to the extent to which the company, through

[12] Cf. Decker, in *Knott*: Unternehmenskauf, 6th edition 2019 margin no. 2250.
[13] For the current legal situation, see the overview in Beisheim/Jung, CCZ 2018, 63.
[14] Beisheim/Jung, CCZ 2018, 63, 64; Weigend/Hoven, ZRP 2018, 30.
[15] Weigend/Hoven, ZRP 2018, 30.

preventive internal procedures in general (criminal compliance) or internal investigations in the individual context, has contributed to prevent actions to be sanctioned or to minimize their impact.[16] In addition, the absolute limit of EUR 10 million for corporate fines under current law is considered inappropriate.

In most legal systems in Europe, it is not only the individual acting who is responsible for the offences, but also the companies in the interest of which the business crime had been committed.[17] A prominent example outside Europe is the US, which in the wake of earlier case law had implemented the Foreign Corrupt Practices Act of 1977.[18] Against the background of this comparative legal analysis and in view of the above-mentioned shortcomings of the options for sanctions against companies available under German law to date, various drafts of a law on sanctions for companies had already previously been discussed. The most prominent example to date was the Cologne draft of a law on business crimes published at the end of 2017.[19] As a result, the Federal Government had set itself the goal of introducing a corporate sanctions law.[20] As a result of this process, this summer the Federal Ministry of Justice and Consumer Protection presented a draft bill of a law on business crimes, the

[16] Weigend/Hoven, ZRP 2018, 30.

[17] https://www.bundestag.de/resource/blob/539400/9f7fe461015429dc5f71c4c3d2816704/wd-7-070-17-pdf-data.pdf (last visit on 23.09.2019).

[18] 15 USC Sections 78-dd-1 *et seq*.

[19] Available at: http://www.jpstrafrecht.jura.uni-koeln.de/sites/iss_juniorprof/Projekte/Koelner_Entwurf_eines_Verbandssanktionengesetzes__2017.pdf (last visit on 20.09.2019); the so-called "Frankfurter Thesen" are also worth mentioning, see Jahn/Schmitt-Leonardy/Schoop, wistra 1/2018, 27.

[20] Beukelmann, NJW Spec ial 2018, 184.

DBCL.[21]

3. Introduction of 'sanctions' instead of 'punishment' and 'associations' instead of 'business enterprises'

Interesting is already the terminology of the DBCL, which is based on the Cologne draft and uses the term "sanctions" and not "penalties" and speaks of "associations" (*Verbände*) and not only of business enterprises (*Unternehmen*).[22]

In addition, the draft bill uses the term "economic unit" (*wirtschaftliche Einheit*), which derives from antitrust law. The concept of "a single economic entity" ultimately extends liability. It becomes relevant for the determination of turnover required for the assessment of sanctions and for the selection of addressees for shortfall liability (*Ausfallhaftung*).[23]

Furthermore, the draft bill provides for a legal obligation to prosecute business crimes. The sanctions imposed on the association range from fines to publication of the conviction of the business enterprise (so-called 'naming and shaming'[24]) in cases in which a large number of persons have suffered harm (Section 15 DBCL), to the dissolution of the business enterprise as a last resort in particularly serious cases (Section 14 DBCL). Section 9 (2) DBCL

[21] There are already requests to significantly increase the fines imposed on companies, becklink 2013932, Redaktion beck-aktuell, Verlag C.H.BECK, August 22, 2019.

[22] Background Weigend/Hoven, ZRP 2018, 30, 31.

[23] See section 7 below.

[24] See in detail Armbrüster/Böffel, ZIP 2019, 1885.

provides for an upper fine limit of 10% of the average annual turnover in the case of intent and 5% in the case of negligence for businesses with an average annual turnover of more than EUR 100 million (based on the last three financial years preceding the conviction).

Finally, pursuant to Section 55 (1) DBCL, a business related sanctions register is to be established. Pursuant to Section 55 (2) DBCL, this register shall contain legally binding court decisions on the imposition of corporate sanctions. Pursuant to section 56 (1) no. 5b DBCL, this also includes warnings reserving the future imposition of fines (see below for more details).

4. Impact of incentives for compliance and internal investigations on M&A transactions

The DBCL is intended to create incentives for companies in several respects to take preventive compliance measures and to conduct internal investigations in cases of suspicion. These incentives also have an impact on M&A transactions. In order to use them, the seller and the buyer must cooperate, because the measures concerning the target company are often initiated under the aegis of the seller and still require the seller's cooperation after the transaction has been carried out. First, compliance measures are relevant in the context of the assessment of corporate criminal responsibility (4.1.). Furthermore, measures to prevent criminal offences (compliance measures) and measures to uncover criminal offences (internal investigations) are important with regard to the assessment of sanctions (4.2.). However, the protection against seizure provided for by the DBCL in respect of the attorney's work

products in internal investigations is limited and in our view inadequate (4.3.).

4.1. Importance of a Compliance Management System

According to Section 3 para. 1 DBCL, corporate criminal responsibility and thus the imposition of a sanction upon the company presupposes the existence of an offence committed by an individual, which has either been committed by a member of the leadership or by other employees in the conduct of the company's business, if members of the company's leadership could have prevented the offence or could have made it considerably more difficult by appropriate precautionary measures, such as in particular activities relating to the organization, selection (e.g. of personnel), guidance (e.g. rules of procedures) and supervision (of personnel and procedures). According to German law, the criminal offence of an individual - and not only that of a management body - is therefore always a prerequisite for corporate criminal responsibility. In case of a previous offence committed by an individual positioned below management level, corporate criminal responsibility can be avoided if the individual offence was committed despite the implementation of preventive internal compliance measures.

Against this background, the relevance of (preventive) criminal compliance measures becomes relevant already at the stage of determining whether a corporate criminal offence has been committed. Effectively implementing an appropriate Compliance Management System is thus recognized as a reason to prevent the occurrence of a corporate crime. In principle, compliance systems

of such nature involve internal measures to ensure that the company and all persons or entities involved in its business (stakeholders*)* act lawfully and are informed of the relevant legal regulations. This compliance system must be tailored to the specific risks relevant to the operations of the company in question[25]. If the Compliance Management System meets these requirements and has been applied, criminal sanctions can be avoided, Section 3 Para. 1 No. 2 DBCL, if the relevant individual offence was committed below management level. In the third scenario for the relevance of corporate criminal responsibility in the context of M&A transactions described above[26] (internal investigations into a corporate criminal offence are already underway prior to the conclusion of the business acquisition contract), the due diligence must use these criteria to examine whether the target company has a compliance management system in place which appropriately protects against the risks.[27] If this is not the case or if there is only a doubt, it is recommended that in the acquisition agreement the buyer requests from the seller an indemnity [28] against all financial consequences of the imposition of a corporate criminal monetary sanction. Since the responsibility for the relevant infringement is attributable to the period during which the seller exercised control over the target company, the purposes of the criminal sanction are not affected by the contractually agreed indemnity. Therefore, the agreement of an indemnity appears to be admissible.

[25] Beck's M&A Handbook/Jungkind, Section 78 Rn 6 ff; Schulz, BB 2019, 579, 581.
[26] See section 1.1 above.
[27] See also Becker/Voß, in: *Knott*, Unternehmenkauf, 6th edition 2019, paragraph 57.
[28] See Matzen, in: *Knott*, Unternehmenskauf, 6th ed. 2019, margin no. 94 f.

As an alternative to an indemnity, a purchase price reduction may also be considered, in particular if, at the time of the execution of the acquisition agreement, investigations by the public prosecutor are already being carried out (second hypothesis in the M&A context, section 1.1 above) or if internal investigations which have been established during the due diligence suggest that the existence of corporate criminal responsibility is possible (third case constellation, section 1.1 above).

It is difficult to identify risks with regard to corporate criminal acts through due diligence.[29] Therefore, it is advisable for the buyer to demand a warranty[30] from the seller in the business acquisition agreement that all preventive criminal compliance measures have been implemented which could exclude or reduce corporate criminal sanctions. The contracting parties should also address how to determine in individual cases whether a violation of this Criminal Compliance Warranty has occurred.[31] In this context, the question arises whether the positive outcome of an internal investigation is sufficient in the absence of an investigation. If a criminal offence committed by an association is established as the result of a preliminary investigation, the target company of the intended company acquisition will attempt to ensure that the criminal prosecution authority according to Section 37 DBCL in conjunction with Section 153a German Law on Criminal Procedure (StPO)

[29] See section 1.1 above.

[30] For due diligence s. Becker/Voss, in: *Knott*, Unternehmenskauf, 6th ed. 2019, margin no. 42 et seq.; on the legal duties of care Knott, ZIP 2019, 1310 et seq.

[31] Schniepp/Holfeld, DB 2016, 1738, 1740.

refrains from criminal prosecution subject to conditions and instructions[32]. If the Criminal Compliance System is appropriate and a criminal offence subsequently uncovered was not the result of an individual crime committed at management level, then according to the above remarks regarding Section 3 para. 1 no. 2 DBCL there is no corporate responsibility at all. As far as the legal consequences of such a criminal compliance warranty in the acquisition agreement are concerned, it is necessary to address how the damages to be compensated should be calculated. This question arises in particular if, for example, an essential business relationship which was included in the purchase price calculation breaks off as a result of the discovery of a suspicion of corruption rendering the price which was paid too high. The buyer's loss should then be determined according to the same company valuation method as the one used for the purchase price calculation.[33] The limitation period for such a warranty should be adapted to the limitation period for prosecution and enforcement[34]. In addition, the buyer should be granted a contractual right of withdrawal in the event that after signing, but before closing, he[35] discovers the risk of a correspondingly substantial corporate criminal sanction.

The US guidelines of the Department of Justice (DoJ) define the criteria for an effective compliance program, the existence of which

[32] See below point 5.

[33] Schniepp/Holfeld, DB 2016, 1738, 1742.

[34] The limitation period for the prosecution of the association corresponds to the limitation period for the association offence; in principle, the limitation period for enforcement is ten years (Sections 22, 23 DBCL).

[35] See Signing and Closing Stamer, in: *Knott*, Unternehmenskauf, 6th ed. 2019, margin no. 252 ff.

leads to a significant mitigation of the sanctions.[36] According to the Sentencing Guidelines, a compliance and ethics program is essentially characterized by two pillars: firstly, a due diligence component to prevent and disclose criminal activities, and secondly, a corporate culture that rewards ethical and law-abiding behaviour in the Company[37]. The Sentencing Guidelines contain the following seven criteria as minimum requirements for the two pillars[38]:

- Establishment of compliance standards and procedures
- Implementation of the program with management support
- Proper management of the program by qualified personnel
- Internal placing of the program
- Monitoring and regular updating of the program
- Compliance with the program by creating incentives and imposing sanctions
- Improvement of the program in case of violation of compliance rules

If there is a concrete suspicion of a corporate criminal offence, the compliance system is automatically put to the test. As part of the due diligence, the contractual guarantees and, if applicable, the provision as to which party bears the costs of the review and update

[36] Hauschka/Moosmayer/Lösler, Corporate Compliance, 3rd ed. 2016, Section 1 marginal 74; Carsten Momsen/Douglas M. Tween, in: Rotsch, Criminal Compliance, 1st ed. 2015, Section 30 marginal 20 et seq.
[37] Carsten Momsen/Douglas M. Tween, in: Rotsch, Criminal Compliance, 1st Edition 2015, Section 30 Rz. 20.
[38] Carsten Momsen/Douglas M. Tween, in: Rotsch, Criminal Compliance, 1st Edition 2015, Section 30 Rz. 21.

of the compliance system - if the purchaser is able to obtain a contractual warranty that the target company is fully compliant - it is then possible to make appropriate arrangements in the acquisition agreement.

4.2. Reduction of sanctions through internal investigations

According to Section 16 (2) nos. 6 and 7 DBCL, "precautions taken prior to or following the corporate criminal offence to prevent and detect criminal offences committed by the company" are to be taken into account when assessing the sanctions.

In the situations two and three described above[39] - external or internal investigations are already underway at the target company - it could be agreed as a closing condition that the seller has caused the target company to take effective clarification measures. For the period after the closing, the seller's obligations to cooperate[40], which are necessary from the buyer's point of view, should be contractually specified for the present circumstances. In this way, the assessment of the corporate criminal sanction can be optimized, i.e., if necessary, a mitigation of the corporate criminal sanction in accordance with Section 18 f. DBCL, a warning with reservation with respect to the company's monetary sanction (Sections 10 to 13 DBCL) or even a waiver of prosecution under conditions and instructions (Section 37 DBCL) may be achieved[41].

[39] See section 1.1 above.
[40] For these see point 7.3 below.
[41] For the last two alternatives see below under point 5.

4.3. Limited protection of legal work products resulting from internal investigations

Although the DBCL provides for a mitigation of corporate criminal sanctions in case an internal investigation is made, provided that a large number of requirements (including a significant contribution to clarification and comprehensive cooperation) are met. According to Section 18 (1) no. 4 DBCL, this also includes the obligation to submit the results of the company's internal investigation, including all essential documents, to the public prosecutor's office. In addition, according to Section 42 DBCL, prosecuting authorities may refrain from prosecuting a business enterprise once it has reported the internal investigations to the authority. In such case the suspension may last until the completion of the internal investigation.

In the event that a target company, as shown in the third hypothesis[42] for M&A transactions, conducts an internal investigation in a suspected case, but then decides to defend itself against the prosecution authorities, the protection against seizure for the legal work products that have been produced within the framework of an internal investigation (e.g. interview minutes, interim and final reports as well as presentations) depends on whether the target enterprise concerned had already been the object of a formal official investigation procedure[43], whether the information in question is part of the confidential attorney-client relationship between the accused enterprise and the law firm, and

[42] See section 1.1 above.

[43] It is not sufficient that another group company is accused, see LG Bonn, resolution of 21. 06. 2012 - 27 Qs 2/12, BeckRS 2012, 18104.

whether the law firm holds the documents in custody for the accused enterprise (Section 97 (2) sentence 1 StPO) - which must be denied, for example[44], in the case of business documents of the accused enterprise.[45] In view of these high hurdles to seizure protection, the new law would not establish an incentive to carry out internal investigations. After all, as in the third of the M&A scenarios mentioned at the beginning, it may be that internal investigations have already been carried out in the run-up to state investigative measures, which first establish the status of the accused. In this case, the legal work products from internal investigations would not be protected from seizure. Even if the status of an accused exists and the information in question is attributable to the relationship of trust between the lawyer and the accused, protection against seizure from lawyers only exists under the narrow conditions described before.[46] In its decision of June 27, 2018, regarding the searches at the international law firm Jones Day in connection with the Volkswagen diesel scandal, the Federal Constitutional Court considered an extension of the protection against seizure beyond what is set forth in Section 97 StPO not to be imperative from the perspective of the German Constitution considering the role of a lawyer in its relationship with the client.[47]

The view expressed here on the scope of the protection against

[44] BGH, resolution of 08.08.2018 - 2 ARs 121/18, 2 AR 69/18, NStZ 2019, 100; accordingly the amendment in Section 97 para. 2 sentence 2 no. 2 StPO pursuant to Art. 4 DBCL.

[45] See the explanatory memorandum to the draft, p. 138.

[46] See the explanatory memorandum to the draft, p. 138.

[47] BVerfG, Resolution of 27.06.2018, Ref. 2 BVR 1287/17 and 2 BVR 1583/17, NJW 2018, 2385, 2388 Rz. 78.

seizure is confirmed on a comparative legal basis if one considers the legal situation in the US: According to the Attorney-Client Privilege and Attorney Work-Product Protection regulations, information and documents exchanged between the company concerned and the attorney in the context of a client relationship in internal investigations are protected from seizure, both from the company's attorney and from the company itself[48]. Therefore, under US laws the seizure protection does not depend on the site where the documents are stored[49], nor on the status of the company as accused in the criminal proceedings. To make the privileged treatment of the documents and results of internal investigations dependent in terms of time, as provided for in the DBCL and in the result also in English law[50], on the justification of an accused position of the association concerned, grants only incomplete protection[51]. This is all the more true as the chronological sequence between internal investigation and state prosecution may depend on chance. Against this background, the demand for protection against seizure in line with the model of the attorney-client privilege in the US[52] is only to be welcomed. Then it would not be relevant for the freedom from seizure of the work products whether they stem from internal investigations or where their storage place (attorney's office or company premises) is

[48] Momsen/Grützner, CCZ 2017, 242, 248.
[49] Momsen/Grützner, CCZ 2017, 242, 248.
[50] Court of Appeal in Director of the Serious Fraud Office v Eurasian Natural Resources Corporation [2018] EWCA Civ.2006 Rz. 86 ff., available at: https://www.bailii.org/ew/cases/EWHC/QB/2017/1017.html (last visit on 01.10.2019).
[51] Nietsch, CCZ 2019, 49, 57.
[52] Momsen/Grützner, CCZ 2017, 242, 248 et seq.

located. Whether the company is an accused would also be irrelevant. Accordingly, Article 18(2) of the Cologne Draft provides that records of internal investigations shall not be subject to seizure.

5. Contractual sharing of risk in the context of an M&A transaction in the event of a warning with the reservation of the right to sanction and exemption from prosecution subject to conditions and instructions

These two measures provided for by the DBCL may only be taken with the involvement of the Criminal Court; they cannot be initiated by the prosecutor's office alone. In M&A transactions, they are important because they require closer cooperation between buyer and seller in the acquisition of a business, when the pronouncement of the warning or of the exemption from sanctions is not yet completed while the acquisition process is still ongoing, but not yet completed either. If the warning or exemption of the sanction has already been determined in the past, the aim is to ensure that the seller has not taken or failed to take any measures prior to the sale which could jeopardise the maintenance of the existing situation in favor of the target company.

Section 10 of the DBCL also provides for the possibility of the court to waive sanctions and instead issue a warning. This is intended to create incentives for criminal compliance measures.[53] The duration of the warning (reservation period) may not exceed five years and may not be less than one year. The court may combine this warning with obligations and instructions pursuant to

[53] Explanatory Memorandum Draft p. 86.

Sections 12 and 13 DBCL. Pursuant to Section 13 (2) DBCL, the court may instruct the business enterprise to take certain precautions to avoid offences committed by the company before and to prove implementation of these precautions by certifying them by an expert body (so-called compliance monitoring). As far as the outcome is concerned, there are basically two conceivable scenarios: Firstly, the affected business company is condemned to the corporate criminal sanction which was reserved before, for example, because the company has grossly or persistently violated conditions or instructions or because it commits another business crime during the reservation period; secondly, the business enterprise which had received the warning may not be condemned to the reserved sanction. In that case after expiration of the reservation time the court determines that the matter concludes with the warning.

The warning with the reservation of the right to impose a fine on the association according to Section 10 DBCL is similar to the so-called deferred prosecution agreements (DPA) as well as the non-prosecution agreements, a frequently used means of the criminal prosecution authorities[54]. According to German law, these instruments may only be used by means of an order issued by the competent court. In the US practice, the use of these instruments by the prosecution offices does not even lead to court proceedings and the associated damage to the company's reputation, which is advantageous for the company. In return, a DPA typically contains an acknowledgement (so-called self-reporting in the context of a statement of facts) of the characteristics of the offence committed

[54] Reyhn, CCZ 2011, 48, 51.

by the business enterprise.[55] This will make it easier to convict the business enterprise for breach of the DPA in subsequent court proceedings. In the case of a non-prosecution agreement, the settlement between the prosecuting authority and the business enterprise includes an understanding that no prosecution will take place; in return, the company concerned usually undertakes to pay the profits drawn from the criminal activity (so-called disgorgement).[56] DPAs were also introduced in English law in 2014 as a tool for law enforcement authorities.[57] Finally, since 2016 French law has also known the so-called "Convention Judiciaire d'Intérêt Public" (CJIP) in Art. 41-1-2 Code de Procédure Pénale, which represents a kind of DPA corresponding to the US model.[58] However, the CJIP are published on the website of the French Anti-Corruption Agency and thus reach a higher degree of publicity. The warnings according to Section 10 will be entered into the corporate criminal sanctions register to be established according to the DBCL (Section 56 (1) No. 5b).

Section 37 DBCL follows the models of the DPAs or CJIPs. Accordingly, the German criminal prosecution authorities may, with the consent of the court and the affected company, provisionally refrain from bringing a public prosecution and at the same time issue conditions and instructions to the Association, whereby the period for fulfilling the conditions shall be a maximum of one year

[55] Reyhn, CCZ 2011, 48, 52.

[56] https://www.bclplaw.com/en-GB/thought-leadership/what-enforcement-tools-are-in-the-armoury-of-prosecutors-in-the.html (last visit on 26.09.2019).

[57] Thomas Rotsch/Markus Wagner, in: Rotsch, Criminal Compliance, 1st Edition 2015, Section 32 Rz. 78; Weiß, CCZ 2014, 81.

[58] Schumacher/Saby, CCZ 2017, 68, 69.

and, in the case of instructions, a maximum of two years. Unlike the US laws, self-reporting is not a prerequisite in order to avoid prosecution. In this respect, the DBCL takes a business-friendly approach.

The possible duration of the reservation period of up to five years as well as the conceivable initial scenarios illustrate the relevance of the regulations on warnings with corporate monetary sanctions coupled with a reservation in M&A transactions. First, the parties to an M&A transaction should cooperate as far as possible to ensure that the target company is not condemned to the reserved corporate criminal monetary sanction. In the event that the seller should violate this cooperation obligation which should be enshrined in the company purchase agreement, the risk of a conviction to the reserved corporate monetary sanction shall be allocated to him as far as possible. In this case, the buyer should require the seller to grant a contractual indemnity against the financial consequences (see above[59]). If, despite the cooperation of the seller, a conviction is handed down, e.g. because the target company commits another sanctionable offence before the transaction is completed or another sanctionable offence committed in the past is uncovered, the question arises as to who has to bear this risk. The case of the uncovered offence relates to the period during which the target company was managed under the control of the seller. This offence does not violate the seller's duty to cooperate because it originates from a previous period of time. Nevertheless, it is of course the responsibility of the seller and resolves consequences with regard to the assessment of the

[59] Item 4.1.

compliance system and the sanction in the specific context. The warning or the waiver of the sanction can now no longer be upheld. The sanction will be imposed on the target company with the consequences for the future for which the seller should be held contractually responsible.

As far as the newly committed offence is concerned, a distinction must be made as to whether it was committed before or after the closing of the transaction. At least in the case of a share deal[60], the buyer will argue that he cannot convert the compliance system provided by the seller in the target company to his own standards from the first day after closing, and that the risk allocation of compliance violations to the seller must therefore continue for a certain time after closing. Therefore, the indemnity in the sale and purchase agreement granted by the seller should also cover such cases. A renewed breach committed between signing and closing can trigger legal consequences according to a MAC (Material Adverse Change) clause[61] in the company purchase agreement. On the other hand, a corporate criminal offence discovered during this period, but committed before is not a MAC event, but falls under the provisions of the company purchase agreement regarding the disclosure of old infringements of the contractual warranties[62] and may subsequently trigger a right of termination on the part of the buyer.

In addition, the buyer must ensure that not only the seller but

[60] In an asset deal, the assets are transferred directly into the compliance environment controlled by the buyer.

[61] Becker/Voß, in: *Knott*, Company acquisition, 6th edition 2019 Rz. 1345 ff.

[62] S. Becker/Voss, in: *Knott*, Unternehmenkauf, Rz. 1453 f.

also the management of the target company fulfils the necessary cooperation obligations. Management may be exposed to the individual risk of self-incriminating criminal offences/sanctions when cooperating with the prosecution. When the legal representative of a business enterprise is questioned, Section 34 DBCL provides for a far-reaching right to refuse to testify and to withhold information if the person would incriminate himself. The management can therefore refuse to cooperate by referring to this individual right, which in turn can contradict the buyer's interest in creating the greatest possible transparency with regard to the past. A resolution of this tension is not easy and can lead to considerable negative consequences for those involved. Appropriate contractual clauses can help to find a regulation for the different interests. To the extent legally permissible and justifiable from a compliance point of view, these may, for example, consist of indemnity agreements with management, whereby an indemnity for a prison sentence is not possible. The employee is obliged under labor law to provide the company with information but cannot effectively prevent the statement from being used in further investigations.[63]

6. Contractual reservations of approval in favour of the buyer in respect of measures relating to corporate criminal offences

An important consequence of the detection of a criminal compliance violation is the need for cooperation between the buyer and the target company in carrying out internal investigations, in

[63] S. Explanatory Memorandum DBCL, p. 102 f. (Decision against the so-called opposition solution)

particular. If, in addition, state investigating authorities also carry out prosecution measures, any steps the target company may take vis-à-vis the state investigating authorities should be made subject to the prior consent of the buyer, if possible before the purchase of the company is closed. This applies in particular in the case of the company's consent to a waiver from prosecution under conditions and instructions pursuant to Section 37 DBCL. It is problematic whether such a reservation of approval violates the prohibition of execution under antitrust law ("gun jumping")[64] if the transaction requires approval by the antitrust authorities. From an antitrust point of view, reservations of approval may only relate to measures which serve to preserve the value of the company to be acquired; reservations of approval are critical if they have the effect of influencing market behaviour or de facto control on the part of the future acquirer[65]. Since the reservations of approval mentioned in the present context only concern the strategy vis-à-vis the criminal prosecution authority and supposedly not market behaviour, a reservation of approval of this kind does not appear in our view to violate the prohibition of execution under antitrust law.

7. Effects of the future regulations on the liability of the legal successor or acquirer ("economic successor") on M&A transactions

Sections 6 and 7 of the DBCL provide for the liability of the legal successor or acquirer ("economic successor") in the sense of

[64] For general information on the prohibition of execution under antitrust law see Scheffler, in: *Knott*, Unternehmenskauf, 6th ed. 2019 margin no. 594 ff./ 627.
[65] Bischke/Brack, NZG 2018, 696, 697.

subsidiary shortfall liability (*Ausfallhaftung*). The DBCL thus essentially follows the provisions of Section 30 (2a) sentence 1 OWiG and Sections 81 (3a) to (3e) and 81a GWB (German Act Against Restraints of Competition). In the context of M&A transactions, the provision in Section 6 DBCL on the liability of the legal successor is of only limited significance: Only cases of universal succession by division (*Aufspaltung*) are covered, in which the original legal entity disappears.

A prerequisite for the shortfall liability, which is expected to be much more important in practice, pursuant to Section 7 DBCL, is that changes after the initiation of proceedings has been announced make it impossible for a corporate criminal sanction to be determined or enforced against the company responsible for the sanction, or that enforcement cannot take place completely. Shortfall liability only applies as subsidiary liability in those cases in which the company to be sanctioned becomes insolvent, is liquidated or is subject to a transfer of assets which makes (full) enforcement of the sanction impossible. It is important to note that shortfall liability shall only cover those cases in which a transfer of assets takes place after the initiation of prosecution proceedings had been announced. Transfers of assets made before that date do not trigger shortfall liability, even if they were made with the aim of evading liability.

If the corporate criminal sanction proceedings were initiated prior to the execution of the company purchase and if the seller has carried out asset transfers which make the enforcement of the sanction against the target company at least partially impossible and if the enforcement of the sanction takes place after the execution of the company purchase (share deal), the corporate

criminal sanction may still be imposed against the seller pursuant to Section 7 para. 1 no. 1 DBCL. According to this rule, it depends on the time of 'notification of the initiation of the sanction procedure'. If, however, the corporate criminal monetary sanction is only announced after the completion of the share deal, the buyer together with the target company is liable for the corporate criminal monetary sanction if the target company is to be regarded as an economic unit (*wirtschaftliche Einheit*) with the buyer from the first day after completion of the business acquisition. Such an economic entity cannot be avoided at all in case of a 100% participation[66]. Moreover, in this context, it is recommended that the buyer should rather delay the integration of the target company until there is clarity as to its circumstances with regard to criminal compliance. In this case, the seller's obligation to compensate the buyer against the corporate criminal sanction to be paid by the buyer, laid down in the company purchase agreement, will become relevant. With regard to Section 9 (2) sentence 2 DBCL, the question arises as to whether the sanction against the company will be determined on the basis of the turnover of the newly created economic entity between the buyer and the target company or whether it is measured on the basis of the aggregated turnover of the economic entity with the seller. This amount is then also decisive for the amount of compensation to be paid by the seller under the business acquisition agreement.

If, on the other hand, the company was acquired in the form of an asset deal, the sanction can be imposed on the buyer, provided

[66] S. the following explanations under item 7.1 on the prerequisites for the assumption of an economic entity.

that the latter has taken over 'substantial assets of the target company affected by the sanction and essentially continues its activities'. In this case, from the buyer's point of view, the business acquisition agreement should provide for an obligation of the seller to reimburse the criminal monetary sanction imposed on the buyer. Therefore, in addition to the traditional liability grounds in the case of an asset deal, Sections 75 AO (German Fiscal Code) and 25 HGB (German Commercial Code), in the future there may be another ground for successor liability in case of shortfall, if the DBCL is passed as a law, namely the liability resulting from Sec. 7 para. 1 no. 2 DBCL for corporate criminal sanctions in the case of economic legal succession.

However, it should be emphasized that shortfall liability under the two circumstances set out in Sec. 7 (1) DBCL can only be considered to the extent that the conditions for shortfall liability are fulfilled after the announcement of the initiation of the sanction proceedings. According to the wording of the proposed law, measures taken previously do not give rise to shortfall liability, even if they were taken expecting imminent corporate criminal sanction proceedings.

7.1. The concept of "a single economic entity"

In accordance with the legal entity principle pursuant to Section 30 German law on Administrative Offences (OWiG) (meaning that liability is confined to the entity which has fulfilled the prerequisites for such liability) and the related principle of separation of entities under German law of group companies, liability is linked to the action of the managing director acting on behalf of a particular

company.[67] If a managing director of the subsidiary commits a criminal offence, the subsidiary is the addressee of the criminal sanction. Under existing law, the parent company can only be held liable if its manager director has committed a breach of a duty of supervision or control over the subsidiary pursuant to Section 130 OWiG.

According to the DBCL, the parent company should also be liable for the unlawful conduct of the subsidiary if it is part of an "economic entity", a concept developed under EU antitrust law relating to Articles 101 and 102 TFEU. The assumption of an 'economic unit' is based on the fact that the parent company has the possibility of exercising decisive influence over the behaviour of the subsidiary/participating company and actually makes use of it[68]. In the case of a 100% subsidiary, the actual exercise of a decisive influence is rebuttably presumed[69]. As a result, this means that under the planned provisions of the DBCL "parents will be liable for their children".

The draft bill contains the term "economic entity" which originates from antitrust law, in two contexts. First, in determining the amount of the corporate criminal monetary sanction. In this regard reference is made to the turnover achieved within the company as an "economic entity" (Section 9 (2) DBCL). In the explanatory memorandum to the draft bill, reference is made in this connection to the provisions of Section 81 (4) sentences 3 and 4 of the German law against restrictions in competition (GWB). An

[67] See BGH, decision of 10.8.2011, KRB 55/10, HDI/Gerling, no. 13 ff.
[68] See ECJ, judgment of 10.9.2009, C-97/08 P, Akzo Nobel, paragraph 60.
[69] See ECJ, judgment of 10.9.2009, C-97/08 P, Akzo Nobel, paragraph 60.

'economic entity' is to be understood as the grouping of those legal entities which are under the same management as the company directly addressed by the corporate criminal sanctions.[70] In the case of subsidiary shortfall liability, sanctions against companies belonging to the "economic entity" may be imposed if they have directly or indirectly exercised a decisive influence on the association concerned or its legal successor (Section 7 para. 1 no. 1 DBCL). This is justified in the explanatory memorandum to the draft bill by the close relationship assumed in these circumstances, in which the subsidiary, despite having its own legal personality, cannot autonomously determine about business, but essentially follows instructions of the parent company.[71] The above-described terminology originate from the Akzo Nobel case law decided by the European Court of Justice which defined the concept of "a single economic unit" between parent company and subsidiary/affiliated company in EU antitrust law.[72] However, it is difficult to reconcile the transfer of the concept of " a single economic entity" developed in EU antitrust law with the general system of German law on sanctions for corporate criminal acts, which is dominated by the principle of legal entities and separation[73], as described above. It can be assumed that this combination of different concepts will lead to confusion in practice.

[70] Cf. draft bill, p. 85 with reference to: BGH, Decision of 26.2.2013 - KRB 20/12, Grauzement, NJW 2013, 1972, 1974.
[71] Cf. draft bill, p. 82.
[72] See ECJ, judgment of 10.9.2009, C-97/08 P, Akzo Nobel, paragraph 58.
[73] On the critical classification in the antitrust sanctions law Klusmann, in Wiedemann (ed.), Handbuch des Kartellrechts, 3. Aufl. 2016, Section 57, para. 92.

7.2. Shortfall liability due to economic succession

The declared aim of the DBCL is to exclude circumvention possibilities through the provisions on liability of legal successors and shortfall liability. In the case of legal succession, the legal entity principle can in practice lead to the result that groups of companies can evade liability through corporate restructuring or sales[74]. These "gaps in the case of legal succession" are referred to in the explanatory memorandum to the DBCL.[75] The provisions of Section 30(2a) of the OWiG provide companies with scope to evade corporate criminal fines by means of certain forms of restructuring.[76] Under this provision, for example, the company directly responsible for the sanctions can evade the fine by means of a separation or spin-off as a result of which this legal entity continues to exist[77], or by transferring assets (asset deal). The possibility of holding the legal successor liable for criminal conduct committed by the managing directors of his legal predecessor, at least by means of monetary sanctions, was imperative in order to prevent the company directly concerned from evading sanctions by creating a legal succession event.[78] Restructuring or asset transfers within a group as well as the sale of material assets to an outside

[74] See BGH, decision of 10.8.2011, KRB 55/10, HDI/Gerling, paragraph 25.
[75] Cf. draft bill on DBCL, pp. 54 and 58.
[76] Cf. draft bill on DBCL, page 54 with further evidence: Mühlhoff, NZWiSt 2013, 321, 327; Werner, wistra 2015, 176, 179; ders., ZWH 2016, 198, 202 et seq.; Achenbach, in Achenbach/Ransiek/Rönnau (ed.), Handbuch Wirtschaftsstrafrecht, 4th edition, 2nd chapter marginal 25; Verjans in FS for Schiller, pp. 662, 669 et seq.)
[77] This case is not covered by Section 6 DBCL.
[78] Cf. draft bill for the DBCL, p. 80.

third party would otherwise not allow the sanctions to be credible enforcement tools for corporate criminal behavior.[79]

This circumvention scenario described in the draft bill became known in practice under the keyword "sausage gap" (*Wurstlücke*)[80]. In the sausage cartel, the Tönnies Group succeeded in completely evading liability for fines through internal restructuring measures. The Federal Competition Authority discontinued the proceedings "with public appeal" and combined this with a call for action to the legislator to close the liability gap.[81] The legislator then expressly regulated individual succession in antitrust law. Pursuant to Section 81 (3c) GWB, a sanction can now also be imposed on a company that continues the company which operated the cartel in economic continuity.

The deviation from the legal entity principle envisaged in the DBCL requires a detailed analysis of the circumstances of the restructuring in the group, with a view to whether they give rise to the seller's or buyer's shortfall liability. The 'key date' for shortfall

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[79] Cf. draft bill DBCL, p. 80 with reference to: BGH, Decision of 10.8.2011 - KRB 55/10, NJW 2012, 164, 165 f.

[80] On the background to the so-called "Wurstlücke" (sausage gap), cf. Podszun, Stellungnahme als Sachverständiger im Wirtschaftsausschuss des Deutschen Bundestags zur Vorbereitung der Anhörung am 23.1.2017, Die 9. Novelle des Gesetzes gegen Wettbewerbsbeschränkungen (GWB), p. 7, available at: https://www.bundestag.de/resource/blob/489168/effffe1ad50da2f28f43442b2d8be7c1/podszun-data.pdf.

[81] Bundeskartellamt, press release dated 19.10.2016, "*Proceedings against companies of the ClemensTönnies Group discontinued - fines of 128 million euros no longer imposed as a result of restructuring*", available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/DE/Pressemitteilungen/2016/19_10_2016_ClemensToennies_Gruppe_Wurst.html

liability must be the date on which the initiation of the procedure was announced. Moreover, pursuant to Section 9(2) of the DBCL, the turnover relevant for the amount of the sanction is measured by that of the economic entity.

In practice, therefore, various scenarios are conceivable which should be taken into account in advance, especially by the purchaser, in M&A transactions. The question of the turnover to be taken into account, that of the seller or the buyer, may become relevant If the cartel infringement takes place before the acquisition is completed, the sole turnover of the individual entity participating in the cartel is likely to be decisive.[82] The decision is presumably more difficult in case of a continuous offence which continued both before and after the M&A transaction, because both the sales of the "economic entity" of the seller and of the buyer can then be taken into account. As only those cases are relevant for shortfall liability in which a transfer of assets is made after the initiation of proceedings has been announced, a restructuring of the group prior to this point in time may be advantageous for the seller. Situations are conceivable in which, for example, a violation is discovered in the course of the due diligence. If the violation persists, it needs to be discontinued immediately. The second step would consist of assessing the possible consequences of corporate criminal actions. It would have to be evaluated which turnover would be relevant for the purposes of calculating the amount of the sanction. For example, the turnover could be calculated as low as possible by restructuring the association (see below) or the assets could be

[82] See in this respect CFI, judgment of 14.7.2016, Marineschläuche, Parker Hannifin, paragraph 174.

withdrawn from liability as a whole. Only in a third step would it then be necessary to decide whether to cooperate with the investigating authorities or to strive for the objective of the occurrence of statute of limitations.

Against the background of the above-mentioned shortfall liability, the following possible effects in particular must be taken into account in M&A transactions for the legal successor or acquirer.

7.3. Implementation of compliance due diligence

As already explained above, special attention must be paid in due diligence to ensuring that the target company has implemented the necessary compliance measures on the basis of an analysis of the past and its individual risk profile.[83] Against this background, during the due diligence the buyer may also have to investigate earlier transactions involving the target company, unless the statute of limitations for prosecution or enforcement has expired in this respect (Sections 22, 23 draft). Pursuant to Section 22 (1) DBCL, the limitation period for prosecution of a Business Association corresponds to the limitation period for the individual offence. Pursuant to Section 23 (2) no. 2 DBCL, the limitation period for enforcement is in principle 10 years and begins pursuant to Section 23 (3) DBCL once the court decision regarding the criminal offence has become legally binding.

In this context, it would be desirable, similar to the laws in the US, to reward the efforts of the legal successor to prevent the target

[83] See Compliance DD, Becker/Voß, in: *Knott*, Unternehmenskauf, 6th ed. 2019 margin no. 57.

company from committing corporate criminal action in the future. In the United States, the Department of Justice issued guidelines on September 27, 2018, which are intended to apply to all cases of corporate criminal liability and whose purpose is to guide corporate buyers as to when criminal risks in the target company do not lead to prosecution after completion of M&A transactions ("Expanded DOJ Corporate Enforcement Policy").[84] What matters[85] most is that the buyer voluntarily and immediately discloses any misconduct, cooperates fully and promptly with the authorities and decides on suitable measures to eliminate the misconduct of the past and to prevent future misconduct.[86] Since March 2019, these guidelines have also been set forth in the DOJ Justice Manual under Item 9-47.120 - FCPA Corporate Enforcement Policy.[87]

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[84] https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-matthew-s-miner-justice-department-s-criminal-division; in relation to the FCPA Corporate Enforcement Policy see: https://www.justice.gov/criminal-fraud/file/838416/download (Last visit on 20.09.2019).

[85] https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-matthew-s-miner-justice-department-s-criminal-division; in relation to the FCPA Corporate Enforcement Policy see: https://www.justice.gov/criminal-fraud/file/838416/download (Last visit on 20.09.2019).

[86] https://www.bakerlaw.com/webfiles/Litigation/2019/Articles/Beyond-the-FCPA-M-A-Due-Diligence-Under-the-Expanded-DOJ-Corporate-Enforcement-Policy.pdf (Last visit on 23.09.2019).

[87] https://www.justice.gov/jm/jm-9-47000-foreign-corrupt-practices-act-1977 (last visit on 26.09.2019); see also Rieder/Güngör, CCZ 2019, 139, on the further development of the DOJ Justice Manual.

7.4. Transaction structure

As far as share deals are concerned, the calculation of the corporate criminal monetary sanction on the basis of the average annual turnover of the buyer group in the last three financial years preceding the conviction can be avoided by staggering the closing of the transaction or the integration of the target company into the buyer group in order to achieve as far as possible an earlier conviction, so that the average annual turnover of the buyer group will not become applicable for calculating the amount of the sanctions (Section 9 (2) sentence 2 DBCL)[88]. The affiliated companies that are under uniform management within a group (Sections 15 et seq. AktG – German Law on Stock Corporations) belong to an economic unit.[89]

In this context, the question arises whether it might be more advantageous to structure the business acquisition as an asset deal. This would be the case if, in an asset deal, for example in a carve-out transaction, the calculation of the average annual turnover is based on whether the buyer has acquired that part of the business from the seller in which the corporate criminal offence had occurred. If the buyer acquires another division of this company, he would not be responsible for the corporate criminal sanction[90]. If he takes over all assets of the company affected by the corporate criminal sanction, he is its economic successor as defined in Section 7 para. 1 no. 2 DBCL and thus is also responsible for the corporate criminal sanction vis-à-vis the criminal prosecution authority. Due

[88] See above under 7.

[89] BGH, Decision of 26. 2. 2013 - KRB 20/12, NJW 2013, 1972, 1975 Rz. 69.

[90] Cf. Timmerbeil/Mansdörfer, BB 2011, 323, 325 (probably different opinion).

to the liability of the buyer as the economic successor, a liability of the seller due to the economic entity existing prior to the sale with the target company would not be considered. This would prevent a calculation of the corporate criminal sanction on the basis of the turnover of the seller group. In this respect, structuring as an asset deal can also make sense from the seller's perspective. The compensation between the parties to the M&A transaction must then take place by means of the indemnity provisions in the business acquisition agreement.

7.5. Duties of the seller and buyer to cooperate in clarifying the facts of the case

The far-reaching duties of the companies to cooperate in clarifying the facts of legal violations and in particular cartel violations as provided for in the DBCL and the associated effects on the criminal liability of companies and persons under the DBCL and the Criminal Code are also of great relevance for M&A transactions.

Sections 17, 18 and 19 DBCL stipulate that the circumstances of a properly conducted internal investigations within the affected company may be taken into account to mitigate sanctions. 'Properly' means that the internal investigation is conducted in accordance with the principles of a fair trial. Employees should be made aware of the use of their own legal assistance before being interviewed, and it should be explained to them that their information can be used in criminal proceedings against them and that they have the right not to incriminate themselves.

When the legal representative of a company is questioned,

Section 34 DBCL provides for a far-reaching right to refuse to testify and to provide information if the person would incriminate himself or the association. By contrast, Section 34 DBCL does not apply, pursuant to Paragraph 50 of the DBCL, where information on the annual turnover of the company is concerned, because that information may be necessary for the imposition of the fine imposed on the association.

Interesting in this context is the duty of the company to provide information in proceedings of the Federal Competition Authority contained in the draft bill on the 10th amendment to the GWB.[91] Pursuant to Section 59b (3), p. 3 and p. 4 Draft-GWB in connection with Section 81m (1) Draft GWB natural persons are obliged to also disclose facts which are likely to lead to prosecution for a criminal offence or administrative offence. In criminal proceedings or administrative offence proceedings, however, a prohibition of utilization should then apply to the natural person, unless he has given his consent.

For M&A transactions, this means that the seller should work towards cooperation of the management before the sale of the company and the buyer after the transaction has been closed, in order to benefit from sanction mitigations that can also benefit the legal successor. However, the rights of natural persons must be respected and any conflicts of interest which might require the involvement of legal advisers of their own concerned must be anticipated.

[91] See BMWi draft bill for the 10th GWB amendment, status: 07.10.2019 18:14, available at: https://www.d-kart.de/blog/2019/10/14/der-referentenentwurf-zum-gwb/

From the point of view of the buyer of a company, it is important to lay down in the M&A-Agreement the details of the seller's participation in internal investigations and the availability of all documents and other information relating to the target company - and possibly the seller - as well as any other form of participation beyond that. After closing of the transaction, the seller is more likely to lose his interest in participating because the sanctions do not hit him economically (unless in case of shortfall liability). A good means of exerting pressure to ensure the seller's cooperation is to agree on an indemnity[92] for the target company and the buyer in respect of the association-related sanction.

In M&A transactions, these obligations play an important role and, from the buyer's point of view, should also be further developed in the company purchase agreement to reflect the special features of the transaction.[93] Similar to external tax audits, it will be important for the purchaser to have the seller obligated to cooperate by way of relevant provisions in the company purchase agreement. The buyer is interested in controlling the process so that the seller does not, for example, provide information to the public prosecutor's office in an uncoordinated manner. In addition, from the acquirer's point of view, all documents relating to the target company must be available to him. However, unlike in the context of tax audits, the seller's interest in participating in investigations related to association-related offences is lower, unless indemnities and/or contractual penalties are agreed in the company purchase agreement, which is therefore recommended from the buyer's

[92] Cf. above point 4.1

[93] See the explanations under 7.3.

point of view. The seller will also have a higher self-motivated interest in participating in the internal (or external) investigations if there is a risk of his liability as part of an economic entity.

8. Conclusion

The DBCL requires a new risk assessment approach for company acquisitions. Compliance is becoming an even stronger focus of due diligence and structuring transactions. Under the planned legal reform the fines imposed to date will increase substantially from a maximum of EUR 10 million to up to 10% of worldwide group turnover. Not only the seller group can be affected, but also the buyer group, if the target company's criminal responsibility continues after the transaction for a business crime committed previously. In the case of a takeover of a family business by a large corporation, for example, the corporate criminal monetary sanction can be drastically increased, and this as a result the buyer also being involved. This demonstrates the further increase in the importance of compliance due diligence. The planned new corporate criminal liability law will have the effect of increasing fines and tightening criminal liability imposing a duty to prosecute all suspected cases. At the same time it will create a new level of flexibility with respect to the legal consequences of corporate criminal acts: postponing sanctions coupled with reserving the right to impose sanctions and exemptions from prosecution subject to conditions and instructions will give those entities which are ready to cooperate, change their compliance systems and assist in uncovering wrongdoings committed in the past a fair chance to benefit from being remorseful. In addition, the new provisions regarding liability on the

basis of an economic entity and economic succession will require forward-looking structuring of M&A deals avoiding the parties running into unwarranted liability risks. There are great opportunities for advising clients conducting properly focused compliance due diligence fencing off substantial fines and shortfall liability risks. At the same time aspects regarding optimized structuring M&A transactions with the parties facing substantial successor liability issues under the relevant provisions of the DBCL will be prevalent in the future and require high level and experienced advice.

If a M&A transaction regarding the target company "being on probation" falls within this period, then close coordination between the parties to the company acquisition is just as necessary as a clear delimitation of the risk responsibility between the parties in the acquisition agreement. It is also important to determine to what extent exemptions, guarantees and the new shortfall liability regulated in the DBCL will be included in the offer of Warranty & Indemnity insurers. So far, criminal fines typically have not been covered by Warranty & Indemnity insurance policies. In any event, the DBCL results in significantly increasing the potential for financial risks in connection with a company acquisition. This requires a very precise definition of the areas of responsibility in relation between the parties of the M&A transaction in the acquisition agreement as well as a clear definition of the details of the obligations to cooperate among the parties to the M&A transaction.

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