

Insurability of corporate fines: new draft law's implications for insurance industry

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Introduction

While in many other countries, such as the United States and France, corporate penalties have long been common practice, in Germany only natural persons have traditionally been subject to criminal law. However, on 22 August 2019 the Federal Ministry of Justice and Consumer Protection presented its draft bill for a new and independent law on corporate penalties. Pursuant to the draft bill, considerable fines may be imposed not only on the persons involved in wrongdoing, but also on companies. This will significantly affect insurance cover, especially in the areas of professional indemnity and directors' and officers' (D&O) insurance.

New draft law

The draft provides for the imposition of so-called 'association penalties' on organisations whose managing persons are responsible for violations of specified company-related obligations. According to the draft, it is irrelevant whether the violation is caused directly or indirectly by the managing persons and whether it is due to inadequate organisation, selection, instruction or supervision. Thus, the factual prerequisites of association penalties are reminiscent of Sections 30 and 130 of the Administrative Offences Act. However, a clear difference can be seen with regard to the legal consequences.

In this respect, only the following penalties are permissible:

- a warning with the reservation of an association fine;
- an association fine of up to €10 million or 10% of the annual turnover for companies with a turnover of more than €100 million; and
- a dissolution of the association.

Although the draft provides for no special criminal norms for companies and is only a corporate penalties law, it represents a paradigm shift compared with the current system. In particular, the theoretically unlimited amount of the fine that can be imposed on associations with a purpose geared towards economic business operations and an average annual turnover of more than €100 million is remarkable.

Associations will be consulted before the legislative procedure continues, so it remains to be seen what the law will ultimately look like. Notably, the draft bill has already undergone some significant amendments (eg, the dissolution of a company as a possible punishment is off the table).

Prospective implications for insurance coverage

The fact that considerable fines may be imposed not only on the persons involved in wrongdoing, but also on companies will naturally have an impact on insurance cover, especially in the areas of professional indemnity and D&O insurance. Penalties are generally not insurable in Germany. However, it is still an open question as to whether companies can take recourse to the employees or managers responsible for a violation for penalties and fines imposed on them. This question is highly controversial and has been intensively discussed with regard to violations of antitrust law. However, it has yet to be decided by the highest court whether a company that has been fined can assert recourse claims against its employees or managers.

In the so-called 'rail cartel case', the Federal Antitrust Division imposed fines of €103 million and €88 million on a steel trading company for collusion contrary to cartel law. The company

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subsequently claimed damages from its former managing director. The Dusseldorf Regional Labour Court dismissed the action because the question regarding the addressee of a regulatory penalty (which is the company itself) and the question regarding the civil law responsibility had to be decided consistently. After the Federal Labour Court set aside the judgment, the matter was passed on to the ordinary courts. A legally binding decision is still pending.

Following this decision, the question arises as to whether the legal representatives can insure the resulting liability risk – an important question for providers of D&O insurance. However, this question can be finally clarified only if the responsibility of the acting persons is affirmed.

Both issues – liability and insurability – will gain new momentum as a result of the new law being discussed. Naturally, it would be desirable for these issues to already be included and taken into account in the legislation.

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