

International Comparative Legal Guides



Business Crime 2020

A practical cross-border insight into business crime

10th Edition

Featuring contributions from:

Advokatfirma DLA Piper Norway DA

AGS Legal

Anagnostopoulos

AO2 Law

Atsumi & Sakai

BDO LLP

Clayton Utz

CMS Rodríguez-Azuero

Debevoise & Plimpton LLP

Del Rosal & Adame

Drew & Napier LLC

Durrieu Abogados

ENACHE PIRTEA & Associates S.p.a.r.l.

Haldanes

Hamdan Al Shamsi Lawyers and Legal
Consultants

Homburger

Joyce Roysen Advogados

Kachwaha and Partners

Lawfirm Holz hacker

Lee and Li, Attorneys-at-Law

Matheson

Morais Leitão, Galvão Teles, Soares da Silva &
Associados, S.P. R.L.

Noerr s.r.o.

Peters & Peters LLP

Rahman Ravelli

Sjöcrona Van Stigt

Skadden, Arps, Slate, Meagher & Flom LLP

Skrine

Softysiński Kawecki & Szlęzak

Studio Legale Pisano



ISBN 978-1-83918-000-2
ISSN 2043-9199

Published by

glg global legal group

59 Tanner Street
London SE1 3PL
United Kingdom
+44 207 0720
www.iclg.com

Group Publisher

Rory Smith

Publisher

Jon Martin

Sales Director

Florjan Osmani

Senior Editors

Caroline Oakley

Rachel Williams

Creative Director

Fraser Allan

Chairman

Alan Falach

Printed by

Ashford Colour Press Ltd.

Cover Image

www.istockphoto.com

Strategic Partners



Business Crime 2020

10th Edition

Contributing Editors:

Keith Krakaur and Ryan Junck

Skadden, Arps, Slate, Meagher & Flom LLP

©2019 Global Legal Group Limited.

All rights reserved. Unauthorised reproduction by any means, digital or analogue, in whole or in part, is strictly forbidden.

Disclaimer

This publication is for general information purposes only. It does not purport to provide comprehensive full legal or other advice. Global Legal Group Ltd. and the contributors accept no responsibility for losses that may arise from reliance upon information contained in this publication.

This publication is intended to give an indication of legal issues upon which you may need advice. Full legal advice should be taken from a qualified professional when dealing with specific situations.

Expert Chapters

- 1** **Recent Trends in U.S. Enforcement and the Advent of Technology Legislation**
Ryan Junck & Pippa Hyde, Skadden, Arps, Slate, Meagher & Flom LLP
- 4** **The Business Crime Landscape**
Aziz Rahman, Nicola Sharp & Syedur Rahman, Rahman Ravelli
- 12** **Corporate Response to Financial Irregularities and How to Prepare for a Crisis**
Kaley Crossthwaite & Richard Shave, BDO LLP

Country Q&A Chapters

- 16** **Argentina**
Durrieu Abogados: Nicolas Durrieu & Alejandro Ignacio Ramella
- 25** **Australia**
Clayton Utz: Tobin Meagher & Andrew Moore
- 34** **Brazil**
Joyce Roysen Advogados: Joyce Roysen & Veridiana Vianna
- 46** **Colombia**
CMS Rodríguez-Azuero: Jacques Simhon Rosenbaum, Daniel Rodríguez Bravo, Santiago Calle Gómez & María Lucía Amador
- 56** **Czech Republic**
Noerr s.r.o.: Petr Hrnčíř & Petr Kobylka
- 64** **England & Wales**
Peters & Peters LLP: Hannah Laming & Karl Masi
- 73** **France**
Debevoise & Plimpton LLP: Antoine Kirry & Alexandre Bisch
- 83** **Germany**
AGS Legal: Dr. Jan Kappel & Dr. Jan Ehling
- 92** **Greece**
Anagnostopoulos: Ilias G. Anagnostopoulos & Jerina Zapanti
- 102** **Hong Kong**
Haldanes: Felix Ng & Emily Cheung
- 112** **India**
Kachwaha and Partners: Ashok Sagar & Sumeet Kachwaha
- 123** **Ireland**
Matheson: Claire McLoughlin & Karen Reynolds
- 136** **Italy**
Studio Legale Pisano: Roberto Pisano
- 147** **Japan**
Atsumi & Sakai: Masataka Hayakawa & Kumpei Ohashi
- 158** **Liechtenstein**
Lawfirm Holzacker: Dr.iur. Gerhard R. Holzacker
- 171** **Malaysia**
Skrine: Lim Koon Huan & Manshan Singh
- 180** **Netherlands**
Sjöcrona Van Stigt: Sabine ten Doesschate & Pasquale Uijtewillegen
- 189** **Nigeria**
AO2 Law: Bidemi Olumide & Ifure Udofa
- 196** **Norway**
Advokatfirma DLA Piper Norway DA: Berit Reiss-Andersen, Victoria Palm & Ivar Valter Kristiansen
- 205** **Poland**
Sołtysiński Kawecki & Szlęzak: Tomasz Konopka
- 215** **Portugal**
Morais Leitão, Galvão Teles, Soares da Silva & Associados, S.P. R.L.: Tiago Geraldo & Tiago da Costa Andrade
- 225** **Romania**
ENACHE PIRTEA & Associates S.p.a.r.l.: Simona Pirtea & Madalin Enache
- 233** **Singapore**
Drew & Napier LLC: Gary Low & Vikram Ranjan Ramasamy
- 241** **Spain**
Del Rosal & Adame: Bernardo del Rosal & Fernando Adame
- 259** **Switzerland**
Homburger: Flavio Romero & Roman Richers
- 270** **Taiwan**
Lee and Li, Attorneys-at-Law: Michael T. H. Yang & Benoit Feng
- 281** **United Arab Emirates**
Hamdan Al Shamsi Lawyers and Legal Consultants: Hamdan Al Shamsi, Roger Bowden & Nandini Tiwari
- 288** **USA**
Skadden, Arps, Slate, Meagher & Flom LLP: Keith Krakaur & Ryan Junck

Germany

AGS Legal



Dr. Jan Kappel



Dr. Jan Ehling

1 General Criminal Law Enforcement

1.1 What authorities can prosecute business crimes, and are there different enforcement authorities at the national and regional levels?

In Germany, public prosecutor's offices are responsible for the prosecution of "general" criminal offences. Public prosecutors act on a regional level. Their jurisdiction is generally determined by the place where the crime is committed. Public prosecutors are in command of police forces who conduct the actual investigation.

Apart from genuine criminal offences, other authorities are in charge of investigating criminal offences that require special knowledge:

- Violations of the German Securities Trading Act (WpHG), i.e. regulatory market manipulations, may be investigated by the Federal Financial Supervisory Authority (BaFin).
- Violations of anti-trust law are investigated by the Federal Cartel Office (*Bundeskartellamt*, FCO). Further, the European Commission in Brussels may investigate in case of suspected violations that affect trade between Member States of the European Union.
- Violations against foreign trade law and illegal employment are investigated by the customs authorities.
- Tax crimes are prosecuted by the Tax Authorities.

1.2 If there is more than one set of enforcement agencies, how are decisions made regarding the body which will investigate and prosecute a matter?

If a case, which is investigated by a specialised authority as mentioned above, is intertwined with other crimes, the public prosecutor can investigate next to the specialised authority or, subject to the specific offence, step in and assume the lead of the investigation. For example, as far as anti-trust law violations are concerned, the FCO can investigate and impose fines against companies. The public prosecutor remains responsible for investigations of individuals.

1.3 Is there any civil or administrative enforcement against business crimes? If so, what agencies enforce the laws civilly and which crimes do they combat?

There is no civil law enforcement by public authorities. A party damaged by crime may seek claims for compensation by filing a civil lawsuit. In this context, the damaged party can rely on support by

official authorities. The authorities can, *i.a.*, secure asset recovery by seizing assets of the perpetrator or by freezing bank accounts. The damaged party is usually entitled to inspect the criminal file to collect evidence for claims for damages.

An administrative fine according to the regulatory offences act (OWiG) can be imposed on a company if their representatives commit criminal offences or violations of the regulatory offences act. In this regard, the most "common" offence committed by a representative is the omission to prevent criminal behaviour from within the company. Hence, if a company fails to put in place adequate compliance measures and then an employee or representative commits criminal offences, and an administrative fine of up to €10,000,000 can be imposed.

Additionally, there is the possibility of profit skimming, sec. 73 StGB, 17 OWiG. Authorities are entitled to skim all profits resulting out of criminal behaviour without any limit. This, for example, led to a total fine/profit skimming against Volkswagen in the VW diesel emissions scandal of €1,000,000,000. Apart from this, the FCO imposes administrative fines amounting up to several billion euros against companies for anti-trust law violations on a regular basis.

1.4 Have there been any major business crime cases in your jurisdiction in the past year?

The VW diesel emissions scandal is still a major case in terms of public interest and the developments both in criminal proceedings and the discussion regarding possible changes to the Law. Aside from this, there is a growing trend for companies that have been subject to prosecution for business crime to claim for damages against their former managers/officers because of defective compliance systems. The goal is to recover high costs incurred for internal investigations or in the context of monitorships.

2 Organisation of the Courts

2.1 How are the criminal courts in your jurisdiction structured? Are there specialised criminal courts for particular crimes?

The Local Court (*Amtsgericht*), the Regional Courts (*Landgericht*) and the Higher Regional Court (*Oberlandesgericht*) have jurisdiction in the first instance. The local courts may only impose prison sentences of up to four years in prison. Therefore, they are only in charge in cases of less serious crimes. Many regional courts provide for special chambers for white-collar crime stacked with particularly experienced judges. The Higher Regional Courts are only concerned in very few special cases such as terrorism or intelligence crime.

In the second instance, the Regional Courts, the Higher Regional Courts and the Federal Court of Justice (*Bundesgerichtshof*) have jurisdiction depending on the court of the first instance and the nature of the appeal.

2.2 Is there a right to a jury in business crime trials?

German law does not provide for jury decisions.

3 Particular Statutes and Crimes

3.1 Please describe any statutes that are commonly used in your jurisdiction to prosecute business crimes, including the elements of the crimes and the requisite mental state of the accused:

• Securities fraud

Sec. 264a of the German Criminal Code (“StGB”) prohibits the advertising of securities with false information. It is not necessary that the addressees of the advertising also bought the advertised securities.

The second important section is “general fraud” (Sec. 263 StGB). The scope is extensive. Criminal liability requires that the perpetrator deceives another person which causes a misconception because of which the deceived person damages his own assets. The perpetrator must have acted not only with intent but also with the intention to enrich himself or a third party. A factual damage is not necessary, but it is sufficient if a realistic threat to the assets of the deceived person has occurred.

• Accounting fraud

A member of a company’s board or supervisory board who misrepresents or disguises the circumstances of the company in the opening balance sheet, the annual financial statements or the management report can be liable for accounting fraud (Sec. 331 of the German Commercial Code). In such cases there is also a high risk for bankruptcy offences (Secs. 283 StGB *et seq.*).

• Insider trading

German law prohibits several forms of insider trading: attempting or engaging in insider trading; tempting or instigating a third party to engage in insider trading; and unlawfully disclosing insider information. Insider trading is defined as when a person acquires or sells a financial instrument directly or indirectly using insider information for his own account or that of third parties.

• Embezzlement

Embezzlement is one of the most controversial but also one of the most relevant criminal offences under German law. In a nutshell, criminal liability results out of an abuse of power of attorney regarding third parties’ assets. Thus, only persons who are entrusted with the management of foreign assets can become perpetrators. This especially includes officers, directors and managers.

One of the most controversial cases in the last few years resulted in sentences for embezzlement against several bank managers who had made very risky business decisions. The courts held that this can be regarded as criminal offence if a damage for the bank was realistic and the managers had “closed their eyes” against such risk. In another very popular case an ex-manager was found guilty for embezzlement because he had received inadequate bonus payments and used company transportation for private travel.

• Bribery of government officials

German law prohibits the bribing of German and foreign public officials in Germany as well as abroad. The benchmark for bribery is relatively low. It is already punishable to offer an advantage to a public official without influencing the public official’s decisions at all (Secs. 333 and 334 StGB).

Not just persons working for the government are regarded as public officials. It depends on the individual role of the person. The question of who is a public official does not depend on their formal role/position but on their individual function: it is sufficient that the person performs public administration tasks on the instructions of the administration.

• Criminal anti-competition

Bribing business partners’ employees or representatives leads to criminal liability for both the giving and the receiving party. It is prohibited to offer, promise or grant (or to demand, be promised or receive) advantages if the receiving party, in return, breaches their duties towards their employer regarding the purchase of goods or commercial services.

Bribery in international business may be also punishable under Sec. 299 StGB. However, this will only be the case if German law can be applied to the offence. For example, if an act of bribery (only took) place abroad, German criminal law can (according to Sec. 7 StGB) still be applied, if the offender is German at the time of the crime and the crime is also punishable in the country where the crime was committed.

• Cartels and other competition offences

Restrictions of competition and abuse of national market power are prosecuted. Violations of these laws are administrative offences and can therefore be sanctioned with fines (Sec. 81 GWB, 30 OWiG). Both the EU Commission and the FCO use so-called key witness/bonus rules to determine cartels. A member of a cartel can avoid a fine or get a substantial reduction of its fine if it reports the cartel to the authorities.

Sec. 298 StGB prohibits agreements that restrict competition in tenders. Anyone submitting an offer in a tendering procedure for goods or services based on an illegal pricing agreement is liable to prosecution. The illegal pricing agreement does not have to lead to an award for one of the participating parties. The fact that the offer is based on an illegal agreement threatening the free market is sufficient for criminal liability.

• Tax crimes

A company’s officer who provides incomplete or incorrect information or leaves the tax authorities unaware of tax-relevant information can be held liable for tax evasion (Sec. 370 AO). This often leaves managers in problematic situations after or during internal investigations. If they receive knowledge of criminal behaviour such as embezzlement or even bribery, this can lead to a duty to report such to the tax authorities since they may lead to errors in past tax declarations.

• Government-contracting fraud

Subsidy fraud (Sec. 264 StGB) requires fraudulent misrepresentation of facts relevant to subsidies to the subsidy provider by providing false information or certificates or by using the benefits in kind or in cash contrary to the subsidy restrictions. An actual financial loss of the subsidy provider is not necessary.

• Environmental crimes

German law provides for criminal offences in case of violation of administrative law regarding the areas of water, soil, nature, emission, radiation protection and protection against improper waste handling. The relevant provisions can be found in the StGB and in Codes of specific areas on administrative law. The respective offence presupposes a violation of the underlying regulations of administrative law.

• Campaign-finance/election law

Political parties are obliged to publish an annual report on the donations, which is examined by the President of the German Parliament. Donations over €10,000 must state the name of the donor. The law prohibits donations from certain donors such as public corporations, political foundations, certain foreign donors and anonymous donors. If a party violates these obligations, penalties apply.

- **Market manipulation in connection with the sale of derivatives**

Illegal market manipulation includes giving false or misleading signals about the supply, demand or price of a financial instrument by entering into a transaction, placing a trading order or any other action.

The ban on market manipulation covers in particular all financial instruments traded on a regulated market or organised trading system. In addition to securities (such as shares and bonds), this also includes money market instruments or derivative transactions if these depend on the price or value of a financial instrument or can have an impact on it. The ban also expressly includes goods traded on a domestic market and foreign currencies.

- **Money laundering or wire fraud**

Transfers of illegally acquired assets into the legal financial and economic cycle are regarded as money laundering, Sec. 261 StGB. All assets representing a certain value can be subject to money laundering, including cash and book money, securities, receivables, movable and immovable objects and electronic money.

However, only assets resulting out of specific criminal offences can be subject to money laundering. This includes, on the one hand, all felonies, i.e. offences punishable by imprisonment for no less than one year, and, on the other hand, offences that are explicitly named in Sec. 261 StGB including bribery and corruption or fraud and embezzlement in severe cases.

In contrast to receiving stolen goods (Sec. 259 StGB) the assets do not have to come directly from a preliminary offence. Money laundering also occurs when a surrogate object replaces the object directly derived from the offence. Sec. 261 StGB also applies to assets obtained abroad if the original offence is punishable abroad.

- **Cybersecurity and data protection law**

Sec. 202a StGB penalises the spying of data, meaning unauthorised access to data which is secured against unauthorised access by overcoming such access security. Sec. 202b StGB extends the protection of secret areas, as special security access is not needed. Criminal liability requires that the offender obtains the data for himself or another person using technical tools. No storage or other recording is required for this. In addition to that the preparing of spying on data and catching of data as well as the trade with illegally obtained data are punishable (Sec. 202c, d StGB).

Data protection is regarded as an important matter in Germany. The Federal Data Protection Act (BDSG) prohibits the collection, processing and use of personal data in general. It is only permitted if either a clear legal basis is given or if the person concerned has expressly given his or her consent. Violations can be punished with severe penalties up to three years of imprisonment. It is of particular importance for international companies to know these legal regulations, as it is possible in many cases that German data protection law may apply to these companies, even if the company's registered office is not in Germany (Sec. 1 BDSG).

- **Trade sanctions and export control violations**

Like other countries, Germany restricts foreign trade regarding certain products, destinations and receiving parties. The main regulations in this regard are contained in the German Foreign Trade Act (AWG) specified on sanctions and embargo lists by German and European authorities.

Intentional violations of the AWG are usually a felony. In German law, intent can already be assumed if the offender considers the violation of the law as possible and accepts it approvingly. Negligent violations of the AWG are mainly punished as an administrative offence.

- **Any other crime of particular interest in your jurisdiction**

The German law against unfair competition (UWG) is relevant regarding the theft or abuse of business secrets. Criminal liability can result out of the betrayal of business and company secrets to unauthorised third parties by an employee as well as industrial espionage. In addition to this, also the exploitation of trade secrets

that were subject to illegal extraction is a criminal offence. Exploitation includes any kind of economic use by unauthorised third parties.

3.2 Is there liability for inchoate crimes in your jurisdiction?

Can a person be liable for attempting to commit a crime, whether or not the attempted crime is completed?

The attempt of an offence is only punishable, if expressly provided for by the law. Nevertheless, the attempt of a felony (any crime carrying punishment of at least one year in prison) is always punishable.

To be held criminally liable for an attempt in either case, the perpetrator's conduct must be intentional and more than merely preparatory to the actual offence. The criminal intent must manifest itself through an act proximate to the conduct prohibited by law.

4 Corporate Criminal Liability

4.1 Is there entity liability for criminal offences? If so, under what circumstances will an employee's conduct be imputed to the entity?

The German criminal code does not provide for corporate criminal liability. Regarding administrative fines and profit skimming, please see above question 1.3.

The main difference between criminal law regarding individuals and regarding companies is that the prosecutors are legally bound to investigate against individuals once an initial suspicion is given. The prosecution of corporations is discretionary. It is, however, the rule that prosecutors will investigate against companies.

The Government is currently preparing a draft for a code of corporate criminal liability. The pre-draft includes a legal duty for prosecutors to investigate against companies in the future, but that, on the other hand, corporates will have procedural rights, just like individuals (e.g. legal privilege) and that companies may exculpate themselves by demonstrating that they had implemented adequate compliance measures which would have normally prevented the criminal offence by an employee or representative from happening. For the time being, the legal situation regarding corporate criminal liability unfortunately remains quite vague as there are no strict rules covering all aspects that corporations can rely on.

4.2 Is there personal liability for managers, officers, and directors if the entity becomes liable for a crime? Under what circumstances?

As stated in question 1.3, a fine can only be imposed on a company if the representative of the company has committed a criminal offence or a violation of law. In many cases, the prosecution argues that the representatives have violated their duty to implement adequate measures to prevent criminal offences from within the company. Hence, the prosecutor will always need liability of a representative to impose a fine on the company. There is a high motivation for the prosecutor to prove personal liability of the representative to reach that goal.

Additionally, there is a trend to claim for damages against directors based on the allegation that they have not prevented criminal behaviour within the company or failed to implement an adequate compliance management system. The goal is usually to recover investigation costs after legal reconditioning of compliance cases.

4.3 Where there is entity liability and personal liability, do the authorities have a policy or preference as to when to pursue an entity, when to pursue an individual, or both?

Please see question 4.2 above.

4.4 In a merger or acquisition context, can successor liability apply to the successor entity? When does successor liability apply?

The successor in a merger or acquisition context can be held liable for earlier breaches of law by the target company prior to the transaction. It is the idea that corporations shall not be released from liability by performing a change of control.

5 Statutes of Limitations

5.1 How are enforcement-limitations periods calculated, and when does a limitations period begin running?

The statute of limitations depends on the maximum penalty provided for the respective offence. The period ranges from three to 30 years. Most business crimes carry limitation periods of five years.

In most cases, the limitations period commences with completion of the offence. Determining the exact date of completion can be difficult and controversial. This concerns particularly offences which only require the establishment of a hazard. German criminal law knows offences that do not require any actual violation of a legally protected right/legal asset, but only the establishment of a hazard through a specific action depicted by law. The most prominent examples are pricing agreements between participants in tenders as well as bribery and corruption.

5.2 Can crimes occurring outside the limitations period be prosecuted if they are part of a pattern or practice, or ongoing conspiracy?

With expiration of the limitations period, an offence is time-barred and cannot be prosecuted.

5.3 Can the limitations period be tolled? If so, how?

The limitations period is interrupted by investigational measures by criminal authorities, most importantly initial interrogation of the accused, order of seizure or search warrant, issue of warrant for arrest. The interruption starts the limitations period anew but may not exceed twice the statutory limitations period.

6 Initiation of Investigations

6.1 Do enforcement agencies have jurisdiction to enforce their authority outside your jurisdiction's territory for certain business crimes? If so, which laws can be enforced extraterritorially and what are the jurisdictional grounds that allow such enforcement? How frequently do enforcement agencies rely on extraterritorial jurisdiction to prosecute business crimes?

As a principle, German enforcement agencies can only act on German territory. To investigate abroad, German enforcement agencies need to cooperate with foreign authorities. This, however, does not mean that German authorities are only interested in criminal behaviour taking place on German territory. Regardless of the place of the criminal act, they are entitled to investigate all cases in which German criminal law is applicable.

Primarily, German criminal law applies to criminal acts either committed on German territory or leading to a result on German territory. But German criminal law is also applicable for German citizens committing criminal acts abroad and in cases where either German citizens or German companies are victims of criminal acts committed abroad. In either case, however, German Criminal Law only applies if the offence itself is also considered a criminal offence in the foreign country where it is committed.

6.2 How are investigations initiated? Are there any rules or guidelines governing the government's initiation of any investigation? If so, please describe them.

The initiation of criminal investigations requires a so-called initial suspicion. This means that, based on facts, there are indications for a prosecutable criminal offence. This is a very low benchmark. If initial suspicion is given, the prosecutor is bound to initiate criminal proceedings against individual persons. There is, however, a variety of criminal offences which require an additional application for (minor) criminal investigation by the damaged party.

6.3 Do the criminal authorities in your jurisdiction have formal and/or informal mechanisms for cooperating with foreign enforcement authorities? Do they cooperate with foreign enforcement authorities?

Inside the European Union, there are organisations such as Europol and EUROJUST that coordinate between the criminal authorities of Member States of the European Union. Apart from this, the cooperation depends on the existence of bilateral agreements or the Law on international legal assistance in criminal matters. There is a growing trend to informally contact foreign authorities and tip them off in cases where authorities in one country cannot investigate a case due to a lack of applicability of their respective national law.

7 Procedures for Gathering Information from a Company

7.1 What powers does the government have generally to gather information when investigating business crimes?

Criminal authorities are entitled to various investigational measures such as dawn raids, seizure of documents, scanning of bank accounts, summoning witnesses or to more specific measures such as wiretapping, electronic searches, etc. Every individual measure has specific requirements and most of them require a warrant by the local criminal court prior to taking the respective measure. This especially applies to dawn raids and seizure orders. In urgent cases, however, the prosecutor can order such measures him-/herself.

Document Gathering:

7.2 Under what circumstances can the government demand that a company under investigation produce documents to the government, and under what circumstances can the government raid a company under investigation and seize documents?

Since there is no company criminal liability according to German law, a company can never be considered a perpetrator. However, German criminal procedure law provides for the right to impose investigative measures such as dawn raids and seizures on third parties if necessary to gather evidence.

7.3 Are there any protections against production or seizure that the company can assert for any types of documents? For example, does your jurisdiction recognise any privileges protecting documents prepared by in-house attorneys or external counsel, or corporate communications with in-house attorneys or external counsel?

The legal privilege which grants absolute protection from seizure by authorities only applies in the relationship between a person accused as perpetrator in criminal proceedings and his/her personal defence lawyer.

A company cannot be subject to criminal liability and, therefore, not an accused person. The Federal Constitutional Court, therefore, in a judgment from early 2018, held that there is no absolute protection from seizure of documents produced in internal investigations in general. A corporation could be regarded as accused person if the prosecution has already formally initiated an investigation aiming for a fine against the corporation or when the authorities are investigating against the corporation or their representatives. There are, however, no strict rules on when authorities must initiate investigations against companies.

The legal situation is very unclear now and the government will have to change the law to clarify the situation. Until then, this must be considered when conducting internal investigations.

7.4 Are there any labour or privacy laws in your jurisdiction (such as the General Data Protection Regulation in the European Union) which may impact the collection, processing, or transfer of employees' personal data, even if located in company files? Does your jurisdiction have blocking statutes or other domestic laws that may impede cross-border disclosure?

As already mentioned under question 3.1, there are strict regulations on how companies may handle personal data of their employees or customers. In general, the disclosure of personal data is not permitted. However, the law offers some exceptions. One of these exceptions allows companies to disclose personal data to law enforcement authorities if this is necessary to prosecute criminal offences and if the interests of the person concerned do not conflict with this (Sec. 24 BDSG).

7.5 Under what circumstances can the government demand that a company employee produce documents to the government, or raid the home or office of an employee and seize documents?

The seizure of documents is possible if they are required as evidence in criminal proceedings (Sec. 94 StPO). In this context, it does not matter if the person possessing the documents is an accused person or a third party. Dawn raids, as mentioned above, require a warrant by the local court.

7.6 Under what circumstances can the government demand that a third person or entity produce documents to the government, or raid the home or office of a third person or entity and seize documents?

Please see question 7.5.

Questioning of Individuals:

7.7 Under what circumstances can the government demand that an employee, officer, or director of a company under investigation submit to questioning? In what forum can the questioning take place?

It depends on the question whether the person is to be interrogated as an accused person or as a witness. There is no status in-between. As unpleasant as it may be for someone to be regarded as the accused by the authorities, this also has legal advantages. Unlike a witness, an accused has a comprehensive right to remain silent before authorities or in court. A witness must provide information to the authorities and can only remain silent on certain topics if he/she were to incriminate himself by the statement (Sec. 55 StPO).

7.8 Under what circumstances can the government demand that a third person submit to questioning? In what forum can the questioning take place?

A third person is always questioned as a witness (please see question 7.7).

7.9 What protections can a person assert upon being questioned by the government? Is there a right to be represented by an attorney during questioning? Is there a right or privilege against self-incrimination that may be asserted? If a right to assert the privilege against self-incrimination exists, can the assertion of the right result in an inference of guilt at trial?

Please see question 7.7. The accused and the witness have the right to have a defence attorney present when questioned by the police, public prosecutor or judge.

8 Initiation of Prosecutions / Deferred Prosecution / Civil Dispositions

8.1 How are criminal cases initiated?

The public prosecutor is obligated to initiate criminal if there is "initial suspicion". Please see question 6.2.

8.2 What rules or guidelines govern the government's decision to charge an entity or individual with a crime?

If the investigation leads to the conclusion that there is sufficient suspicion of a criminal offence, the public prosecutor's office is obliged to bring action before the criminal court against individuals. If not, he can terminate the proceedings in general or terminate in combination with the imposition of a minor fine or duty.

Regarding companies, please see question 4.1, the decision to charge is at the prosecutor's discretion.

8.3 Can a defendant and the government agree to resolve a criminal investigation through pre-trial diversion or an agreement to defer prosecution? If so, please describe any rules or guidelines governing whether pretrial diversion or deferred prosecution agreements are available to dispose of criminal investigations.

If the accusation concerns a minor offence, there is the possibility that the prosecutor waives the charge (Sec. 153, 153a StPO). This requires that the public interest in the prosecution of the offence can be eliminated through certain instructions or obligations imposed on the offender. For example, the order to compensate the injured party or to make donations.

8.4 If deferred prosecution or non-prosecution agreements are available to dispose of criminal investigations in your jurisdiction, must any aspects of these agreements be judicially approved? If so, please describe the factors which courts consider when reviewing deferred prosecution or non-prosecution agreements.

In addition to the consent of the culprit and the prosecutor, the consent of the respective court is also required. The case is closed as soon as the offender has entirely fulfilled the imposed obligations. If the offender does not fulfil the conditions within the time limit set for him, the public prosecutor's office can still press charges.

8.5 In addition to, or instead of, any criminal disposition to an investigation, can a defendant be subject to any civil penalties or remedies? If so, please describe the circumstances under which civil penalties or remedies may apply.

The defendant can be subject to profit-skimming. The prosecution is entitled to seize assets resulting out of criminal behaviour. If the object itself cannot be confiscated, the value of the object can be confiscated as a replacement. The confiscated item or money can be reclaimed by the injured party if there is a substantiated claim for restitution (Sec. 459 h StPO).

9 Burden of Proof

9.1 For each element of the business crimes identified above in Section 3, which party has the burden of proof? Which party has the burden of proof with respect to any affirmative defences?

The burden of proof lies with the public prosecutor, who must present evidence that all conditions of the accused crime have been

met by the accused during the criminal proceedings. However, the criminal proceedings are not contradictory. The court has the responsibility to examine all necessary evidence to determine the truth. For this reason, it is up to the court to pick the witnesses and other evidence that will be heard or examined in court.

The defence and the public prosecutor have the right to request that additional witnesses are heard or that other evidence is examined by the court. The court can only reject this request under very strict legal conditions.

9.2 What is the standard of proof that the party with the burden must satisfy?

The court must be convinced without any doubt that the defendant has fulfilled all the conditions of the relevant criminal provision.

9.3 In a criminal trial, who is the arbiter of fact? Who determines whether the party has satisfied its burden of proof?

This duty lies with the court.

10 Conspiracy / Aiding and Abetting

10.1 Can a person who conspires with or assists another to commit a business crime be liable? If so, what is the nature of the liability and what are the elements of the offence?

Incitement to a criminal offence is a criminal offence itself. The instigator must act with intent regarding the instigation as well as the criminal offence that the other person will commit.

Aiding and abetting is also a criminal offence, Sec. 27 StGB, and requires that the offender intentionally supports the main offender in his criminal offence in any way (even only psychologically).

11 Common Defences

11.1 Is it a defence to a criminal charge that the defendant did not have the requisite intent to commit the crime? If so, who has the burden of proof with respect to intent?

Criminal liability requires intent except regarding offences which can expressly be committed negligently. However, intent does not require that the offender absolutely wants the success of the crime. It is sufficient if he accepts the possibility of the offence and approves of it. Some offences require a special form of intent. For example, regarding fraud the perpetrator must not only act intentionally but also with the intention to enrich himself or a third party.

As with all other elements of the crime, the burden of proof lies with the court.

11.2 Is it a defence to a criminal charge that the defendant was ignorant of the law, i.e., that he did not know that his conduct was unlawful? If so, what are the elements of this defence, and who has the burden of proof with respect to the defendant's knowledge of the law?

If the offender acts without the awareness of wrongdoing, the criminal punishment may be no longer possible according to Sec. 17

StGB. However, this only applies if the culprit's misconception was unavoidable. German law places very high demands on the unavoidability of such a misconception, so that the unavoidability can only be assumed in extraordinary cases.

11.3 Is it a defence to a criminal charge that the defendant was ignorant of the facts, i.e., that he did not know that he had engaged in conduct that he knew was unlawful? If so, what are the elements of this defence, and who has the burden of proof with respect to the defendant's knowledge of the facts?

If the defendant was ignorant of the facts of the case, he cannot be convicted of crimes that require intent (Sec. 16 StGB). Criminal liability for negligence is nevertheless possible. Here, too, the court must investigate clues and must undoubtedly be convinced that the defendant was fully aware of the facts of the case.

12 Voluntary Disclosure Obligations

12.1 If a person or entity becomes aware that a crime has been committed, must the person or entity report the crime to the government? Can the person or entity be liable for failing to report the crime to the government? Can the person or entity receive leniency or "credit" for voluntary disclosure?

There is no general duty to report crimes to authorities. Nonetheless, in most cases the voluntary disclosure of an illegal offence can have a positive effect on the imposed amount of the penalty.

13 Cooperation Provisions / Leniency

13.1 If a person or entity voluntarily discloses criminal conduct to the government or cooperates in a government criminal investigation of the person or entity, can the person or entity request leniency or "credit" from the government? If so, what rules or guidelines govern the government's ability to offer leniency or "credit" in exchange for voluntary disclosures or cooperation?

Please see question 12.1; the reporting of criminal behaviour (except for tax offences) does not mandatorily lead to impunity. However, in most cases the authorities take such behaviour into account in favour of a lower penalty but there are no guidelines for this. Only in anti-trust investigations can the party of illegal pricing agreements who confesses first and discloses the illegal behaviour "claim" impunity or a discharge on fines.

13.2 Describe the extent of cooperation, including the steps that an entity would take, that is generally required of entities seeking leniency in your jurisdiction, and describe the favourable treatment generally received.

Please see question 13.1.

14 Plea Bargaining

14.1 Can a defendant voluntarily decline to contest criminal charges in exchange for a conviction on reduced charges, or in exchange for an agreed-upon sentence?

A confession is usually considered positively by the court in determining the penalty. In most cases it leads to a reduction of the penalty, but it is not possible to trade a confession for a precisely negotiated punishment.

14.2 Please describe any rules or guidelines governing the government's ability to plea bargain with a defendant. Must any aspects of the plea bargain be approved by the court?

Within the bounds of a plea bargaining (Sec. 257c StPO), the defendant can be promised an upper and lower limit of the penalty for a confession. However, it is formally not possible to agree to a specific penalty. The plea bargain is supposed to be negotiated in the main public hearing and the court, the prosecutor and the defendant must agree.

15 Elements of a Corporate Sentence

15.1 After the court determines that a defendant is guilty of a crime, are there any rules or guidelines governing the court's imposition of a sentence on the defendant? Please describe the sentencing process.

The law contains a minimum and maximum penalty for each criminal provision. The court determines the specific amount of the penalty by considering the individual aspects of the case. Such aspects are, for example, the motivations for the crime, the defendant's attitude and willingness to commit the crime, the way in which the crime was committed, the consequences of the crime, the defendant's background (especially previous convictions), the defendant's behaviour after the crime and efforts to remedy the damage.

15.2 Before imposing a sentence on a corporation, must the court determine whether the sentence satisfies any elements? If so, please describe those elements.

The basis for the calculation of administrative fines is the significance of the administrative offence and the accusation made against the offender. The economic circumstances of the corporation can also be taken into consideration. It is important that the fine exceeds the economic advantage that the corporation has gained from committing the administrative offence (Sec. 17 OWiG).

16 Appeals

16.1 Is a guilty or a non-guilty verdict appealable by either the defendant or the government?

A guilty verdict may be appealed by the defendant or the public prosecutor. An acquittal can only be appealed by the public prosecutor.

16.2 Is a criminal sentence following a guilty verdict appealable? If so, which party may appeal?

A guilty verdict is always combined with the concrete determination of the punishment. Both the defendant and the public prosecutor may appeal the verdict. The appeal can only be limited to the sentence, but in most cases the verdict as a whole is challenged with the appeal.

16.3 What is the appellate court's standard of review?

Verdicts can be appealable on the grounds of violations of the law and that the facts do not carry the sentence and allow for another decision. Where an appeal is lodged on ground of fact and law, the appeal court fully reviews the verdict so that the trial of the first instance is repeated. In case of an appeal on grounds of law, the court only verifies whether the court of first instance has applied the laws correctly. Evidence in the first instance will not be examined.

16.4 If the appellate court upholds the appeal, what powers does it have to remedy any injustice by the trial court?

If the appeal is made on grounds of fact and law, the appeal court repeals the first instance verdict and imposes a new verdict.

If the appeal is lodged only on ground of violation of a law, the appeal court has two opportunities. It can annul the verdict of the first instance court and instruct the court of first instance to decide on the case again. In this case, the court must follow the legal opinion of the court of appeal in its new decision. Or the appeal court may repeal the verdict of the first instance and pass a verdict itself or suspend criminal proceedings.



Dr. Jan Kappel is a lawyer and managing partner of AGS, where he heads the White Collar Crime and Investigation practice. Jan is strongly recommended for handling complex cases of business crime that straddle the cutting edge between criminal law and civil law. Clients appreciate that he is "clever in strategy", "very pragmatic", "precise" and "solid as a rock" (*Juive*). He has been awarded twice each year for many years as one of the top names for white-collar crimes in Germany, especially with regards to D&O-liability (*Wirtschaftswoche*).

Jan represents his clients on a wide scale *vis-à-vis* contractual partners, employees and (prosecution) authorities. Jan takes on challenging cases and knows that good legal advice does not primarily depend on citing legal authority. Checking compliance structures and guidelines as well as implementing and supporting training programmes lie at the core of his preventive compliance counselling.

AGS Legal

Bockenheimer Landstraße 33-35
60325 Frankfurt
Germany

Tel: +49 69 7690 73129

Email: j.kappel@ags-legal.com

URL: www.ags-legal.com



Dr. Jan Ehling is a partner based at AGS Legal's Frankfurt location. He has been awarded as a "name of the next generation" for Compliance and Internal Investigations by *The Legal 500* (2018 and 2019).

Jan's main focus of activity is at the interface between criminal law, civil law and corporate law, especially the handling of complex cases involving corruption, embezzlement or fraud. Jan regularly represents companies in investigation proceedings and advises them on how to deal with and cooperate with the relevant authorities. In this context, Jan has special expertise in dealing with D&O and fidelity insurers and how to incorporate them in the strategy of the investigation.

Based on his experience in white-collar crime cases, Jan has been appointed Compliance Monitor for several German international operating medium-sized companies by lenders or private equity firms. Jan also regularly advises his clients in establishing and strengthening Compliance-Systems and performs corresponding audits.

AGS Legal

Bockenheimer Landstraße 33-35
60325 Frankfurt
Germany

Tel: +49 69 7690 73129

Email: j.ehling@ags-legal.com

URL: www.ags-legal.com

AGS Legal are a boutique law firm specialised on white-collar crime matters and dispute resolution formed by spin-offs of international law firms. Since their foundation in 2012, AGS have continuously been listed as one of the top 10 law firms in this area in Germany. AGS offers high quality advice for companies, directors and officers in all concerned legal fields in white-collar cases such as corporate defence, fraud litigation, internal investigations, bribery and corruption, asset recovery, D&O-liability, data protection and labour law, as well as preventive measures.

The lawyers of AGS can, therefore, provide for a "360 degree" view on white-collar matters. They use this experience to team up with forensic experts of Big 4 accounting firms and US and other international law firms on a regular basis to conduct both, domestic and international internal investigations and advise their clients on how to handle the results.

www.ags-legal.com

AGS LEGAL 

ICLG.com

Other titles in the ICLG series

Alternative Investment Funds
Anti-Money Laundering
Aviation Law
Business Crime
Cartels & Leniency
Class and Group Actions
Competition Litigation
Construction & Engineering Law
Copyright
Corporate Governance
Corporate Immigration
Corporate Investigations
Corporate Recovery & Insolvency
Corporate Tax
Cybersecurity
Data Protection

Employment & Labour Law
Enforcement of Foreign Judgments
Environment & Climate Change Law
Family Law
Financial Services Disputes
Fintech
Franchise
Gambling
Insurance & Reinsurance
International Arbitration
Investor-State Arbitration
Lending & Secured Finance
Litigation & Dispute Resolution
Merger Control
Mergers & Acquisitions
Mining Law

Oil & Gas Regulation
Outsourcing
Pharmaceutical Advertising
Private Client
Private Equity
Product Liability
Project Finance
Public Investment Funds
Public Procurement
Real Estate
Securitisation
Shipping Law
Telecoms, Media and Internet Laws
Trade Marks
Vertical Agreements and Dominant Firms