

# The Federal Assembly approves government draft bill on Law to strengthen Integrity in Business

## ANALYSIS OF THE MOST RECENT STATE OF THE NEW GERMAN CORPORATE SANCTIONS LAW WITH THE CHANGES REQUIRED BY THE BUNDES RAT

### Executive Summary

- On 18 September 2020, the German Federal Assembly (*Bundesrat*) approved the Law to strengthen Integrity in Business (*Gesetz zur Stärkung der Wirtschaft*).
- The Legal- and Economic Committees of the Federal Assembly had previously demanded a general rejection of the draft bill.
- Despite the heavy criticism - especially regarding the proportionality of possible sanctions against small and medium-sized companies and the threat of overburdening judiciary - the probability has thus risen that this significant new law will actually be passed by the end of the current legislative period.

### I. Background

On Friday, 18 September 2020, the government draft bill of 16 June 2020 for the Law to strengthen Integrity in Business<sup>1</sup> - of which the Associations Sanctions Act is the centerpiece (*Verbandssanktionengesetz, VerSanG-E*) - took an important hurdle. In the 993rd session of the Federal Assembly, the government draft bill was approved against the general rejection demanded by the Legal- and the Economic Committee of the Federal As-

<sup>1</sup> Cfr. GSK Update of June, 19 2020: Grand coalition agrees on government draft bill on Law to strengthen integrity in Business, <https://www.gsk.de/wp-content/uploads/2020/06/GSK-Update-Verbandssanktionengesetz-Juni-2020.pdf>

sembly<sup>2</sup>. The absolute majority required for a rejection could not be achieved in the plenum. Nevertheless, the Federal Assembly demanded comprehensive changes. Thus this initiative which had already been mentioned as a reform project in the coalition agreement of 12 March 2018<sup>3</sup> and which originally led to the draft bill for the Law on combating Corporate Crime (*Gesetz zur Bekämpfung der Unternehmenskriminalität*) on 22 August 2019<sup>4</sup>, took an important milestone. The discussion about a new sanctions regime for companies in Germany has been going on for more than half a decade.

### II. Statement of the Federal Assembly

Surprisingly, the Federal Assembly did not follow the clear recommendation of its Legal- and its Economic Committee for an outright general rejection and adopted a statement on 18 September 2020 in which the government draft bill for the Law to strengthen Integrity in Business was approved in principle.<sup>5</sup> On 8 September 2020, the Legal- and the Economic Committee of the Federal Assembly led by representatives from six Ger-

<sup>2</sup> Recommendation of the Legal and Economic Committee of the Federal Assembly of 8 September 2020 [https://www.bundesrat.de/SharedDocs/drucksachen/2020/0401-0500/440-1-20.pdf?\\_\\_blob=publicationFile&v=1](https://www.bundesrat.de/SharedDocs/drucksachen/2020/0401-0500/440-1-20.pdf?__blob=publicationFile&v=1)

<sup>3</sup> Coalition agreement of 12.03.2018, p. 126: <https://www.bundesregierung.de/breg-de/themen/koalitionsvertrag-vom-12-maerz-2018-975210>.

<sup>4</sup> Federal Ministry of Justice and Consumer Protection, draft bill on Law on combating corporate crime, editing status: 15.08.2019.

<sup>5</sup> Statement of the Federal Assembly on the draft bill for the Law to strengthen Integrity in Business of 18 September 2020 [https://www.bundesrat.de/SharedDocs/drucksachen/2020/0401-0500/440-20\(B\).pdf?\\_\\_blob=publicationFile&v=1](https://www.bundesrat.de/SharedDocs/drucksachen/2020/0401-0500/440-20(B).pdf?__blob=publicationFile&v=1)



man Federal States (*Bundesländer*) - including the three largest States of Baden-Württemberg, Bavaria and North Rhine-Westphalia – strongly recommended the outright rejection of the government draft bill. The main criticism focused on a purportedly inevitable massive overload of the public prosecutors' offices and courts likely resulting in a blockade of the judiciary's scarce resources<sup>6</sup>. The Federal Assembly is now demanding:

- a) to examine in the further legislative process whether the contemplated associations' - or corporate liability and the corresponding sanctions for small and medium-sized enterprises (SMEs) are proportionate
- b) to review whether certain associations' deeds committed by SMEs should be exempted
- c) that SMEs ought to be measured against lower levels of expectations concerning "adequate measures to prevent associations' deeds" already for avoidance of overly burdensome bureaucracy. For reasons of legal certainty, different levels should be defined more clearly in the further legislative process than provided so far.<sup>7</sup>

### III. What are the next steps?

For legislative initiatives of the Federal Government the statement of the Federal Assembly needs to be obtained in accordance with article 76 section 2 of the German Constitution (*Grundgesetz*) before such bill can be passed on to the Federal Parliament (*Bundestag*). The massive criticism arising from the seven-weeks' associations' alignment phase which was only marginally implemented by the Federal Government in the government draft bill of 16 June 2020 only one and a half working days later will certainly be revisited at the further associations' and experts' hearings in the various committees. The main points that were attacked were the lamentable lack of clarity of the necessary compliance-measures – i.e. of the ominous "measures" -, the re-

<sup>6</sup> Recommendation of the Legal- and the Economic Committee of the Federal Assembly of 8 September 2020, p. 1.

<sup>7</sup> Statement of the Federal Assembly on the draft bill for the Law to strengthen Integrity in Business of 18 September 2020, p. 1



quirement to separate internal investigations from corporate defence and the fact that corporate revenue is the only reference point for monetary sanctions. In addition, it is feared that the consideration of the point in time of a conviction instead of the time of the offence itself in combination with the calculation of the average revenue of the last three years at group level can trigger a particularly negative effect on corporate takeover transactions.<sup>8</sup> The Law to strengthen Integrity in Business is a law that requires approval of the Federal Assembly. This means that the Federal Government cannot simply ignore the vote of the Federal States. To avoid the involvement of the Mediation Committee (*Vermittlungsausschuss*), the Federal Government might feel obliged to respond to the demands of the Federal Assembly. On the other hand, it cannot be ruled out completely that this initiative could eventually fail after all given next year's federal election.

### IV. Conclusion

Now the Federal Parliament will have to deal with this draft bill for a first time. Many topics will most likely change. Yet this vote of the Federal Assembly shows that the legislative bodies are actually willing to introduce the new Associations' Sanctions Act despite the ongoing COVID-19 pandemic. The recent German corporate compliance scandals such as Diesel-Gate, Cum-Ex or Wirecard as well as the most recent money laundering allegations against several major banks are emphasizing

<sup>8</sup> Cfr. in detail GSK Update from 18 June 2020



that Germany needs a new instrument to effectively combat white-collar crime. Regardless of the remaining government tenure of the current grand coalition, the necessity for change in the largest economy in Europe is pressing to finally start reducing the considerable gap against international best practice in legislation and enforcement. A US Foreign Corrupt Practices ACT (FCPA) has been regularly applied against a plethora of non-American companies for now 43 years. The UK Bribery Act has been in force for almost half a decade and the French Loi Sapin II is being applied for almost four years. Alone this comparison clarifies that the Associations' Sanctions Act can certainly not be called a "law against the German economy" – as the often-times "export world champion" has to play by strict international rules already since a long time.

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**Eric Mayer**

Attorney-at-Law (Germany)  
Munich Office  
[eric.mayer@gsk.de](mailto:eric.mayer@gsk.de)

**Teresa Gaboardi**

Lawyer (University)  
Munich Office  
[teresa.gaboardi@gsk.de](mailto:teresa.gaboardi@gsk.de)

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[www.gsk.de](http://www.gsk.de)

### GSK Stockmann

#### BERLIN

Mohrenstrasse 42  
10117 Berlin  
T +49 30 203907-0  
F +49 30 203907-44  
[berlin@gsk.de](mailto:berlin@gsk.de)

#### HEIDELBERG

Mittermaierstrasse 31  
69115 Heidelberg  
T +49 6221 4566-0  
F +49 6221 4566-44  
[heidelberg@gsk.de](mailto:heidelberg@gsk.de)

#### FRANKFURT / M.

Taunusanlage 21  
60325 Frankfurt am Main  
T +49 69 710003-0  
F +49 69 710003-144  
[frankfurt@gsk.de](mailto:frankfurt@gsk.de)

#### MUNICH

Karl-Scharnagl-Ring 8  
80539 Munich  
T +49 89 288174-0  
F +49 89 288174-44  
[muenchen@gsk.de](mailto:muenchen@gsk.de)

#### HAMBURG

Neuer Wall 69  
20354 Hamburg  
T +49 40 369703-0  
F +49 40 369703-44  
[hamburg@gsk.de](mailto:hamburg@gsk.de)

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#### LUXEMBOURG

GSK Stockmann SA  
44, Avenue John F. Kennedy  
L-1855 Luxembourg  
T +352 271802-00  
F +352 271802-11  
[luxembourg@gsk-lux.com](mailto:luxembourg@gsk-lux.com)



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