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Hogan Lovells Guide on
Internal Investigations in
Germany

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EDITORIAL

Dear reader,

Compliance obligations and related internal investigations remain of major importance to international companies around the world. We have been focusing on compliance topics and compliance investigations for many years. As a result, we have profound experience in managing the effects of investigations around the world.

This guide outlines some of the most important legal requirements and investigation techniques you should note in Germany. It will help you avoid, prevent, and manage legal risks. The leading authors of this guide are part of our Investigations and Compliance Team in Germany.

We hope to give you a useful overview of compliance investigations in Germany.

Your Hogan Lovells Investigations and Compliance Team, Germany



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Please note: This guide is written as general guidance only. It should not be relied on as a substitute for specific legal advice. In the interests of readability the masculine form has been used throughout, although both sexes are accorded equal importance.

Further information

For further information on any aspect of this guide, please contact the authors (contact details on pages **130-132**).



1. COMPLIANCE AND INVESTIGATIONS IN GERMANY

1.1 Overview and trends in 2021

One of the defining aspects of 2020 and 2021 was certainly the Corona pandemic. The pandemic had an impact on how investigations were conducted. Remote investigations and especially remote interviews have become increasingly important. In addition, an increased need for legal tech solutions arose.

However, not only companies, but also authorities adjusted quickly to the limitations of the pandemic. Specifically, they now increasingly interact remotely with companies and their representatives. This results in quicker exchanges with the authorities and thus facilitates cooperation with authorities.

Further, despite the challenges of the pandemic, authorities still performed dawn raids. Some of these dawn raids related to specific allegations of tax evasion and fraud around the COVID-19 emergency program of the German government. This showed that companies should continue to be prepared for dawn raids.

Another topic creating wide attention in the media was the case of the former DAX company Wirecard. In June 2020, Wirecard admitted that reported assets of over €1.9 billion could not be substantiated after its auditor refused to certify the balance sheet. As a result, the company's CEO resigned. He was later arrested on charges of gang-related fraud, tax evasion and market manipulation. A former board member is wanted on an international arrest warrant for billion-dollar fraud. Wirecard filed for insolvency proceedings – the first DAX company ever to do so. This incident, *inter alia*, led to the draft law to strengthen the financial market (*Finanzmarktintegritätsstärkungsgesetz – "FISG"*).

In addition, the years 2020 and 2021 have once again featured numerous legislative developments as well as new case law in the area of compliance and investigations (see also Top 10). However, despite various activities, the awaited draft bills on the implementation of the EU Whistleblower Directive in Germany as well the draft bill on increased corporate sanctions have not been passed yet. To the contrary: Existing draft bills have not been agreed upon so that the upcoming new government will

need to work on new draft bills. Thus, the further legislative developments need to be observed closely.

As always, the Hogan Lovells Guide on Internal Investigations in Germany addresses legislative and other important new developments and presents them in a concise and practical manner. The guide includes the essentials to keep in mind when thinking about compliance or investigations, as well as an information sheet that provides an overview of the Top 10 developments of the past two years.

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1.2 What's new in Investigations – Top 10

1. Draft law on corporate sanctions and new rules for internal investigations

The coalition agreement between the German parties CDU, CSU, and SPD of 12 March 2018 included extensive plans to regulate and extend sanctions against companies in cases of white collar crime. On 16 June 2020, the Federal Government presented a corresponding draft law on Strengthening Integrity in the Economy (*Gesetz zur Stärkung der Integrität in der Wirtschaft*).

In June 2021, the German parties CDU and CSU stated that they would no longer support the draft law. The reason for this was that the draft law of 16 June 2020 provided for a potential reduction of a sanction against a company in case the company had conducted internal investigations that contributed to the clarification of the company-related criminal offense. However, this mitigation possibility was linked to the prerequisite that the internal investigation was performed by other persons than the (criminal) defense counsel of the company. Therefore, results of the internal investigation would not have been protected from seizure pursuant to Section 97 of the German Code of Criminal Procedure (*Strafprozessordnung* – "StPO"). CDU and CSU argued that this legal framework would rather prevent companies from conducting internal investigations of potential misconduct.

Due to the elections in September 2021, it remains to be seen whether and to what extent a legal framework for corporate criminal law will be established in Germany.

2. New German competition legislation

On 14 January 2021, the German Federal Parliament decided to amend German competition law by adopting the Federal Government's draft law to modify the German Act against Restraints of Competition ("GWB Digitalization Act"). The GWB Digitalization Act entered into force on 19 January 2021.

The aim of the law is to prevent abusive behavior by companies with an outstanding, cross-market

significance for competition. To this end, the investigative powers of the antitrust authorities are expanded. This in particular includes broader powers in relation to hearings conducted during dawn raids.

Furthermore, for the first time in Germany, the legislator has explicitly established a compliance defense in antitrust fine proceedings in its legislation. Companies with effective and appropriate compliance management systems can now invoke the newly introduced Section 81d para. 1 sentence 2 No. 4 and No. 5 GWB to have their compliance efforts taken into account in the fine assessment by the Federal Cartel Office or the Higher Regional Court Düsseldorf.

3. New developments regarding money laundering legislation in Germany

On 1 January 2020, the Money Laundering Act amended on the basis of the Fifth EU Money Laundering Directive ("Act on the Implementation of the Amending Directive to the Fourth EU Money Laundering Directive") came into force.

The German Act implementing the European Directive modified the German Money Laundering Act by extending its scope of application to the area of virtual currencies and by improving the networking of European transparency registers. In this context, the act allows public access to the already existing transparency register, which – under the new law – is subject to expanded entry, notification and registration requirements.

In addition, the law expanded the due diligence requirements for transactions with high-risk countries and gave the federal anti-money laundering unit ("Financial Intelligence Unit" – "FIU") more powers to access data.

Furthermore, there were relevant developments with regard to Section 261 of the German Criminal Code (*Strafgesetzbuch* – "StGB"). The first relevant development refers to a decision of the Federal Constitutional Court of

31 January 2020 (2 BvR 2992/14). In its decision, the court stated that a search warrant to search premises of the accused based on an initial suspicion of money laundering can only be justified if there are concrete factual indications for both a money laundering act and the commission of one of the predicate offenses mentioned in Section 261 para. 1 sentence 2 StGB (so-called double initial suspicion – *doppelter Anfangsverdacht*).

The second relevant development refers to a draft law introduced by the Federal Government to improve the fight against money laundering ("Act to Improve the Criminal Law on Combating Money Laundering"). The law simultaneously transposes Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 into national law. The implementation of the directive will therefore be combined with a revision of the money laundering offense in Section 261 StGB. The current version of Section 261 StGB stipulates that money laundering can only be prosecuted if the relevant object derives from an offense enumerated in Section 261 StGB.

According to the newly introduced law, it shall not matter through which offense illicit assets were acquired. The only decisive factor shall be that an asset has been obtained through any criminal offense. Thus, it will no longer be necessary to detect from which criminal acts exactly the disguised funds derive.

Pursuant to the draft law, both the attempt and the reckless commission of money laundering remain punishable. Following the elimination of the catalogue of offenses in the current version of Section 261 StGB, recklessness shall now refer to the failure to recognize that an asset has been criminally acquired.

The draft law which was adopted by the German Federal Parliament on 11 February 2021 entered into force on 18 March 2021.

4. Decision of the Regional Labor Court Baden-Württemberg on the employee's obligation to compensate attorney fees paid by the employer for internal investigations

On 21 April 2020, the Regional Labor Court Baden-Württemberg held that if there was a suspicion against an employee to have violated internal compliance rules in a significant manner, the engagement of a law firm specialized in (white collar) criminal law by the employer to clarify the facts was justified (19 Sa 46/19). The court ruled that the employee was obliged to reimburse costs related to the measures necessary to eliminate the disruption or to prevent damage. This was the case in this case because the result of the investigation caused the employer to issue a notice of dismissal. However, the costs of further investigations aimed at preparing claims for damages not based on a concrete suspicion of an offense were not recoverable.

In the present case, suspicions had been based on anonymous whistleblower reports that the company's purchasing manager had attended professional football matches several times at the expense of the employer's business partners.

5. New Whistleblower Directive of the European Parliament and Council

On 16 December 2019, the Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law entered into force. The Member States have to implement the new rules by 17 December 2021.

The Directive introduces, *inter alia*, safeguards to protect whistleblowers from retaliation, such as being suspended, demoted and intimidated. Each member state has some room in transposing the Directive. However, the EU Commission and the EU member states still disagree on the exact interpretation of individual aspects of the EU Whistleblower Directive.

Specifically, the EU Commission stated that according to its interpretation, a group-wide and centralized organization of a whistleblower

system would generally not meet the requirements of the Directive. Accordingly, each legal entity with 50 or more employees would be required to set up channels and procedures for internal reporting, even if these entities belonged to a group that had already implemented a centralized reporting system.

According to the EU Commission the Directive does not prohibit maintaining or creating also centralized whistleblowing functions within a group. Moreover, the EU Commission acknowledged certain exceptions under which resources may be shared within a group or under which the reports can be handled centrally. However, one of the requirements in the view of the EU Commission would be the consent of the reporter.

The viability of this interpretation for companies within group structures remains questionable. In particular, such interpretation would contradict the requirements to maintain and supervise compliance structures from a group level. Therefore, various discussions are currently ongoing, both at EU and member states level to discuss whether and how these statements from the EU Commission would be implemented in local law. If implemented in the member states, the EU Commission's view would cause considerable additional effort resulting in modification of existing internal reporting systems for many companies.

6. Adoption of a German Supply Chain Act

The Federal cabinet approved the Government's draft of a supply chain law (*Lieferkettengesetz*).

According to the law adopted on 3 March 2021, companies of a certain size based in Germany will be obliged to perform certain due diligence in the supply chain with regard to respecting internationally recognized human rights.

Furthermore, the law provides for environmental protection to the extent that environmental risks lead to human rights violations. It also establishes environmental obligations arising from international agreements on protection against

the health and environmental hazards of mercury and persistent organic pollutants.

In the event of violations, the Federal Office of Economics and Export Control (*Bundesamt für Wirtschaft und Ausfuhrkontrolle* – "BAFA") could impose fines and periodic penalty payments based on the global turnover of the company. In case companies fail to prepare a risk analysis, set up complaint procedures or fail to effectively remedy identified human rights violations they may face fines between €100,000 and €800,000. Companies with annual sales of more than €400 million can be imposed fines of up to two percent of their revenue. Companies may also face exclusion from public contracts for up to three years if they were imposed a fine of €175,000 or more.

The law will be binding from 2023 for companies with at least 3,000 employees in Germany, and from 2024 for all companies with at least 1,000 employees in Germany.

7. Implementation of the European Trade Secrets Directive into German law

The German law implementing Directive 2016/943 (EU) of 8 June 2016 on the protection of business secrets against unlawful acquisition, use and disclosure (*Geschäftsgeheimnisgesetz* – "GeschGehG") entered into force in April 2019.

New rules clarify the scope of protection of trade secrets and facilitate procedural enforcement with additional confidentiality measures in court.

The law also contains a statutory regulation of whistleblowing for the first time in Germany. It allows business secrets to be published under certain conditions, for example to uncover unlawful acts or wrongdoing and in cases where the protection of business secrets restricts the right of free expression.

According to the Federal Administrative Court, protection of trade secrets pursuant to Sections 2 No. 1 and 4 GeschGehG requires not only preventing the unauthorized access to the content of files containing the trade secret, but also the

prevention of access to external characteristics of files (such as file name, file extension, file type, file size) from which the trade secret can be derived.

8. Imposition of a €35.3 million fine based on European Data Protection Regulation

Due to alleged data protection violations in service centers, the Commissioner for Data Protection and Freedom of Information of the city of Hamburg imposed an €35.3 million fine on a company. The company decided not to appeal against this notice. The decision is therefore legally binding.

The company was accused of having monitored hundreds of service center employees which would constitute a violation of Articles 5 and 6 of the European Regulation on Data Privacy ("GDPR"). At least since 2014, some of the employees have had their private matters recorded to a significant extent. Corresponding notes were permanently stored on a network drive. By way of example, after absences due to holidays and illness the superior team leaders conducted so-called "Welcome Back Talks". After these conversations, not only concrete holiday experiences of the employees were recorded, but also symptoms of illness and diagnoses. Allegedly, the data collected in this way was used, among other things, to obtain a profile of the employees for measures and decisions in the employment relationship.

The fine imposed in October 2020 is the highest fine ever imposed in Germany since the regulation came into force in May 2018 and the second highest fine in Europe.

9. Draft law to strengthen the financial market

On 16 December 2020, the Federal Cabinet submitted a draft of the "Financial Market Integrity Strengthening Act" (*Finanzmarktintegritätsstärkungsgesetz – "FISG"*). As a consequence of the alleged billion-dollar fraud at the former DAX company Wirecard, the draft law provides for a tightening

of the balance sheet control procedure. In this respect, the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht – "BaFin"*) shall be granted more competences. This, *inter alia*, includes search and seizure rights as well as the power to conduct forensic audits.

The draft law also provides for adjustments with regard to stricter sanctions of balance sheet offenses. In particular, the provisions on fines for auditors who audit companies of public interest are to be expanded in terms of their content and the maximum fines possible shall be increased to up to €5 million. It is also intended to make a rotation of external auditors after ten years mandatory for also capital market companies. Moreover, it shall no longer be permissible for external auditors to provide tax advisory and accounting services for the same company in addition to auditing financial statements.

Further, internal controls in companies are to be expanded. This includes, *inter alia*, that the supervisory board of stock corporations of public interest is required to establish an audit committee. The chairman of this audit committee is to be granted a direct right of information vis-à-vis the heads of departments relating to the tasks of the audit committee. Listed stock corporations shall furthermore be required to establish an appropriate and effective internal control system and a corresponding risk management system.

The Federal Parliament still has to approve the draft law.

10. Mandatory lobby register for Germany starting in 2022

In March 2021, the German Bundestag decided to implement a mandatory lobby register at the federal level coming into force on 1 January 2022 (*Lobbyregistergesetz – "LobbyRG"*). After an eventful year with various press coverage on interactions between members of the parliament/government and companies, a new level of transparency will be reached by this.

Every actor representing interests to the Bundestag or the government, including firms with a lobbying department, associations, and NGOs, professional lobbying agencies or consultancies as well as lawyers representing their client's interests to politics, will be obliged to register. A violation of this obligation or wrong statements could lead to fines up to a maximum of €50,000.

When registering, lobbyists will have to name their area of interest as well as personal and financial resources. Professional lobbying firms will have to provide information about their client's identity. As the lobby register will be public, these information will be accessible for everybody interested.

Once registered, lobbyists will also have to comply with a code of conduct based on the principles of openness, transparency, honesty and integrity. For example, they won't be allowed to charge success-based fees.

In addition to the implementation of the lobby register, the Bundestag also renewed the *Abgeordnetengesetz* ("AbgG") in June 2021, thereby introducing higher transparency requirements for members of parliament.

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WHAT OTHERS SAY ABOUT US



Hogan Lovells' German compliance and investigations team is clearly one of the leading teams in the German market and is also very well known internationally for its expertise and remarkable track record in the field.

The Legal 500 Germany, 2021

Tier 1 for Compliance and Internal Investigations.

The Legal 500 Germany, 2021

Few competitors can compete with Hogan Lovells as an industry consultant.

JUVE Handbook, 2020/2021

TOP law firm for compliance.

WirtschaftsWoche, 2021

Well-recognised practice with a particular focus on advising DAX-30 and international clients on complex compliance issues. Particular expertise comprises advising on internal and external investigations regarding diesel emissions manipulation, bribery, corruption and data protection violations.

Chambers Europe, 2021

[Hogan Lovells] Also assists with anti-money laundering programmes and is well-versed for product compliance matters including product liability, recalls and safety. Further expertise in compliance management systems for leading companies, with particular strength in global whistle-blowing structures, anti-corruption and dawn raid programmes as well as risk assessments. Well positioned to handle large, cross-border cases due to its strong international network.

Chambers Europe, 2021



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