

Business Crime and Investigations in Germany: Overview

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CORPORATE MANSLAUGHTER Regulatory Provisions and Authorities

1. What is the main legislation relevant to corporate manslaughter?

There is no specific legislation relating to corporate manslaughter under German law. However, under sections 222 and 212 of the German Criminal Code (*Strafgesetzbuch*) (StGB) a person that causes the death of another person can be liable for negligent or wilful manslaughter. If the offence involves danger to public safety (such as involving a risk to many persons), it can even amount to murder.

At the time of writing (June 2021) only natural persons can be liable for criminal offences and corporate criminal liability does not yet exist under German criminal law. However, this is expected to change in the near future, as criminal liability for companies is foreseen in a Draft Act on Corporate Sanctioning (*Verbandssanktionengesetz*) (VerSanG) (see *Question 20*).

According to sections 30 and 130 of the Act on Regulatory Offences (*Ordnungswidrigkeitengesetz*) (OWiG), companies can face administrative sanctions if a person representing the company has committed a criminal or administrative offence by which the company's duties were violated or by which the company was supposed to be enriched.

Causing the death of a person can also trigger civil liability under German tort law, according to section 823 of the Civil Code (*Bürgerliches Gesetzbuch*) (BGB). More specifically, the Product Liability Act (*Produkthaftungsgesetz*) (ProdHaftG), provides the possibility of a civil claim against the producer of a product that causes the death or injury of a person or damages an object.

Negligence is defined under the general rules as the failure to exercise reasonable care (*section 276(2), BGB*).

Offences

2. What is the specific offence that can be used to prosecute corporate manslaughter?

Negligent or Intentional Manslaughter

Negligent or intentional manslaughter is a criminal offence under sections 212 and 222 of the StGB.

Elements. A person commits the offence of negligent or intentional manslaughter by causing the death of another person. However, there is no corporate criminal liability and therefore no specific offence of corporate manslaughter in German law. Natural persons acting on behalf of a corporation can be held liable within the common regime of individual criminal responsibility, while companies may face monetary sanctions.

The offence can be committed by omission, especially in the corporate context, which is often reflected in criminal product liability. For the offence to be committed by omission, the offender must hold a position of responsibility (guarantor position), for example, manufacturers or distributors who put products on the market which entail the risk of damage to third parties or objects. It is irrelevant whether the company and its employees knew, or should have known, about the risk to the third parties. This is particularly evident in errors related to the monitoring of products.

Manslaughter is also relevant in cases where workers are harmed by the acts of their employers. "Corporate manslaughter" most often qualifies as negligent homicide or manslaughter (*section 222, StGB*) because the offender's intent is difficult to prove.

Conduct may qualify as intentional if, for the offender, the potential for causing death was likely and the offender accepted this possibility while acting (*dolus eventualis*). An act committed with intention, or at least with *dolus eventualis*, can qualify as wilful homicide under section 212 of the StGB.

Penalties. The following penalties apply under the StGB:

- Negligent manslaughter carries a sentence of imprisonment for up to five years or a fine (*section 222*).
- Intentional manslaughter carries a sentence of imprisonment for at least five years (*section 212*).
- If the manslaughter was committed by means that pose a danger to the public, the offence will be qualified as "murder" or "murder under specific aggravating circumstances" and will carry a life sentence (*section 211*).

In addition to these penalties, other sanctions under the StGB include:

- Confiscation of objects or proceeds of the crime by court order (*sections 73 et seq*).
- Professional bans (*section 70*).
- Ban from driving for up to six months (since August 2017) (*section 44*).

There are no specific sentencing guidelines in Germany. However, there is a list of factors in section 46 of the StGB that should be considered when making a sentencing decision. According to section 46, the offender's personal guilt forms the basis for the sentencing decision (that is, the decision will be based on the individual circumstances of both the offender and the incident). The effect that the sentence will have for the future life of the offender and society should be considered. Other factors include:

- The motives and aims the offender had when committing the offence.
- The form of commission and effects of the act which were attributable to the offender.
- The offender's previous life, and personal and economic situation.

Individual criminal verdicts and employment bans are registered with the Federal Register of Criminal and Court Records.

Right to Bail. There are no specific provisions on bail in relation to manslaughter.

The German Code of Criminal Procedure (*Strafprozessordnung*) (StPO) provides for the general possibility to be released on bail from pre-trial detention (*section 116*).

Pre-trial detention based solely on flight risk should be used only in cases when such detention cannot be accomplished through less radical measures (*section 116, StPO*). Less radical measures include, for example, a requirement to report to the police station, restrictions of movement, and depositing a security payment (bail).

Bail is available until final conviction.

Defences. There are no specific legal defences or exemptions for corporate manslaughter. However, at the factual level, it will often be doubtful whether the death can be directly attributed to the company, especially when it comes to committee-made decisions. Moreover, the general defences, such as error in law or fact, can be invoked.

Administrative Manslaughter Offences

Manslaughter is also an administrative offence under sections 30 and 130 of the OWiG.

Elements. Companies may face administrative sanctions where one of its representatives, or another person in a leadership position, has committed a criminal or administrative offence for which prosecution and enforcement are not yet statute-barred and where either:

- The offence constitutes a violation of a duty for which the company is responsible.
- The company has gained, or was supposed to gain, a profit through the criminal conduct.

Penalties. There are no specific legal provisions setting out the administrative penalties for corporate manslaughter. The following rules therefore apply in relation to all administrative offences.

Companies can be fined under sections 130 and 30 of the OWiG. However, although the law does provide administrative sanctions for such circumstances, in practice many of these cases are settled out of court (*see Question 6*).

Fines of up to EUR10 million can be imposed against a company (or other association) alone or with a sanction against the manager in question (*section 30(2), OWiG*).

Following recommendations from the Organisation for Economic Co-operation and Development (OECD). The maximum administrative fine in Germany was raised from EUR1 million to EUR10 million on 30 June 2013.

The amount of fine imposed can vary significantly, depending on, for example:

- The profile/notoriety of the specific case.
- The stakeholders involved.
- The location of the court (that is, some federal states generally provide more severe sentences than others).

Where there has been a violation by a company representative entailing a monetary fine, the highest possible fine for the company is determined by the highest possible fine for the violation committed by the individual (*section 30(1) and 30(3), OWiG*).

Among the criteria to be considered is the amount of the economic gain in relation to the offence. The regulatory fine must therefore exceed the financial benefit that the perpetrator obtained from commission of the regulatory offence. If the statutory maximum

does not suffice for that purpose, it may be exceeded (*sections 30(3), 30(4) and 30(17), OWiG*).

There are presently no further guidelines on the imposition of fines in Germany.

In the event of universal succession (for example, if the company is later merged with or acquired by another organisation), monetary fines can be imposed on the company's successors (*section 30(2a), OWiG*). Moreover, if the legal entity has acquired proceeds from the committed criminal offence, the proceeds can be confiscated (*section 29a(2), OWiG*).

The decision as to whether or not to impose a fine on a company is at the authorities' discretion (known as the "discretionary prosecution principle") (*section 47, OWiG*). There are no further rules on how to apply this discretionary power.

It should be noted, however, that the rules regarding administrative corporate penalties in Germany are presently being reformed, so many of the above points are likely to change in the near future (*see Question 20*).

In addition to monetary fines, other possible penalties include:

- The confiscation of objects or the proceeds of the crime (*sections 29 and 29a, OWiG*).
- Prohibition of business activities (*section 35, Industrial Code (Gewerbeordnung)* (GewO)).
- Administrative bans on activities regarding banking or capital market activities, administered by the German Federal Financial Supervisory Agency (*Bundesanstalt für Finanzdienstleistungsaufsicht*) (BaFin).

The Federal Office of Justice (*Bundesamt für Justiz*), a subordinate of the Ministry of Justice, keeps a Central Business Register (*Gewerbezentralregister*) in which final administrative decisions that prohibit the conduct of business activities are registered. Decisions on fines over EUR200 which cannot be appealed are entered into the Central Business Register.

Individual criminal verdicts and employment bans are registered in the Federal Register of Criminal and Court Records.

Right to Bail. There is no pre-trial detention for administrative offences and therefore no right to bail.

Defences. The general defences, such as error in law or fact, can be invoked.

Furthermore, companies can always try to show that they are not responsible for the actions of their employees. Responsibility for acts of a high-ranking employee (such as a managing director or board member) are more easily attributed to the company. However, they must have acted in their specific corporate role and with the intent to enrich the company through their actions. Criminal liability under sections 30 and 130 of the OWiG can only be assumed if these conditions are satisfied.

Enforcement

3. Which authorities have the powers of prosecution, investigation and enforcement in cases of corporate manslaughter? What are these powers and what are the consequences of non-compliance? Which authority makes the decision to charge and on what basis is that decision made? Please identify any differences between criminal and regulatory investigations.

Public Prosecutor's Office (*Staatsanwaltschaft*) (PPO)

Investigation and Enforcement Powers. There is no specialised authority for prosecuting corporate manslaughter in Germany. Prosecutions are therefore brought by the German police and the applicable PPO. In some cases, specialised departments (such as the business crime or fraud department) within the local jurisdictional authority will handle the case. Each German federal state has its own judicial system, including state-specific police, PPOs, and courts.

The police are supervised by the PPO but in practice effectively carry out investigations independently.

The StPO sets out the powers for finding and securing evidence, securing objects subject to deprivation or confiscation, and apprehending the accused (*sections 94 et seq, StPO*). Such powers include confiscation, telephone tapping, e-mail and online searches, surveillance operations in private residences or public areas, use of technical aids, use of undercover agents and informers, and search and seizure.

If there is danger of a suspect absconding or hiding evidence, they can be held in pre-trial detention (*section 112, StPO*). Most measures require a court order, but in the case of imminent danger, this can be substituted with an order from the PPO.

Interrogations during the criminal investigation process can be conducted by the competent police officers or the PPO. The StPO sets out the process for hearing the accused (*sections 136 and 163a, StPO*) and the hearing of witness (*sections 48, 58 and 161a, StPO*). The accused is only obliged to appear if summoned by the PPO.

The police are authorised to conduct searches of a premises or of persons. Searches must be ordered by the judge and/or the PPO.

The German authorities do not have formal powers to compel disclosure. However, in practice, the prosecution authorities may find ways to convince a person to disclose evidence (for example, by showing a search warrant and making it clear that the warrant will be enforced if the concerned person does not co-operate and provide the missing evidence voluntarily).

Under the StPO, a person can be arrested where either of the following conditions are met:

- Where the person is caught or pursued red-handed.
- Where there is reason to suspect a flight risk or where the identity of the suspect cannot be immediately established.

(*Section 127, StPO*.)

The prosecution and police can arrest a person in the case of imminent danger when the conditions of an arrest warrant are met.

With regards to making arrests, the power to deprive an individual of person liberty can only be made by a judge under Article 104(2) of the Constitution. If such a deprivation is not based on a judicial order, a judicial decision must be obtained without delay. The court can waive the arrest if it cannot be expected that imprisonment or a custodial measure will be ordered on account of the offence and the accused provides adequate security for the fine to be expected (*section 127a, StPO*).

A warrant for arrest (remand or pre-trial detention) can be ordered where:

- There is a strong suspicion that the person is involved in the commission of an offence.
- There are grounds for making an arrest, for example:
 - flight/hiding;
 - risk of flight/hiding (because of the punishment they expect);
 - hampering of evidence, including improperly influencing or threatening witnesses;
 - specific particularly serious offences, such as membership of a terrorist organisation (*section 112 para. 2, StPO*); and
 - danger of recurrence in certain cases (*section 112a, StPO*).
- Proportionality (for example, the offence is serious enough that prison sentence can be expected).

(*Sections 112 et seq, StPO*.)

Power to Charge. German law does not set out the procedure for when to make a formal decision to charge a suspect. Whether a person has the formal status of an accused as opposed to a witness, will depend on the authorities. The formal status of being an accused becomes particularly relevant when a suspect is being interrogated, which must take place, at the latest, at the conclusion of an investigation (*section 163a(1), StPO*).

The accused has the right to remain silent, while a witness must respond, unless they risk incriminating themselves. Unlike common law systems, the accused cannot commit perjury (although witnesses can). The police must inform the witness as soon as it becomes clear that this person may be accused (that is, when they are suspected of having committed or participated in a crime). An ongoing witness interrogation must be interrupted, and the person must be informed of their position as accused and their rights.

On finalisation of a criminal investigation, the PPO will decide whether to either:

- Send the case to court by issuing a bill of indictment (*section 170(1), StPO*).
- Discontinue its investigation.

With the opening of this new procedural phase, the decision whether or not to admit the bill of indictment and go to open trial is put into the hands of the court.

Criminal Court

Investigation and Enforcement Powers. During investigations directed by the PPO, the criminal courts play a minor role.

A court order is required for the most intrusive investigative measures (for example, house searches, arrest, confiscation, telephone tapping, online searches, or surveillance operations). The PPO applies for the respective measure and the competent judge decides to either issue the order (in most case in practice) or to reject the application if it finds that the legal requirements are not met (which is rare in practice).

However, the investigating judge has no powers to order measures on their own initiative without a prior request from the PPO (unlike, for example, in the French system), unless there is imminent danger (*section 165, StPO*). The practical relevance of this provision is minor, due to the organisation and availability of the PPO and courts, respectively.

In practice, the courts usually grant measures applied for by the PPO. Legal practitioners often criticise a lack of profound legal review by courts.

Power to Charge. On presentation of a bill of indictment, the court decides whether to open or close proceedings (*section 199, StPO*).

Safeguards

4. Are there any measures in place to safeguard parties subject to a government or regulatory investigation? Is there a process of judicial review? Is there a process of appeal?

Abuse of Investigatory Powers

Right to Legal Advice. At the commencement of the first examination, the accused must be informed of the offence, the charges being brought against them and the applicable criminal law provisions. The accused must also be informed of their:

- Right to respond to the charges being brought against them, or to not make any statement regarding the charges.
- Right to consult with a defence counsel of their choice, at any stage, even prior to examination (*sections 137 et seq, StPO*).
- Right, under certain conditions, to a duty counsel (*sections 140 et seq, StPO*).

The accused will further be advised that they can request evidence to be taken in their defence. However, in practice, first police interrogations (for example, during house searches) often take place without the assistance of a lawyer.

Defence counsel can be present during the examination of the accused by the police, PPO, and by a judge (*section 163a(3) to 163a(4) and section 168c(1) to 168c(5), StPO*).

If arrested, the accused may notify a relative or another trusted person unless this endangers the purpose of the investigation (*section 114c(1), StPO*).

An arrested person is always entitled to a defence lawyer appointed by the state (*section 140, StPO*). Oral and written communication between a lawyer and their client is confidential. Communications must be clearly labelled as attorney-client communication (*section 148(1), StPO*). There are, however, exceptions to these rules in cases involving allegations of terrorism (*section 148(2), StPO*).

Since 24 August 2017, the accused must also be informed that they will have to pay the legal fees in the case of conviction. In addition, since 27 August 2017, the accused must be allowed to access information that facilitates contacting a lawyer in case they wish to consult with a lawyer before the interrogation. This provision is an implementation of EU law requirements.

Right to Exclude Unlawfully Obtained Evidence. There are formal rules on how to obtain evidence during investigative measures. However, not every breach of such rules will make obtained evidence inadmissible. In most cases, even evidence obtained through a violation of procedural law can be used in court (although it will carry a lesser evidential value).

An important issue pending judicial clarification is the extent to which authorities can seize documents produced by legal counsel in the context of internal investigations. In 2018, the Federal Constitutional Court ruled on the matter when the premises of the American law firm Jones Day were entered by the Munich PPO. Jones Day had carried out internal investigations for the American criminal proceedings against their client Volkswagen in relation to its emissions scandal. The Munich PPO was investigating Volkswagen's subsidiary Audi (but not Volkswagen itself) and confiscated documents relating to internal investigations to a considerable extent. Subsequently, two constitutional complaints were lodged by Volkswagen AG, two by Jones Day, and one by lawyers working at Jones Day. The Federal Constitutional Court ruled that the search and seizure of these documents was not

contrary to German constitutional law. However, the court's judgment has left many questions unanswered, on which the local courts in Germany have not ruled consistently (for further comment see www.linkedin.com/pulse/new-ruling-german-federal-constitutional-court-legal-anna-oehmichen/).

Judicial review may be requested where the PPO has relied on the use of doubtful evidence in court proceedings.

Provisions of Written (Human) Rights. Fundamental rights are provided for in sections 1 to 19 of the German Constitution. Particularly relevant for criminal investigations are:

- Human dignity, freedom of movement, and right to privacy (*sections 1 to 2*).
- Confidentiality of telecommunications, professional freedom, and the inviolability of the home (*sections 10 to 13*).
- Protection of personal property (*section 14*).
- Right to a legal remedy (*section 19(4)*).

These fundamental rights also apply to legal entities (as far as possible and meaningful with regards to their content) under section 19(3) of the Constitution.

Under constitutional and criminal law, any measures used by the investigatory authorities which limit the fundamental rights of the accused will usually require a court order (see *Question 3, Criminal Court*).

The process for judicial review of violations depends on the measure causing the violation.

Appeal Process

Judgments rendered by a court of first instance can be appealed by the accused and by the prosecuting authority (*sections 312 et seq and/or sections 333 et seq, StPO*). The competent court, the procedure to be followed, and the extent of re-examination will depend on the individual case.

Depending on the court of first instance, an appeal is brought before the Regional Court (*Landgericht*), the Higher Regional Court (*Oberlandesgericht/Kammergericht*) or before the Federal Supreme Court (*Bundesgerichtshof*).

Court orders other than judgments, such as orders for investigative measures as applied for by the PPO during investigations, can be reviewed on request by the concerned person (*sections 304 et seq, StPO*).

Civil Suits and Settlement

5. Can private parties bring civil suits for cases of corporate manslaughter?

There are no specific provisions in relation to bringing civil suits for corporate manslaughter.

Under general rules, private parties can bring civil suits additionally to and separately from criminal proceedings to obtain reparation for damages caused by the defendant's behaviour. Civil claims can be brought against natural persons as well as against corporate entities. In both cases, the civil claimant must prove civil liability, requiring intentional or negligent behaviour that caused the person's death (*sections 823 et seq, BGB*). Individual conduct also may lead to a corporation's civil liability under the general rules (*section 831, BGB*).

Under general civil procedural law, such claims can be brought by individuals, and under certain circumstances, by associations. Class action lawsuits do not per se exist in Germany. However, since 2018 the Code of Civil Procedure (*Zivilprozessordnung*) (ZPO) has provided for a sample claim for a declaratory judgment

(*Musterfeststellungsklage*) and sets out the requirements needed for associations to bring claims (*sections 606 et seq, ZPO*). This generally involves obtaining a court's statement establishing the facts necessary for consumers to then bring a civil corporate liability claim. The claim by the association is, however, intended merely to establish the facts. Only individual consumers can then, based on the established facts, bring an action for performance and thereby engage the corporation's liability.

6. Can individuals and/or legal entities reach a civil settlement with the appropriate authority in cases of corporate manslaughter?

In criminal proceedings, the competent authorities will consider and, if appropriate, encourage a settlement between the suspect and the victim (*Täter-Opfer-Ausgleich*) (*section 155a, StPO*). Successful settlements may, in the case of a conviction, lead to a less severe or even to no sanction at all (*section 46a, StGB*).

Authorities conducting criminal proceedings may decide to discontinue their investigation and instead give instructions to the suspect where:

- Giving such instructions would be in the public interest. It may be the case, for example, that the public interest does not require a criminal investigation for the particular offence.
- The gravity of the offence does not require further criminal investigation.

(*Section 153a, StPO*).

Such instructions would sometimes (but not invariably) involve reparation for the damage caused by the alleged criminal behaviour.

Although the competent authorities are required by law to prosecute criminal allegations, the decision regarding whether to prosecute for administrative offences is left to their discretion (*section 47(1), OWiG*). Especially in complicated cases, the specialised administrative authority or PPO might prefer to limit its investigations. Unlike criminal offences under section 153a of the StPO, the administrative authority or PPO cannot decide to discontinue an investigation into an administrative offence in exchange for the accused making payment to a charitable organisation or other entity (*section 47(3), OWiG*). This does not, however, exclude the possibility of the competent authority considering other circumstances when deciding whether to prosecute or discontinue its investigation (for example, the requirement for the alleged offender to satisfy its obligations by providing reparations to the victim).

Punitive damages do not exist in Germany.

HEALTH AND SAFETY OFFENCES

Regulatory Provisions and Authorities

7. What are the main regulatory provisions and legislation relevant to health and safety offences?

There is a wide variety of civil and administrative laws governing individual occupational health and safety areas, for example, the:

- Safety and Health at Work Act (*Arbeitsschutzgesetz*) (*ArbSchG*).
- Working Time Act (*Arbeitszeitgesetz*) (*ArbZG*).
- Maternity Protection Act (*Mutterschutzgesetz*) (*MuSchG*).
- Youth (Work) Protection Act (*Jugendschutzgesetz*) (*JuSchG*); (*Jugendarbeitsschutzgesetz*) (*JArbSchG*).
- Works Constitution Act (*Betriebsverfassungsgesetz*) (*BetrVG*).

Offences

8. What are the specific offences relating to health and safety?

Causing Bodily Harm

Causing bodily harm is a criminal offence under the StGB. There are several provisions penalising any conduct that causes bodily harm, including special ways of commission and qualifications.

Elements. Section 223 of the StGB penalises physical maltreatment or harming the health of another person, when acting with intent, and the attempt to do so.

Section 226 of the StGB further qualifies section 223 by penalising the type of conduct that would cause grievous bodily harm (for example, where the offender was at least reckless as to whether they would cause grievous bodily harm to the victim and where the victim has either lost their sight, hearing, speech, or fertility, ability to use an important body part, has been permanently and seriously disfigured, has contracted long-term illness, or has become paralysed, mentally ill, or disabled).

Section 227 also qualifies section 223 by penalising conduct that causes the death of the bodily harmed person. This offence requires that:

- The offender's act resulted in the death of a person.
- The offender was acting at least recklessly with regards to causing the death.

Section 229 of the StGB further penalises the negligent infliction of bodily harm. While requiring the same objective elements as section 223 of the StGB, this offence requires negligence instead of intent.

Penalties. The following penalties are applicable under the StGB:

- Causing bodily harm carries a sentence of a monetary fine or a prison sentence of up to five years (*section 223*).
- Causing grievous bodily harm carries a prison sentence for up to ten years (*section 226*).
- Causing a person's death by the infliction of bodily harm is punished with imprisonment for at least three years (*section 227*).
- Causing bodily harm by negligence is punishable with imprisonment not exceeding three years or a fine (*section 228*).

Offences can only be committed by individuals. However, sanctions for companies are likely to increase in the future (see *Question 20*).

For the general considerations regarding sentencing and other possible sanctions, see *Question 2, Negligent or Intentional Manslaughter*.

Right to Bail. See *Question 2, Negligent or Intentional Manslaughter*.

Defences. Consent by the victim excludes criminal responsibility for the perpetrator (*section 228, StGB*).

The general defences available under criminal law also apply (see *Question 2, Negligent or Intentional Manslaughter*).

Violation of Occupational Safety Regulations

Elements. Section 25 of the ArbSchG foresees administrative sanctions for employers violating a duty contained in any specific regulation relating to health safety at work through any intentional or reckless conduct.

The applicable specific regulations vary in each case and depend on the activity and workplace in question.

Section 26 of the ArbSchG criminalises conduct of employers from carrying out any repetitive infringement or any intentional infringement which causes any threat to any employee's life or safety.

Penalties. Violations of section 25 of the ArbSchG can lead to the imposition of a fine of up to EUR30,000.

Violations of section 26 of the ArbSchG can lead to a fine or to a prison sentence of a maximum of one year.

As outlined above, at present the offence can only be committed by individuals. However, sanctions for companies are likely to increase in the future (see *Question 20*).

For the general considerations regarding sentencing and other possible sanctions, see *Question 2, Negligent or Intentional Manslaughter*.

Right to Bail. For criminal offences, see *Question 2, Negligent or Intentional Manslaughter*. For administrative offences, there is no pre-trial detention and therefore no right to bail.

Defences. There are no specific defences or exemptions besides those of general criminal law regarding health and safety offences (see *Question 2, Administrative Manslaughter Offences*). It may be a defence if the organisation can show that it had an effective occupational health and safety management system (*Arbeitsschutzmanagementsystem*) in place to prevent the violation from occurring. Furthermore, it may be a defence for the organisation to specify that it had complied with all regulations relating to monitoring and control and had proceeded with care.

Enforcement

9. Which authorities have the powers of prosecution, investigation and enforcement in cases of health and safety offences? What are these powers and what are the consequences of non-compliance? Which authority makes the decision to charge and on what basis is that decision made? Please identify any differences between criminal and regulatory investigations.

The relevant authorities, investigation and enforcement powers are the same as for corporate manslaughter (see *Question 3*).

Inspections may additionally be conducted by specialised authorities such as the Trade Inspectorate (*Gewerbeaufsichtsamt*) or the State Office for Occupational Safety (*Staatliche Ämter für Arbeitsschutz*).

Safeguards

10. Are there any measures in place to safeguard parties subject to a government or regulatory investigation? Is there a process of judicial review? Is there a process of appeal?

See *Question 4*.

11. Can private parties bring civil suits for health and safety violations?

See *Question 5*.

12. Can individuals and/or legal entities reach a civil settlement with the appropriate authority for health and safety violations?

See *Question 6*.

ENVIRONMENTAL OFFENCES Regulatory Provisions and Authorities

13. What are the main regulatory provisions and authorities responsible for investigating environmental offences?

Environmental offences are primarily set out in the StGB.

There are further provisions in other laws transposing EU directives or referring to EU regulations relating to the environment.

For many individual areas there are special laws and ordinances under civil/administrative law (see *Question 14, Offences Under Specific Laws*).

Offences

14. What are the specific offences relating to the environment?

Water Pollution

Elements. Water pollution is punishable under section 324 of the StGB.

A person may be punished for causing water pollution if, without an authorisation, they:

- Pollute a body of water (as defined in section 330d of the StGB and section 3 of the Water Management Act (*Wasserhaushaltsgesetz*) (WHG)), or otherwise change its characteristics.
- Cause the pollution either with intent or by negligence.

Penalties. At present, the offence can only be committed by individuals, but sanctions for companies are possible under certain circumstances. In practice, many of these cases are settled out of court (see *Question 4 to 5*). Sanctions for environmental offences are likely to increase in the future (see *Question 20*).

Water pollution is punishable with:

- For intentional behaviour: a monetary fine or a prison sentence of up to five years.
- For negligent behaviour: penalties range from a monetary fine to a prison sentence of up to three years.

Aggravated sentences can be imposed for especially severe cases of offences under sections 324 to 329 of the StGB. They range from monetary fines and/or up to ten years of imprisonment (*section 330, StGB*).

For the general considerations regarding sentencing and other possible sanctions, see *Question 2, Negligent or Intentional Manslaughter*.

Right to Bail. See *Question 2, Negligent or Intentional Manslaughter*.

Defences. There are no specific defences or exemptions regarding environmental offences. Criminal liability relies on permits to be obtained in administrative admission procedures and is excluded if such permits exist. Therefore, companies should make sure to obtain all necessary formal approvals. Further, informal

administrative action can be a justification for a polluting activity if an authority tolerates a known unauthorised behaviour.

Further, defences available under general criminal law apply (see *Question 2, Negligent or Intentional Manslaughter*). In rare cases, necessity under section 34 of the StGB may be invoked if the offending conduct averts an imminent danger to life, limb, freedom, property, or another legal interest which cannot otherwise be averted.

Soil Pollution

Elements. Soil pollution is punishable under section 324a of the StGB.

A person may be punished for causing soil pollution if, without an authorisation, they:

- Violate their administrative duties by carrying substances into soil, letting them penetrate into soil or releasing them, and thereby contaminate the soil or otherwise adversely change soil in a way that would inflict harm to:
 - the health of others;
 - animals, plants, or other objects of significant value;
 - a body of water; or
 - contamination to a considerable extent.
- Cause the pollution with intent or by negligence.

The attempt is also punishable.

Penalties. Soil pollution is punishable with:

- For intentional behaviour: a monetary fine or a prison sentence of up to five years.
- For negligent behaviour: a monetary fine or a prison sentence of up to three years.

For further general considerations concerning penalties for environmental offences, see above, *Water Pollution*.

Right to Bail. See *Question 2, Negligent or Intentional Manslaughter*.

Defences. See above, *Water Pollution*.

Air Pollution

Air pollution is punishable under section 325 of the StGB.

Elements. A person may be punished for causing air pollution if, without an authorisation, they:

- Violate their administrative duties while operating a (industrial) plant and thereby cause changes to air or release a considerable amount of hazardous material which may beyond the plant's territory cause harm to the health of another person, animals, plants, or damage to other objects of considerable value.
- Cause the pollution through intent, negligence, or by gross negligence.

Penalties. Air pollution may be punished by the imposition of a fine or a prison sentence with the maximum length depending on the *mens rea*, reaching from one year up to five years.

For further general considerations concerning penalties for environmental offences, see above, *Water Pollution: Penalties*.

Right to Bail. See *Question 2, Negligent or Intentional Manslaughter*.

Defences. See above, *Water Pollution*.

Causing Noise, Vibrations and Non-ionising Radiation

This offence is punishable under section 325a of the StGB.

Elements. A person may be punished for such offence if, without an authorisation, they:

- Violate their administrative duties while operating a (industrial) plant and thereby cause noise, vibrations, or non-ionising radiation capable of inflicting harm to another person's health outside the (industrial) plant or endangering another person's health, animals or other objects of considerable value.
- Cause the pollution with intent or negligence.

Penalties. This offence is punishable with:

- For intentional behaviour: a monetary fine or a prison sentence of up to five years.
- For negligent behaviour: a monetary fine or a prison sentence of up to three years.

For further general considerations concerning penalties for environmental offences, see above, *Water Pollution: Penalties*.

Right to Bail. See *Question 2, Negligent or Intentional Manslaughter*.

Defences. See above, *Water Pollution*.

Unlawful Disposal of Waste

Unlawful disposal of waste is punishable under section 326 of the StGB.

Elements. A person may be punished for unlawful disposal of waste if, without an authorisation or by performing such act outside of an admitted (industrial) plant or without respecting an applicable procedure, they:

- Collect, transport, treat, use, store, dispose of, remove, deal, or otherwise trade with waste that contains or may produce certain substances, or may pose some other danger to humans or to the environment.
- Cause the pollution with intent or negligence.

The term waste is regulated under section 3 of the Waste Management Act (*Kreislaufwirtschaftsgesetz*) and further determined by the Environmental Crime Directive (2008/99/EC).

Penalties. Unlawful disposal of waste is punishable with:

- For intentional behaviour: a monetary fine or a prison sentence of up to five years.
- For negligent behaviour: a monetary fine or a prison sentence of up to three years.

For further general considerations concerning penalties for environmental offences, see above, *Water Pollution*.

Right to Bail. See *Question 2, Negligent or Intentional Manslaughter*.

Defences. The commission of the above elements may not be punished if the detrimental effects on the environment are excluded (*section 326(6), StGB*).

See also above, *Water Pollution*.

Unlawful Operation of Facilities

Unlawful operation of facilities is punishable under section 327 of the StGB.

Elements. A person may be punished for an unlawful operation of facilities if they without an authorisation or despite a prohibition preventing them from doing so, they:

- Operate, hold, remove, or modify a facility (as defined in paragraph 1 of section 327).
- Carry out the process through intent or negligence.

The scope of the provision is, under additional requirements, extended to facilities located in other member states of the EU.

Penalties. Unlawful operation of facilities is punishable with

- For intentional behaviour: a monetary fine or a prison sentences of up to five years.
- For negligent behaviour: a monetary fine or a prison sentence of up to three years.

For further general considerations concerning penalties for environmental offences, see above, *Water Pollution: Penalties*.

Right to Bail. See *Question 2, Negligent or Intentional Manslaughter*.

Defences. See also above, *Water Pollution*.

Unlawful Handling of Radioactive Substances or other Dangerous Substances and Goods

Unlawful handling of radioactive substances or other dangerous substances and goods is punishable under section 328 of the StGB.

Elements. A person may be punished for the unlawful handling of radioactive substances or other dangerous substances/goods if, without an authorisation or despite a prohibition preventing them from doing so, they:

- Do any of the following in relation to radioactive substances or other dangerous substances (as defined in paragraph 1 of section 328):
 - produce, store, transport, process, or otherwise use or import/export such substances;
 - fail to immediately hand over such substances despite an existing obligation;
 - transmit such substances to a non-authorised recipient;
 - cause a nuclear explosion; or
 - induce or support the commission of such acts.
- Carry out such act with intent or negligence.

A qualification is foreseen in some special cases, where the conduct threatens another person's health, animals, plants, waters, air, soil, or objects of considerable value.

The attempt is also punishable for most of the listed acts.

Penalties. Unlawful handling of radioactive substances or other dangerous substances and goods is punishable with:

- For intentional behaviour: a monetary fine or a prison sentences of up to five years.
- For negligent behaviour: a monetary fine or a prison sentence of up to three years.

For further general considerations concerning penalties for environmental offences, see above, *Water Pollution: Penalties*.

Right to Bail. See *Question 2, Negligent or Intentional Manslaughter*.

Defences. See also above, *Water Pollution*.

Endangering Protected Areas

The endangering of protected areas is punishable under section 329 of the StGB.

Elements. A person may be punished for endangering of protected areas if, contrary to a regulatory law passed to protect a certain area from detrimental effects on the environment, they:

- Operate an (industrial) plant in an area contrary to the regulatory law or commit another act in such an area and thereby contravene the protective purpose of the law.
- Carry out such act with intent, negligence, or gross negligence (as applicable).

Penalties. Endangering protected areas is punishable with:

- For intentional behaviour: a monetary fine or a prison sentences of up to five years.
- For (grossly) negligent behaviour: a monetary fine or a prison sentence of up to three years.

For further general considerations concerning penalties for environmental offences, see above, *Water Pollution: Penalties*.

Right to Bail. See *Question 2, Negligent or Intentional Manslaughter*.

Defences. See also above, *Water Pollution*.

Causing Severe Danger by Releasing Poison

Causing severe danger by releasing poison is punishable under section 330a of the StGB.

Elements. A person may be punished for causing severe danger by releasing poison if they:

- Release or diffuse a poisonous substance and thereby cause either:
 - risk of death or serious harm to a person's health; or
 - risk of harm to the health of a large number of people.
- Carry out such act with intent, negligence, or gross negligence (as applicable).

Penalties. At present the offence can only be committed by individuals, but sanctions for companies are possible under certain circumstances. In practice many of these cases are settled out of court (*Question 5 to 6*). Sanctions are likely to increase in the future (see *Question Question 20*).

Causing a severe danger by releasing poison is punishable with:

- For intentional behaviour: a prison sentence of six months to ten years.
- For (grossly) negligent behaviour: a monetary fine and a prison sentence of up to three years.

For the general considerations regarding sentencing and other possible sanctions, see *Question 2, Negligent or Intentional Manslaughter*.

Right to Bail. See *Question 2, Negligent or Intentional Manslaughter*.

Defences. There are no specific defences or exemptions regarding environmental offences.

As opposed to sections 324 to 329 of the StGB, causing danger by releasing poison does not require a violation of administrative regulations or unauthorised behaviour in order for there to be an offence. In addition, an official approval does not constitute any justification.

Furthermore, defences available under general criminal law apply (see *Question 2, Negligent or Intentional Manslaughter*). In rare cases, necessity under section 34 of the StGB may be invoked if the offence averts an imminent danger to life, limb, freedom, property, or another legal interest which cannot otherwise be averted.

Offences Under Specific Laws

Elements. The most relevant civil/administrative offences in the context of the environment are regulated by various statutory laws. These include, for example, the:

- **Chemicals Act (*Chemikaliengesetz*) (ChemG).** This is intended to ensure protection against hazardous substances. Regulatory offences are contained in section 26, while criminal provisions can be found in section 27.
- **Plant Protection Act (*Pflanzenschutzgesetz*) PflSchG.** This provides for the protection of plants and plant products, on the one hand, and the protection of humans, animals, and the ecosystem on the other.
- **Federal Act for the Protection of Nature (*Bundesnaturschutzgesetz*) (BNatSchG).** This is intended to preserve and conserve nature and landscape management. Regulatory offences are contained in section 69, while criminal provisions can be found in sections 71 and 71a.
- **Animal Protection Act (*Tierschutzgesetz*) (TierSchG).** This penalises behaviour that involves cruelty towards animals. Regulatory offences are contained in section 18, while criminal provisions can be found in section 17.
- **Federal Hunting Act (*Bundesjagdgesetz*) BJagdG.** This protects game animals and penalises prohibited shooting of animals and the practice of hunting parent animals and hunting during the closed season. Regulatory offences are contained in section 39, while criminal provisions can be found in sections 38 and 38a. Section 42 of BJagdG confers the power to state legislation to provide further regulatory offences and crimes.

Penalties. The penalties under the above laws range from monetary fines to imprisonment for up to five years. Other penalties may include:

- Withdrawal of formerly-granted permissions.
- Confiscation of the objects or proceeds of a crime.
- Business activities being barred based on administrative decisions of unreliability.

At present, offences can only be committed by individuals. However, sanctions for companies are under certain circumstances possible and are likely to increase in the future (see *Question 20*).

For the general considerations regarding sentencing and other possible sanctions, see *Question 2, Negligent or Intentional Manslaughter*.

Right to Bail. As far as criminal provisions are concerned, see *Question 2, Negligent or Intentional Manslaughter*.

For administrative offences, there is no pre-trial detention and therefore no right to bail.

Defences. In addition to the special provisions under their respective codes, defences may be available under general criminal law (see *Question 2, Negligent or Intentional Manslaughter*).

Enforcement

15. Which authorities have the powers of prosecution, investigation and enforcement in cases of environmental offences? What are these powers and what are the consequences of non-compliance? Which authority makes the decision to charge and on what basis is that decision made? Please identify any differences between criminal and regulatory investigations.

Generally, the relevant authorities, investigation and enforcement powers are the same as for corporate manslaughter (see *Question 3*).

For certain environmental crimes, nature protection authorities such as the Federal Agency for Nature Conservation (*Bundesamt für Naturschutz*) and the State Offices for Nature Conservation (*Landesämter für Naturschutz*) as well as other specialised authorities, such as the Office for Customs Investigations (*Zollfahndungsämter*) or the Main Customs Offices (*Hauptzollämter*) are competent to bring prosecutions under section 73 of the Federal Act for the Protection of Nature (BNatSchG).

Safeguards

16. Are there any measures in place to safeguard parties subject to a government or regulatory investigation? Is there a process of judicial review? Is there a process of appeal?

See *Question 4*.

17. Can private parties bring civil suits for environmental offences?

See *Question 5*.

18. Can individuals and/or legal entities reach a civil settlement with the appropriate authority for environmental offences?

See *Question 6*.

Modern Slavery

19. What are the general concerns regarding modern slavery in your jurisdiction?

Slavery and forced labour are sanctioned by criminal law under sections 232 of the StGB.

At the time of writing, the German legislator is in the process of finalising draft legislation on supply chains (see *Question 20, Corporate Due Diligence Obligations in Supply Chains*).

REFORM, TRENDS AND DEVELOPMENTS

20. Are there any impending developments or proposals for reform?

Corporate Criminal Liability

As it presently stands, German law is based on the presumption that legal entities (such as organisations/companies) have no awareness of wrongdoing and therefore cannot be liable for criminal offences. However, as regulatory offences are no longer considered to be an effective tool for dealing with corporate criminal conduct, new legislation has been drafted to create a new legal basis for such conduct.

The official draft legislation was presented by the German Ministry for Justice in April 2020 and adopted by the proposing government in June 2020. At the time of writing (June 2021) the draft is still pending approval by the Parliament.

In relation to corporate criminal liability, the new draft legislation, the Draft Act on Corporate Sanctioning (*Verbandssanktionengesetz*) (VerSanG) foresees significant changes to both material and procedural law:

- The VerSanG defines corporate crimes as the commission of acts violating corporate duties or enriching the corporation (*section 2(1)*). A fine can be imposed on a corporation for a corporate crime committed by a natural person acting on behalf of the corporation (*section 3(1)*). To hold a corporation liable, it is sufficient to establish that a corporate crime has been committed without identifying the individual responsible for the commission.
- The VerSanG makes reference to the StGB, entailing an obligation to prosecute corporate crimes in the same way as ordinary crimes. So far, the decision regarding whether or not to prosecute for administrative offences is being left to the competent authority's discretion (*section 24(1)*).
- With regards to the possible sanctions, VerSanG provides that these will entail monetary fines and warnings reserving the possibility of a subsequent fine (*section 9*). Possible fines will be up to EUR10 million, with the exact amount depending on the economic situation of the company. Such sanctions will need to be entered into a special register (*sections 35 to 42 and sections 54 to 66*). In some cases, additional instructions may be inflicted on the corporation (*sections 12 and 13*) or the corporation's conviction may be announced publicly (*section 14*).
- With regards to sentencing provisions, sections 15 to 20 of VerSanG provide that sentences will be considered based on:
 - the gravity of the corporate crime in question; and
 - the extent to which measures to avoid corporate crimes were adopted or omitted.
- The circumstances under section 15(3) that will be considered for sentencing individuals will include:
 - the aims and motivation of the offender;
 - the extent, impact, and duration of the crime;
 - the methods of commission;

- whether there are any formerly committed crimes; and
 - any efforts to reveal the crime and to compensate for it with damages.
- Specific possibilities for not initiating or discontinuing proceedings are set out in sections 35 to 42 of the VerSanG.

Corporate Due Diligence Obligations in Supply Chains

Germany has introduced a Law on Corporate Due Diligence Obligations in Supply Chains (*Lieferkettensorgfaltspflichtengesetz*) (*Lieferkettengesetz*).

Lieferkettengesetz is intended to strengthen human rights by making corporations liable for any related breaches of human rights-related compliance throughout their supply chains. At the same time, *Lieferkettengesetz* is intended to reduce environmental destruction, especially illegal deforestation, emission of pesticides, and air and water pollution.

On 25 June 2021, the legislation passed through the Parliamentary assembly. The legislation is now due to enter into force from 1 January 2023 for companies with 3,000 and more employees.

Under the law, corporations are required to:

- Draft and adopt a policy statement on respecting human rights.
- Carry out a risk analysis and engage in risk management to prevent human rights violations.
- Establish a compliance mechanism.
- Report on their business activities.

The legislation does not establish any new forms of liability but instead refers to existing liability rules under German and foreign laws. The extent to which corporations will be held to be liable will depend on their possible influence on the supply chain. Although this would be obvious in the case of a company's core business activity, the legislation extends such liability to (indirect) suppliers as soon as the corporation gains any substantiated knowledge of a human rights violation at the suppliers' level. Some of these requirements are already included in some EU regulations, meaning many companies are already required to comply with them.

The Federal Office for Economic Affairs and Export Control (*Bundesamt für Wirtschaft und Ausfuhrkontrolle*) (BAFA) is the authority in charge of implementing the legislation. The German government intends to offer support programmes for companies to provide guidance in relation to complying with the new obligations.

The legislation provides for civil but not criminal liability. In the case of infringement, corporations may face monetary fines, with serious infringements potentially leading to them being excluded from public procurement processes for up to three years.

Lieferkettengesetz also establishes a right for persons affected by human rights violations to file a lawsuit against a company (non-governmental organisations can support the affected persons but do not have their own right to engage in legal action in this regard).

The German Federal Ministry for Economic Co-operation and Development (*Bundesministerium für wirtschaftliche Zusammenarbeit und Entwicklung*) (BMZ) has published a supply chain law FAQ on its website (see www.bmz.de/de/entwicklungspolitik/lieferkettengesetz).

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