

## GERMAN LEGISLATOR FACILITATES CONFISCATION ORDERS AND ASSET RECOVERY

After having implemented stricter anti-bribery and corruption regulations in late 2015 and mid-2016, new criminal law provisions regarding confiscation orders and asset recovery will enter into force on 1 July 2017. The present legislation was considered to be insufficient. Further, the law implements European provisions into national law. The law provides new rules for compensation of damaged parties and lower prerequisites for confiscations. The new regulations might have an impact for corporations as confiscation orders might be imposed more easily and asset tracing could in some cases be facilitated.

### Impact for corporations which suffered damage from criminal misconduct

In the event of a criminal offence committed to the detriment of a corporation, it will become, in general, easier for the corporation to recover losses. However, in some cases longer proceedings can be expected.

#### I. Compensation proceedings become part of the criminal proceedings

Following the new regulations, claims of potential victims will be satisfied after the criminal proceedings against the perpetrator have been completed. Exceptions apply if the asset is a movable item. In general, the compensation proceedings will be part of the criminal enforcement proceedings upon request by the damaged party within a six month time period after the decision on confiscation. The damaged party only has to demonstrate its claim *prima facie*. The authorities will then have to decide on the claim itself. No complicated (civil law) proceedings are required anymore.

In addition, - in contrast to the old law - also in cases of subsequent detection of illegally gained

assets and/or substitutes a confiscation order by the court is possible.

#### II. Separate civil law proceedings might still be recommendable in certain situations

Separate civil law proceedings in order to gain compensation from the perpetrator directly are still possible. This might be recommendable, although higher requirements must be met by the damaged party to prove the claim, in some cases to achieve quicker compensation.

#### III. Equal treatment of all debtors in case of insolvency of the perpetrator

Under the old law some legal uncertainty existed in the case of insolvency of the perpetrator. The new regime tries to establish clearer rules. The Public Prosecutor's Office is now entitled to request the opening of insolvency procedures. All debtors will be treated equally regardless of the origin and timing of their claims. No "dog racing" is possible nor required anymore between debtors.

### Impact for corporations under investigation

Confiscations, although not qualified as sanctions, might have a significant impact on corporations and

possibly exceed the amount of a potential fine. The following new principles apply.

### **I. Concretization of the applicable gross principle**

For a fairly long period of time it has been disputed how to determine which values constitute the "assets obtained". Divergent principles were applied by different judges. The new regime will reinforce the so-called "gross principle" ("*Bruttoprinzip*") which provides legal certainty. Expenses which were made consciously and willingly with the aim of committing an offence will not be deducted from the assets obtained. However, expenses for acts which are in compliance with the law can be considered to be deductible, even if they were made with regard to the same situation as the offence.

### **II. Extension of the scope of confiscations**

The new regime does no longer distinguish anymore between certain types of offence. It is sufficient in all cases that a provable crime has been committed; however, the offence from which the assets in question originate does not necessarily have to be proven.

Even lower requirements apply in the field of organized crime (which also comprises e.g. cases of qualified tax evasion and money laundering) and terrorism. In these situations assets of unknown

origin can be confiscated without having to prove an offence if the court has no reasonable doubt that they are stemming from an offence.

### **III. New rules on preliminary securing of assets**

Another change concerns the preliminary securing of assets. Where it used to be a question of discretion whether the Public Prosecutor's Office ordered such preliminary securing, the new provisions make securing of assets the rule if urgent reasons suggest a confiscation. Furthermore, it is no longer necessary to substantiate a reason for the seizure of assets and there will be no provisions governing the duration of preliminary securing. In the future, both aspects will be decided according to the principle of proportionality. This makes it more likely that investigation authorities will use this mechanism during investigations proceedings.

### **IV. Clearer rules on confiscations from third parties**

Furthermore, clearer rules regarding confiscations from third parties will apply. Such confiscations will be possible in cases in which the offender shifted assets to a third person free of charge or without legal basis. Those new regulations could also be relevant for corporations that transferred funds stemming from a criminal or regulatory offence to affiliated companies.

## **Contacts**



**Prof. Dr. Jürgen Taschke**  
Rechtsanwalt | Partner  
T +49 69 271 33 481  
juergen.taschke@dlapiper.com



**Florian Kirstein**  
Rechtsanwalt | Counsel  
T +49 40 1 88 88 244  
florian.kirstein@dlapiper.com



**Dr. Daniel Zapf**  
Rechtsanwalt | Associate  
T +49 69 271 33 486  
daniel.zapf@dlapiper.com