

VW, Deutsche Bank and Siemens – International Compliance Challenges for German Companies

Against the background of recent corporate scandals which have been noticed globally this article focuses on the requirements of a modern compliance system in a German organisation and explains the risks of non-compliance. Further, it looks at the influence of foreign laws which have a major impact not only in Germany.



Introduction

For a long time there was a common consensus in Germany that compliance in general and corruption, competition and cartel law violations, fraud and money laundering in particular, were a problem of South America, Africa, Eastern Europe and parts of Asia. On the other hand, the image of Germany was of a country of law-abiding citizens, fair courts and pedantic, but incorruptible government officials. While this may still be true for courts and public servants, recent events in the private sector have cast doubts on this premise.

Compliance violations are not only an image issue, but can lead to serious problems for companies and members of management. In many cases, the only defence that may avoid potentially disastrous consequences is a compliance organisation that meets the requirements as determined by civil and criminal courts.

While there still is no strict obligation to have a compliance system in place, the (indirect) punishment for any negligence in that regard can be severe.

High (Personal) Risks

As far as risks of non-compliance are concerned, some relate to the company itself and others create personal liability for officers and employees.

German law does not recognise criminal offences of companies. Thus, the main issue at the company level is the avoidance of financial risks. Penalties in case of violations of mandatory laws can be heavy. Areas of particular high risk are cartel law violations, bribery payments, money laundering and social security contribution fraud (in the case of a misclassification of employees). Numerous laws, for example, those dealing with data protection, workplace security and tax and environmental duties often contain heavy administrative and punitive penalties in the case of violations. As a further consequence of a violation, a company might be excluded from (public) procurement and public projects. Penalties in foreign countries, especially in the case of United States' law infringements, can be an additional problem.

The personal liability of employees violating the law needs no further explanation. Usually such employees face prosecution and termination of employment. In the case of criminal law violations, civil damage claims are potentially unlimited.

As far as members of management are concerned (both the board and supervisory board) a criminal law conviction is rarely the issue, since usually a personal contribution cannot be proven. The civil law risk of been sued by government agencies and especially by shareholders, who try to recover the damages awarded against the company, are much more relevant.

Managers must observe the prudence of a diligent business man in all company affairs. This principle is the basis for their obligations to fully comply with all relevant laws.¹





During the due diligence process high risk areas need to be identified and then addressed first.

Necessary Elements of a Compliance Organisation

Due Diligence

The process to implement a compliance system that helps to limit risks and liabilities starts with a thorough due diligence of all rules, regulations, policies, contracts and company practices. Even if such systems already seem to be in place, it is advisable to check from time to time whether the compliance organisation must be amended or modified in order to comply with the latest legislative developments.

The resistance within an organisation against such process must not be underestimated. Many parties (for example, former managers now being members of the

In the wake of the Siemens case the something extraordinary happened (at least by German standards) when Siemens took one of its former board members to court (as he did not agree to a proposed settlement) and claimed damages in the amount of €15 million. This led to a landmark decision by the Landgericht München I of 10 December 2013² awarding the full amount. In that decision, the court outlined the responsibilities for board members to create and monitor a compliance organisation within the company. Any failure to do so (here, for the supervisory board member, to urge the board of directors to act accordingly) leads to a personal, potentially unlimited, liability of each board member (joint and several liability) which is generally not covered by the usual D&O insurance policies. Such personal liability is not only relevant in cartel law or bribery cases, but other areas of law as well. In some areas, for example, tax and social security law, there can even be a direct liability of company officers towards investigating agencies.

Thus, board members, regardless of their nationality and place of residence, are well advised to implement a functioning compliance organisation and constantly monitor adherence to all relevant laws and regulations.

supervisory board, works councils, individual employees with special responsibilities in the past and present) often have no interest in changing the way things are done and/or to uncover any previous mistakes.

During the due diligence process high risk areas need to be identified and then addressed first. Sometimes this can be done unilaterally by issuing and communicating a new policy. More often contracts and existing policies need to be modified and rights of employee representatives must be observed.

Communication and Trainings

Once adequate regulations are in place these need to be communicated to all relevant employees in a way that a binding obligation is created and no mandatory laws (for example, data protection) are violated. The method of communication must also ensure that each employee has received the regulations and that such receipt is traceable and can be proven in case of dispute.

Regulations on subjects such as cartel law, money laundering, bribery, fraud etc. can be complicated. Thus it is important to explain to all employees concerned the

concept and its interpretation. German labour courts in the past did not regard e-learning or brochures as sufficient, they asked instead for in-person training, which allows monitoring of attendance and gives employees the opportunity to ask questions. New programmes and technical possibilities to monitor employee participation might change that view, although data protection certainly is an issue. Training sessions need to be repeated on a regular basis to ensure that newly hired employees are participating and to update the information once given in view of legislative modifications and/or recent court decisions.

Monitoring, Compliance Office and Whistleblowing

A further task for management is the careful monitoring of the practical observance of all compliance rules. In that regard, the delegation of authority is particularly important. The board is responsible to carefully select and choose those persons within the organisation that are qualified and whose personality ensures loyalty, fairness and scrutiny. A wrong selection or removal of an unqualified person may create a personal liability for the board members.³

The appointment of a compliance officer is not mandatory under German law (with the exception of certain sectors of the financial services industry) and thus the system has many flaws, for example, a compliance officer is not independent from the management and not protected against dismissal (unlike a data protection officer). On the other hand, there is even criminal liability for the compliance officer to carefully fulfil his/her duties.⁴ Recent experience highlights that it is no solution to simply appoint a competent compliance officer and disregard resistance within the organisation.⁵

In practice, a whistleblowing system can be useful. Again, no legal frameworks exist and numerous obstacles ranging from data protection law to employee co-determination need to be observed. A major flaw is the fact that whistleblowers regularly are not rewarded for their effort—they are not even protected against dismissal—if they cannot prove the protected facts they report.⁶ Therefore, any system needs to address these issues in order to make whistleblowing an effective compliance tool.



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Sanctions

While it will never be possible to detect each and every violation of laws and/or company rules in advance, it is ever more important to sanction a violation as it becomes apparent. Any leniency or neglect can seriously backfire and invalidate the whole compliance system.

Risk management is another important element. In the case of a police raid, everyone must know how to react. A wrong decision—be it being too cooperative or, on the other hand, obstruct the investigation—can make or break a case and can even create additional serious problems.

Documentation

Finally, it must be possible to immediately retrieve all relevant documents and present them to a supervisory body or court. Often documents are there but nobody knows where they are, which are outdated or recent policies and whether the collection is complete. Therefore, an IT-based system which does not depend on the knowledge of individuals, who might leave the company or are otherwise not available, is essential.

Foreign Law Influence

In a global environment and an export oriented economy like Germany, foreign laws such as the United Kingdom's Bribery Act and the United States' Foreign Corrupt Practices Act, can have a major impact. These laws contain their own requirements for an effective compliance system, which need to be viewed in addition to the German requirements.

Further, when dealing in and with other countries and partners, foreign mandatory local laws need to be observed. Employees seconded to, travelling to or from or otherwise responsible for foreign transactions, who are based in Germany (regardless of their nationality) are at risk. In order to be able to comply with mandatory foreign laws such employees need to be informed, trained, monitored and sanctioned (in case of a violation) just as local employees in those countries. Even large corporations lack the resources and hardly do training sessions for their responsible management members in Germany. Small or medium sized companies often do not even recognise the problem. Recent cases such as those involving Volkswagen and Deutsche Bank, but also Takeda and Glaxo Smith-Kline (to name but a few), show that any negligence can lead to serious consequences both for the company and its employees travelling abroad.

Thus, companies are well advised to carefully check their processes and regulations in view of foreign laws.

Conclusion

In order to avoid potentially disastrous criminal and civil law liabilities, board members of corporations are well-advised to implement a compliance system which meets the requirements of German as well as foreign authorities. Although it takes time and financial resources, a modern compliance organisation is not a luxury item for any company doing business above the local level.

This also applies to corporations from other jurisdictions doing business in Germany and to foreign board members of German companies, even if resident abroad.

Notes:

- 1 BGH, 03.12.2001, II ZR 308/99, DB O2, 473f.
- 2 LG München I, Decision of 10 December 2013, AZ 5 HKO 1387/10.
- 3 BGH, Dec. of 30 September, 2003, XI ZR 232/02.
- 4 BGH 5 StR 394/08, Dec. of 17 July, 2009.
- 5 The-just hired-CO of VW left the company after a year citing 'internal resistance' as reason for stepping down.
- 6 Transparency International states that Germany does not protect whistleblowers, on the contrary the EUHR held Germany liable for the unjustified violation of the right to free speech of a whistleblower.



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