International expansion of „Compliance“

Internationale Expansion von “Compliance”

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Abstract – The aim of this paper is to give a compact introduction to the term Compliance and its development, including its latest international expansion.

Zusammenfasung – Das Ziel des vorliegenden Beitrags besteht darin, eine kompakte Einführung in den Begriff Compliance zu geben und dabei auch seine Entwicklung und die aktuelle internationale Expansion aufzuzeigen.

I. Compliance as a term

The term "compliance" originally comes from American law and means observance, agreement with the law, or consent [1]. In general, the term is understood as agreement with the rules. According to the general worldwide understanding, the now "fashionable" term encompasses the entirety of all measures to ensure compliance with legal requirements and non-violation of legal prohibitions by companies, board members and employees [2]. The term compliance is often used as an "abbreviation" synonymous with the terms "corporate compliance", "compliance management" or "compliance management system" [3].

A. Compliance rules for enterprises

General compliance rules and prohibitions can arise not only from externally set legal requirements, but also from internal rules of conduct (“guidelines” or “policies”) or contractual agreements [4]. What is meant by this is that the companies as a whole behave in accordance with the law. It is not the corporate policy and strategy of the company management in the sense of right or wrong entrepreneurial decisions that is in the focus of compliance, but rather, about ensuring that management acts in accordance with the law [5].

B. Corporate Compliance

The term “corporate compliance” has also grown and spread. In addition to measures to ensure lawful behavior in the company, this also embodies measures for early risk detection and risk minimization [6]. These measures also recognize that, from a company perspective, compliance obligations are part of the organizational responsibilities of management.

C. Compliance Management Systems (CMS)

The term Compliance Management System ("CMS"), which is also appearing more and more frequently, is understood in abstract terms as an entrepreneurial organizational system that is intended to ensure and further develop compliance in the company. As an example, CMS is referred to as "the entirety of the measures and processes set up in a company to ensure compliance with the rules" [7].

The German legal literature likes to fall back on the so-called IDW PS 980 standard when explaining the CMS term [8]. Under the abbreviation “IDW PS 980”, the Chamber of Public Accountants has drawn up a standard including sample formulations for test reports through the Institute of Auditors in Germany e.V. (“IDW”), which is used to properly review compliance systems. According to this, a compliance management system is to be understood as "the principles and measures introduced by a company on the basis of the objectives set by the legal representatives, which aim to ensure that the legal representatives and employees of the company and, if necessary, third parties behave in accordance with the rules, ie on compliance with certain rules and thus on the prevention of significant violations (rule violations) ”[9].

From a legal point of view, a compliance organization in the sense of a CMS is only required if it is necessary and reasonable [10].

The type and scope of the measures depend on the size, industry and circumstances of the company [11]. The creation of a compliance area of responsibility or a separate department through assignment to one of several managing directors, appropriate selection, instruction and monitoring of employees, ensuring clear competencies and areas of responsibility in the company, sufficient information supply and the prosecution of suspicious cases come into consideration.

II. International developement

Generally known as the “motherland of compliance”, the first authorities and courts in the USA actually began to take compliance regulations into account in the prosecution and sanctioning of companies [12].

For the first time during the Cold War, a set of legal requirements was created under the umbrella term compliance, in order to enable the US industry to keep up with the rapidly changing and severely sanctioning US export control legislation and its delivery restrictions into the “Eastern Bloc states” [13]. Since then, the USA has steadily developed into the “motherland of compliance” [14]. The extensive investigative proceedings of the US Department of Justice and the US Securities and Exchange Commission (SEC) and their considerable sanctions against companies under the Foreign Corrupt Practices Act of 1977 (FCPA) against numerous companies in and outside the USA also play a decisive role [15].

A. Origin in the USA

The US export control and anti-corruption compliance rules and guidelines were and are also to be observed for non-Americans and thus also for European companies in their activities in the USA, as they also apply to companies that are not listed on a US stock exchange or are not “closely related”

to the stock exchange [16]. In this respect, the general compliance requirements from the Sarbanes-Oxley Act ("SOX") passed in 2002 after the Enron and Worldcom scandal must also be observed.

According to this, "the USA can claim jurisdiction in criminal matters even over companies that are not established in the USA or are listed on the stock exchange if an act has taken place on the territory of the USA. In the investigative practice of the authorities, a money transfer via an account in the USA or even e-mail with recipients who are in the USA is sufficient."

To avoid a misunderstanding: the application of the "Foreign Corrupt Practices Act" introduced in 1977, which criminalizes the bribery of foreign public officials and the associated incorrect accounting practices, is also relevant for every type of company [17].

The "US Sentencing Guidelines" (Federal Sentencing Guidelines), which came into force in 1991 and were substantially revised in 2004, are of particular importance for the requirements of a compliance system from the US point of view. In the USA, this means that companies can be held criminally responsible if an employee with power of attorney commits a criminal offense in the context of his employment relationship with the intention of benefiting the company. The amount of the penalties imposed on individuals and companies in the event of a conviction under federal law is based on the sentencing provisions of the aforementioned US Sentencing Guidelines, even if, according to judgments of the US Supreme Court, these are no longer mandatory for constitutional reasons. In the case of sanctions against companies, the amount depends crucially on whether the company has tried to prevent criminal offenses through an "effective" compliance system or not [18].

B. Development outside of the USA

Compliance has gained even more global importance since the Convention to Combat Corruption of the Organization for Development and Cooperation (OECD) of December 17, 1997, which came into force in February 1999. At present, 41 states have ratified the convention. Building on this, the UK Bribery Act and, in 2010, the OECD Good Practice Guidance on Internal Control, Ethics and Compliance guidelines have also been introduced [19].

In addition to these regulations, which are based on the fight against corruption, there are other international institutions that have published proposals on compliance and are thus actively involved in the further development of international standards. This can be seen especially in the case of the OECD. Here it important to mention The International Chamber of Commerce (ICC). With the participation of the business community, it has drawn up various practical guides on essential aspects of compliance, such as the selection and due diligence of business partners or, most recently, a comprehensive "ICC Ethics and Compliance Handbook".

The latest aspect of the tightening of compliance within the European Union is likely to be the EU Whistleblower Directive 2019/1937, which came into force on December 16, 2019 and must be implemented in national law by the member states by December 31, 2021. Not only employees who report grievances are protected, but also applicants, former employees, supporters of the whistleblower or journalists. These persons must be protected from dismissal, demotion and other forms of discrimination.

The protection only relates to the reporting of abuses related to EU law, such as tax fraud, money laundering or offenses related to public contracts, product and traffic safety, environmental protection, public health and consumer and data protection (the EU encourages national Legislators, however, to expand this scope in national law).

Another potential need for advanced compliance regulations may arise with the ongoing international digitalization. There surely are requests to government authorities to control the implementation of high-tech solutions to monitor their effects on the labor market [20].

C. National development in Germany

The "starting point" of the development of compliance in Germany is often seen in Section 93 (1) sentence 1 AktG and Section 91 (2) AktG [21]. However, the judgment of the Federal Court of Justice on ARAG / Gamenbeck from 1997 often serves as a basis for assessing breaches of corporate duty by executive and supervisory boards [22].

There, the BGH ruled on the duty of the supervisory board to assert claims for damages against members of the executive board and, among other things, made it clear that the supervisory board, due to its task of monitoring and controlling the activities of the executive board, is obliged to check the existence of claims for damages by the AG against executive board members. In the context of the examination of the conduct of the board of directors, it is (however) to be given a broad scope of assessment. It was also decided that the Supervisory Board, should it come to the conclusion that the Management Board has made itself liable for damages, must assess, on the basis of a careful and properly carried out risk analysis, whether and to what extent the judicial assertion will result in compensation for the damage incurred by the AG. If the supervisory board comes to the conclusion that enforceable claims for damages exist, the supervisory board has to pursue these claims in principle according to the above-mentioned decision of the BGH.

In the area of criminal law, the company's management is also primarily concerned with aiding and abetting offenses, but an offense (by actively doing or not doing) is easily conceivable, as has recently been the case with various criminal proceedings against well-known German managers for breach of trust, Section 266 StGB, . In addition, pursuant to Sections 9, 30, 130 of the OWiG a company can be held liable and be fined in case, a member of the body authorized to represent the company, culpably neglects supervisory measures that are necessary to prevent legal violations by employees in connection with its business activities.

However, since criminal proceedings in Germany can only be carried out against individuals so far and therefore only an administrative offense procedure with correspondingly more limited sanction options can be considered in relation to illegal actions against companies, the German legislator is working on a so-called Association Sanctions Act (VerSangG). This was foreseen in the coalition agreement of the federal government from 2018 and should initially be passed in 2021 before the next federal election and then also enable tougher sanctions directly against companies. It is now clear that a corresponding law will no longer be passed before the federal election [23].

In the corresponding draft, it is explicitly provided that with an "appropriate" compliance management system, the sanctions will be completely eliminated or at least lower. An anonymous whistleblower system and internal investigations are particularly emphasized in this context and will be able to trigger concrete legal consequences.

The German "Supply Chain Act" ensures further compliance regulations that go beyond their effects within Germany. According to the new law, which was passed by the German Bundestag on June 11, 2021, companies should take responsibility if human rights or environmental protection regulations are not complied with in the supply chain - for example if children are involved in the production of preliminary products or if illegal chemicals are used or not properly disposed of. Associated with this are new or increased duties of care and documentation as soon as the majority of the new regulations of the law comes into force on January 1, 2023.

III. Conclusion

The compliance management system should initially ensure that no legal violations are committed; The requirements for the personal punishment and liability norms for the management are not met. If this is also not successful, the compliance management system can be used to argue for the lowest possible fine or punishment [24].

The compliance management system therefore enables a defense with three lines of protection: (1.) Avoidance of legal violations (2.) Avoidance of personal punishments and liability (3.) Ensuring the lowest possible punishment or personal liability.

It should also be mentioned at this point that a CMS can have positive effects on securing and promoting the reputation of the company towards all stakeholders (business partners, banks, investors) [25] or can also be helpful for recruiting [26].

Regarding the further development of individual compliance rules it is obvious that "the sky is the limit", which means in theory there are no limits for additional rules and regulations and we see a clear tendency that governments (here including the European commission) rather add new regulations than take back existing ones.

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