

# Compliance Rules: Renaissance of “Neo-Protectionism”?

## Compliance Regelungen: Renaissance von “Neo-Protektionismus”?

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**Abstract** – The aim of this paper is to describe the connection between compliance rules and modern neo-protektionism and its potential for a strategic trade policy.

**Zusammenfassung** – Das Ziel des vorliegenden Beitrags besteht darin, den Zusammenhang zwischen Compliance-Regelungen und modernem Protektionismus sowie das damit verbundene Potenzial zur Nutzung für eine strategische Handelspolitik aufzuzeigen.

### I. INTRODUCTION

This paper engages in the connection between compliance and the currently increasing worldwide neo-protectionism (which can be described as protectionism 4.0) and to what extent compliance rules can be used as a means for non-tariff trade barriers, i.e. as a strategic trade policy. The essay contains both economic and legal aspects. Its goal is not only to point out the current status quo of compliance and current state-of-the-art protectionism in order to raise awareness of the context at all, but ultimately promotes the need to study the impact of both to help affected companies to react appropriately and reasonable to current developments. With regard to Government trade policy, the essay seeks to promote a critical examination of compliance and protectionism and also to create an awareness that a protectionist effect surely can be achieved with a steady increase of national regulation of entrepreneurial activities (e.g. tightening of employment conditions or environmental protection), but on the other hand, however, this (over-)regulation can also affect the domestic economy more than the foreign economy and might backfire.

So where to begin?

### II. FROM COMPLIANCE TO PROTECTIONISM

Those who want to get a lucrative business deal outside of northern Europe, North America and Japan quickly learn that smaller or higher hand money or other incentives are often the necessary pre-conditions for a deal to be made. Those, who pound on the relatively new keyword compliance and the corresponding "checklist", will find himself without a chance right from the beginning!

This applies to business as well as sports, politics and many other areas. If the provincial and formal legislature demands “appropriate” rules and a businessman even adheres to these and his potential own additionally set compliance policies, because he believes the role model USA and other emulating "global players" would do the same, this may be nice to look at from the provincial German frog's perspective, but the "Sommermärchen“ (summer fairy tales) actually take place elsewhere [1]. The payment of cash in the context of the conclusion of a deal is of course representative for a grant of various benefits in connection with all kinds of different business transactions. So that, for example, the gifted house on

Naxos for the Greece "supportive" works council chairman is just as relevant as the "just friendly" procurement of a rare place in the internationally private school (alternatively: University) for the "key account salesman" and its "of course, independently granted " discounts. But please do not get the wrong impression. Ethical questionable and/or illegal business can also be reported for the former “Exportweltmeister” [2] (world champion of export) and “Vorzeigerechtsstaat” [3] (role model for all free governments under the law) Germany [4].

The focus of this essay, however, lies on those constellations in which the entrepreneur or the enterprise violates internal or external requirements (in particular legal regulations) (for example environmental or health protection regulations) in order to obtain an economic advantage for himself - It looks at both one-sided and joint practices of several companies that are already violating compliance regulations or could violate them in the future.

Compliance often proves to be a naïve attitude by those who believe such rules are needed to make business relationships open, honest, and fair. The fact that they are often merely given as empty promises and are actually deliberately undermined or only practiced one-sidedly in order to achieve strategic business advantages is often the historically established rule, especially in international business. This is particularly true in the age of the "re-industrialization" of the old industrialized countries. This was especially relevant in the past few years when it was asked again and again what compliance is good for, if it is not even to be considered [5]? Above all, (over-) motivated journalists, still give the impression that compliance is not only of paramount importance for global corporations, but also for the local middle class, since without an effective compliance management system employees, executives and companies themselves "risk it all". It is also said that compliance has been one of the dominant topics in corporate practice and legal literature for several years [6].

On the other hand, compliance in the USA is actually held in check by means of extensive internal investigations, which can also be carried out across borders by international companies [7]. In the end, penalties in the tens of millions or even billions have been handed out [8]. As early as December 2006, Christian Sapsizian was charged because of preparing certain crimes and violations of the US FCPA [9]. Mr.

Sapsizian was once a senior manager of Alcatel S.A., a well-known French telecommunications company whose shares were also traded in American stock exchanges. The prosecution accused him of having made illegal payments to officials of the Telecommunications Agency of Costa Rica. The us-prosecution accused Mr. Sapsizian even though he was acting exclusively outside the United States. Alcatel itself was not prosecuted. In June 2007, Mr Sapsizian made a confession to two courts for preparing for crimes and violations of the FCPA. He was sentenced on 23.09.2008 to 30 months imprisonment and three years' probation. He was also punished with a 261,500.00 US Dollar fine [10]. Even then, this case showed how far US authorities are interpreting the scope of the FCPA and pursuing corruption scandals in a Euro-Latin American affair that has little to do with the US. In Germany, however, this process was paid little attention.

The case shows very clearly that in addition to civil law consequences, criminal proceedings are possible and can have far-reaching (personal) consequences. In recent development, both the company itself and those responsible for the organization are personally affected. The VW "exhaust scandal", also referred to as "diesel affair" confirms this perception in the broad (German) public. Even Huawei does not seem to have accidentally got into the crosshairs of American investigators and trade politicians [11]. All just coincidence? All just isolated cases that only have in common that legal violations (supposedly) were committed?

Nor is it undeniable that states that are known for their institutionalized corruption and bribery are much less attractive to trading partners and investors and that, to a certain extent, have a noticeable negative effect on economic growth [12]. Brazil, for example, saw economic growth of 3% in 2013 and drop dramatically to -3.5% in 2015, mainly due to nationwide corruption scandals and associated political unrest, in the context of the elections of the new president (Brazil's "Mini-Trump") but then, according to current forecasts, should rise again to 2.5%.

Independently of this international aspect, compliance violations can even be criminally relevant to corporate governance at the national level, as the Federal Court of Justice has confirmed [13]. It cannot be denied that compliance regulations can also have a protective function for the company itself and its corporate leaders [14]. The case of "Bilfinger" and the former Prime Minister of Hesse, Roland Koch, may serve as an example here [15].

Some other examples can be seen in relatively recent German history. These examples include, the ADAC affair, that was triggered by fake participants and fake surveys, the "rail cartel" which resulted in penalty and compensation payments to the amount of almost 300,000,000.00 euros for Thyssen Krupp, Mercedes Benz and „the fake test driver“ (around 20,000,000.00 euros damage), or even the HypoVereinsbank, which, due to their involvement in more than borderline Cum-Ex tax forms, a total loss of around 250,000,000.00 euros [16].

With regard to antitrust violations, both the Federal Cartel Office and the EU Commission imposed cartel fines totaling EUR 2.1 billion (Bundeskartellamt) and EUR 8.9 billion (EU Commission) on several hundred companies in the period from 2010 to 2014 alone [17].

Correspondingly impressive figures (with some German and, above all, a strikingly large number of Japanese events) also result for non-European antitrust authorities such as the

US Department of Justice [18]. The corresponding antitrust proceedings concerned a large number of heterogeneous products from coffee to cables and crabs to automotive parts [19]. In many cases, they also had an international relevance (e.g. in the field of automotive parts). It must therefore be assumed not only that numerous customers were affected by them, but also that the corresponding competitors were often harmed to a considerable extent.

European data protection in accordance with the General Data Protection Regulation (GDPR) and the corresponding German implementation in the form of the Federal Data Protection Act (BDSG) are also bringing new fine proceedings and sometimes spectacular fines into the focus of companies and the general public. The German highlight is the fine of over 35 million euros imposed on the textile group H & M in October 2020 for the digital storage and use of very personal information about its own employees [20].

### III. PROTECTIONISM AS A MEANS OF CHOICE

Since the election campaign of the former President of the United States, Donald Trump, and the present international sanctions imposed or still under discussion against North Korea, Iran, Saudi Arabia, Russia etc. the concept of protectionism has also returned to the focus of the general public [21]. The political dispute between free trade and protectionism did not just begin with the election of Trump in the 21st century. Trade disputations have been taking place between the USA and China for some time now [22]. An example of these difficulties can be seen in the difficult market for solar cells [23].

However, the EU and its member states, have become the target of the later US protectionism and demand or impose various new punitive tariffs for steel imports and aluminum imports [24].

It should not be forgotten that vocabulary such as "trade war", not only accompany the current world events, but were also seen in also the past, again and again and will most likely be seen in the not so distant future [25]. Currently, there is the widespread impression that German (business) politicians, in particular, are mourning the term of the former President of the United States, Barack Obama. These business politicians are obviously forgetting that he too had developed protectionist tendencies or forced himself to do so because of internal pressure to protect US companies [26].

Protectionist measures are increasingly the subject of (international) court decisions, which show that the various states are indeed constantly trying to operate on the border with international law or (clearly) beyond protectionism in favor of the domestic economy. As an example, Hungarian tax law mentions that employers (in fact: exclusively Hungarian banks) have the possibility to grant their employees credit for services and benefits in kind on favorable tax terms [27].

Regardless of this, however, it should be emphasized at this point that protectionism cannot per se be "demonized" as harmful and false. Because protectionism also has causes and reasons [28]. Too often in Germany, it is pointed out very sweepingly that protectionism (most recently, of course, that of the "impossible" Mr. Donald Trump) harms the entire global economy [29]. However, it quickly becomes clear that there is no one global economy that would have to bear the negative consequences of protectionism. So the "bitter" truth is, first of all, that protectionism not only produces losers, but also includes "individual profit potential." A blanket evaluation can

therefore only be discouraged and so this essay should also contribute to the necessary differentiating consideration and evaluation.

#### IV. FROM NEOPROTECTIONISM TO PROTECTIONISM 4.0

Neo-protectionism is therefore included under strategic trade policies. It is a dazzling, multi-layered term for that part of protectionist measures that does not use the classic instruments of protectionism. These measures include tariff barriers such as customs duties, subsidies or the acquisition of research and development costs and non-tariff barriers such as import or export quotas and embargoes [30].

In general, tariffs or subsidies seek to make non-competitive domestic producers competitive by setting extra charges on the prices of foreign suppliers or by subsidizing the costs of domestic suppliers. Quotas aim to protect non-competitive domestic producers through limited import volumes and the resulting price increases. Since the preservation of non-competitive providers permanently reduces world welfare, since the end of the Second World War attempts have been made to overcome protectionism in the interests of more free trade.

For that reason, even the General Agreement on Tariffs and Trade (GATT) of 1947 outlawed protectionism. In the long term they never really overcame it, since the total removal of protection would compel world trade partners to make their competitive sectors more efficient or possibly shut them down. This could result in a painful structural change. This outcome is something the political elite would rather avoid. This area of tension could not be fully resolved by the WTO since 1995 and most recently in 2013 with the most recent version of the free trade agreement [31]. The current discussion about the North-Atlantic Free Trade Agreement (TTIP) between the EU and the US provides another current example of these conflicting interests [32].

Nevertheless, there were longer periods of considerable liberalization, but most of them were confined to the interior of free trade areas or common markets such as the European Union. Their public images, however, were often associated with more protectionism, which, however, used new terms and reasons.

For many years, the "voluntary export restriction" has been successfully applied by emerging economies and tolerated by GATT, as they are supposed to protect the importing country's beleaguered import substitution sector from competitive pressure on the voluntary decision of the exporting country. Often, these were trade measures to obtain legal anti-dumping duties and to participate in the price increase in the importing country triggered by the reduction in supply.

The argument to create more price-cutting competition by building new suppliers in tight markets, such as the market for passenger aircraft (Airbus) was also used to justify protectionist subsidies and was often rationalized under the label "Infant Industry Protection", which was originally intended to protect the development of a hitherto non-existent industry in developing countries as a temporary exception protectionism. In fact, it is a political instrument to flexibly protect and develop the national position in world markets, and thus an instrument of "strategic trade policy" to promote national interests.

The range of arguments for justifying such "neo-protectionisms" vary from the alleged protection of the importing country, such as the "voluntary export restriction", to

the prevention of price advantages due to social dumping abroad, to the contingent treatment of foreign imported products with ecological or moral-political arguments. Social dumping refers to competitive advantages of foreign countries, e.g. lack of social welfare, child labor, etc. Ecological arguments usually refer to allegedly low environmental standards or the use of toxic substances in imported goods or the reference to product characteristics that may not have been met. A good example of this is the limitations set on exceeding CO2 emissions from diesel vehicles, whereby the limit values that are set are hardly, or not at all, attainable in the current state of the art. Ecologically decreed extreme regulations thus become the breaking point of fair trade relations, which can thus easily be exploited in a protectionist manner. As a neo-protectionism you can also look at the US campaign against Volkswagen. In this instance the VW management itself was responsible for their own demise. Their handling of their US branch was so poor that it made it virtually impossible for Trump to not take a swing at them. It is also to be kept in mind that the "Dieselgate scandal" arose already during the second term of President Barack Obama. Obama was rather "quiet" and careful in all aspects, whereas, his successor, Donald Trump showed a much more aggressive and open approach to protectionism [33].

Furthermore, references to undemocratic or totalitarian political systems in exporting countries or unacceptable policies are used to justify restrictions on international trade and capital movements. For example, in some countries direct and open embargoes are used; in other completely similar cases, however, local events are generously overlooked and certainly not "sanctioned".

Frequently, this is also limited to discriminatory statements, review measures or delivery harassment, where the protectionist effect is achieved only through the media.

The current dealings of the Western world with Iran, Russia and, on the other hand, Turkey quickly show the complexity of global economic interdependence and its consequences.

And Germany? Meanwhile, German economic leaders also want to "protect" German companies and are obviously working on new programs to strengthen and further develop German industries [34]. Above all, investments and business purchases from China are increasingly being called in connection with calls for new protectionism. According to China's subsidies distort the (fair) global competition [35].

The exit of the British from the European Union also gives reason to look critically at the potential use of strategic trade policy with regard to free trade outside the EU.

Ultimately, in a juxtaposition of free trade and protectionism is always the all-important question, will the players who have been playing unfairly convince the fair players to cross over to the unfair side, or will the fair players manage to convince the so far unfairly playing parties to finally stick to the rules and play a fair game.

#### V. CONCLUSION

The current state of research seems to confirm that both the number of compliance regulations and neo-protectionist measures are steadily increasing, making global trade more complex and more difficult month by month. Free trade developed over decades, which has undoubtedly produced prosperity and technical development for many, no longer seems to embody the non plus ultra of modern trade policy.

The further development of compliance shall therefore be observed particularly critically from this point of view.

It's obvious that not all, but a concerning part of typical compliance rules have a protectionist effect and it has to be assumed that this effect is met with approval by the governmental bodies (and – if applicable - its supervising jurisdiction). This applies most notably for environmental, employment (incl. health & safety) and other rules and regulations tax equity, which are justified with fairness, ethics and moral.

This is how the international trade agreements (GATT; WHO) also proposed from the outset that exceptions to the principle of the free market economy are possible, infringements can be sanctioned with countermeasures and ultimately an equalization of the market conditions should be made possible. Especially the latter aspect is ideally suited for "leading economic nations" to "protection" their own economy and to refer to a positive objective. Who is not against child labor, exploitation, forced labor, environmental destruction, tax evasion or corruption and bribery?

So let's have a look, for example, at China and the state-organized transfer of know-how from there, European and German "protective measures" act as a positive objective. From a German point of view, the same US efforts, especially under former President Donald Trump, were seen and commented as a policy of discrimination and thus negatively.

With new and/or extended "Compliance Rules", the governments therefore have another tool in the "toolbox" to protect their own economy, provided that it generally already complies with the corresponding regulations or at least the resources to implement them in the affected companies are already available.

Depending on the development of global markets, the states can therefore use "Compliance Rules" as part of their strategic trade policy. Especially developing and emerging countries with a less pronounced degree of administrative organization (keyword: "documentation is the be-all and end-all of compliance"), less occupational safety and environmental protection can be taken "out of the game". Take Bulgaria, for example, the implementing of Good Governance and all relevant European regulations still demand significant resources and are described as one of the main tasks and challenges of the Bulgarian government [36]. The fact that NGOs and the left-wing moralists, who themselves have been emerging in the wealthy industrial countries for some time, provide the templates for neo-protectionism with their calls for "fair trade" (but mostly only includes working conditions and environmental protection) is not without a certain irony; but can simply be explained by their perceived moral superiority and their own financial coziness.

Business-close economic lobbyists, just like the governments, then have the difficult task of weighing up the extent to which new compliance rules actually also burden domestic companies additionally and to what extent foreign companies would have an upside or disadvantage as a result.

The current discussion about national and international supply chain law shows exactly this area of tension and remains to be seen for which way the industrialized countries and, of course, Germany and the European Union will position themselves.

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