

Auxilium Expatbiz Services is an alliance of experts delivering services and products to companies and individuals from the US and other countries with business or other economic interests in Central Europe. This edition of our »EuroGateway Publications« recapitulates an EXECUTIVE SUMMARY published in May 2011 in German for your free use! **Together we create value across cultures!**

Mysteries of Compliance

For companies active in Germany **COMPLIANCE** is defined by the DCGK («Deutscher Corporate Governance Kodex« the German Corporate Governance Codex) as the management's obligation to safeguard all legal regulations and all the company's internal policies are observed by the enterprise and its employees. Additionally, section 130 OWiG (German law on administrative offenses) requires management to use all reasonable endeavors to prevent breach of law. This includes the obligation to carefully select, employ and supervise supervisory staff. In addition to supervision, clear and unambiguous directives are required. Business processes must be designed and the enterprise must be equipped with staff and technically as to ensure that it is in a position to follow the law and its internal guidelines.

Old wine in new skins

Therefore discussing compliance is just using new wording for leading a company with »**POS**« which stands for the old Management-Triangle »Planning, Organizing and Supervising« with a focus on the law and internal guidelines. Consequently compliance consist of

- ❖ a documentation of
 - the objectives of the company
 - the legal context relevant for the company
 - the company's organizational structure
 - the core operational processes including the directives for Internal Controls
- ❖ depending on the size of the company a tailored **Internal Audit** which is independent from the organizational structures and which is reporting directly to C-level management

Internal Audit shall be aligned with

- ❖ Risk Management and
- ❖ Customer Relationship Management (integrating Complaint Management)

And give the desired feedback for a continuing improvement of the operational and organizational structure of the company which should be documented in an **Organizational Manual**.

Compliance Officer and Whistle-blowing

It is Management's obligation to decide what leadership and supervisory tools it will use. In Germany it can be lengthily discussed whether a whistle-blowing mechanism, following American paradigm, to stimulate the reporting of inappropriate conduct does make sense or is required if there is an adequate maturity of Internal Controls and a functioning Internal Audit. While a Data Privacy Officer as well as a Company Safety Officer are legally required with only few exceptions neither whistle-blowing nor a Compliance Officer are mandatory – again with some few exceptions for the Compliance Officer. In the end, compliance is part of the core obligations of the top management. Solely the size or complexity of the enterprise could make it necessary to install a Compliance Officer or Department to prevent organizational default leading any (personal) liabilities of the management. Exceptions apply to companies active on the financial markets supervised by BaFin (the Banking and Insurance Supervisory Administration) and to subsidiaries of companies listed in the US.

Guarantor Position of the Board and the Compliance Officer

Management (Managing Directors, Members of the Management Board) have a guarantor position by law deriving from their control of the »enterprise as a possible cause of risk« which they cannot dispose of. They can only reduce their liability to third parties according to civil law with the help of a D&O insurance. In mid 2009 the German Supreme Court affirmed

a penal guarantor position of the compliance officer in an »obiter dictum«. Naturally one needs to discuss the scope of this decision for management and compliance officers.

It seems clear that management can exculpate itself within certain limits by installing an adequate compliance organization and employing qualified staff. If that is achieved, it is basically the supervision of this organization that remains the obligation of management. The scope of the Compliance Manager's guarantor position is deemed by most experts to depend on the contractual obligations of his employment contract. Some consultants suggest limiting the liability of management by giving those contractual obligations a wide frame and constitute expressly the liability of the Compliance Officer. Each manager must decide for himself whether this is ethically sustainable. The legal principle of freedom of contractual scope is – outside of the application of the special legal fields mentioned above – still valid for »normal Corporate Compliance« in Germany. As a general rule nothing should prevent an exclusively internal scope of the duties of Corporate Compliance solely for the protection of the company – at least for small and midsize enterprises.

Conclusion

Compliance requires top Management to align the company's operational and organizational structure to the business and the size of the enterprise. It must be designed to prevent violations of the law and the company procedures by employees. This comes with the need for documentation and supervision of all business processes and, provided the entity has outgrown a size that allows constant monitoring by top management, an Internal Audit. To ensure efficiency of Internal Audit management will implement Risk Management and (customer) Satisfaction Management following this.

More organizational requirements can be mandatory by special norms applicable to special companies. Whether a Compliance Officer or a compliance management system is necessary or reasonable for your company needs to be decided with a sense of proportion. Contact us for a customized assessment at dr.herdmann@expatbiz.eu!

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