

B. Challenges and Future of Compliance

I. The future of Compliance

Dr. Rainer Markfort

The 4th Viadrina Compliance Congress brings together experts from many different countries to discuss ideas on what the future of compliance will bring and what we can do to contribute to its development in our communities. Before looking ahead, we should start with an analysis of the status quo even though, at first glance, this may not seem very encouraging. By gaining a clear view of where we come from, we can better understand the deficiencies we encounter today (1.). Today, numerous business and social factors are driving the need for a more sophisticated approach to compliance. We must be patient as this evolution will take time (2.). However, only through our own initiative and commitment will we ensure the prospects of success for compliance in the future (3.)

1. Where does compliance stand today?

In Germany, compliance first emerged in 2005. Before then, no one had heard the word “compliance” except bankers and doctors. Daimler then became the subject of investigation by the US Department of Justice (DOJ) and the Stock Exchange Commission (SEC). One year later, the same happened to Siemens and since then a similar fate has befallen a series of large and small companies. Scandal after scandal followed and there were times when almost every day the newspapers were reporting about corruption, fraud, breach of antitrust regulations, manipulation of interest rates and other economic crimes taking place within many respected companies.

Shockwaves rippled through the German Automobile Club ADAC (by far the largest NGO in Germany in terms of members) when manipulations of inquiries and fraud came to light. The same happened to FIFA, the only difference being that many had harbored suspicions regarding FIFA officials whereas the German Automobile Club was a somewhat ‘holy’ institution.

The amounts that corporations were paying in penalties consistently increased and society became used to reading about fines in the billions being imposed. At the same time, the reputation of these corporations were destroyed. Once upon a time, the name “Deutsche Bank” was synonymous with strength and glory. But what is left now?

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A whole industry is constantly demonstrating what happens when compliance merely means applying the rules set by the regulator. The banking sector claims that it has practiced compliance for over 20 years. However, a closer look shows that this is only true in specific areas. Some of the biggest scandals in the past, which led to enormous penalties, have occurred in banks. So it appears there has been no value-based compliance for a long time and this may still be true today.

Today, many of Germany's large corporations have established compliance organizations, appointed compliance officers, implemented anti-corruption and anti-trust policies and trained their employees accordingly. Some of them did so after they experienced corruption and other criminal scandals and were forced to act owing to the pressure of investigative authorities and the public debate. Astute companies were quick to take these measures in order to avoid such situations.

After the initial phase of corporations tackling compliance, a big German corporation was repeatedly fined for breaching anti-trust rules. It responded by implementing a state-of-the-art Compliance Management System. This was one of the first tested by external auditors according to IDW PS 980, a newly developed standard. The accountants certified the Compliance Management System as being adequate, implemented, and effective. It may therefore be surprising to learn that this same corporation was again subjected to high fines owing to a new breach of anti-trust rules! How could this happen? Then it was announced that the board member responsible for legal matters and compliance had to quit his job for a personal breach of the compliance rules. This case clearly demonstrates that compliance requires more than policies and procedures.

It does appear surprising that compliance scandals happen again and again. Did the compliance function fail to achieve its aims? Were there deficiencies in the company's policies or training? In view of these examples, we may have to admit that compliance is still in its infancy and, in this sense, needs time to develop.

2. Does compliance have a future?

Quite a few people are of the opinion that compliance is just hype and that it will fade away. The burden of compliance bureaucracy could endanger and challenge a company's competitiveness. Some argue that, in most countries of the world, business does not work without bribes and it is not the company's responsibility to make the world a better place to live.

A keynote speaker is not a prophet but he may dare a prognosis: Compliance has a future and will not vanish! The reason is that, today, compliance is no

longer simply an issue between the authorities on the one hand and corporations on the other. Compliance is far more than this because public opinion has changed dramatically in the past years.

Twenty years ago, tax fraud was viewed as a trivial offence. Bribery and corruption, especially in foreign countries, was a legitimate means of obtaining business. In Germany and other countries bribes were even tax deductible. The biggest mistake in breaking anti-trust rules was to be seen to have been caught. Today, this is different: penalties and damages have increased as has the pressure resulting from investigations. Most of all, however, the corporation's reputation suffers to such an extent that it influences the value of products and the company as a whole. Here, we see that public opinion has a really dramatic impact which leads to change.

Back in the 70s or 80s, the laws for the protection of the environment were tightened with the support of a strong social movement. At that time, a breach of environmental laws was viewed as a trivial offence, at least within the business community. Some entrepreneurs ignored the stricter rules and argued that following these rules would endanger their business and that they were responsible for creating jobs in society. Today, nobody would dare to suggest that environmental crime is a trifling affair.

One can therefore predict that compliance will undergo a comparable evolution and, for this reason, has a future. How long will it take? Probably one generation of managers. Recently, a study showed that managers' business attitudes are mainly influenced by their experiences during their first years in business. This finding may not be all that surprising. However, it does show that we must be patient: it may be difficult to convince today's director that corruption is evil. When this director was a young sales person early in his career, he might have used petty cash to obtain business. However, a young business person today, who has gained his first business experience against the backdrop of compliance scandals and internal investigations, will certainly have a different attitude when he becomes a manager or director.

3. How can we improve the prospects of compliance?

Compliance must become attractive! Compliance must add value to those who run the business and make profits for their company. Compliance should support and promote business and not hinder it. However, compliance is still rarely viewed in this way.

Today, most managers understand that they may be held liable for the misconduct of their employees. However, they may still claim that in foreign markets they could lose business to competitors who are less rigorous with regard to

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compliance. Sales persons and people from procurement departments are unhappy about the amount of training and e-learning. They are annoyed and frustrated about having to check company policies on gifts and hospitality when they want to invite a business partner for lunch. They blame compliance for the bureaucratic hurdles they have to overcome before they can start business with a new partner. So what can we do?

Let's look at the example of third party checks, often referred to as "Business Partner Due Diligence". For business, the integrity check is not the most important thing when starting a new relationship. For people on the front line, it is more important to understand whether a new business partner will be able to deliver quality and whether he has good financial standing so that he might survive a longer business relationship or a challenging project. Now, if the Compliance Department were able to provide exactly this information at this very early stage (i. e. immediately after the first contact has been made), all stakeholders would be fine. The company's decision-makers would have relevant information available for their business decisions and the Compliance Department would be involved at a very early stage and might be in a position to check for potential risks. Business and compliance working hand-in-hand are much better at supporting compliance than policies and controls.

When management takes compliance seriously and entrepreneurial decisions are guided by values then compliance can be a useful tool for good leadership. People are much more creative, effective and, ultimately, productive when they work in an environment that reflects their own values and principles. A management that uses compliance as a leadership tool need not fear liability owing to their employees breaking the law.

Finally, compliance will support competition. Brand, reputation, sustainability and corporate social responsibility are becoming increasingly important as they represent a substantial part of the added value of a product. In such an economic environment, compliance is a competitive advantage. In today's world, a product or company's value will, to a certain extent, be determined by good compliance. However, writing down a set of core values won't be enough. What we need (as in all other areas of business), is specific implementation, best practice, and support. At the same time, not every company has to reinvent the wheel. The wider stakeholders in the economy should come together to establish common rules for good business.

This was exactly the idea and goal when, in November 2012, German corporations, university professors, accounting and law firms took the initiative and founded the German Institute for Compliance, DICO. Today, DICO has more than 200 members, more than half of which are corporations from all sectors and industries. Over 200 individuals are personally engaged in six committees

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and 11 working groups. They discuss and develop guidelines, working papers and training materials on various topics such as business partner compliance, internal investigations, qualifications, compliance certificates and quality management. Other working groups cover healthcare compliance, data privacy, anti-trust and export control. They formulate opinions and develop proposals for legal initiatives. By this means, DICO protects the stakeholder interests to avoid bureaucratic and excessive laws and regulations. On the other hand, DICO members can rely on proposals and models that they have developed collaboratively.

This is the best way to ensure compliance. We are taking the initiative, developing our own ideas and not waiting for the legislator to intervene. Let us take compliance into our own hands, work together to further its development and improve compliance's prospects of success in the future.