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## **The Corporate Crimes Act is on the way!**

**The penalties are going to hurt. But anyone taking preventative measures can expect a reduction of up to 50%.**

The bad news for rule breakers is the Corporate Crimes Act is on the way ("The Act on Promoting Integrity in Commerce"). The good news is, in future, anyone who can prove that an effective compliance management system (CMS) was in place at the time an offence was committed can hope for a significant reduction in penalties. This means it's better safe than sorry.

After all, the maximum penalty is 10 to 20 percent of annual sales for companies with a revenue greater than 100 million euros, which would threaten their existence. Those who have less revenue get away with a cap of 10 million euros. Unfortunately, nobody knows exactly what the legislature wants, and there is some legal uncertainty around what an effective compliance management system would look like.

### **The gold standard that isn't one**

A Company's attempt to protect itself against penalties (after all, you never know...) currently consists of a voluntary certificate issued by an auditor (such as IDW PS 980). An internal risk analysis should make it clear to companies where the dangers lie. Therefore, management's efforts to comply with the rules would be documented and, in the event of a challenge, any potential accusation of fault on the part of an official corporate body would be refuted. In terms of compliance practices, these include exhaustive e-learning and cost-intensive face-to-face seminars for senior personnel which call for morals and ethics to be observed.

But so far, the successes achieved have been modest. Recurring compliance scandals show that more training on rule-keeping is going to be of little help. Almost half of Chief Compliance Officers have doubts about whether the content of their own training is actually being applied. Anyone operating in high-risk countries, such as Russia, China or India, estimates the relevant level of effectiveness to be near zero. Behind closed doors people are saying: yes, we are training our employees, but we have no idea if it's doing any good.

Who is not reminded of Sisyphus, forever condemned to rolling a boulder uphill? The legislature now wants to see tangible results, i.e., an effective compliance system. Industry is certainly willing but quite clueless how to effect it. Because, in order to prove effectiveness, you must be able to measure it. The supposed gold standard of certification determines what barriers to misconduct exist and what industry-specific ethical rules have been the subject of

in-house training, but it does not assess whether the rules are being applied in a real-life situation. That's something you only find out once it's too late. The Wirecard case has shown once again that, to some extent, we really are flying blind.

### **Man is the measure of effectiveness**

The only litmus test that the legislature is now demanding is proof of practical application. There's no question that a system needs rules. But its effectiveness will only be achieved, once the people who take decisions within this system also abide by them.

The US Department of Justice, the toughest compliance authority in the world, has been demanding that human capital be measured and evaluated since April 2019 and has now increased the load. Since 1 June 2020, investigators have been asking specifically for tailor-made risk analyses and curative measures: Is your compliance system capable of detecting the misconduct common in your industry? What have you done about this in a real-life emergency situation? Has the behaviour of your employees demonstrably changed as a result? If so, how are you measuring this? A German judge now has to ask the offender the same things before imposing sentence.

### **How do you measure integrity?**

Not by querying the rules, because people weigh up for themselves whether a command has to be obeyed. Over the last two decades, cognitive neuroscience and behavioural economics have made ground-breaking contributions in this area. White-collar crime research also demonstrates that human decision balancing (every criminal offence is preceded by a human decision) primarily involves risk assessment and previous experience. In the end, it is not the rule itself that is decisive, but a fabricated justification that makes breaching the rule possible in the first place. Anybody who has ever parked their car in the pouring rain without paying for a parking ticket because they only needed to stop for a short while knows something about this.

So, successful decision-making requires justification strategies to be suppressed. This is because, whenever we solve complex tasks, various functional systems compete with each other in our minds; this requires brain fuel and intelligence. The skills for this are distributed differently from person to person. For this reason, simply memorising rules without taking into account one's own personal context and background doesn't help much. If compliance with the standard does not turn into a reason (integrity) in the long term, applying the rules will always be in short supply.

### **Man will become better when you show him what he is like. Anton Chekhov**

Only individual diagnostics and tailor-made risk training enable the individual to autonomously do the right thing, even if they have some inner resistance to it. This is similar to pilot training for flying in bad weather. Managing risk and dealing with the consequences makes the purpose of compliance something tangible. As if you were in a burning building and saved lives. There is nothing better than your own experience. And this is exactly what rule-based training measures, such as e-learning and face-to-face seminars, are not capable of achieving.

## **You can't manage what you can't measure**

Only complex business simulations running advanced analytics in the background can achieve this. These types of data analysis not only try to retrospectively understand why something happened (diagnosis), but also try to make predictions about the future and to give recommendations based on the investigation carried out (predictive analytics). The decisive factor here is putting the company and its employees in a position where preventative action can be taken.

Nowadays, technology is available that can answer any questions posed by the US Department of Justice or a German judge on an evidence-based basis. This technology analyses, evaluates and increases a central factor of competitiveness – the individual intellectual assets represented by employees – with regard to compliance. Success monitoring consists not only of reducing risk in a documented way, but also in being able to predict the sustainability of any result achieved; i.e. in real time, anonymously and in compliance with data protection legislation.

Nevertheless, anyone who limits themselves to rule-based compliance and an auditor's certificate makes themselves vulnerable. These companies know almost nothing about the individual decision-making behaviour of their middle and upper management. Calculating probabilities as part of a risk assessment would inevitably come out virtually the same for all employees and so would be pretty meaningless.

## **Just a "money-making machine" or an effective way to combat criminal offences?**

State-of-the-art technology in this area makes effective prevention possible and the associated rewards would be high. Companies could continuously improve their compliance systems, provide proof of effectiveness and so obtain a reduction in penalties, should a breach occur, of up to 50 percent. Protecting employees against misconduct and criminal prosecution would come on top of this.

However, as long as the legislature does not specify how seriously it wants to take prevention, the Corporate Crimes Act is going to remain nothing more than an instrument of retaliation, in other words, a money-making machine. As a result of the state's mandate to now carry out compulsory investigations in suspicious cases (principle of legality), the number of internal investigations will increase rapidly and with it the legal defence costs incurred by companies. And to what end? The treasury will fill up with fines. The audit companies will continue to certify. But moral standards will not improve.

## **Author**

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