
How to fight bribery and corruption in your business ?

The relevance of compliance management systems

Dr Patrick Schroeder, Tallinn, 23 May 2016,



Introduction

Section 1

Compliance Management in the context of investigations

- In each and every investigation, someone will ask the question regarding the effectiveness of the compliance management system in place at the company:
 - „Why didn‘t we know about this?“
 - „Why didn‘t anyone tell us?“
 - „Could we have prevented this?“
 - „Can we hold someone liable for this and, if yes, whom? “
 - „How do we prevent this in the future?“
- High need for advice on the part of corporate clients
- Board attention due to the directors‘ and officers‘ duty to implement and effective compliance system
- **Low tolerance for error!**

Compliance Management in the context of investigations

“Companies must institute compliance programmes that truly change the corporate culture after discovering an antitrust violation. [...] The DoJ will examine whether compliance was poor enough that seeking to impose probation or a compliance monitor might be appropriate.”

Brent Snyder, US Department of Justice’s deputy
for criminal antitrust enforcement

“In 2006, when the scandals broke, Siemens appeared to be well-prepared. It had an anti-corruption rulebook and it screened business partners. But the rulebook was never really implemented. There was simply never a discussion about compliance.”

Klaus Moosmayer, Siemens’ CCO
in an MLex interview (March 2016)

“In the presence of risk of bribery or corruption, a board member will only discharge its obligation to the company only if it establishes a compliance system aimed at damage prevention and risk control.”

LG München I, NZG 2014, 345
– Siemens/Neubürger

“A human being is, after all, human. And there will always be misbehaviour [...] One tries everything possible to prevent criminal acts in a company. But they can happen anyway. However, compliance programmes make this more difficult. They reduce risks. And we do not know, how much they actually prevent.”

Andreas Mundt, Präsident des Bundeskartellamtes,
Interview im “Compliance Manager”, Januar 2015

Elements of a Compliance Management System



Common main areas:

- Bribery / corruption
- Competition law
- Capital Markets Law
- Environmental rules
- Product liability
- Discrimination / Human rights

Certification?

- IDW PS 980
- ISO 19600 (Guidelines)

Responsibility?

- Compliance Department
- Legal Department

Corporate law aspects from a German
perspective

Section **2**

Obligation to install a Compliance Management System?

Perspective: Directors' Duties

- **No express general duty** to establish a compliance organisation
 - Exception: banks and insurance companies
- Compliance organisation as part of the duty to **adhere to the applicable laws** and to apply **due diligence**
 - Requirement of a compliance organisation: **risk analysis** (Size of company, industry, geographical footprint)
 - **Low threshold** according to German case law (specifically: **Siemens vs Neubürger** – NZG 2014, 345)
 - **Failure to establish any compliance organisation at all** will most probably constitute directors' **negligence**
- **Non-existence** of an **effective** Compliance Management System may also constitute a **breach of duty**

Requirements for the design of a CMS

Director's discretion

- **Design** of a compliance organisation falls within the **discretion** of the management board (*Business Judgement Rule*)
- Guideline: **General purpose of compliance systems:**
 - **Prevention, Detection and Reaction / Sanctioning**
- Basis: comprehensive **risk analysis:**
 - **Central areas of substantive law**
(e.g. antitrust, data protection or tax risk)
 - **Scope** and organisational design

„Compliance is a management duty“

- Establishing a compliance organisation is part of the **joint responsibility of management** towards company and shareholders
- **(Horizontal) delegation** within the board and **(vertical) delegation** on a level below the board is possible only within **narrow limits**

Where can lawyers help?

As part of an investigation

- Analysis of **breaches of duty** on the part of **directors**
- In addition: breach of duty for **failure to establish a functioning compliance system?**
- Further: Breach of duty due to a lack of **investigation and controlling** in the past?

After an investigation

- **Advice** on **improving** the existing **compliance system**
- Development of a **concept** for an **effective CMS**
- Performance of a **risk analysis**

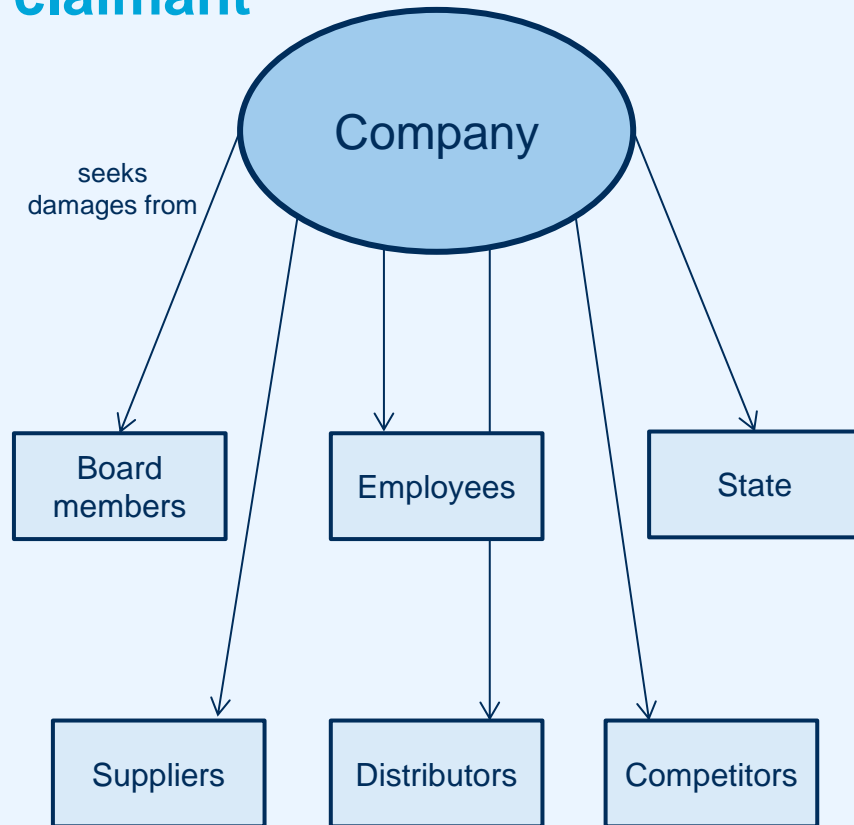
Beyond investigations

- **Compliance *Due Diligence*** in the context of corporate transactions
 - Compliance systems at the level of **target companies**
 - **Integration** in an existing (group-wide) CMS

Follow-on litigation

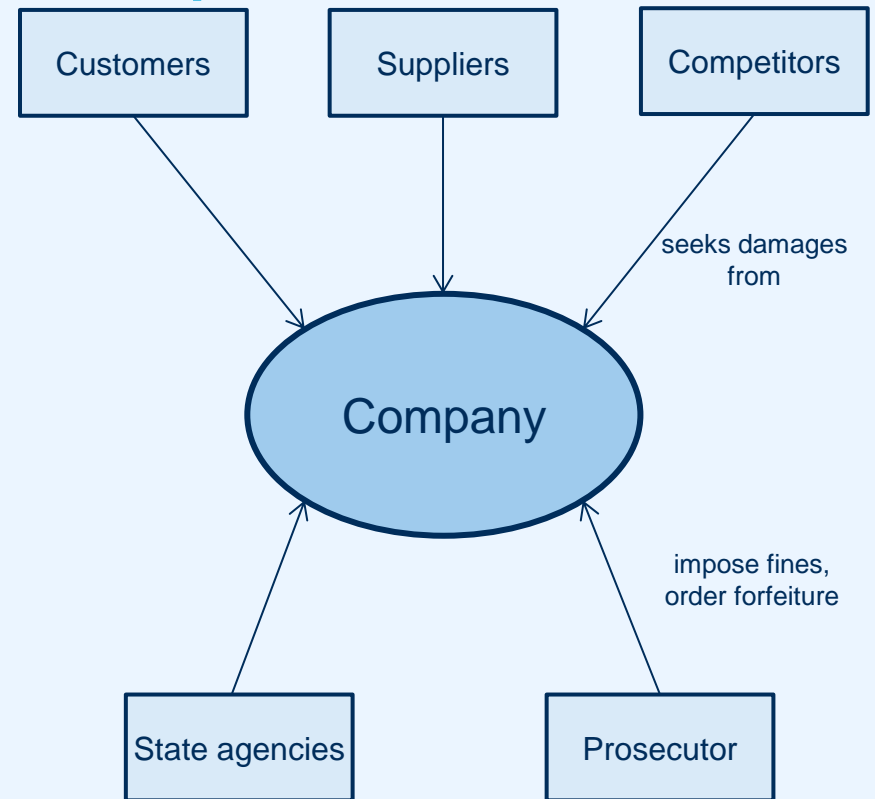
Types of follow-on litigation

„Active” litigation company as claimant



Risk of insolvency

„Passive” litigation company as respondent



High relevance due to risk exposure!

Strategic considerations when facing follow-on claims

- ❑ You cannot prevent follow-on litigation, but you can prepare for it
- ❑ Develop a global strategy, taking into consideration the interests of all stakeholders:
 - ➔ customers, regulators, investigation authorities, competitors, shareholders
- ❑ Ensure that global strategy considers interdependencies between different jurisdictions
- ❑ Prevent contradictions between jurisdictions in the defence against follow-on claims (no silos)
- ❑ Provide for public relations to consider (and manage) the impact of public statements on follow-on claims
- ❑ Consider „torpedos“ to prevent follow-on litigation in unfavourable jurisdictions
- ❑ Strive to protect privilege wherever it exists and to the extent possible
- ❑ Avoid written summaries of results of internal investigations
- ❑ Engage in active communication with the regulator and other authorities, but avoid admissions of guilt (specifically in view of other jurisdictions)

Thank you for your attention!

For further questions, please contact:



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