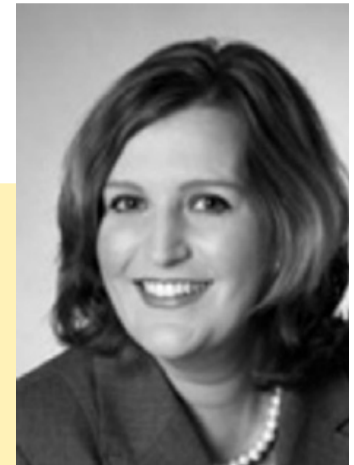


FOCAL POINT FROM COMPLIANCE PROGRAMME TO COMPLIANCE MANAGEMENT SYSTEMS: INTERNATIONAL CONVERGENCE AND STANDARDIZATION



*By Daniel Lucien Bühr and Claudia Seitz**

■ Governance has long been considered a somewhat esoteric subject. Definitions are often vague and situation-based. Opinion is frequently divided. There is perhaps greater agreement on what constitutes poor governance. Bad decisions result in poor outcomes, and to identify the cause of failure is, in its specificity, perhaps easier than establishing a standard for best practice. In this remarkably informative article, its authors Daniel Bühr and Claudia Seitz provide a guide to the evolution of compliance standards and demonstrate how their scope has been influenced by a regular flow of instructions, guidelines, regulation and laws, to impact now the concept of governance itself. Seeing the evolution of standards, be they soft or hard law, is to see how the role of the Board, its duties and liability has grown. Daunting though it may seem, the well-advised board director would be wise to try to distinguish the wood from the trees.

Development of modern corporate compliance

It was the Watergate scandal in 1972 that first shed light on the widespread corruption of politicians by US corporations. Then in 1975 it became known that the US aircraft manufacturer Lockheed had been systematically bribing foreign politicians and government

officials in order to win deals for its military and commercial aircraft, causing repercussions such as the resignation of the Italian president at the time, the arrest of the Japanese prime minister, and the Franz Josef Strauss scandal. These events led to the US Foreign Corrupt Practices Act (FCPA), passed in 1977, making it a felony in the USA (probably for the first

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The financial crisis revealed that many companies had no culture of ethics and compliance

time worldwide) for companies and their employees to bribe foreign politicians and government officials. The seeds of corporate compliance were sown.

In the mid-1980s, the US government realized that its defence procurement contracts were tainted with corruption, fraud and mismanagement. President Ronald Reagan appointed an inquiry commission that concluded that defence contractors must publish a code of ethics and enforce it vigilantly.¹ Subsequently, defence contractors undertook, under the Defence Industry Initiative, to avoid serious, systematic breaches of the law by adopting compliance programmes. During the 1990s, these efforts were increasingly imitated by major American industrial corporations outside the defence sector.

From the late 1980s, the USA urged other OECD States to outlaw the bribery of foreign officials in a bid to prevent distorting competition to the detriment of the US American economy. This

internationalization of the fight against corruption and the increasing efforts to combat money laundering in the finance industry caused international conglomerates in the early 21st century to start addressing the “American” issue of compliance and to start hiring the first compliance officers. The major cartel cases in the first few years of this century, such as the vitamin cartel, convinced major companies that adherence to the laws based on a code of conduct should be guaranteed by companies and their managers. Despite this widespread realization, however, instances of serious misconduct were brought to light even in companies that employed compliance officers.

In the 2000s, leading industrial and financial companies were fined billions of dollars for many years of systematic breaches of the law, and some even ended up on the brink of collapse due to their ineffective compliance. From 2007, the financial crisis revealed that many companies had no culture of ethics and compliance and that maximizing profits

1 A Quest for Excellence, Final Report of the Commission on Defence Management (Packard Report), Recommendations: <http://bit.ly/1BvLq5K>

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was their most important corporate virtue. The serious cases of misconduct that have come to light in the last few years have caused top management to place greater emphasis on compliance and ethical conduct, reinforce their compliance departments and replace compliance programmes with widespread compliance management systems.

The instigators of the international compliance movement

LEGISLATORS AND AUTHORITIES

The cases of misconduct and breaches of the law mentioned above, led to new laws and regulations, mainly in the banking and capital market sectors, that even foreign companies wanting to do business in the USA have to comply with. For example, the Federal Sentencing Guidelines (FSG)² issued by the United States Sentencing Commission (USSC) came into force in 1991 and, in the wake of various financial

scandals, they have been considerably tightened over the past few years. The most recent version of these guidelines provides an overview of the components of an effective compliance programme. At the same time, they provide companies with instructions for setting up proper compliance structures and form a universal benchmark for evaluating corporate compliance programmes for the purposes of sentencing. Although the FSG were only intended as *non-binding* guidelines, they were regularly used by courts in the USA for the purposes of setting penalties.³ Foreign companies quoted on US stock exchanges or doing business in the USA are just as bound by the FSG as American companies. Other US laws relevant to compliance are the *Sarbanes-Oxley Act (SOA)*⁴ and the *Foreign Corrupt Practices Act (FCPA)*.⁵ Under Section 406 of the SOA, any company listed on US stock exchanges,

2 The Federal Sentences Guidelines came into force on 1 November 2012:
http://www.usc.gov/Guidelines/2012_Guidelines/index.cfm.

3 Evidencing an effective compliance and ethics programme (Chapter 8) can lead to a reduction in sanctions.

4 The latest version of the SOA:
<http://www.soxlaw.com/>

5 The latest version of the FCPA:
<http://www.justice.gov/criminal/fraud/fcpa/>

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regardless of where they have their headquarters, must inform the Securities & Exchange Commission (SEC) whether they have published a code of ethics for the main managers in the finance and bookkeeping sectors. Both the SOA and the FCPA stipulate in detail the need to set up an internal audit system to ensure compliance with the law.

Following the example of the US, legislators and authorities in Europe have also issued policies, particularly relating to anti-bribery and competition law. For example, the British competition authority, the UK Office of Fair Trading,⁶ published its *Compliance Package*⁷ in June 2011 which provides competition law compliance measures for companies. The French body *Autorité de la Concurrence* on

10 February 2012 also issued guidelines on competition law compliance programmes, the EU Commission recently emphasized the importance of compliance policies as part of competition law⁸ and the British government issued the UK Bribery Act 2010⁹ as part of its fight against corruption

TRADE ASSOCIATIONS

The compliance issue has also been addressed by trade and professional associations. For example, the International Chamber of Commerce (ICC) on 22 April 2013 presented an *Antitrust Compliance Toolkit*¹⁰ that describes compliance structures, processes and related challenges from a corporate perspective. For small and medium-sized companies and companies that still do not have any compliance programme, the Toolkit

6 On 1 April 2014, the OFT merged with the Competition Commission to become the Competition & Markets Authority (CMA).

7 The OFT's Compliance Package is available at:

http://www.of.gov.uk/shared_of/ca-and-cartels/competition-awareness-compliance/oft1341.pdf

8 The EU Commission's Directorate-General for Competition published a brochure on 24 November 2011, *Compliance with competition rules: what's in it for business?* in which it underlines the importance of compliance policies as part of competition law.:

http://ec.europa.eu/competition/antitrust/compliance/index_en.html

9 The 2010 UK Bribery Act: <http://www.legislation.gov.uk/ukpga/2010/23/contents>

10 The *ICC Antitrust Compliance Toolkit* is available at: <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Areas-of-work/Competition/ICC-Antitrust-Compliance-Toolkit/>

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contains instructions describing the basic components of compliance programmes.

In the fight against corruption, the ICC had already published recommendations as early as 1997, the *ICC Rules of Conduct to combat Extortion and Bribery*, that prompted international organizations and national governments to address the issue. Since then the ICC has published a large number of guidelines, such as the *ICC Rules on Combating Corruption*¹¹.

CORPORATE GOVERNANCE CODICES

International corporate governance codices lay down some important compliance principles. For example, the *Listing Standards* of the New York Stock Exchange¹² require companies to have codes of ethics and conduct as well as standards and processes for effectively enforcing these codes; they also state that the audit committee should help the

board of directors ensure that the law is adhered to within the company and require companies to set up ombudsman functions to which employees can report breaches without any fear of reprisals¹³.

On the basis of the principle that business leaders are part of careful and effective risk control, the *UK Corporate Governance Code (UK Code)*¹⁴ recommends that the board of directors audit their risk management and internal audit systems at least once a year and confirm their effectiveness to the shareholders. The audit should include all the important aspects: finances, operatives and compliance¹⁵. With respect to the audit committee, the *UK Code* states that such committees should make their terms of reference publicly available and describe their work in the annual report¹⁶. The audit committee should also check whether staff can confidentially report misgivings about potential misconduct and whether

11 The *ICC Rules on Combating Corruption*: <http://www.iccwbo.org/advocacy-codes-and-rules/areas-of-work/corporate-responsibility-and-anti-corruption/ICC-Rules-on-Combating-Corruption/>

12 *New York Stock Exchange Listed Company Manual*, Section 303A, New York 2009.

13 *New York Stock Exchange Listed Company Manual*, Sections 303A.07, 303A.10.

14 *The UK Corporate Governance Code*, Financial Reporting Council, London 2012.

15 UK Code (FN 19), C.2.1.

16 UK Code (FN 19), C.3.3.

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The Swiss Code specifically states that the Board of Directors should take measures to ensure compliance with the applicable standards

these reports have been independently investigated and appropriate action has been taken.

Similarly, the *Swiss Code of Best Practice for Corporate Governance (Swiss Code)* and the *Guidelines on Information about Corporate Governance* in the Swiss Stock exchange (*SIX Exchange Regulation*)¹⁷ require that the board of directors report at least once a year on whether the applicable compliance principles are sufficiently well known in the company in general, and whether they are put into practice consistently¹⁸. The 2014 amended version of the Swiss Code specifically states that the Board of Directors should take measures to ensure compliance with the applicable standards, which includes following the best practice rules.¹⁹ The 2014 *Swiss Code* refers to the “Fundamentals of Effective Compliance Management” which define the five basic elements of

effective compliance.²⁰ These include:

- Active commitment to and responsibility of the Board of Directors and the executive management for the compliance management system;
- Ensuring that the structural set-up of the organisation effectively implements the code of conduct;
- Implementing compliance processes and compliance programs;
- Implementing appropriate incentives and sanctions; and
- Regularly auditing the compliance management system to ensure effectiveness.

The German *Corporate Governance Code (Deutscher Corporate Governance Kodex)*

17 The Richtlinie *Corporate Governance* (RLCG) dated 29 October 2008 are an integral part of the information that shall enable investors to judge the quality of the issuer under the Stock Exchange Act (Art. 8 par. 2 of Swiss Federal Act of Stock Exchanges and Securities Trading).

18 Swiss Code (recital 9), section 2.2, margin note 20.

19 Swiss Code (2014), recital 21.

20 *Fundamentals of Effective Compliance Management*, dated September 2014 drafted by economiesuisse and SwissHoldings, available at http://www.economiesuisse.ch/en/Documents/compliance_e_web.pdf.

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requires the management board to inform the supervisory board regularly, promptly, and completely of any issues relevant to the company and pertaining to risk exposure, risk management and compliance.²¹ Additionally, the supervisory board should set up an audit committee to monitor the effectiveness of the internal audit system and compliance.

In summary, corporate governance codices reflect the national legal requirements and in general state that the board of directors is responsible for the internal audit, risk and compliance management and that these must be effective and proportional to the risk. The board of directors may delegate the day-to-day running of the company to the management team. However, it cannot delegate its responsibility for the design, supervision and effectiveness of the compliance management system for ensuring compliance with the law. This

system comprises of a code of ethics and conduct, the necessary procedures for effectively putting the code into practice and a reporting body that staff can contact confidentially and without fear of retaliation.

INTERNATIONAL ORGANIZATIONS

The fight against corruption has long been an issue at the international level. In a global economy, the risk of corruption extends beyond national borders. Any effective fight against corruption therefore requires international collaboration. One of the most important compliance documents of international law is the *United Nations Convention against Corruption (UNCAC)*²², which came into force on 16 September 2005. It is the first legally binding international instrument in the fight against corruption. The *Convention* requires signatories to penalize and sanction the various types of corruption and to cooperate in the international fight against corruption.

21 Deutscher Corporate Governance Kodex, sections 3.4 and 5.3.2.

22 The *United Nations Convention against Corruption* is available in English at:

http://www.unodc.org/pdf/crime/convention_corruption/signing/Convention-e.pdf.

A German translation is available at: <http://www.admin.ch/opc/de/official-compilation/2009/5467.pdf>

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Besides the *UNCAC*, the OECD drafted an international agreement, the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention)*,²³ which was ratified on 15 February 1999. The *Convention* requires signatory States to impose sanctions for bribing foreign public officials, including politicians, and to prohibit fiscal deductibility of bribes. The intention of the *OECD Anti-Bribery Convention* is that Member States consistently punish cases of bribery of foreign public officials.²⁴ The aim is to extend the standards already applied in some individual States to others in a bid to fight corruption and create a level playing field.

In addition, the organization *Transparency International (TI)*,²⁵ a charitable, politically

independent, non-governmental organization has taken on the global fight against corruption. To this end, Transparency International publishes an annual *Corruption Perception Index (CPI)*.²⁶ The *CPI* is based on a yearly analysis that ranks countries according to how corrupt their politicians and public officials are perceived as being. The index is frequently used as input to identify corruption risk facing a company.

STANDARDIZATION AT NATIONAL AND INTERNATIONAL LEVELS

In 1998, Standards Australia issued the world's first national compliance programme standard, the *Australian Standard on Compliance Programs (AS 3806)*. Developed in 1995, on the initiative of the Australian Consumer & Competition Commission in cooperation with businesses, the standard intends to

23 The OECD Anti-Bribery Convention is available at:

<http://www.oecd.org/corruption/oecdantibriberyconvention.htm>

24 Cf. *Alexander Dörrbecker/Philipp Stammler*, OECD Anti-Korruptionskonvention: Folgerungen aus der Evaluierung Deutschlands – Auswirkungen auf die Compliance im Unternehmen, DB 2011, 1093 ff.

25 Further information about Transparency International and the Corruption Index is available at: <http://www.transparency.org/>

26 The latest *Corruption Perception Index 2012* is available at: <http://cpi.transparency.org/cpi2013/results>. The forerunner to the *Corruption Perception Index* was the *Bribe Payers Index (BPI)*.

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give public and private organizations a framework for designing, introducing and maintaining effective compliance programmes. The revised version of 2006, AS 3806-2006 became the basis for the *International Standard 19600 – Compliance Management Systems of the International Organization for Standardization (ISO)*.²⁷

In addition to *Australian Standard 3806*, there are other national compliance management system standards, for example the *Austrian standard ONR 192050 – Compliance Management Systems*²⁸. Standards have also been established that describe the procedures for auditing *Compliance Management Systems (CMS)*, for example the *German Audit Standard 980 – Principles for properly auditing CMS*.²⁹

The purpose of the standards for *CMS* is to provide guidelines or minimum requirements for public and private organizations to design, introduce, apply

and improve effective *CMS*. The standards will also make best practice benchmarking easier. A material comparison of the existing standards shows that there is barely any difference between the various principles of good governance, organization and the processes of effective *CMS*. So in future it should be considerably easier for all organizations to bring their compliance programmes or *CMS* into line with international best practice.

Principles of effective compliance management systems

COMPLIANCE AS INTEGRATED QUALITY MANAGEMENT

If we are to believe the findings of the regulatory authorities, the financial crisis revealed major failings in the ethical values and the compliance systems in a large number of companies. The six major US banks alone have paid more than USD 100 billion in fines, damages and legal costs over the past six years.³⁰

27 ISO 19600 is a Guideline Standard for effective compliance management systems; cf. <http://www.iso.org>

28 Cf. www.austrian-standards.at

29 German Public Auditors Institute IDW: the standard is available at <http://www.idw.de/idw/portal/n589244/n589350/n589334/index.jsp>

30 Cf. Neue Zürcher Zeitung 8 October 2013, p. 28, 'Die Ärmel sind hoch gekrämpt'.

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*Organizations at national
and international levels are
addressing the issue of effective
compliance management*

This latest setback in compliance management has led to the conclusion that effectively applying compliance within the corporate environment should rely on holistic and disciplined quality management. The “previous” compliance management concept, under which a company’s major risks can be addressed by means of rather technical stand-alone compliance programmes, is now being questioned and is being replaced more and more by the concept of an integrated compliance quality management system. In the occupational and safety sector, companies have been applying this approach for the last 15 years.³¹

The most widely known quality management standard is ISO 9001,³² which is part of the ISO 9000³³ series of quality management system standards.

ISO 9001 is applied by 1 million companies worldwide. Under ISO 9000, the successful management and operation of an organization requires that it be managed and run systematically and transparently. Important principles of quality management are the creation of the right conditions by the management, the involvement of all those concerned, a process and system-oriented approach, continual improvement, and a factual approach to decision-making. When an organization develops its individual compliance programme into a compliance management system, it takes a quantum leap in terms of the professionalism and effectiveness of its compliance management. All organizations, whether for example a university, a government authority, a trade association, or a commercial business, will in the

31 The International Labour Organization (ILO) published ILO-OSH 2001 – Guidelines on occupational safety and health management in 2001. The standard helps organizations to introduce occupational safety procedures and recommends that all public and private organizations should continually guarantee occupational health and safety by means of an integrated process based on strategy, organization, planning, introduction, monitoring, measuring effectiveness and improving the occupational safety process. Since June 2013, ISO has also been developing a standard for occupational health and safety.

32 ISO 9001:2008 – *Quality management systems – Requirements.*

33 ISO 9000:2005 – *Quality management systems – Fundamentals and vocabulary, Introduction.*

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future need to introduce a compliance management system if they want to meet best practice requirements.

ELEMENTS OF A BEST PRACTICE COMPLIANCE MANAGEMENT SYSTEM

On the basis of the general principles of quality management along with authoritative compliance management standards and guidelines,³⁴ a best practice organizational compliance management system requires the following:

- A culture of ethics and compliance with the law, built on values and business principles applied by the governing body and management within a good compliance governance framework.³⁵
- A written compliance policy that

sets out the objectives of compliance within the company, describes the responsibilities of the board of directors, executive management and the staff, explains how the compliance function is organized and what its role is, and regulates its independence, its authority within the organization and its resources.

- The full, systematic analysis of the compliance risks.
- The organization and procedures³⁶ of the CMS, including the specific risk-related compliance programmes that are a part of the overall CMS.

The best practice CMS can be illustrated as follows:

34 For instance ISO 19600 – Compliance Management Systems – Guidelines, Australian Standards AS 3806:2006, German Audit Standards IDW PS 980, Austrian Standard ONR 192050 (cf. para II.5) and the *Resource Guide to the U.S. Foreign Corrupt Practices Act*, available at: www.justice.gov/criminal/fraud/fcpa/guidance/

35 The foundations of good compliance governance are: (i) ensuring access of the compliance function to the governing body, (ii) independence of the compliance function, and (iii) granting the necessary authority and adequate resources to the compliance officers.

36 In brief these are: risk management, training, counselling, auditing and supervising, issues management, sanctions, communication, reviews and continual improvement.

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CULTURE OF ETHICS AND COMPLIANCE WITH THE LAW
BASED ON THE

- VALUES OF THE ORGANIZATION
- GOOD EXAMPLE FROM MANAGEMENT ("TONE FROM THE TOP")
- CODE OF CONDUCT, AND
- GOOD COMPLIANCE GOVERNANCE

COMPLIANCE POLICY

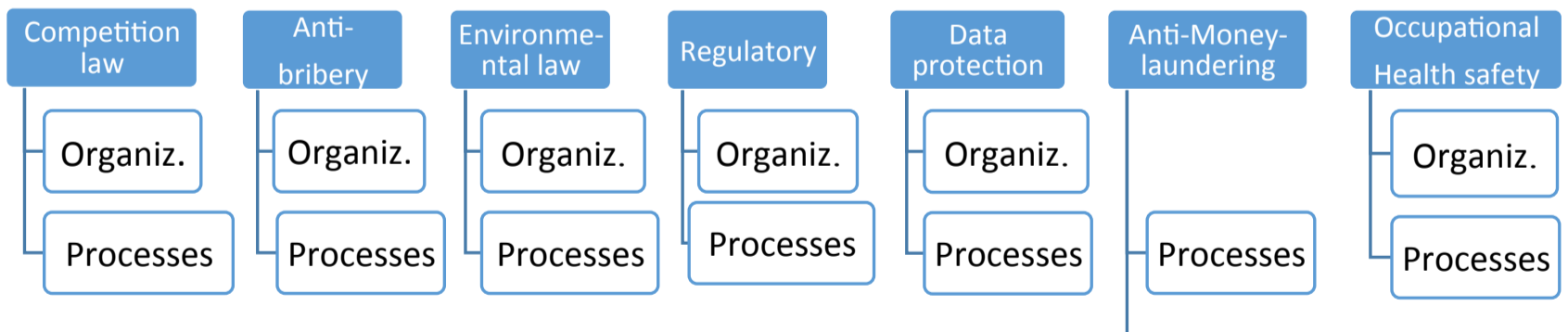
SETTING OUT STRATEGY, GOALS, GOVERNANCE,
ORGANIZATION AND PROCEDURES

INITIAL RISK AUDIT AND CONTINUAL RISK MANAGEMENT

COMPLIANCE MANAGEMENT SYSTEM -
CHARTER:

- Organization
- Processes
- Compliance programmes

CMS programmes



Regular monitoring of the CMS

Regular monitoring of the CMS and its effectiveness measured against best practice standards and taking account of changing conditions. Recognizing the necessary improvements.

Improvement

Continually improving and constantly developing the CMS to ensure it is fit for its purpose and effective.

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COMPLIANCE AND THE ORGANIZATIONAL RESPONSIBILITY OF THE COMPANY

The organizational measures and its processes, are elements of a CMS that ensure that the organisation's governing body, its management and staff in general all adhere to the applicable laws and regulations. In Germany for instance, the Corporate Governance Kodex specifically states that compliance is the responsibility of the management. Although Germany's Corporate Governance Kodex is mandatory only for companies quoted on the stock exchange, organizational duties and responsibilities are also a concern for non-listed companies. In practice, more and more medium-sized companies are introducing compliance systems even though it is not mandatory for them, simply because it is best practice and often also is a requirement of the customers they supply. Under German and Swiss law, for instance, an organizational liability exists when the company is accused of not having

taken the necessary and appropriate precautions to avoid criminal conduct by its employees. In Switzerland, the board of directors of a public limited company is liable for the company's compliance with the laws.³⁷ In this regard, the board of directors bears organizational and supervisory responsibility under civil law. In addition, the company bears criminal liability if any organizational shortcoming causes serious criminal acts to be committed within the company (e.g. corruption or money laundering).³⁸ If the company's staff who have committed the criminal acts cannot be identified, criminal liability lies with the governing bodies, i.e. in a public limited company the board of directors and the executive management.

Conclusion

The requirement for companies to adhere to the law is now known and recognized throughout the world under the term 'compliance'. Legislators, authorities, trade and professional associations and organizations at national and international

37 Cf. Art. 716a para. 1, Section 5 Swiss Code of Obligations.

38 Cf. Art. 102 German Penal Code.

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levels are addressing the issue of effective compliance management. The compliance sector is developing fast: in the 1980s and 1990s, the first compliance programmes were introduced in businesses. At that time, they were considered sufficient. They often were comprised of limited measures and took little account of what are considered today as major legal and reputational risks, but they were the start of the development towards a culture of values, ethics and compliance with the law in businesses. The major accounting scandals during the dot-com bubble and the financial crisis that we have witnessed since 2007 have led to a call for the introduction of comprehensive compliance management systems in all organizations, i.e. government bodies, NGOs and international organizations, in addition to businesses. The prerequisite for this development was that the principles of effective compliance management should, on the whole, be consistent and undisputed throughout the world. This has resulted in national and international compliance management system standardization. Best practice compliance will therefore in the future mean that businesses (and all other organizations

as well) perform compliance quality management systematically in accordance with recognized standards on the basis of a culture of ethics and compliance with the law. This will be accompanied by independent certification of effective compliance management systems, particularly as large corporations require compliance certification from their vendors. These systematic compliance management efforts by companies are an essential component of diligent management and the key to successful business in the long term. ■

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