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Compliance

The CMS Employment and Pensions Group

Compliance

Introduction

A lot of examples not only from the current press, but especially recent experiences in the daily practice of the CMS Employment & Pensions Group show that corruption and other forms of misconduct are a big issue for companies. Regardless of the respective sector, there is an urgent need for action in terms of compliance and corporate code of conduct issues in order to avoid, as far as possible, illegal conduct on the part of representatives of companies and damage arising from such conduct.

Consequences of Non-Compliance

Neglecting to implement a proper compliance system can lead to a number of consequences. In the event of non-observance of the statutory provisions, there is not only the risk that the officers held will have to face individual criminal proceedings. Rather, if criminal conduct is in question, in addition to fines for the companies and officers held skimming off of returns achieved by such means also comes into consideration. Moreover, there is the impending threat of considerable image loss and immense claims for damages by principals and competitors.

In the light of the experience we have gained over many years of developing and structuring such systems, introducing compliance systems is becoming increasingly important. Ultimately, clear regulation with regard to organisation and responsibility is the prerequisite for ensuring that the necessary steps are taken to comply with the relevant laws and standard provisions.

Mandatory Rules

Introducing compliance systems is by no means voluntary. Rather, setting up and monitoring such systems is part of the care of a prudent businessman which both the board and management must observe. Germany has already implemented a corporate governance codex, which since June 2007 has also included special compliance requirements such as information rules between the board of directors and the supervisory board. An infringement of these rules may result in serious damage. After all, incumbents of office can be held liable if criminal acts are committed from inside a company. Apart from that, properly functioning risk management assumes appropriate measures as does the US American Sarbanes Oxley Act (SOX). Even if this Act is primarily aimed at companies listed on the US American stock exchange, it is also applicable to subsidiaries of such companies outside the USA.

Three Steps to Sustainable Compliance

The point of departure of any consideration in terms of a practicable and effective compliance system is carrying out a risk analysis in a company. Once enterprises have become aware of the risks, a commitment must be made by management in the form of a clear basic attitude and/or corporate culture which must be communicated to the entire staff. In this connection, in addition to information and training events, rules of conduct and ethical guidelines are of fundamental importance.

The second step is creating a structure within corporate management which makes it possible to implement the compliance system. A compliance officer could monitor observance of the compliance system and be available to employees as a concrete contact person. Legal transactions that are particularly vulnerable (e.g. opening bank accounts at credit institutes and giving and receiving gifts) should be catalogued and made conditional on the consent of corporate management. Of course, consideration would have to be given to individual cases. To ensure compliance, fixed periods for review and reporting must be laid down, within which the board and management and, in the event, compliance officers, undertake review of the status quo and its functional integrity.

Finally, the third step and crucial element of any compliance system in an enterprise is an organisation enabling management to have an overview of the economic and financial situation of the enterprise. In addition to separating and monitoring functions that are potentially burdened by a conflict of interests (purchasing, accounting control, investment applications etc.) it is necessary to lay down monitoring units with regard to the compliance system. Our experience has shown that so-called indicator lists lend themselves to identifying risks. In addition to the dual control principle, checklists and continuous or random checks at regular intervals are suitable as a means of employee surveillance.

Whistleblowing Hotlines

Finally, the introduction of whistleblowing provisions should not be disregarded. In many cases, the implementation of special whistleblowing hotlines for employees can be recommended. A contact point can bundle information about possible misconduct within the company. Employees of an enterprise are the first to identify malpractice so that this is a resource that should not be waived. At the same time, possible punishments for whistleblowing such as termination of the employment agreement, suspension or harsh mistreatment by other employees must be ruled out.

Another positive effect of sensible enterprise or group-related whistleblowing provisions is the fact that they reduce the risk of employees going directly to the general public.

Labour Law Aspects

In terms of labour law, for the most part, implementing a compliance system requires both individual and collective agreements, there also being the possible requirement to observe the obligation to inform and consult the employee representatives. In some countries, essential aspects of a code of conduct are subject to works council approval and must be implemented in the form of a works council agreement. The main advantage of such a works council agreement is that it makes negotiations with every single individual employee superfluous.

In any case, it is necessary to analyse all aspects of labour law that are likely to be affected by the implementation of the compliance system. This is especially true for international enterprises that have to comply with different national legal standards. In particular, the US-American codes of conduct often contain clauses (like, for example, rules regarding drug tests or intimate relationships between colleagues)

that would be regarded as non-valid or debatable according to other national legal systems. The same applies to sanctions that every successful compliance system should include.

Also, in practice, the significance of data protection and, above all, of security in telecommunications have skyrocketed. In this context, from the enterprises' point of view, it is not only important to ensure compliance with national data protection provisions, but rather, special precautionary measures with regard to data protection in terms of international activities often have to be implemented in order to be able to comply with the entrepreneurial and statutory purpose, also within a group.

Conclusion

In summary, we can state that in view of the increasingly more tightly woven net of regulations and provisions aimed at combating misconduct in enterprises, a compliance system is indispensable. There are, unfortunately, no concrete recommendations that are universally applicable. Rather, our experience has shown that what is needed is a tailor-made system which can identify typically entrepreneurial risks and draw on existing structures. It is only in this way that the highest possible degree of legal certainty can be achieved while at the same time minimising the costs.

Please do not hesitate to contact us if you have any questions on these aspects.

We would be pleased to make our services available to you of course in this regard and also with regard to making an analysis and, in the event, with regard to improving your current system of protection from illegal conduct by representatives of your enterprise. The important thing is that these steps are taken regularly and that the results are documented.

CMS Employment and Pensions Group

The Employment and Pensions group of CMS advises national and international organisations on all aspects of employment law issues that affect businesses across Europe. Our solutions are based on a broad experience in specific business environments and industry sectors.

We offer coordinated European advice through a single point of contact. Thus, clients can deal with a local firm in their own country using their own language whilst benefiting from the integrated expertise of a wide multi-jurisdictional team of more than 200 practitioners.

Full range of employment law services

Our lawyers have particular expertise in all the legal aspects of the following areas:

- compliance with national and international laws and standards
- individual and collective dismissals
- employee share/stock ownership
- employee pension schemes
- social security contributions
- labour/trade union issues/disputes
- employee and pensions aspects of mergers and acquisitions, outsourcing, nationalisation, privatisation
- litigation to prevent employees competing with their former employer
- drafting employment contracts, company policies and collective agreements
- works councils at company, national and international levels

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More information

Please phone your nearest CMS office or contact us at www.cmslegal.com for more details about CMS and the Employment and Pensions group.

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