

Section III

Perspectives from Organizational Practitioners

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Corporate Compliance and Business Ethics between Claim and Reality— Why Academic-Bureaucratic Compliance Programs Fail

Abstract Propagated compliance management standards fail. Despite certified, audited, and award-winning compliance programs, serious compliance scandals continue to take place. While some see the shortcoming in an insufficient implementation of best practice compliance management standards, others criticize a lack of focus on the “human factor.” However, all approaches fail to recognize the reality of organizational behavior and tend either towards naïve oversimplification or fragile complication.

Keywords Business Ethics, Behavioral Science, Compliance Management, Corporate Crime, Useful Illegality

A policeman sees a drunk man searching for something under a streetlight and asks what the drunk has lost. He says he lost his keys and they both look under the streetlight together. After a few minutes the policeman asks if he is sure he lost them here, and the drunk replies, no, and that he lost them in the park. The policeman asks why he is searching here, and the drunk replies, "this is where the light is." (P. Watzlawick)

Introduction

When the last compliance policy has been written, the last compliance process implemented, the last compliance training held, the last compliance risk analysis performed and the last tone from the top announced, what has actually been achieved? By no means a company that complies with criminal law, as many compliance scandals show; there, such measures were even in place in certified, award-winning and audited form. Neither corporate criminality nor a criminogenic attitude are prevented by these academic-bureaucratic management methods.

Despite that, the role of corporate compliance in a management and business context has gained enormous importance in the last two decades. There is now an almost unmanageable number of guidebooks, publications, and more than a dozen compliance standards, numerous national and international guidelines, regulations, and recommendations on how compliance with laws, internal rules or even integrity can be effectively (apparently) ensured by organizations. Google shows more than 600 million hits¹ for the term "compliance" and not only law firms but also auditors, management consultants, and communication agencies see compliance as a lucrative field of activity.

Thus, comprehensive and costly compliance management systems are implemented, compliance programs are rolled out, and compliance officers are appointed. According to a PwC study (2018), 60% of medium-sized companies with 500 to 999 employees now have a compliance management system (CMS); large companies with more than 10,000 employees have even implemented a CMS in 97% of cases. In the German DAX, there are on average 1.75 compliance professionals per 1,000 employees. The average compliance budget of German DAX compliance organizations is around EUR 9 million/year.² In another (published) example of a German-based, internationally active company with currently about 30,000 employees and a turnover of about 4 billion EUR, it states:

1 10th January 2021.

2 A DAX30 compliance maturity benchmarking from 2017/2018 initiated by the author together with Ernst & Young.

"In 2015 and 2016 alone, 50 million euros were spent to bring the compliance system up to date. Starting in 2017, another 40 million euros will be invested in expanding and anchoring the system. These amounts do not include internal costs, such as management and staff time, which are expected to be around a similar total." (Schneider 2017, 441)

Citigroup Bank now employs around 15% of its staff in compliance; that is currently around 35,000 employees. Nevertheless, the bank recently had to pay a fine of 400 million dollars for compliance violations (Cassin 2020). AT&T won a compliance award only to be embroiled in a compliance scandal a short time later (Kelly 2018). Other well-known companies have even had the adequacy and effectiveness of the implemented compliance management system audited or certified and yet corporate criminal behavior was not prevented (Chen and Soltes 2018; Grüninger and Schöttl 2017, 3ff.; Bergmann 2016, 85ff.). So, if you strictly or blindly follow any compliance standard, you run the risk of losing sight of reality, with sometimes serious consequences: *"Enron, Lehmann Brothers, or Fannie Mae's asset valuation, for example, surely followed some accounting standard and yet were not necessarily related to reality"* (Hubbard 2014). The bank Morgan Stanley had installed an extensive compliance program, but it did not reach the employees, as the accused in the corruption case explained: *"[...] whatever nonsense they've shown to the government. It just wasn't in my head, and it wasn't in other people's head"* (Dauble 2012).

So, what is going wrong in corporate compliance?

Against this background, the first part outlines the prevailing legal-economic compliance approach and critically analyzes it as a "small world" approach. This is followed by a presentation of an alternative compliance approach which, following Simon, Gigerenzer, Taleb, Zimbaro, Schünemann and Luhmann, prefers context-related "large world" insights for compliance to prevent corporate crime.

1 Compliance and Business Ethics for a small world³ — the prevailing legal-economic compliance approach

The starting point of the current approach to corporate compliance is the USA, the "motherland of modern compliance" (Haack and Reimann 2012, 2) and still the main driver of the compliance movement. The origins of corporate compliance date back to the 1970s, when the US Foreign Corrupt Practices Act (FCPA) required compa-

3 Small world: a situation in which all relevant alternatives, their consequences, and probabilities are known, and where the future is certain, so that the optimal solution to a problem can be determined (Gigerenzer and Gaissmaier 2011, 451ff.; Jüttner et al. 2019, 225ff.).

nies to establish internal controls to prevent corporate corruption. Some of the confusions of the currently propagated corporate compliance are related to the US mindset, as will be shown below.

1.1 Compliance as a legal discipline

In line with the legal requirements and following the core of the definition of compliance, the topic was originally understood as a legal discipline (Marschlich 2010, 75).⁴ With this understanding, “*all measures were directed primarily at the establishment of rules and their control*” (Bussmann 2009, 223) including their communication of rules, i.e. training. Even today, more than 75% of compliance officers have a law degree (Deloitte 2019); the compliance function is also (still) part of the legal department in many places.⁵ In addition, a large number of legal topics and statutory regulations are still, and even increasingly, declared, analyzed and presented as compliance tasks by lawyers.⁶ For example, labor and social security law, banking and finance, stock exchange and capital market law, export control and foreign trade law, corporate law, insolvency liability issues, data protection law, product liability law, tax law, environmental law, etc. are all considered compliance topics.

This originally purely legal view of compliance has been and still is often criticized.⁷ For example, the question “*Why Don’t General Counsels Stop Corporate Crime?*” (Avci and Seyhun 2016) has been addressed. It has also been argued that the view to need a lawyer to run a compliance program because they’re an expert on the law is like saying one need a referee to be the head coach of a team because they’re an expert on the rules (Pellafone 2020). Some even speak of an outdated legal “Compliance 1.0” approach:

“In the early days of compliance, a new remit to help companies prevent and detect wrongdoing had to evolve. At that time, companies often relied on a flawed model that we now call Compliance 1.0. This model was based on the misconception that compliance

4 But even at present, corporate compliance manuals are dominated by legal contributions and authors. “*For the question of whether a proper CMS exists, only the requirements of case law and laws are decisive. This can only be answered by lawyers*” (Wiedmann and Greubel 2019, 88f.). This is certainly correct when it comes to the question of liability, but not the actual prevention of corporate crime.

5 Depending on the size of the company, compliance history, and industry (Deloitte 2017, 18).

6 Critically and rightly also Kreutzner 2020, 24.

7 In the author’s opinion, rightly so, but this does not necessarily mean that compliance cannot be part of the legal function. Compliance is first a question of approach and mindset, i.e. the correct understanding of the task and goal of compliance, and only then a question of implementation. Whether this task is then taken on in isolation by a separate department or part of another corporate department or even (without delegation) by the body itself can then, in principle, be left open.

could be implemented and managed from within the legal function. But this is a misconception. Many large compliance cases show that general counsel or partners of law firms do not have the necessary expertise or experience to set up and monitor a modern compliance program that meets the requirements. In fact, the legal advice that shapes their work is completely different from compliance management.” (Boehme 2015)

The criticism of a purely legal understanding of compliance is justified. Managers that treat compliance as a legal topic are more interested in how it looks as a legal defense and not whether the compliance program actually works in practice. However, serious and effective compliance as risk prevention is not primarily about reducing sanctions after a crime has been committed but about preventing company-related crimes in advance (Hui Chen 2018). The fate of preventive risk management measures is then also the non-occurrence as success — “*There is no glory in prevention*” (Merkel 2021). An exclusively legal understanding of compliance then also includes the danger of merely working through legal guidelines regardless of the question of whether the measures manifested in the guidelines are actually suitable for preventing corporate crime. Closely connected to this is also a lack of trying out new compliance approaches, although it is recognized that “trial and error” is one, if not the most elementary, procedure for solving a complex problem; with a purely legal understanding, however, it is a red rag in corporate compliance.

1.2 Compliance as an economic discipline

In the wake of this criticism, because of the Sarbanes-Oxley Act in the US and the compliance scandals that continue to occur despite implemented internal rules, controls, and training, compliance is currently understood as a management system or an economically organizational model (Haack and Reimann 2012). One speaks of so-called “compliance management systems” (CMS). A CMS can be understood as a systematic planning approach that ensures compliance with the principle of legality (in special risk areas) through rules, process flows, and an organizational, documentation and communication structure. Over the years, various compliance management system standards and guidelines have developed as framework concepts for compliance with rules and laws in and by companies, including possible audits and certifications (Cauers et al. 2008, 2718).⁸ These compliance standards are developed in the hope of establishing a basis for organizations to follow in order to build an effective compliance management system (Makowicz 2020). In practice, many companies use such compliance management standards as framework concepts (Deloitte 2018, 15). Well-known ones are the OECD Principles, United States Federal Sentencing Guidelines, ISO 19600, IDW PS 980, ISO 37001, COSO, UKBA Principles for Adequate

8 Bürkle (2018, 525ff.) speaks of the “organisation-centred approach”. Same here.

Procedure etc. The elements or criteria of the compliance standards are very similar in their basic features and orientation.

“The catalogue of relevant organizational measures ranges from the development of a compliance risk strategy tailored to the company and a clear commitment of the management to compliance with the rules, to communication and training measures, sufficient controls and regular documentation and updating processes. If there is broad agreement on this basic program of compliance management, however, difficulties often arise in the implementation and realization of the measures in corporate practice.” (Schulz 2018, 1283f.)

The cited guidelines also refer directly or indirectly to a so-called compliance culture, which is decisive for compliance success. In this context, the compliance culture is often associated with a corporate culture of integrity or ethics and thus expanded into a so-called “integrity management” (Pyrcek and Uebachs-Lohn 2019, 291f.). In summary, the idea behind this is that the behavior of employees should not only be controlled by means of rules, guidelines, and processes, as is the case with the “pure compliance approach”⁹ but that the personal responsibility of employees should also be strengthened through ethical measures (KPMG 2019), i.e. a sense of “we” should be created together with emotional commitment paired with insight and conviction (Pyrcek and Uebachs-Lohn 2019; Grüninger and Wanzek 2018). The goal is the internalization of the underlying norms for a decision by the employees (Schulz 2018, 1283ff.) or the induction to act correctly (KPMG 2019), to a kind of “self-moral governance” (Tams 2018)¹⁰ or “ethical leadership”. For example, it is said:

“While compliance aims at the pure conformity of a company on the basis of legal requirements, integrity management is dedicated to value orientation from a moral point of view. Integrity therefore covers not only legality but also legitimacy in the sense of an awareness of norms in the cultural corporate identity [...] Only if companies link compliance management with the factors of integrity and business ethics and internalize criminal law norms will they be able to approach the goal of legal conformity. As a result of a corporate culture that promotes integrity, [...] consistency, trustworthiness, transparency and conformity to rules can be generated, open communication can be stimulated and the autonomy of the actors can be limited. Through a common goal, the employees’ sense of community is increased in the sense of an internal self-binding effect. A lived corporate culture and functional identification with the employer does not only encourages employees to adhere to value concepts out of conviction and thus prevent compliance violations.” (Volk 2019, 31ff.)

9 Pyrcek and Uebachs-Lohn (2019, 291f.) speak of “rigid rules” and “blunt surveillance”.

10 Against this already Jüttner (2018, 28ff.).

A better understanding of this economical management approach as well as the classical legal approach is gained if one understands the person-relatedness as well as the (ir-)rationality idea behind both approaches.

1.3 Person-relatedness as the first common factor of the legal-economic compliance approach

The current CMS measures are largely based on a perpetrator-related understanding of the causes of “white-collar crime” and thus on a person-centered approach to prevention. On the face of it, this is obvious because ultimately only a person can be a (criminal) perpetrator. *“He is the origin of every crisis and the one who can prevent it, master it and—very importantly—learn from it”* (Hockling 2016). Closely connected to this is an almost unmanageable number of studies on the “motives of white-collar criminals” (Blickle et al. 2006, 220–233), the “types of perpetrators” (Hugendubel 2016), the “reasons for misconduct by managers” (Reuter 2020, 673ff.), the characteristics of the “fraudster” (KPMG 2016), the “mind of a white-collar criminal” (Soltes 2016). It is therefore not surprising that the classic compliance prevention measures are similar:

“personality tests before hiring a manager; regular personality tests in the course of employment, especially in critical areas; request for regular submission of police clearance certificates (personal clearance certificate); transfer of (potentially) suspicious employees to other departments or regular rotations; clear governance rules, communicated with an “ethical leadership approach” and the much-cited “tone from the top”; regular information; regular training to increase sensitivity; installation of effective internal processes (four-eyes principle, etc.); regular checks; consistent enforcement of the rules, including a consistent and appropriate response in the event of non-compliance, in particular investigations and appropriate responses; whistleblower procedures and hotlines; central bodies installing and monitoring the above compliance measures.” (Reuter 2020, 687 with reference to Hugendubel 2016)

Also, the majority of measures to establish a corporate and compliance culture that promotes integrity and ethics are of an educational, i.e. behavioral, nature. For example, a so-called “Management Education & Development” (Grüninger 2019, 26ff.), further education and training courses (Schulz and Muth), workshops (Schulz 2018), positive attitudes, and statements by the management (“Tone from and at the top”) (Unger 2020) as well as communication elements such as pocket cards, posters, emotional films (Prycek and Uebachs-Lohn, 294), furthermore a comprehensible formulation of compliance rules and guiding values (Schulz 2018) or the inclusion of compliance or integrity in the corporate vision or in the so-called “Mission Statement” are recommended (Schulz 2018). This understanding of cultural design is accompanied by the appeal of so-called “ethical leadership”. This is associated with an expectation on the part of the organization that compliance is not only a manage-

ment task (Gößwein 2017) but that managers must also behave with moral integrity and not allow themselves to be corrupted (in the broader sense) (Rinker 2019). Ideally, a leader with integrity has the following characteristics:

“vision, honesty, integrity, trust, service, modeling, pioneering, appreciation of others and empowerment [...] communication, credibility, competence, stewardship, visibility, influence, persuasion, listening, encouragement, teaching and delegation...altruistic calling, emotional healing, persuasive mapping, wisdom and organizational stewardship...empowering and developing people, humility, authenticity, interpersonal acceptance, providing direction and stewardship.” (Parris and Peachey 2013, 380)

The manager is thus elevated to the status of a “role model” who assumes an exemplary central position in dealing with compliance, moral issues, and integrity—or has to learn to do so in the sense of the educational instruments cited above.¹¹ This “understanding of leadership” is thus largely cross-situational and cross-role, since the manager has to behave in a normatively correct manner in a wide variety of decision-making situations and should also transfer this attitude to the employees he/she leads (see also Jung 2019, 43ff.).

1.4 (Ir-)Rationality as the second common factor of the legal-economic compliance approach

Both branches of science also have in common that they traditionally cultivate a thought model of the rational human being and the rational organization. This fundamental background understanding assumes that people (especially in organizations) decide on their violations of rules and laws according to a cost-benefit analysis (Vaughan 1998, 23ff.). Whatever is done or not done, the rationality (rational guidance) of decision-making is given decisive importance (critically summarizing Pertiwi 2018, 70ff.; Schütz et al. 2018, 29f.). In accordance with this so-called “rational choice” theory, current compliance programs are also purpose-driven (Kette and Barnutz 2019, 47ff.). Terms such as “goal”, “program”, “process”, “guidelines” or “management” reflect this basic attitude.¹²

11 In order to achieve moral compliance among subordinates, the leader must be manipulative, “has to be manipulative, in order to make the followers behave ethically” (Brown et al. 2006, 108).

12 Osrecki (2019, 19ff.) then also speaks (ultimately criticising) of “...*adapting agent behaviour to the actual interests of the headmaster. In this approach, the legal sciences have the task of specifying under which circumstances a given conduct is to be considered as fraud on the headmaster...*”

"The standard approach to the study of ethics in business and management has been a normative or prescriptive approach, which focuses on what managers, employees and people in general "should" do to act as morally responsible actors...The prescriptive tones that are inherent in this literature are clearly reflected in the popularity of organizational codes of conduct and moral guidelines issued by management...An interesting and important underlying assumption of this approach is that it promotes the idea that individuals are rational purposive actors who act in accordance with their intentions and understand the implications of their actions." (De Cremer et al. 2011, 4)

This understanding of compliance is accompanied by the idea that well-informed, rational actors can decide what is "wrong" and what is "right". Knowledge, reasoning power, and intentions are supposed to cause people to act in accordance with the law or even ethically (critically Palazzo et al. 2012, 323ff.). Extensive rules and regulations or appropriate guideline management, monitored instructions as well as training and processes are considered to be the all-important basic condition for functioning compliance. The management from the "very top" (Schütz et al. 2018, 30) then watches over the orderly implementation of the rules, and in the event of a breach of the rules, it must punish it in the sense of "zero tolerance"¹³.

In contrast, according to recent economic behavioral research and psychology, the impression arises that man is "irrational", i.e. a downright faulty construction with several cognitive deficiencies (so-called biases). Thus, economic scandals are now also seen as the result of the irrational, lazy-thinking "Homer Simpson" (Schneider 2010). The newer compliance improvement measures and prevention programs that follow on from this, such as the nudging and debiasing approaches¹⁴, continue to work with a "rational as-if model" (Gigerenzer 2018).

13 The concept of "zero tolerance" originates from criminology and follows the "broken window" approach (Kunz 2011, 348ff.).

14 Haugh (2017, 683ff) distinguishes between three types of "behavioral ethics nudges" with partly limited benefits and (also) points out the dangers, especially if the workforce perceives the nudging itself as encroaching, immoral. Feldmann and Kaplan (2018) also point out an important distinction and difficulty when they elaborate that the traditional nudges of Thaler und Sunstein "are designed to help people to make decisions that better serve their own self-interest; in contrast, ethical nudges are supposed to help people make decisions that more candidly consider the interest of others. This means that it would typically be more difficult to design and implement effective ethical nudges, compared to traditional nudges, so that they will successfully alter behavior."

1.5 The failure of the legal-economic compliance approach

But if the (ir)rationality considerations and their instruments to prevent violations of the law are correct, why do serious violations of the law continue to happen (Kühl 2020b, 109)? Why is it that “*in some organisations, despite highly complex and intricate systems of rules, regular disasters occur (...) and in others they do not*” (Möhrle and Weinen 2016, 253ff.)? Increasingly, therefore, the question is being asked why current compliance management systems fail (Chen and Soltes 2018; Grüninger and Schöttl 2017, 3ff.; Bergmann 2016, 85ff.), especially in cases of blatant moral or criminal behavior.

“Indeed, the first goal of any compliance program is to prevent corporate agents from violating the law. While this be a top priority for companies, effectively managing compliance risks remains elusive. Large companies spend millions of dollars a year on compliance, some hiring “hundreds, and even thousands of compliance officers at a time,” yet most are unsure of how to best deter wrongdoing. Despite a sustained focus on curbing bad corporate behavior over the past two decades, and a resulting boom in the compliance industry, corporate America is still searching for compliance strategies that are evidence-based, demonstrably successful, and cost effective.” (Haugh 2017, 683–741)

...lack of evidence

The lack of evidence base of the prevailing legal-economic compliance concept mentioned in the quote does indeed seem to exist. Spindler (2013, 292f.), for example, speaks of compliance as a “*sociological-empirical or legal-statistical nirvana*.” Others state that compliance is merely a “*theory of better legal compliance*” or is based on a *hypothesis* (Bassl 2017, 68). In this context, Schütz et al. (2018, 24ff.) and Orthmann (2009, 5) also speak of compliance as a “*game with fear*.” Reichert (2017, 671f.), in turn, regrets that the “*empirical research on the effectiveness of the compliance measures under consideration is insufficient, hardly reliable and contradictory in itself*.” According to Bassl, the study situation regarding the effectiveness of compliance in preventing legal violations is not only “*deficient*” but “*practically non-existent*” (2017, 68ff.). Hence, Corporate Compliance is doing the second step before the first one (Singelstein 2012, 52ff.).

...lack of empiricism

Closely related to this is the question of whether the legal-economic understanding of compliance is based on solid empirical substance or whether a connection between the implemented CMS or a compliance measure contained therein, and the hoped-for goal is not simply asserted. However, for a management method to

stand out from chance and thus justify an application or intervention in the first place, the following minimum cumulative conditions must be present (Barabba and Pourdehnad 2002, 5ff.):

- 1) The group of organizations must be randomly selected.
- 2) The group must include both “successful” organizations, i.e. companies without a compliance scandal, and “unsuccessful” organizations, i.e. companies with a compliance scandal.
- 3) The proportion of “successful” organizations with the corresponding success factor (here a CMS) must be significantly higher than the proportion of “successful” organizations without the factor (here without a CMS).
- 4) Finally, the proportion of “unsuccessful” organizations without the success factor must be significantly higher than that of the unsuccessful with the corresponding factor.

To date, the propagated corporate compliance management has apparently not provided this proof with regard to combating corporate crime. It rather looks as if a multitude of promises are being made (Compliance Punk 2020, 58ff.).

“However, the promises associated with this are hardly ever questioned or examined on the basis of effectiveness and efficiency criteria. Instead, an ideal image is often adhered to, free of an impact-oriented discourse. Compliance programs are said to be necessary to curb white-collar crime by establishing ethical, legal and manageable guidelines and, in the case of criminally relevant violations, to make prosecution possible in the first place [...] From the perspective of white-collar criminology as well as white-collar criminal law, however, there is reason to doubt whether the introduction and expansion of compliance programs in companies [...] can actually contribute to the legal control of white-collar crime.” (Puschke and Singelstein 2015, 339ff.)

The fact that the CMS approach has become widespread despite the lack of proof of its effectiveness and the lack of empirical evidence is due not only to the lack of willingness to experiment (Jüttner 2020, 20ff. with reference to a lack of falsification practice according to Karl Popper) but also to the so-called “isomorphism”, the “liability issue”, and the so-called “horror vacui”.

...isomorphism instead

Isomorphism is understood as a process through which organizations, including their structures, work processes, etc., converge—irrespective of the question of its effectiveness. This can happen in three different ways: either through coercion by an authority, through mimesis (imitation) or through profession, i.e. through professional associations and education and training institutions (Schütz et al. 2018).

All three phenomena can also be found in compliance, as the legalization of CMS standards is increasing, imitation is encouraged by the tendency to compare best practices, i.e. benchmarking (critical of this Jüttner 2018, 2), and the professions are also strongly trained with those of lawyers, auditors, and fraud examiners.

“Regardless of which of these basic mechanisms underlies regulatory-organizational alignment processes: It is continuously possible that ideas or practices of organizational design and management spread, the effectiveness of which cannot be proven or cannot be proven satisfactorily even despite or precisely because of an already advanced degree of dissemination. However, this is also not surprising, and it is precisely with reference to isomorphism that it can be substantiated that (almost as an irony) with rapid and intensive dissemination it becomes increasingly difficult to precisely determine local benefits and specific functioning.” (Schütz et al. 2018, 87)

...instead focus on legal defense

In this context, the original US-style “compliance set-up” certainly plays a role. In that, the compliance measures imposed (decades ago) by the US authorities and then (more or less) accepted or proposed by the offending companies themselves served less to actually prevent corporate crime than ultimately to reduce the liability of the company and the managers. In this respect, questions and doubts about the actual effectiveness of the compliance measures to be implemented would be counterproductive in terms of liability for the companies under regulatory scrutiny. However, if these compliance measures implemented by the companies—due to the publicity of the scandals—are later seen as “best practice” on the market and are continually propagated as such by the consultants extensively involved in those projects, these measures continue to assert themselves without being asked. Authorities then (unfortunately) do replace justifications in this context. However, this seems to be changing, at least to some extent, when it is said:

“What do you hear from the highly regulated financial industry? That you need an additional compliance and governance system that really works, in addition to the one that is checked by all kinds of regulatory bodies.” (Grüninger 2020, 8ff.)

The development of having two management systems is actually worrying because it is not only highly inefficient, calling into question the meaningfulness but also increases the fragility of the company as well as the legal system. On the other hand, assuming the quote reflects reality, it shows the first signs of tackling the rampant academic bureaucracy.

...instead filling the horror vacui

The third cause of the successful dissemination of the legal-economic compliance approach despite unsuccessfulness is the so-called “horror vacui” (Nicolai 2004, 99) of compliance managers and the C-suite. On the one hand, there is a desire (or rather pressure) for practical solutions that are as familiar as possible; on the other hand, at least at the beginning of the compliance career, the managers mentioned are often untrained in how to ensure effective compliance through organizational measures due to a lack of training, experience, interest or time. The propagated compliance management standards fill this vacuum by thinking ahead and anticipating the individual legal and business management action steps for supposedly successful compliance. In addition, the conditions for the development of such methodism are particularly good in situations where one rarely receives feedback on the consequences of one’s actions or only after a long time (Dörner 2003). This also applies to corporate compliance or business ethics because whether the measures implemented by the compliance managers or integrity evangelists actually have an effect is not readily apparent; and especially not to the compliance managers or integrity evangelists.¹⁵

1.6 Interim result: Problems of knowledge *and* implementation of corporate compliance

The critics of current compliance management systems can be roughly divided into two camps. One group is of the opinion that there is no problem with knowledge but only with implementation (Remberg 2020; Schlaghecke 2016 notes that most of the time, it remains with the establishment of guidelines, the whistleblower hotline, and the implementation of initial training). The second group goes further and considers the current CMS to be insufficient insofar as “*compliance or non-compliance is ultimately about individual behaviour, which is decided in the minds of the employees*” (Haack and Reimann 2012, 1). It is therefore also referred to as the “human factor” (Schulz 2018, 1283). This is also increasingly linked to the demand for an interdisciplinary approach to compliance. A look at the behavioral sciences or the discipline of behavioral economics is then obvious, even if it brings uncertainties for one or the other traditionally thinking lawyer or business economist.

“While many firms continue to see ensuring compliance as a legal exercise, it is really much more a behavioral science. That assertion may make attorneys uncomfortable...” (Chen and Soltes 2018)

15 “Culture is when the Compliance Officer leaves the room.”

However, two pitfalls should be pointed out that are frequently encountered in practice. It is either the trend towards “oversimplification” or a trend towards “complicatedness”. A rogue who thinks evil here.

...for all the criticism, “as simple as possible, but not simpler”.

If the criticism of legal and business compliance practice concentrates on the lack of focus on people, there is a danger of succumbing to a deceptive oversimplification; especially if, in addition to the knowledge of rules and values that needs to be trained, one also boldly demands strength of character, moral intelligence, and self-regulation from the employees and then thinks that they have automatically created a corporate culture of integrity. The deceptive oversimplification also manifests itself in simplified nudges:

“Armed with a sparkling new vocabulary of cognitive and behavioral effects, it’s easy to see examples of biases all around us, and we fool ourselves into believing that we have become experts...By simplifying human behavior into a collection of easily identified, neatly separate irrationalities, we strengthen our misguided self-perception of expertise...” and even more “it’s rare for a single, simple nudge to have the full desired effect.” (Smets 2018)

But there are also naïve forms of training that want to train attitudes or even habits of the employees through e-learning.¹⁶ The idea of contributing to the socialization of the workforce through training or quasi-education does not take into account the host. The actual socialization power lies in the operative business areas, not in a cross-sectional department outside the line (Pohlmann and Starystach 2018).

...for all the criticism, “complexity does not mean complicatedness”.

On the other side of the scale, a complication can also be observed, especially when it comes to the question of personality tests to promote integrity, the analysis and design of an integrity “lived” compliance culture or the measurement of the effectiveness of compliance. Here, recommendations are often made that are seen as “ad on” to the legal-business CMS and have a high, detailed degree of complexity. According to the measurement, evaluation, and design methods offered on the market, more than 100 measurement points are supposed to be decisive for this, in addition to various culture and integrity dimensions (Nagel and Heine 2020 or

16 Thus, vis-à-vis the author, compliance training recommended by third parties and touted as “next practice.”

Bielefeld et al. 2020, 205ff.).¹⁷ As a consequence, this would mean that in addition to the detailed and fine-tuned CMS, complicated, comprehensive culture and integrity analysis measures, including corresponding effectiveness measurements backed by mathematical formulas (see for example Hastenrath 2020, 84ff.), or design and adjustment programs, would have to be available. In this respect, there is not only the danger of “overfitting” (Gigerenzer 2018, 4), but also of fragility (Taleb 2018, 53).

However, life, human behavior, companies as emergent dynamic, social systems are not complicated like a clock or a chess game; they are complex, like a football match, a forest or our body (on the distinction also Ramge 2020, 29ff.). So, compliance and the issue of preventing corporate crime are also complex, *not* complicated. While complicated problems (e.g. a broken clock) can be solved by specialized experts, this learned silo expertise does not help in solving complex problems. Instead, networked thinking, experience, and robust heuristics are needed. Successful compliance management to prevent corporate crime is therefore not a consequence of legal, business management, psychological expert advice or a causal management sequence mechanism; it is rather like a good craftsman or forester who looks after the well-being of his forest, or even an experienced doctor who not only looks for symptoms but holistically for the causes of the illness in the body, mind, and also in the environment (sic!) of the patient. One can describe this with so-called “context competence”, which is needed instead of complicated methods.

“Knowledge is context, it strives for relationships. Contexts make up the world. Contextual knowledge, then, is one that stands on both feet in reality—and that doesn’t just operate within the confines of a discipline, a bubble or within oneself.” (Lotter 2020, 12)

In order to promote this urgently needed contextual competence in risk management and compliance, however, the criticism of the prevailing CMS, which is justified in itself, should not focus on an even more intensive implementation of measures that are unsuitable in themselves, nor on a concentration on the individual employee or the individual manager. Rather, an organizational view is needed because the whole is not the linear accumulation of its components, as is yet to be shown (Taleb 2018).

17 See, for example, the so-called “Integrity Index” of GOII GmbH, a consulting firm, which considers 126 measurement points necessary to determine a corporate culture of integrity.

2 Compliance and Business Ethics for the large, real world¹⁸ — an organizational behavior approach

“Given the great rewards and low risks of detection—, why do so many business people adopt the ‘economically irrational’ course of obeying the law?” (Braithwaite 1985)

2.1 Corporate crime as a decision of the organization

Corporate compliance as a *“form of privatised social control of economic life”* (Puschke and Singelnstein 2015, 339ff.) is embedded in an entrepreneurial environment. As organizations, enterprises are *“decision-based social systems”* (Luhmann 2006) or *“decision machines”* (Nassehi 2005, 178ff.)¹⁹. Everything that happens in companies happens in the form of decisions. Whether a new product is designed, a project started, new personnel recruited, a transaction carried out, etc., these are always decisions (Jung et al. 2019, 7ff.). In this respect, criminal corporate behavior is also a decision of the organization “company”, even if it is punishable or illegal. *“Corporate crime is organisational crime, and its explanation calls for an organisational level of analysis”* (Kramer 1982, 75ff.). The understanding of this, however, must be sought beyond the realms of law, business studies, and political science (Jüttner 2018, 168f.).

2.2 Decisions are neither rational nor irrational but contingent

As outlined, the traditional and currently still advocated legal-business compliance management concept wrongly assumes logically decisive “rational actors” (Hertwig 2004, 391ff.). Where decision-makers deviate from this picture, the errors of human behavior are located in the mind by these approaches—in irrationality, as postulated by behavioral economics (Kahnemann 2012), for example, or human mental rot or lack of impulse control, as propagated by the “nudging” approach²⁰. However, reducing human misbehavior to individual deficits does not do justice to the complexity of the situation. People, organizations, and the world are characterized by

18 Large world: a situation in which some relevant information is unknown or must be estimated from samples, and the future is uncertain, violating the conditions for rational decision theory (Gigerenzer and Gaissmaier 2011, 451ff.; Jüttner et al. 2019, 225ff).

19 That organizations are not “machines” has been recognized at least since the work of March and Simon. They tend to act according to the so-called bin principle, i.e. on the basis of a multitude of inconsistent and poorly defined preferences (Cohen et al. 1990). The striking quotation is therefore also more about the concept of decision.

20 In order to speak of serious nudging in the compliance context at all, these have to be “deployed in real time”, “targeted rather than general” und “tailored to the characteristics of the specific bias that is causing unethical behavior in each specific case.” (Feldmann and Kaplan 2018).

a lack of information, dynamics, and complexity in which the optimal strategy is usually difficult or impossible to define in advance (Jüttner et al. 2019, 225ff.).

Thus, neither the traditional rational nor the more recent irrational approach with its reduction of human or organizational misconduct to individual deficits does justice to reality because the rationality of decisions is not logical but contingent or ecological. Contingent rationality implies that a decision is not intrinsically good or bad, rational or irrational but only in relation to a certain environment (see also Gigerenzer 2006, 37ff. He merely speaks of heuristics instead of decisions.).

“People always behave naturally according to the context in which they live. That is, people behave reasonably according to the system. And if the organisation is stupid, they behave stupidly.” (Vollmer 2016, 31)

With this in mind,²¹ corporate criminal behavior may be illegal, wrong, irrational, and possibly even immoral for outsiders²², but from the perspective of the organization and its members, it is (often) rational, logical or useful (Kühl 2020b, 28). This observation is overlooked in the currently propagated form of corporate compliance, for example with the demands for “*ethical leadership*” and “*self moral governance*” (Jüttner and Barnutz 2020).

“Once you understand this principle, you understand better that moral decisions (by whomever) are not a sufficient condition to exclude corrupt structures in organizations. Decision-making programs sometimes mask immoral effects at the system level. Ethical leadership then merely feeds the illusion of having made moral decisions, while failing at the system level. Especially with regard to corruption, it would be worthwhile to examine the logic of organizational decision-making programs more closely...” (Jung 2019, 43ff.)

But the associated communication and observation latencies (Kühl 2009; 2020a, 34) are also underestimated in day-to-day compliance, which manifests itself, for example, in a “socially desirable response behavior” of operational departments towards the compliance department (Jüttner 2020, 18ff.). Against this backdrop, expectations of current corporate compliance must be put into perspective, especially if compliance is absolutized with an integrity component and comprehensively formalized as “*service by the book*”. The former only leads to hypocrisy (Jüttner and Barnutz 2020, 28ff.), the latter is known to be a form of strike (Pohlmann 2020, 185ff.).

21 Following Herbert Simon’s so-called “scissors”; cf. in relation to moral behavior (Gigerenzer 2010, 528ff., 529f.).

22 Illegal behavior is not necessarily immoral at the same time.

2.3 Myth of the person and personalized organizational culture

If one has internalized that compliance is about decision-making strategies, however, it is not—as is very often erroneously assumed—the person, the employee, the manager or the individual, including his or her character and attitude, that is to be focused on in isolation (Epley and Tannenbaum 2017, 73ff.)²³. In this respect, one can also speak of a compliance myth (critical of this: Jüttner 2020, 6of.). The rash demand that compliance measures must focus on people must not lose sight of the organization.

“But if people are seen as the solution to organizational problems, then the search for the right conditions for organizational action seems irrelevant. Structural organizational problems are then attributed to people—and remain unsolved...One is far from finding possibilities for better organization. Because the lack of analytical access leads to blame instead of system-sensitive causal research.” (Muster 2019, 16f.)

As a result of the person- or human-centeredness, the compliance culture of a company is then also wrongly understood as the sum of the individual attitudes of the employees (Jüttner and Barnutz 2020). For example, it is emphasized that “*first and foremost, it must be about the personal attitude of each employee*” in order (Schwenker 2010, 153ff.) to shape a compliance culture. But if, strictly speaking, an organization does not consist of people as a whole but only of the part of them that they need to interact in this social system and their role then a corporate culture is not the sum of the individuals’ attitudes either.

“Equally important is the realization that culture is not tied to individuals. It consists only of the agreements that have developed in the history of the organization. They remain, even if the originators are no longer there. Or are currently in prison for tax evasion. *Mia san trotzdem mia!*” (Vollmer 2016, 62)

The fact that this cult of personality is nevertheless deeply anchored in compliance has three main reasons: one, as already outlined in the introduction, is anchored in the US culture with its absolutization of the individual:

“...the social control of organizations no doubt originates in a belief fundamental to American culture: the value placed on individualism that locates responsibility for achievement, accountability, and responsibility in the single actor...This cultural belief has been reinforced by socio-legal research on structural variables related to “white collar” and other forms of organizational misconduct.” (Vaughan 1998, 3)

23 They call it “*three myths about morality*”, as there are: “*Ethics are a property of people*”, “*Intentions guide ethical actions*”, and “*Ethical reasoning drives ethical behavior*”.

The other reason for the focus on the individual is due to the fact that individual decision-making situations are easier to study in the laboratory²⁴ and therefore psychology enjoys a higher status than sociology.

“Normally the decision situation in normal life exhibits a lot of intransparency with regard to the situation, the consequences of action and the prerequisites of a decision. Until now psychological research tried to avoid the dirtiness of everyday life by cleaning, and therefore denaturalizing, such situations.” (Dörner and Wearing 1995, 65ff.; simililar Friemel 2008, 9; Vaughan 1998, 71)

Finally, the third cause of compliance personalization is the charm after a case of corporate crime has been uncovered of being able to hold people responsible for the act, since the perpetrator(s) can be shown to have received appropriate training, directions, instructions (Parker 2013, 174ff.).

“From the perspective of organizational sociology, it seems reasonable to assume that the main effects of organizational compliance management are the initiation of a blame game that draws its energy from the uncertainty regarding future attributions of responsibility. The background problem of compliance management is then less the securing of factual conformity to rules than the question of who has to answer when violations of rules become apparent.” (Kette 2018, 4)

2.4 Focus on the organization instead of the person

However, instead of placing the individual person at the center of newer, interdisciplinary understood compliance efforts, the interaction between employees, i.e. the company as an organization with all its characteristics such as decision-making premises, membership expectations, division of labor, informalities, zones of indifference, functional deviance, etc. is decisive. This certainly does not make compliance easier at first glance, but it makes it more serious and credible and thus ultimately more effective. The following metaphor is helpful in this context:

“The main idea behind complex systems is that the ensemble behaves in way not predicted by the components. The interactions matter more than the nature of the units. Studying individual ants will never (one can safely say never for most such situations), never give us an idea on how the ant colony operates. For that, one needs to understand an ant colony as an ant colony, no less, no more, not a collection of ants. This is called an “emergent” property of the whole, by which parts and whole differ because what matters is the interactions between such parts.” (Taleb 2018)

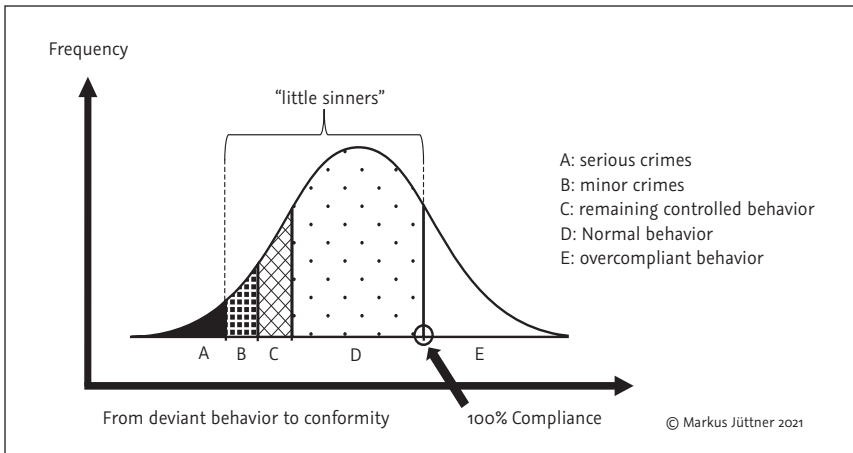
24 Instead of laboratory, one could also use the term “small world” (Gigerenzer and Gaissmaier 2011, 451ff.; Jüttner et al. 2019, 225ff.).

Taking this into account,²⁵ a compliance program to prevent corporate crime should therefore be less likely to educate the individual employee and demand that he or she internalizes values and knowledge through guidelines, sets of rules, and training that he or she cannot then use in the concrete situation. In this respect, a distinction must be made between relatively ineffective behavioral prevention and relatively successful situational prevention in compliance (Pohlmann 2020). Accordingly, legal or ethical-moral decisions are always context-related:

“It is a truism in psychology that personality and situations interact to generate behavior as to cultural and societal influences. However, I’ve tried to show in my research over the past 30 years that situations exert more power over human actions than has been generally acknowledged by most psychologists or recognized by the general public.” (Zimbardo 2004, 21ff.)

2.5 Little bandits instead of big sinners

In this context, the behavioral sciences also show that we humans may be “*little sinners*” or “*little bandits*”, but we are *not* serious (immoral) offenders (cf. chart) (Bannenberg and Rössner 2005, 20; see also Mazar et al. 2008, 633ff.).



25 One could counter here: an examination of an ant gives little information about how an ant colony functions. The examination of an organizational member, however, can say something about the organization, since people internalize structures in the form of expectations. However, this is precisely the reason why behavioral prevention aimed at the individual is unsuitable. People internalize structures, form fixed expectations, therefore the structures are the cause although they also interact with individual interpretations of the structures.

The latter is then also less a question of character than of the said context.²⁶

“In the world of the “little bandits”, minor deviations from rules are not only part of everyday life but have the function of keeping the organization running. Often, it is not possible to comply with all internal and legal requirements in everyday operations without causing the daily business to collapse. Even the “zero tolerance” of behavioral prevention will not change the necessity of regular rule violations. It only leads to the fact that the number of unreported cases will increase and hypocrisy will gain further importance.” (Pohlmann and Starystach 2018)

In this respect, compliance to prevent corporate crime, i.e. serious legal or moral misconduct, differs from compliance to ensure any adherence to rules or even to behave with integrity.²⁷ Effective compliance to prevent corporate crime should therefore not take the form of a prescribed change in behavior but rather start with the (formal) structure of the organization (Jüttner and Barnutz 2020) and thus the main causes of corporate crime. The concrete corporate environment is therefore decisive because a kind of basic willingness to obey already exists through voluntary membership in the organization “company”.

“It is only because organizations are able to make their membership conditional that they can achieve such a high level of willingness to follow among their members. The organization simply declares everything that seems good and important to them to be a membership obligation. If you need people in the human resources department to be willing to enforce salary cuts in the company then you make this unpleasant activity a condition for remaining in the organization. If you need soldiers in a professional army to be willing to secure elections in the Congo and to put up with a six-month separation from their life partners to do so then this willingness to serve is made a formal expectation without further ado. Either you participate or you have to leave the organization.” (Kühl 2010, 3)

Now, a still formal legal membership expectation can exceptionally (previously the heading “Of little bandits...” as well as Schünemann 2013, 20) also become an informal illegal membership expectation.²⁸ In this context, one speaks of a so-called “criminal association attitude” (also the government draft on the law on sanctions for associations, going back to Busch 1933; Schünemann 1979; Gross 1978, 55ff.; Ashforth and Anand 2003, 1ff.; Kölbl 2014, 552ff.), which essentially causes compliance violations. Describing this phenomenon in general terms as “false culture” may be striking, but it is far too unspecific to be of any help in concrete compliance

26 Incidentally, this applies to both types of deviant behavior. Both self-interested and other-interested deviance is context-related (Jüttner and Koch).

27 See Luhmann and his concept of useful illegality.

28 A formal illegal membership expectation would be, for example, the mafia, if one classifies the mafia as an organization and not as a family.

work. In connection with the causes of corporate crime, behavioral science speaks in particular of “*social cocooning*”, “*rigid framing*”, “*slippery slope*” or “*escalation path*” (Jüttner and Barnutz 2020).

If the aforementioned “toxic” structural factors of an organization are the main cause of corporate crime, they must be (merely) uncovered and eliminated through structural changes; the latter, however, must then focus less on the respective individuals (Van Rooji and Fine 2018, 13). Therefore, there is no need for a continuous behavioral preventive compliance management that impacts on the staff. For as outlined, the combination of us humans as merely “little sinners” and voluntary membership in a legal organization does not automatically mean that a criminal association will always emerge; on the contrary, legally organized business and entrepreneurship are not criminal in the majority of cases even without a CMS. Thus, “toxic” intra-organizational structural factors must first be added for “normal cucumbers” to become pickles.²⁹

“While a few bad apples might spoil the barrel, a vinegar barrel will always transform sweet cucumbers into sour pickles—regardless of the best intentions, resilience, and genetic nature of the cucumbers. So, does it make more sense to spend resources to identify, isolate, and destroy bad apples or to understand how vinegar works...?” (Zimbardo 2004)

3 Conclusion

This realistic view then also answers the question why scandals occur in some organizations despite implemented legal-economic compliance and integrity management systems and not in other companies, although the latter either have not implemented a CMS at all or have large gaps in their compliance programs. The “invisible hand” is the absence of the toxic structural elements of the organization, i.e. the vinegar. Uncovering the vinegar, i.e. the toxic structural elements, and then eliminating them within the framework of situational prevention is and remains the core task of serious compliance to prevent corporate crime. Compliance officers are therefore required to counteract the dilution of the compliance task by other topics as well as to withstand the constant appeal for “more is better” and the “latest next practice pressure”.

29 “With this concept (remark: “criminogenic association attitude”) was intended to draw attention to the fact that a company, like any organization, is of course not criminogenic as such but only on condition that a criminal association attitude prevails in it...Conversely, organizations (associations) without a criminal association attitude do not mean a greater source of danger for legal interests than it already...exists in society as a whole” (Schünemann 2013, 20).

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