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CORPORATE COMPLIANCE AND HUMAN RIGHTS

Setting the Scene: Corporate Compliance and Corporate Human Rights Obligations – Can there be Synergies?

ABSTRACT. Human rights violations by corporations are a major challenge, even if serious companies try to prevent them with their internal compliance program. Traditionally CSR and compliance were synonyms for soft law and self-regulation. Compliance, however, is increasingly establishing itself as a fundamental requirement to prevent corporate liability. Obviously, there are additional requirements for responsibility (like jurisdiction and the offence as a step towards the corporate goal). Overall, what has evolved in areas like corruption, money laundering and tax crime is gradually extending to the protection of human rights.

I WHY WOULD CORPORATIONS VIOLATE HUMAN RIGHTS?

Companies do not want to commit human rights violations, it is not good for their reputation. And yet,

– why then does the clothing industry systematically buy from cut-throat suppliers?
– Why did Union Carbide allow an insecticide factory to be built in midst of a densely populated area and why did they not ensure that that valve of the poisonous concentrate tank was regularly checked?

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– Why did Shell hire armed gunmen to protect their installations in Nigeria and omit to ensure that they randomly shot villagers?
– Why did Banca della Svizzera Italiana (BSI) allow the Prime Minister of Malaysia to funnel up to 4 billion $ stolen from the sovereign wealth fund (1MDB) through their accounts in Singapore?
– Why did a Swiss gold refinery (Argor Heraeus) accept several tons of conflict gold and gold from child labour stemming from East Congo?
– Why did Lafarge pay off all parties in the civil war in Syria in order to allow its factory to continue operating?
– Why would Glencore and its subsidiary in Katanga team up with an intermediary, known to have bribed a Minister and the President of Congo in order to obtain mining licences?

Well, if you ask the participants of the WEF in Davos, the answer is easy: shareholder value, get rich quick (if you are in doubt, consult the Panama or the Paradise Papers).

II SERIOUS COMPANIES THINK FURTHER AHEAD

Okay, targets are tough, bonuses are sweet, but, let's be fair, not every manager is a crook. What is more: for several of these companies mentioned, their behaviour did not pay on the long run:

– BSI lost its licence
– Lafarge is in court
– Argor Heraeus only narrowly escaped charges for pillage as a war crime
– Glencore is facing the music
– Shell had to pay damages

However, it must be admitted, that too many are let off:

– Union Carbide, for instance, has not had to fully face responsibility for the 25'000 deaths in Bhopal.

And yet, farsighted companies give themselves compliance programs and CSR-reporting to prevent such things from happening.

III THE TRADITIONAL ROLE OF CSR AND COMPLIANCE

If I am a bit cynical, compliance at least ensures that, maybe not the lower ranks, but the top echelon decide on big corruption or money

laundering; of course, if ever possible, without leaving traces (it was a stupid mistake to copy the CEO of Rio Tinto on the hiring of a friend of the President of Equatorial Guinea when bidding for a mining licence. When the email was published, the CEO lost his job).

So, compliance used to be the sensible approach of corporations to ensure their values and rules were enforced. So far, we have been talking about self-regulation and soft law.

But times are a'changing…

IV THE COMPLIANCE AGENDA "HIJACKED" BY THE INTERNATIONAL COMMUNITY

The human rights agenda for companies remains indeed largely soft law. I am thinking in particular of the OECD Guidelines on Multinationals[1] or the UN Guiding Principles[2], I am thinking of the system of NCPs or on the UN side of the super-soft worldwide system of the UN Global Compact[3], to which every company seems to be able to sign up and live with the standards. Whereas human rights are secured by soft law, is like adjoining or maybe overlapping areas the anti-money laundering agenda, the fight against financing of terrorism, of weapons of mass destruction and the anti-corruption topic as well as the tax agenda embrace a totally different style of international regulation.

Soft law Recommendations enacted by Task Forces or mixed Convention and Recommendation systems, bolstered by robust country evaluations, are pushing the monitored Member States to enact laws and above all to apply them.[4]

NGOs, but also the private sector itself and to no small extent the so called "compliance industry" played a key role in the emergence of the new standards. Instead of self-regulation or "command and control" (the traditional hard law) we would need to speak of "co-regulation".[5]

An obvious example is what happened to Siemens: The OECD enacted its rules on corruption in 1997, Germany in 1999/2000

[1] OECD Guidelines for Multinational Enterprises (2011 edition).

[2] UN Guiding Principles on Business and Human Rights (2011).

[3] www.unglobalcompact.org, last visited 06 September 2018.

[4] Bonucci, "Art. 12, Monitoring and Follow-up", in Pieth/Low/Bonucci, *The OECD Convention on Bribery, A Commentary* (2014), pp. 534 et seq.

[5] Pieth, *Wirtschaftsstrafrecht* (2016), pp. 24, 169.

(IntBestG). Siemens, however, did not believe that this was going to change much in everyday business and kept its ''nest egg''. Monitoring pushed towards enforcement, maybe uneven at first; especially within a federalist country there would be differences, in Germany between sleepy Frankfurt and proactive Munich. Even though the efforts were recognized, the OECD forced Germany to revise its OWiG (to raise maximum sanctions for corporation from 1 to 10 million € and to clarify successor liability).

V COMPLIANCE TO PREVENT LIABILITY

Rapidly the link between compliance and corporate criminal or administrative liability became obvious: In some countries the failure to introduce a compliance system in itself became an offence (Brazil, France, Italy). In most countries, though, compliance became relevant where an employee committed an offence: Corporate liability was based either on management failure (be it direct involvement in a crime by top management or by failure in effective supervision) or – in some countries – on strict liability. Under all circumstances, though, the existence of a credible compliance system mattered – be it as a defence or as a mitigating circumstance in sanctioning.

So compliance evolved from a soft and often fluffy ''nice to have'' into an essential management tool.

VI ADDITIONAL HURDLES TO LIABILITY: JURISDICTION

Obviously, so far this is not more than the entry point. Compliance is necessary and usually multinational enterprises enact a worldwide single standard, even if, when something goes wrong, in litigation, there will be a tough struggle over jurisdiction.

One of the major difficulties – be it for economic crime or human rights violations – is that typically the offences are committed abroad, by employees, agents or (more difficult even) by legally independent subsidiaries. Now, the traditional company lawyer, who has created a complex holding structure explicitly in order to limit liability, will insist that the legal form is decisive. Yet, on a worldwide basis, the economic reality is gaining territory: The mother company of a fully controlled subsidiary will have to take responsibility for its lack of supervision of the economically controlled entity – unless the subentity and its agents deliberately went against the orders of the parent

company. And just to be clear: I am here talking about territorial jurisdiction for the mother company's behaviour in the home country in the North – in Germany for the lack of adequate supervision, in Switzerland for blatant disorganization.

VII "BETRIEBSBEZOGENHEIT"

Moving closer to the crucial issues for the protection of human rights, corporate liability, like Art. 102 Swiss Criminal Code or §§ 30/130 OWiG would demand beyond a lack of supervision that the underlying offence has a relation to the company's goal. The company would not be held responsible for so-called "excesses" of its employees with no relationship to what the company is actually doing.

But beware, this is slippery terrain: In German terminology "Betriebsbezogenheit" has been used to prevent corporate liability by the German Supreme Court in a case of mobbing on a construction site.[6] Now, US Courts have taken a markedly different approach, in the case of the lack of a sexual harassment policy in a multinational enterprise active in the US.

For our topic particularly touchy is the question whether a company active in an autocratic state has an obligation to protect its work force or whether it is responsible if it co-operates with the oppressor (eg the German car manufacturer VW in Brazil of the time of military dictatorship, 1984). Similar questions arise in cases where companies hire local gunmen to protect their operation, which then ultimately goes out of hand.

Now, no one would doubt that the reason why Shell hired these thugs in Nigeria, why Syngenta hired armed security to protect its seed project next to a national park in Brazil, why Danzer hired armed men, is because they wanted to ensure that production continued without interruption.

Where – as in the case of VW in Brazil – the link is only slightly more indirect, where the multinational enterprise hands over members of the work force to military or para-military forces – it does it in furtherance of its overall goals of profitability.

[6] BGHSt, *Neue Juristische Wochenschrift (NJW)* 65 2012, 1237 (4 Str 71/11).

VIII "SYNERGIES", A NICE WORD FOR A ROUGH REALITY

So, whereas CSR and compliance started off as tools to safeguard reputation and to ensure that employees understood company values, this preventive goal has been hijacked by a legal interest: to limit ones liabilities.

Corporate liability demands adequate organization of the company. With strict liability or alternatively with models of disorganization or the lack of supervision (what I call overall the the due-diligence-model of corporate liability[7]) international standards become key to responsibility. These standards do not have to be "hard law", they can be taken from established soft law (eg. international public policy in arbitration).

Multinational enterprises and exporters have learned this the hard way in certain areas, where regulation is in the intense economic interest of some countries – take corruption, money laundering or tax fraud.

IX DOES ALL THIS APPLY TO HUMAN RIGHTS VIOLATIONS?

What is the likelihood that such a development will expand to other serious human rights violations?

It is not so long ago that we started minding how the diamonds or the gold we were giving to our beloved were extracted. However, conflict-diamonds have become a big topic (not that our concepts against them are very efficient). With gold it is still less obvious: Rolex does not want to talk about its supply chain due diligence.[8] Using a different example: Are you aware that producing a wedding ring creates 20 tons of dangerous rubbish ("Sondermüll") and that maybe a quarter of the gold used to produce it has been mined by ten-year-old kids in Burkina Faso? Okay, so far these matters touch us on a moral ground, but are they legally relevant?

As the case Argor Heraeus shows, refining conflict gold can be a war crime according to the Rome Statute and other legal instru-

[7] Pieth, in Pieth/Ivory, *Corporate Criminal Liability, Emergence, Convergence, and Risk* (2011), pp. 50 et seq., 393 et seq.

[8] Human Rights Watch, *The Hidden Cost of Jewelry* (2018), pp. 89 et seq.

ments.[9] Organized slavery and trafficking in human beings is also a crime according to German law. Corporations can be held responsible. What I have said about the supply chain due diligence fits into the duties of supervision according to the OWiG and the jurisdiction may depend on the detail, but does not seem to be an insurmountable obstacle. If the company saves money by omitting to introduce a credible compliance system, it will not pass the test of adequate supervision, once something goes seriously wrong.

[9] Pieth, *Wirtschaftsstrafrecht* (2016), pp. 233 et seq. (with further references).