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Legal Compliance Systems – a Necessary Mechanism in Organizational Risk Management

ABSTRACT

Objective: Compliance is currently seen as an integral structure of managing financial organizations and it is widely gaining popularity in other types of companies. However, despite model solutions being widespread across the world, there are still many problems due to the lack of effective business compliance management systems meeting the expectations of managers

or executives. This is caused by not only incessant legislative changes, but also the multilateral character and function of compliance norms in legal practice and theory. The research purpose of this theoretical dissertation is to demonstrate that legal compliance management systems are a necessary tool for organizational risk management, both formally and practically.

Methodology: This research intends to study the impact of compliance on effectiveness of administrative bodies and private sector participants as part of the methodology in the form of a theoretical article

Findings: The initial hypothesis states that normative compliance first introduced in financial institutions is becoming an organizational standard in risk management, directly affecting the quality and systemic management processes.

Value Added: This article discusses the theoretical meaning and functions of compliance, in terms of both EU law and one of its member states, namely Poland. The choice of Poland as the subject of the study in comparison with the EU is motivated by the fact that this year Poland enforced a rather strict system of legal norms, comprising a broad code of compliance as part of the draft act on the responsibility of collective entities.

Recommendations: The system of legal compliance is a necessary mechanism of risk management in organizations, in both formal and practical sense, immediately strengthening the very traditional functions of management.

Key words: compliance, legal standards, management, the risk of non-compliance

JEL codes: K40 Legal Procedure, the Legal System, and Illegal Behavior: General; G32 Financing Policy, Financial Risk and Risk Management

Introduction

Ensuring an organization's compliance with the broadly understood legal system is surely a challenge for any organization considering the dynamics of regulatory changes around the world. Compliance processes are at the core of the operations of both the regulator and the authorities auditing and enforcing the laws, government bodies, financial institutions all the way down to the individual entrepreneurs, regardless of their scale of operations

or legal form. Governmental bodies as well as specialized auditors have repeatedly emphasized the importance of complying with regulations, which is synonymous with quality in public entities and an additional endorsement of the financial results generated by businesses. The research methods and findings from around the world prove that compliance methods should focus on designing programs aimed to prevent noncompliance, identify risks and violations or conduct appropriate internal control. This, in turn, leads to implementing effective reparative measures, eliminating the violations and the resulting negative occurrences within an organization effectively improving the quality of the management processes. It also was also proved that regardless of employee preference to comply with the law, egregious sanctions reduce the probability of abuse (Blair & Knight, 2013, pp. 529–537). In addition to the legal and economic environment, ethics, behavioural conditions and cultural factors play a key role in the process of creating and verifying compliance - which are subject to management processes and are largely dependent on attitudes of management and employee preferences regarding risk in this area.

Compliance – meaning and function

The term compliance has a broad meaning, which is constantly being developed. It can be defined presently as an interdisciplinary field defining mechanisms for verifying the legality of operations. It is not a separate branch of law or management sciences, and the extent and scope of this concept indicate that it transcends many areas. The accompanying principles and standards of compliance are not yet fully defined, although many of them are related to the theory of procedural justice and the recognition of certain criminal behavior (Murphy, Bradford, & Jackson, 2016, pp. 102–118). This is the reason why entities aiming to meet or implement compliance are forced to establish the minimal framework of behaviors and activities themselves in order to create effective organizational compliance systems. An interna-

tional example of this is a bilateral investment agreement (BIT) concluded between countries, aimed at increasing investment credibility in the context of increasing the inflow of foreign direct investment (Chen & Ye, 2019, pp. 1–15).

Compliance consists of systems and procedures designed to avoid legal risks, mainly civil and administrative consequences as well as loss of reputation and image. The most significant function of compliance is the possibility to avoid risks that would be likely if the standards being in effect had not been met (Andrzejewski, 2012, p. 259).

Non-compliance with regulations and mandatory standards is subject to certain consequences in the form of legal sanctions - criminal, fiscal and financial. The requirement for actions to comply with the law prevents erroneous behaviors. As V. Root indicates, the rules should lay out a clear line of action, where compliance should be relatively easy to keep (Root, 2019, p. 212). Unfortunately, only theoretically, because in the world there are no universal rules, no single legal act that could result in non-compliance with the law regardless of whether it concerns economic behavior, a business, clerical, or public decision.

The meaning and function of compliance differ depending on industry, the scope of business, e.g. goods (trade, production) or services (material, consulting, financial), the legal form of the entity and business size (listed companies, private property), scope of competence and type of activity - public / social, and a countless plethora of other factors. The pioneers of compliance are financial companies – mainly banks, large capital companies listed on stock exchanges as well as entities from other regulated industries, operating based on obtained permits / licenses or concessions. Currently, apart from those types of entities, growing interest to apply compliance standards is seen in small and medium enterprises, non-government organizations and state authorities. Assuming that the concept of compliance is acting as a system of internal control with appropriately selected control mechanisms, the purpose of which is to ensure actions comply with the law, while demarcating compliance as a control function with other operational

functions and its proper relationship with risk management (Cichy, 2015, p. 7). The findings of the research conducted 2018, by the Institute of Compliance in cooperation with EY, Wolters Kluwer and Viadrina Compliance Center operating at the European University Viadrina in Frankfurt (Oder), show that in most countries there is a perception that compliance management is now an important component of good organization management practices, i.e. good governance. Meanwhile, the awareness as to the legitimacy of implementing this system was stimulated not only by large companies operating on the global arena committing fraud and becoming entangled in various types of irregularities, but often also suffering irreversible damage to their reputations (Compliance 2018, p. 9). In light of these views, it should be acknowledged that the correct implementation of compliance needs the support of knowledge management systems. The research of K. Raczkowski and A. Pawluczuk on the concept of knowledge management, which unquestionably constitutes a part of good governance, shows that its implementation should follow an analysis of corporate culture, taking into account the level of trust in the organization and the need to break the resistance to changes in management (Raczkowski & Pawluczuk, 2014. p. 42). Compliance, much like knowledge management, requires focusing on effective transfers of consolidated and tacit knowledge through technology, integrated information and effective communication systems, as well as teamwork.

From the perspective of perceiving problems and solving them in terms of compliance, it should be stated that both concepts should not set limits as to their interpenetration. This claim is supported by the perception of it being the essence of intellectual capital and its enormous significance in the discussed interdisciplinary fields. It is extremely important to integrate the role of the compliance instrument in the process of achieving excellence in corporate social responsibility with the role of the organization's leaders, who ought to exhibit particular moral competences. They are the ones obliged to give guidance and direction to the activities and growth of their organization (Barcik, 2019, p. 4). It is noticeable that the increasing awareness of managers

results in introducing so-called compliance management systems serving both repressive and preventative functions.

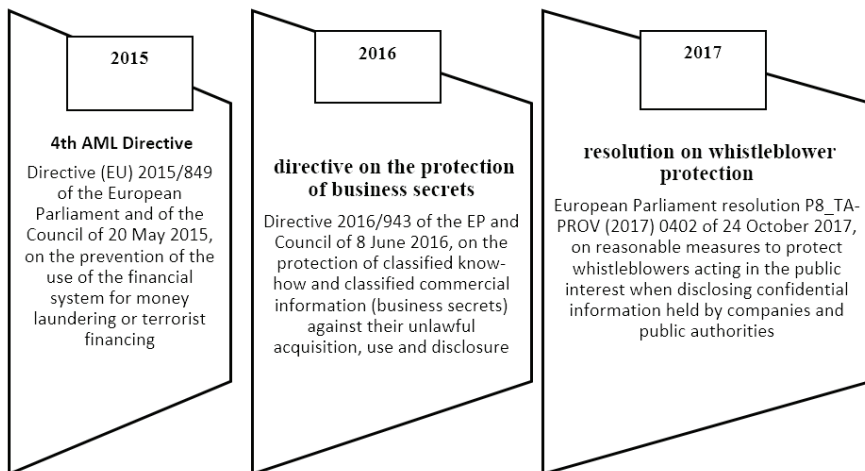
The preventative functions include promotion of compliant behavior among employees, security measures consisting in developing and implementing principles of risk mitigation activities (e.g. against industrial espionage, or protection of tangible and intangible assets), as well as organizing to take action in order to adapt existing organizational structures with the goal to minimize elements most exposed to the risk of irregularities. The repressive functions include the evidence-gathering function comprising investigative and evidentiary actions confirming the occurrence of abuses, and a corrective function consisting in restoring or attempting to rebuild the prestige of the organization in the environment of a compliance system (Makowicz, 2011, p. 21). The functions of compliance, regardless of the industry where the entity operates, consist in adhering to the appropriate standards of market behavior, managing and eliminating conflicts of interest while at the same time maintaining the desired ethical standards (Mrozowska-Bartkiewicz & Wnęk, 2016, p. 74). In order to achieve them, it seems necessary to enhance the compliance implementation processes with the scope of standards of the International Organization for Standardization (ISO). These are based on the principles of good governance, proportionality, transparency and sustainability.

Legal basis for compliance in EU legislation

The idea of regulatory compliance in corporations and state authorities has been part of best practices for a few years now, but it is also a requirement enforced by EU legislation. The law that sparked a broad discussion about compliance issues in Poland was undoubtedly the Regulation of the European Parliament and of the European Council of 27 April 2016, No. 2016/679, on the protection of individuals with regard to the processing of personal data and on the free movement of such data (called GDPR) introduced to the Polish

legal realm with the Act of 10 May 2018, on the protection of personal data. In addition to the GDPR directive, the European regulators have introduced other laws, equally important in terms of compliance, illustrated in Figure 1:

Figure 1. The principal legal acts regulating compliance processes



Source: own study.

The common feature of the above laws is that all entrepreneurs conducting businesses within the European Community must implement them. Thus, the issues of broadly understood compliance became significant not only for large-scale corporations in developed countries. This change of focus of the European regulator was intended primarily to increase the protection of EU citizens, the main manifestation of which being the GDPR directive, but also to prevent the spread of crimes taking advantage of the financial system – the 4th AML Directive.

Undoubtedly, compliance matters gained in importance after 2008, when the aftermath of the global financial crisis revealed a number of irregularities in the functioning of the broadly understood financial market. This does not mean that previously local regulations did not include laws that would protect the economy against the effects of unauthorized activity on financial

markets, but the lack of care for complying with them contributed to the deep economic crisis that reverberated through most global economies in the following years. The recession of the last decade caused a significant increase of awareness as to the necessity of implementing laws preventing fraudulent financial practices both on the level of corporations and on the level of national and international regulations. The aftermath of the crisis also brought the tightening of regulations aimed at sealing up the budgets of EU member states. The intensification of these activities is aimed mainly at the prevention of VAT fraud by facilitating international exchange of information, execution of multilateral audits as well as a punitive approach to designing aggressive tax optimization schemes and income tax avoidance. Many times the fraudulent mechanisms resulted from vulnerabilities that allowed company managers and financial employees to create fake transactions. The low risk of revealing the tax fraud acted as an incentive promoting these illicit economic activities (Totwińska, 2014, p. 170). Therefore, the issue of recruitment of personnel responsible for compliance activities seems essential. In addition to competences, high personal integrity and resistance to corruptive temptation or pressure from decision makers acting to the detriment of the organization are indispensable for compliance personnel.

Compliance is directly associated with the term white collar crime, which was first used in 1939 by an American sociologist and criminologist, Edwin Sutherland, during a symposium of the American Sociological Association (Gajewska-Kraczkowska & Partyka-Opiela, 2016, p. 5). This was the first case of determining a certain type of crime based on the background of the perpetrator – in this case a “white collar,” an office worker (Sutherland 1940, pp. 1–12). Considering the present level of economic abuse, including financial and tax fraud, it is no longer surprising that a criminal can enjoy a high social position, be a respected business person and at the same time commit crimes as part of his profession connected with business transactions. The author of the contemporary definition of white-collar crime is Aaron Goldstein. He claims that this category of crime should include elaborately complex schemes

committed by both natural persons and organizations in the form of either forgery or fraud (Żółtek, 2009, p. 109). They are initiated in connection with business activities in industry or finance where the probability of detection is rather low, while being extremely difficult to expose and prove.

Legal basis for compliance in Polish legislation

In the Polish legal system, there is no single law that could be named as the “Code of Compliance.” The matters concerning compliance are regulated by a number of laws, including the already mentioned Act of 10th May 2018, on the protection of personal data, the Act of 1st March 2018, on anti-money laundering and terrorist financing, as an implementation of the 4th AML Directive, but also individual provisions of the Penal Code, the Code of Commercial Companies or the Act on combating unfair competition. Special notice needs to be given to the Act of 28 October 2002, on the liability of collective entities for punishable offenses. Regulations previously in effect made the liability of a collective entity conditional on the court finding the offence was committed by a person acting for or on behalf of the company, while demonstrating fault in the selection or supervision of the perpetrator. In addition, the list of crimes a collective entity could be held liable for was limited and the associated financial penalty was only 12 thousand PLN.

In the beginning of 2019, the Council of Ministers in Poland adopted a new draft law on the liability of collective entities for punishable offenses that assumes a mixed nature of the entity's liability (both administrative and criminal), independent liability of the company in relation to the liability of a natural person and a very wide subjective scope of direct perpetrators, including in the first place representatives and employees, as well as subcontractors, suppliers and their employees. Pursuant to this act, liability will be imposed for all tax offenses and criminal offenses, and the range of financial penalties for violations may range from 30,000 PLN up to 30 million PLN, and in special cases up to 60 million PLN. The adopted draft law on the liability of collective

entities for punishable offenses is now the broadest compendium of knowledge on standards of compliance. It, however, does not indicate how to implement compliance practices or how to manage processes that will guarantee legality of an entity's operations. This Act only shows the Polish regulator is seeking to extend the scope of liability of collective entities, but also to resign from the previous requirement of obtaining an injunction sentencing a natural person for committing a punishable offence qualified as a criminal or fiscal offence. The above assumptions should be assessed as controversial, because both the potential amount of the imposed financial penalty, as well as the possibility to incur liability without maintaining an objective cause and effect relationship between the violation and the fault of the collective entity, results in the inability to mitigate the risk of violations effectively.

Referring to the types of the offence, they can be divided according to the criterion of the victim. Thus, forming three categories, i.e. offences committed to the detriment of organizational units in which the perpetrator performs decision-making functions, offenses to the detriment of other participants of trade and offenses to the detriment of supra-individual social interests (Gajewska-Kraczkowska & Partyka-Opiela, 2016, p. 5). Example offences from these categories are featured in Table 1.

Table 1. Example categories of offences

Offences committed to the detriment of organizational units in which the perpetrator performs decision-making functions	Offenses to the detriment of other participants of trade	Offenses to the detriment of supra-individual social interests
Abuse of trust in business transactions	Offenses to the detriment of creditors	Money laundering
	Offenses to the detriment of the partners and creditors of a commercial company	Corruption

Offenses against property	Offenses violating the principles of fair competition	Fiscal and banking offences Offenses related to securities trading
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Source: own study based on Gajewska-Kraczkowska & Partyka-Opiela, 2016, pp. 13–16.

The Polish legal system, in addition to the relevant substantive provisions, contains a number of procedural regulations, which aim to both prevent and detect all types of non-compliance and abuse. The main legal acts granting the power and scope of competence to law enforcement and preparatory bodies include the Code of Criminal Procedure, the Executive Penal Code, the Fiscal Penal Code, the Act on the Central Anti-Corruption Bureau, the Act on the National Tax Administration, the Act on Police, and also the Act on the processing of criminal information or the Act on money laundering and financing of terrorism. The provisions arising from these laws undoubtedly constitute a framework for the activities of state authorities as part of the examination of broadly understood compliance. Literature on the subject indicates that the social, economic or normative motives of compliance or non-compliance with applicable regulations are somehow "triggered" by the behavior and attitudes of many people, companies and organizations. Additionally, the attitude of the legislator has a significant impact on the behavior of entities in this area. Thus, proper identification and understanding of different points of view on compliance requires a detailed analysis that takes into account the social and business environment (Parker, Lehmann Nielsen, 2017, p. 224). Therefore, it should be expected that a steady increase in public awareness as to the need of implementing regulations on broadly understood compliance would actually contribute to improving compliance with applicable regulations.

Compliance – a necessary risk mitigation mechanism - costs and benefits

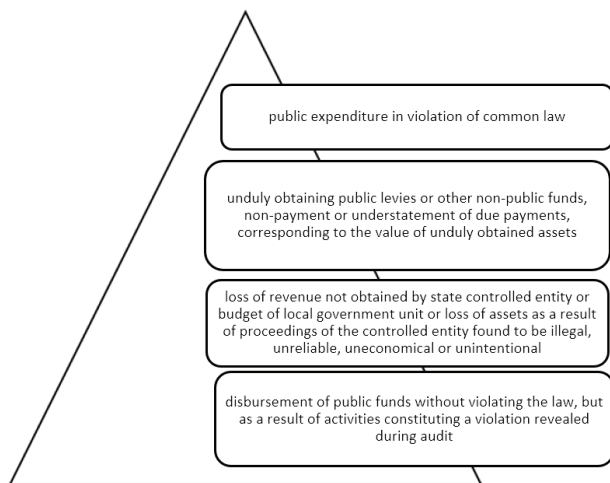
The concept of risk is most simply defined as the probability of occurrence of a specific event and the amount of damage it can cause (Łosiewicz-

Dniestrzańska, 2015, p. 348). Risk is the fear of potential threats that may negatively affect the functioning of an organization. According to the global Aon research, published in the Global Risk Management Survey report covering 1843 companies from around the world, including Poland, risk perception depends on the economic, demographic and geopolitical situation, as well as the level of technological development. The surveyed companies believed that the risk of increased competition, online fraud and political risk had a significant impact on their operations. The surveyed entities also indicated a decrease in concerns, compared to the year before, caused by risk of legal changes, inability to acquire and retain talents in the organization, business interruption and civil liability (Aon, 2017, p. 4).

Moving on to the findings published in the most recent Compliance in Poland report, which also mentions the risk of economic slowdown, lack of innovation and failure to meet client expectations, difficulties in recruitment, failure to maintain business continuity, misappropriation of property, theft, use of company assets for private purposes, conflicts of interest, falsification or forgery of financial data, fiscal offenses, consumer protection, lobbying, violations of labor law, as well as the lack of personal data protection or money laundering, loss of market position, reputation or, consequently, bankruptcy (2019, p. 43). Considering the legal aspects of compliance and thus the need to preserve the division and balance of power, as well as to ensure the sustainable development of economic entities, the state needs a controlling institution to audit the undertakings of organizations, including the legislator and executive bodies.

In Poland, the institution serving this purpose is the Supreme Audit Office (NIK). Through a public assessment - communicated to citizens, the state is to provide the general public with knowledge on the impact of lawfulness of audited entities on their effectiveness, including processes related to managing public funds. The catalogue of risks identified by this institution is shown in Figure 2.

Figure 2. Risks in managing public funds



Source: own study.

The Supreme Audit Office (NIK) focuses on controlling all branches where public funds are spent, i.e. government administration, local government, other entities as well as entrepreneurs that are beneficiaries of public spending (NIK Report, 2019, p. 60). It can be assumed that these entities are subjected to public compliance; the results depend mainly on the quality of management control as defined in the Public Finance Act. Its priority is to guarantee the execution of tasks in a lawful, effective, economical and timely manner. Both compliance and management control are to ensure compliance of the entity's activities with legal provisions and internal procedures, effectiveness and efficiency, reliability of activity reports, as well as protection of its resources (Sobol, 2002, p. 35). Management control, however, should not contribute to the implementation of a compliance system in public entities. Although it is a new dimension of control still being perfected, examining compliance with and promoting the principles of ethical conduct, effectiveness and efficiency of communication, the measures and indicators set out in it may obscure the actual situation and results of the entity. This does not always indicate

the real quality of management, due to such factors as lack of objectivity, manipulation of statistics resulting, for example, due to the subordination of management control teams to the head of the entity. We need to remember that only efficiency enforces rational actions, while rationality itself is characterized by efficiency that has its pillars in effectiveness – attainability of goals, economy - frugality and efficiency, as well as profitability (Filipiak, 2011, p. 348). Effective compliance tools minimizing the risk of multidimensional failure to comply with the law include communication and knowledge management systems, including information on irregularities; employee rights protection policy, controlling financial settlements, including tax settlements, anti-corruption and anti-money laundering and terrorist financing procedures. Compliance cannot be limited to only part of the activities of the company, e.g. only limited to financial compliance, because the source of the problem could lie not in the economic situation of the company but in the level of responsibility of employees in relation to their identification with the company, industrial secrecy or commitment in the implementation of strategic objectives.

Undoubtedly, it is positive to see that compliance is used more and more frequently in designing environmental protection policies, including improvement of qualifications and ethical standards of managers, which are essential for shaping the global outlook of economic ventures around the world, not only in terms of ecology.

Final remarks

Compliance as a system of supervising legality of business operations is becoming an increasingly widespread standard not only in risk management, but more importantly, in systemic organizational management. It can be called a kind of demarcation line between risky decisions and potentially high profitability, and a more effective application of the management control function. The key elements of creating an effective compliance system include

comprehensive knowledge of law, implementation of appropriate security policies, adopting standards, ISO certification, or appointing a compliance officer in the company, but also aligning this system with the priorities and objectives of executive management and the whole organization.

Implementation of an effective compliance system requires an in-depth analysis of the current and future business activities and improving the knowledge of law applicable to the company's operations and strategy by the management. The result of this theoretical dissertation provokes the conclusion that entities of the national economy should apply the theoretical and practical approach to compliance to increase the efficiency of actions aimed at achieving their strategic goals. Conversely, the lack of a broader perspective and compliance practice may lead to unintentional violation of legal norms, threatened by high financial penalties - both for the management and the entire organization. In consequence, this could not only decrease the net result of business operations or lead to the necessity to replace key management staff, but more importantly, it could pose a significant risk of losing business continuity due to the insufficient application of legal knowledge in the current activities of management.

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