POHLMANN & COMPANY

International Compliance Update

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Our "International Compliance Update" portrays current developments and trends in international compliance legislation, jurisdiction, and practice with a focus on their relevance for Germany.

Special Topic

How to Prepare for a Monitorship

Nicole Willms / Clemens Blettgen

- Companies that have violated the Foreign Corrupt Practices Act of 1977 ("**FCPA**") or similar international compliance rules and regulations are more and more facing so-called deferred or non-prosecution agreements ("**DPAs**" or "**NDAs**"). Next to monetary fines, DPAs or NDAs often impose a duty on the delinquent company to hire an independent compliance monitor, who assesses the different elements of the company's compliance program.
- Hui Chen, former corporate compliance expert at the US Department of Justice ("**DoJ**"), spoke, at the inaugural "*Pohlmann & Company Compliance Roundtable Discussion*" in Munich in September, about her monitorship-related experiences at the DoJ and the criteria that, in her opinion, make a robust and sustainable corporate compliance program.
- Next to her expertise and the written guidelines issued by the US authorities and other institutions, Pohlmann & Company has gained extensive experience and insight into those requirements themselves, from both the company's and the monitor's perspective.

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S. Petri / N. Neumann | **Developments of Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPA)**

D. Abrokwa / C. Meckenstock | **Reduced fines and other incentives for companies with compliance management systems**

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With the significant rise of monitorships under deferred or non-prosecution agreements ("**DPAs** or **NDAs**")[1], a question which more and more companies these days have to ask themselves is: how to prepare for such a monitorship? A question, which former US Department of Justice compliance expert, Hui Chen, knows all too well. She extensively spoke about her take on it and her related experiences with the US authorities at the inaugural "*Pohlmann & Company Compliance Roundtable Discussion*" on September 14, 2017 in Munich. In addition, this article presents some of the Pohlmann & Company team's own experience in the field, when either being on the company's side or acting as a compliance monitor.

The Concept of a Monitorship

The general idea of a monitorship is laid out in the so-called "*Morford Memorandum*"[2] of 2008, named after the then-acting US Deputy Attorney General Craig S. Morford. It discusses and explains nine principles[3], split between three focus areas, for the entirety of the monitorship process:

Selection

The main selection criteria for a monitor are based upon the qualification of the relevant individuals and the absence of any conflicts of interest. In many instances fulfilling these general criteria may be more complicated than most think. There are usually at least a handful of people who fulfill the criterion of extensive knowledge and expertise particularly needed to monitor the company (such as language skills and industry experience). These experts, however, oftentimes have already worked with the company or at least their firms have. Generally, a long-lasting selection process is not desired by any company facing a monitorship, because there might be additional fines pending and it wants to be released from the monitorship as soon as possible. At the same time, however, such period should give the company time to prepare for the monitorship and enable a proactive improvement of its compliance program, before the monitor even arrives and starts his review and testing.

Scope of Duties

The definition of the scope of monitor duties is crucial for the interaction and cooperation between the company and the monitor. As the monitor is fully independent, he should neither be an extended arm of the US authorities nor is he an advisor to the company. While both, the company and the monitor, must be aware of this strict application of the principle of independence, it seems desirable with respect to the success of the monitorship, to establish a collaborative atmosphere and cooperation – not only from the company towards the monitor, but also vice versa – in providing full transparency and avoiding any hidden agendas.

The main duty of a monitor will be set forth in the respective DPA or NDA between the company and the authorities: preventing the risk of reoccurrence of the company's original misconduct. In some monitorships the monitor finally has to certify the effectiveness of the company's compliance program in this respect.

Even though the monitor is not an investigator, he must furthermore notify the authorities of any previously undisclosed or new misconduct that he becomes aware of during the course of his review.

Plenty of discussions revolve around the recommendations the monitor can and should provide to the company in his reports with respect to necessary improvements of its compliance program. While such recommendations have to be implemented by the com-

[1] Which is further elaborated in S. Petri / N. Neumann: *Developments of Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPA)* as part of this issue.

[2] Available at: https://www.justice.gov/sites/default/files/dag/legacy/2008/03/20/morford-useofmonitorsmemo-03072008.pdf.

[3] Nine Principles: (1) monitor's qualification and absence of conflicts of interest, (2) monitor's independence, (3) monitor's primary responsibility, (4) extent of monitor's duties, (5) communication and reports, (6) adoption of recommendations by the company, (7) reporting of previously undisclosed or new misconduct, (8) duration of the monitorship, and (9) extension or early termination of the monitorship.

pany, most of them within a fairly short amount of time, they should not be overly burdensome. The company has the chance to contest any recommendations made by the monitor, but it should again be the goal of both, the monitor as well as the company, to use a collaborative approach and to clarify the implementability of the recommendations before the finalization of any report in order to allow the company to start implementing as soon as possible or do. This also avoids issues that may arise, if the authorities have to decide whether ultimately the monitor's recommendations are too burdensome and do not fit the purpose of the agreement between the company and the authorities.

Duration

Oftentimes, the standard term for a monitorship is three years. It consists of one initial review and issuance of an initial report, including various recommendations, and several follow-up reviews with the goal to test proper implementation of the former recommendations and, if necessary, issue new recommendations. The duration of the monitorship should be such that all parties can have confidence that the company's compliance program has finally reached an effective and sustainable level. If the monitor does not assess the company's compliance program to be fully effective at the end of the originally defined term, DPAs/NPAs generally provide for an option to prolong the monitorship as necessary.

Expectation and guidance from the authorities and other institutions

So what can companies do to prepare for a monitorship or what can they expect the monitor to evaluate? While the specific issues, that the monitor is focused on, will depend on the agreement between the company and the authorities, the companies can be sure to be assessed according to the Resource Guide to the FCPA[4]. Within it, DoJ and SEC clearly formulate three key questions in this respect "*Is the company's compliance program well designed? Is it being applied in good faith? Does it work?*"[5] The Resource Guide to the FCPA also sets forth ten hallmarks of an effective compliance program, which will be explained in detail below, together with the, in early 2017, issued detailed and in this kind well-received and highly praised guidance[6] by the DoJ on what it is looking for, when evaluating a company's corporate compliance program. The guidance summarizes some sample questions that the DoJ may ask the company and is split into eleven different elements. The criteria below are discussed according to this structure. Additionally, there are also other sources for guidance, such as the World Bank Group Integrity Compliance Guidelines[7] and the US Sentencing Guidelines, § 8 B2.1[8], which were taken into account for the definition of criteria of an effective compliance program described in this article.

The Key Elements of an Effective Compliance Program

Analysis and Remediation of Underlying Misconduct

As stated already, one of the first and foremost monitor duties is to prevent the reoccurrence of the underlying misconduct. The DoJ expects significant improvements in terms of the entire compliance system, especially in the area that the misconduct occurred in. Thus, next to internal investigations, a root cause analysis should be performed by the company in order to detect and eliminate any systematic deficits in the specific area of the compliance program where the misconduct happened. The company should derive specific lessons learned from revealed misconduct and apply it to all relevant elements of its compliance program as further outlined below.

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[4] Available at: https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf.

[5] FCPA Resource Guide, p. 56.

[6] US Department of Justice, Criminal Division, Fraud Section, "*Evaluation of Corporate Compliance Programs*"; available under: https://www.justice.gov/criminal-fraud/page/file/937501/download.

[7] Available at: http://siteresources.worldbank.org/INTDOII/Resources/Integrity_Compliance_Guidelines.pdf.

[8] Available at: https://www.ussc.gov/guidelines/2015-guidelines-manual/2015-chapter-8.

Senior and Middle Management

When it comes to the commitment of senior and middle management to the corporate compliance program, companies often times focus on the tone-at-the-top. The DoJ, and also Hui Chen, rather emphasize the term "*conduct-at-the-top*". It is not only about managers' spoken words, but rather about their actions and the examples that they set in everyday business life. The management must demonstrate strong, explicit and visible support and commitment to the company's adherence to the law and the company's internal policies and guidelines. Their subordinates may listen to their statements, but ultimately only the managers' action will give them the necessary trust in the seriousness of mind and the practical guidance on how to apply compliant principles in their day-to-day behavior. Crucial in this context are not only the company's top executives, but especially the middle-managers[9] as they can reach a much broader employee base through their daily interaction. Thus they have a great opportunity to function as role models in terms of ethics and compliance.

Additionally, the ethical culture of a company is considered to be an essential pillar for a company's compliance program. A company should communicate that ethical conduct is expected and encourage and incentivize conduct consistent with the highest level of ethical standards. Top and mid-level management should regularly communicate in a clear, understandable and unambiguous manner that there is zero tolerance for any and all compliance misconduct. But how to measure the rather intangible culture? Hui Chen recommends "*as a compliance officer, go around the company and ask random people that will give you a sense of your culture and the maturity of your compliance program*".

The commitment of senior and middle-managers should not only be visible, but hould also be supported through a compliance strategy. Such strategy should not be a compliance function-internal working document but instead be visibly recognized, owned and driven by the company's top management as well. It should not just be a "*check-the-box*" exercise, but should lay out specific measureable milestones, which will become the company's compliance operating plan, in order to first build and later foster and strengthen the ethical culture. "*There is no general recipe for any and all companies*", Hui Chen states. Companies should rather focus on their unique risks and challenges, which need to be identified via risk assessments, as discussed below.

Also externally, the company can strive to show its commitment through regular compliance communication to all stakeholders via e.g. its website, where a statement of the CEO could be placed to also make the leadership's commitment and ownership not only clear to internals but also externals.

Autonomy and Resources

A company must ensure that its compliance function is autonomous from all other key control functions. The interfaces between the compliance function and other assurance functions should be clearly set and outlined in order to minimize overlaps and avoid negative competence conflicts. However, companies should be well-warned against establishing functional or regional silos. Rather they should feel encouraged to promote their interaction and exchange and thus get the most out of it. Hui Chen clearly outlines: "[…] a*s an 'integrator' of all functions in the company, compliance no longer functions merely to defend against potential legal actions, or to prevent and detect misconduct in the narrow sense. Instead, it functions as an enabler and guardian of the company's values and missions in all aspects of the business* - […] *how a company treats its suppliers reflects as much about the company as to how it treats customers, and how a respectful workplace is directly relevant to a productive workplace*"[10].

In order to improve the reputation and perception of the compliance function within a company, all employees should be familiar

[9] FCPA Resource Guide, p. 57.

[10] Chen, Hui (December 15, 2017): *Rethinking Risk and Compliance*; retrieved from: https://www.bna.com/rethinking-risk-compliance-n73014473314/.

with the roles, responsibilities and competencies of the compliance function as such as well as its individual members. Compliance staff should be involved at all stages of major business decisions. To build trust between business functions and other control functions, personal relationships need to be established, whereby not only respectable business skills of the compliance personnel but also a certain degree of continuity in personnel are important.

Companies should ensure that the CCO reports directly to the CEO and the board of directors, including the board's sub-committees, such as the audit committee, as appropriate.[11] Thus, giving him/her sufficient independence and autonomy is key. This needs to be reflected in the adequate staffing of the compliance function,[12] not only in terms of the number of persons, but also in terms of their experience, expertise and seniority. For the relevant characteristics of a CCO, Hui Chen has clear expectations: "*I'm looking for social skills, common sense and backbone.*" These are important to not only be able to utilize the given reporting channels in challenging situations and to ensure the adequate standing of the compliance function within the company, especially in relation to other assurance functions. Such a CCO should determine and delegate the roles and responsibilities of each team member within the compliance function as necessary.

Furthermore, a company should provide the compliance function with its own budget. As it is crucial for a company to build internal capabilities based on individual risks and experiences, such compliance budget should not be used to outsource most or even all compliance tasks to external counsels or advisors.

Policies and Procedures

A company should have a solid policy framework tailored to its risk exposure depending upon its business model and geographical spread. The cornerstone of such a compliance policy framework is a company's code of conduct ("**CoC**"). It creates the basis for all other policies and procedures. It should be designed and drafted in a clear, descriptive and structured manner, best even with some real-life examples. It should be clearly communicated to and easily accessible by the company's internal as well as external stakeholders; this may include a roll-out in various local languages. Depending on the operational activities of the company, other more detailed policies and procedures, such as a governmental interaction policy, are to be derived from the CoC. It goes without saying that any group-wide applicable regulation may need to be adapted in order to comply with local law requirements. Again, all policies and procedures must be communicated and rolled-out in a clear, understandable and accessible manner. This way together, under the umbrella of the CoC, they constitute a consistent and robust 'house of policies'.

However, it will be crucial for a company to not only ensure the existence of adequate policies and procedures, but also that those are properly understood and effectively implemented by all employees throughout the organization. According to Chen companies have to be cautious to not "*only put in place a paper-based program*". Of course not all policies will be read by all employees, but employees still should know where to find them or at least where to ask for adequate guidance and assistance in case of questions. Chen emphasizes that "*any such question for guidance arising in the context of a company's policies and procedures should be understood as indicating that they might require revision*". As business risks constantly develop and change over time, companies should install a continuous review and adjustment process concerning its house of policies.

Risk Assessment

Compliance risk assessments help the board, the senior management and the compliance function to focus on significant compliance risks specific to the company and its individual business models and to determine the adequate reaction, including in particular prevention or mitigation measures and their tracking. According to Chen, the identification of these

[11] FCPA Resource Guide p. 58.
[12] Section 2.3 of the World Bank's Group Integrity Compliance Guidelines.

compliance risks should be seen as an opportunity: "*What if we reframe the concept of risk as 'anything that may inhibit the company from realizing its potential, achieving its missions, or living its values?' In other words, instead of thinking of risk management as merely reacting to external factors, think of it as proactively removing barriers to internally driven goals*"[13]. Thus compliance risk assessments provide a critical tool in determining the appropriate allocation of resources and prioritization of action items. "*Companies in general and compliance departments in particular should use data and ask the question: 'what data points lead us to the risks in our company?'*" says Chen. Re-assessing these compliance risks on a regular basis is required to understand and manage the company's ever-changing environment and appropriately react and adapt the company to its continuously developing compliance risk factors. Within all its compliance risk assessments a company must always observe an essential basic rule: Business risks may be handled and, as the case may be, even accepted at the management's discretionary business judgment, based on a company's individual risk appetite and thresholds. Risks related to violations of the law, however, must be mitigated at best (duty to legality) in accordance with a zero-tolerance policy.

Training and Communication

As discussed above, a company should not only provide its policies and procedures to all employees, but should also ensure that they all are really understood, meaning that employees should have direct access to proper training as well as ad hoc guidance and advice on these regulations as needed.[14]

This can be achieved in two forms: regular trainings and a helpline function. The training for each employee should depend on his/her individual risk-exposure and, as for the policies and procedures, should be provided in his/her local language and in a well understandable, realistic and exemplary manner. Thus, an effective training concept requires a risk-based approach: individual risk groups need to be identified and training contents as well as frequency and mode (face-to-face vs. web-based) need to be tailored to exactly these target groups, which will most likely also include some of the company's business partners. According to the FCPA Resource Guide a company must provide "*periodic training for all directors and officers, all employees in positions of leadership or trust, positions that require such training or positions […] that otherwise pose a corruption risk to the company and, where necessary and appropriate, agents or other high-risk business partners.*"[15] In addition, compliance training must form part of new employees' onboarding process. Training attendance should be tracked and feedback should also be obtained in order to continuously improve the trainings. A further measure to evaluate the effectiveness of the training is the integration of tests in the trainings (at the end or throughout). Test results will determine employees' knowledge level and help to find any areas that require additional training efforts.

Next to the regular training curriculum, a helpline should be available, not only to employees, but also to external business partners, to solicit direct feedback or advice on a specific question resulting from their daily tasks or a specific transaction. Any kind of helpline should again be available in local language and be used by the company to take away lessons learned, as stated by Chen "*do not just learn from whistleblower reports – a question on a hotline can also tell you where the weaknesses of your program are*".

Confidential Reporting and Investigation

Every company needs to establish a whistleblower system that allows both, internals as well as externals, to report any company-relevant misconduct. Employees should be familiar with the available channels for reporting misconduct and feel not only comfortable but, even more important, actively encouraged in using them. This requires communi-

[13] Chen, Hui (December 15, 2017): *Rethinking Risk and Compliance*; retrieved from: https://www.bna.com/rethinking-risk-compliance-n73014473314/.
[14] FCPA Resource Guide, p 59.

[15] US Sentencing Guidelines § 8 B.21 (b) (4).

cating a "*duty to report*" to employees and providing a strong "*speak up*" culture.[16] In this context it is not only crucial to provide and ensure whistleblowers the option to stay anonymous; companies must actively protect them from retaliation, discriminatory and disciplinary actions under all circumstances.[17] An adequate and reliable standard process for the handling of all reported cases should be established, including a clear definition of the roles and responsibilities of all involved functions, and in order to establish the necessary trust and reliability.

Incentives and Disciplinary Measures

Companies should strive to establish a strong, value-based culture, as outlined above, throughout the entire company by appropriately incentivizing compliance and having robust processes in place to properly discipline those that fail to take their responsibilities seriously.[18] Therefore compliance should form part of the Key Performance Indicators ("**KPIs**") of all managers, i.e. expectation of the promotion of compliance by the manager as well as no violations within his/her area of responsibility. To set the right tone already during the pre-employment phase and to communicate the company's commitment to compliance to external stakeholders, a requirement to be compliant and adhere to all ethical standards should be included in any job profile as well as the final job descriptions for each employee. Establishing a solid and sustainable culture of compliance requires a company to "*make character a part of the firm's set of key hiring criteria*".[19]

Equally important are a transparent enforcement and the application of equal standards in all cases of compliance violations, irrespective of the individuals' managerial level or personal history, leading to prompt and consistent application of disciplinary sanctions appropriate to the severity of the violation of the CoC and other policies and procedures.[20] Upon discovering misconduct, a company should also take reasonable steps to internally remedy the misconduct and ensure that appropriate measures are taken to prevent or impede similar misconduct in the future. All types of such corrective actions should aim to continuously improve a company's compliance program.[21]

Continous Improvement, Periodic Testing and Review

A company should take "*reasonable steps to evaluate periodically the effectiveness of the organization's compliance and ethics program*"[22]; it needs to ensure that its compliance program "*constantly evolves*"[23] along with changes of relevant risk factors, business models, market environments and international standards. A company should employ a common-sense and pragmatic approach to regularly reviewing, testing and evaluating the effectiveness of its compliance program. Therefore companies should ensure that the compliance function, but also all other assurance functions, regularly perform testings and reviews. Relating to the international standards, one element of the continuous improvement should be the benchmarking against similar organizations in order to determine specific standards set and individual risks identified which require to be mitigated in a specific industry or region. Testing results and progress of any deficiency remediation of the compliance program should be reported regularly to the management and the resulting action items should be allocated to specific owners, who have their KPIs linked to the full and timely completion of such action items.

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[16] Section 9.1 of the World Bank's Group Integrity Compliance Guidelines.
[17] US Sentencing Guidelines, § 8 B2.1 (b) (5) (C).
[18] FCPA Resource Guide, p. 59.
[19] Quotation from Stephen M. Cutler, Director, Division of Enforcement, SEC, *Tone at the Top: Getting It Right*, Second Annual General Counsel Roundtable (December 3, 2004) under https://www.sec.gov/news/speech/spch120304smc.htm.
[20] Section 8.2 of the World Bank's Group Integrity Compliance Guidelines; FCPA Resource Guide, p. 59.
[21] US Sentencing Guidelines, § 8 B2.1 (b) (7); Section 10.2 of the World Bank's Group Integrity Compliance Guidelines.
[22] US Sentencing Guidelines, § 8 B2.1. (b)(5).
[23] FCPA Resource Guide, p. 61.

Third Party Management

The payment of bribes in business transactions is very often concealed via third parties. As a result, the retention of third parties – particularly sales agents and government-related intermediaries – entails a risk of illicit behavior. Therefore, the company must ensure that it conducts risk-based due diligence when selecting these partners, and the relationships must be subjected to continuous monitoring.

A company's risk-based approach should successfully uncover potential red-flags and take into account the structure and complexity of the contractual relationship, including the exposure inherent to the type of service (e.g. sales related, government facing, etc.), the location or region of contract performance, and the remuneration scheme. The process should be standardized across the company and effectively supported by adequate tools. To ensure consistent application, existing due diligence processes must be integrated into relevant policies and procedures, particularly the sales and procurement processes.

To ensure proper behavior of engaged business partners, it is essential that a company provides sufficient information to business partners about its compliance program and its commitment to ethical and lawful business practices as well as specific trainings.

Mergers and Acquisitions

M&A transactions bear specific compliance risks that the company must identify, analyze and adequately address and mitigate either prior to or, as the case may be, after the closing of a relevant transaction. With respect to potential acquisitions specifically, the DoJ has developed five steps for acquiring companies to avoid successor liability in the "*Halliburton*" doctrine:[24] (i) performance of thorough risk-based FCPA and anti-corruption due diligence; (ii) implementation of the buyer's CoC and anti-corruption policies as quickly as possible; (iii) compliance training for the acquired company's directors, employees and business partners; (iv) FCPA-specific audit of the acquired company as quickly as possible; and (v) disclosure to the DoJ of any corrupt payments identified during due diligence.

The conducted due diligence cannot only have a significant effect on the targets transactional value, but also deliver a better understanding of what Chen calls the "*underlying values*", meaning the culture of any target or potential joint venture partner. Again, evaluating compliance considerations on an ongoing basis is key, particularly in joint ventures, even if not majority controlled. A company has obligations to utilize its influence and "*best efforts*" to ensure that its joint ventures have strong compliance programs and adequate and skilled in-house compliance staffing. Joint venture board members and other company representatives in joint ventures must be regularly trained on corporate, fiduciary and compliance duties.

Conclusion and Outlook

While several European, and also German, companies either have in the past or currently are experiencing monitorships, the concept of a monitor has not yet been implemented in the German Justice System. However, with its decision on May 9, 2017[25], the German Federal Court of Justice has also given weight to a company's corporate compliance system.[26]

When facing a monitorship, companies look for guidance on the requirements for an effective compliance program. Hui Chen sees such guidance, but also the recent developments of the compliance function as both an opportunity, but also a potential threat if not steered correctly, because "*in some cases, strong compliance leadership that rises above mere compliance to focus on ethics can and have functioned as a much needed voice of reason*

[24] DOJ Opinion Procedure Release 08-02 (June 13, 2008) Source: https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/0802.pdf; DOJ Opinion Procedure Release 14-02 (Nov. 7, 2014) Source: https://www.justice.gov/criminal/fraud/fcpa/opinion/2014/14-02.pdf.

[25] Case no.: 1 StR 265/17

[26] Which is further discussed in D. Abrokwa / C. Meckenstock: *Reduced fines and other incentives for companies with compliance management systems* within this issue.

in business deliberations, and effective compliance programs can and have produced results in preventing and detecting misconducts, as well as streamlining systems and processes. When it is done right, an effective ethics and compliance program can bring discipline to business processes, enhance employee engagement, reduce fraud and waste, and elevate morale and sense of ethics, and enhance companies' reputation. Unfortunately, however, most compliance programs have not measured themselves in those terms. Instead, they have defined themselves as an insurance program: the company's 'get-out-of-jail-free' or at least 'reduce-the-fine' card"[27].

The question on how one specific company can prepare for a monitorship cannot generically be answered, as a lot of it depends on the misconduct that occurred, the specific risks the company is facing and the already undertaken efforts of the company to establish a robust and effective compliance system. However, companies facing a monitorship are well advised to take the above mentioned guidance from the DoJ and Hui Chen into consideration, if they want to build or foster their compliance program. This of course does also apply to any other company that is rather proactively looking for a benchmark which it can utilize to identify the necessary building blocks for its compliance program.

[27] Chen, Hui (December 13, 2017): *40 Years Of FCPA: Compliance, Past And Future*; retrieved from: https://www.law360.com/articles/980408.

Nicole Willms
is Attorney at Law (Germany) and Partner (Member) at Pohlmann & Company in Frankfurt and part of the Monitorship team. She advises German and international clients in the areas of Corporate Law, M&A and corporate restructurings as well as Compliance and Corporate Governance.

Clemens Blettgen
is Senior Consultant at Pohlmann & Company in Frankfurt and part of the Monitorship team. While obtaining his two Master degrees in Law & Business and International Business, he gained international experience in Management Consulting and Corporate Governance.

USA

Developments of Deferred Prosecution Agreements (DPAs) and Non-Prosecution Agreements (NPA)

Dr. Stephan Petri / Nicole Neumann

- The instruments of Deferred Prosecution Agreements ("**DPA**") and a Non-Prosecution Agreements ("**NPA**") under US law are voluntary agreements concluded between an US criminal or judicial authority and a corporation, which committed unlawful acts.
- Often DPAs/NPAs also include the appointment of a monitor to supervise the fulfillment of the agreed terms and reservations of the NPA/DPA and to make recommendations to enhance the compliance management system as well as following up on their implementation status.

DPAs and NPAs in the USA

The term of DPA/NPA

The instruments of Deferred Prosecution Agreements ("**DPAs**") and a Non-Prosecution Agreements ("**NPAs**") under US law are voluntary agreements concluded between an US criminal or judicial authority and a corporation, which committed unlawful acts. Competent authorities are among others the US Securities and Exchange Commission ("**SEC**") and the US Department of Justice ("**DOJ**"). By way of such agreement a criminal or civil prosecution of or sentence against the corporation can be avoided. In return, the corporation is obliged to accept penalties and fulfill certain conditions as agreed with or required by the authorities. These conditions are intended in particular to avoid new compliance violations, to enhance and further develop the corporation's compliance program as well as to compensate for the damages caused. In case of a DPA, legal proceedings have already been initiated, which will be stayed if the corporation abides by conditions as defined. In case of a NPA legal proceedings have not yet been started. However, as is the case with a DPA, the corporation has to accept and take certain measures. Furthermore an admission of wrongdoing or an agreement not to contest the underlying facts ("*Statement of Facts*") of the affected corporation is generally included in DPAs and NPAs.[1]

During the term of the DPA or NPA court proceedings are excluded.[2] If the required conditions are fulfilled by the corporation within a defined probation period, the agreement mandates final dismissal of the charges. Another legal instrument for a consensual dispute resolution in case of statutory violations in the USA is the so-called "*Consent Decree*" which can be compared to a settlement in court (*Prozessvergleich*). It concludes ongoing court proceedings via mutual agreement with the approval of the court.[3] The Consent Decree is used by the authorities such as the SEC or the Food and Drug Administration ("**FDA**") as an instrument to settle legal disputes in court. In order to do so, the authority – after filing a complaint – has to submit the proposed settlement, as negotiated with the corporation, to the competent court. The settlement proposal is lodged with the request to the court to approve it with a *Consent Decree*.[4] A similar instrument is a plea agreement, which is concluded before a

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[1] https://www.sec.gov/divisions/enforce/enforcementmanual.pdf (December 21, 2017)
[2] See https://www.lexisnexis.de/whitepaper/fcpa.pdf (December 13, 2017).
[3] Reyhn, CCZ 2011, 48 (53) with the observation that the *Consent Decree* – different from a DPA – can be modified or terminated by the court during its term.
[4] See Reyhn, CCZ 2011, 48 (53).

court with its approval. It terminates criminal proceedings under the premise that the agreed conditions are fulfilled during a defined probation period. A prominent example is Volkswagen, which pleaded guilty under a plea agreement before the US District Court in Michigan in January 2017 and thereby was able to settle the criminal charges brought by the DOJ with the payment of a criminal penalty and the fulfillment of further conditions.[5] Civil claims brought by the DOJ and the US Environmental Protection Agency ("**EPA**") in light of Volkswagen's violations of US environmental laws etc. were resolved by three successive Partial Consent Decrees with the approval of the US District Court in San Francisco 2016 respectively 2017 in return for a penalty payment and certain reservations.[6]

NPAs/DPAs especially resolve violations against US anti-corruption law, i.e. the Foreign Corruption Practices Act ("**FCPA**"), as well as fraud investigations. Other application areas pertain to food and drug legislation (as laid down in the Food Drug & Cometic Act), antitrust, tax and anti-money laundering regulations.[7] Authorities as the DOJ or SEC decide at their own discretion whether to enter into a DPA or NPA with a corporation. The length of the probation period, during which the corporation has to fulfill the requirements and obligations agreed, varies and depends on the particular case. The period can be between a few months up to four years.[8] Typically the term ranges between two and four years.[9] Often the DPA/NPA also includes the appointment of a monitor as a requirement to resolve the charges. The monitor is charged with supervising the fulfillment of the agreed terms and reservations of the NPA/DPA and with making recommendations to enhance the compliance management system as well as following up on their implementation status.[10] The term of a typical monitorship is in line with that of the DPA/NPA. On average it lasts two to three years and can be prolonged, if necessary.

Increased importance of DPAs and NPAs

The first NPA was entered into by the DOJ in 1992 with Salomon Brothers Inc.[11] In 1993 the first DPA followed with Armour of America.[12] The year 2004 saw the appearance of DPAs and NPAs also in connection with proceedings regarding violations of anti-corruption rules under the FCPA. End of 2004 the DOJ chose for the first time a NPA as a FCPA-enforcement instrument in its investigations against InVision Technologies and General Electrics.[13] After that the use of DPAs and NPAs skyrocketed. Between 2004 until and including 2016 a total of 444 DPAs and NPAs were concluded. Out of the total of 444, 94 DPAs and NPAs were entered into in connection with the FCPA.[14] According to our internal company database for DPAs and NPAs, fraud cases (over 99) and tax violations (over 92 cases) are frequently the subject matter of DPA/NPA settlements. Overall, NPAs represent the majority of settlements. In more than half of all concluded DPAs and NPAs the concerned corporations have their domicile in the USA, followed by companies located in Switzerland and Germany. Roughly 100 DPAs and NPAs since 2005 included a monitorship, out of which 60 were imposed with regard to an US corporation, followed by companies from

[5] https://www.justice.gov/opa/pr/volkswagen-ag-agrees-plead-guilty-and-pay-43-billion-criminal-and-civil-penalties-six (December 19, 2017).
[6] https://www.epa.gov/enforcement/volkswagen-clean-air-act-civil-settlement (December 19, 2017).
[7] http://www.securitiesdocket.com/wp-content/uploads/2012/01/Jan-27-2012-Consolidated.pdf (January 3, 2017).
[8] Warin/Diamant/Root, *FCPA Monitorships and how they can work better*, University of Pennsylvania, Journal of Business Law, p. 347.
[9] http://www.securitiesdocket.com/wp-content/uploads/2012/01/Jan-27-2012-Consolidated.pdf (January 3, 2017).
[10] Schorn/Sprenger, CCZ 2013, 104 (106).
[11] https://www.rcfp.org/sites/default/files/litigation/uvafoia_2014-11-17_complaint.pdf (November 29, 2017).
[12] http://www.wlf.org/upload/chapter6DPAs.pdf (November 29, 2017).
[13] Mike Koehler, *Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement*, 2015, p. 503, https://lawreview.law.ucdavis.edu/issues/49/2/Symposium/49-2_Koehler.pdf (November 29, 2017).
[14] Gibson Dunn 2016 Year-end update on corporate non-prosecution agreements (NPAs) and deferred prosecution agreements (DPAs), http://www.gibsondunn.com/publications/documents/2016-Year-End-Update-Corporate-NPA-and-DPA.pdf (December 19, 2017).

the UK, Germany and Switzerland.[15] The first monitorship dates back to the year 1995 with the US-based enterprise Consolidated Edison.[16] The first monitorship in Germany related to Siemens with a 4-year term. Other German companies placed under monitorship are / were Bilfinger, Commerzbank, Daimler, Deutsche Bank and Volkswagen.

The highest penalty in the context of a DPA or NPA settlement was imposed on the telecommunication group Telia AB with USD 965 million. Runner-up was Siemens with USD 800 million followed by VimpelCom with USD 795 million. Ranking fourth and fifth are Alstom with USD 772 million and KBR/Halliburton with USD 579 million.[17] The penalties usually consist of a fine as well as a disgorgement of profits.

[15] Internal Company database of Pohlmann & Company regarding DPAs/NPAs.
[16] http://globalinvestigationsreview.com/insight/the-practitioner%E2%80%99s-guide-to-global-investigations/1079360/monitorships (December 13, 2017).
[17] http://www.fcpablog.com/blog/2017/9/22/telia-tops-our-new-top-ten-list-after-we-do-some-math.html (November 29, 2017).

Other Jurisdictions

Besides the USA, where DPA respectively NPA settlements have been in place for quite some time, the UK has introduced – after the enactment of the UK Bribery Act in 2011 – a comparable DPA model. Since February 2014 there is the possibility for concerned corporations to conclude such a settlement in the context of proceedings under the aforementioned anti-corruption law.[18] The competent prosecution authorities are the Serious Fraud Office ("**SFO**"), which is responsible for investigating fraud, and the Crown Prosecution Service ("**CPS**"), the agency charged with prosecuting violations in England and Wales in the name of the British Crown.[19] Until today three DPAs have been concluded since their introduction. The first one was a DPA with Standard Bank in 2015, followed by another DPA in 2016 with an undisclosed enterprise. In 2017 a third DPA with Rolls-Royce was entered into.[20] It hence appears as if this sort of settlement is gradually gaining traction under the UK Bribery Act.

It is interesting also to follow the developments with regard to DPA/NPA with our French neighbors. With the enactment of the so-called *Loi Sapin 2* in December 2016 a DPA-like settlement agreement called "*convention judiciaire d'intérêt public*" was introduced, with the blueprint being the FCPA and the UK Bribery Act. As is the case of a DPA under the FCPA, the concerned corporation admits the facts, but without – and usually contrary to the DPA under US law – pleading guilty.[21] Just recently the first such DPA has been concluded in France between the National Financial Prosecutor's office and HSBC Private Bank Swiss ("**HSBC**"), whereby HSBC agreed to pay EUR 300 million to settle criminal charges relating to laundering the proceeds of

[18] Süße/Püschel, CCZ 2016, 131 (133).
[19] Süße/Püschel, CCZ 2016, 131.
[20] https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/ of 11/28/2017.
[21] Schumacher/Saby, CCZ 2017, 68 (69).

tax fraud, with neither an admission of guilt nor a conviction.[22]

The World Bank also uses socalled *negotiated resolution agreements* ("**NRAs**"), a settlement form similar to the DPA, in its investigations against corporations in order avoid the process of customary sanctions. The NRA leads to a faster and more efficient finalization of investigations and requires the targeted company to introduce an adequate compliance program.[23]

Dr. Stephan Petri
is Attorney at Law (Germany) and Partner of Pohlmann & Company in Frankfurt. He has long-term senior management experience in the pharmaceutical and engineering industry and advises and supports German and international clients in the areas of compliance and corporate governance, mergers & acquisitions, corporate and labor law.

Nicole Neumann
was Research Assistant at Pohlmann & Company in Munich. After completing her Master's degree in Law and Economics she is now working for the Compliance Department at the MAN group.

[22] https://www.debevoise.com/~/media/files/insights/publications/2017/12/Fcpa_Update_Dec_2017.pdf of 12/22/2017.
[23] http://siteresources.worldbank.org/INTDOII/Resources/NoteOnSettlementProcess.pdf (December 12, 2017); see also Freeh/Hernandez, in: Hauschka/Moosmayer/Lösler, Corporate Compliance, 3. Edition 2016, p. 1516.

Germany

Reduced fines and other incentives for companies with compliance management systems

Dominique Abrokwa / Dr. Cordula Meckenstock

- It has become widely accepted in German jurisprudence and legal teaching that a Compliance Management System ("**CMS**") that has been put into practice and documented may contribute to the reduction of liability or a relief in liability of the management board in the event of compliance violations.
- Up to now, it had been unclear whether a CMS is actually taken into account at all when assessing the amount of the fine imposed on a company.
- According to the judgement of May 9, 2017 it is for the first time that Federal Supreme Court ("**BGH**") comments on this issue and sends out a groundbreaking signal.

Introduction / Status Quo

It is generally accepted and experts agree that companies of a certain size and risk exposure should have an implemented compliance management system ("**CMS**"). There are good arguments in favor of this: an adapted and practiced CMS prevents breaches of law, protects the management, sends a positive signal to the markets, creates clarity and security for employees and is increasingly a prerequisite for participation in public tender processes.

However, implementation and continuous development of a CMS also comes with considerable monetary expenses. Therefore, proponents of a CMS are regularly confronted with the question (usually from the management and supervisory boards) about specific financial benefits, in addition to the undisputed benefits of sound and legally compliant business operations.

It has become widely accepted in German jurisprudence and legal teaching that a CMS that has been put into practice and documented may contribute to the reduction of liability or a relief in liability of the management board in the event of compliance violations due to breaches of supervisory duties. This aspect contains a clear financial component, even if the exact criteria for calculating such reduction in liability have not (yet) been codified in Germany.

Currently, the situation is far less clear with regard to the positive financial effects for a company as such in the event of a compliance incident ("*reward*"), provided that the classification of the compliance violation is regarded as an "*exception*" and not as part of a systemic misconduct. This question is typically asked by the Supervisory Board, which considers the cost-benefit ratio for a company, rather than looking at relief from its own liability.

Up to now, it had been unclear in Germany whether a CMS is actually taken into account at all when assessing the amount of the fine imposed on a company pursuant to § 30 OWiG because of a breach of the management's duty to supervise. In addition, the exact criteria for the amounts of a possible reduction in fines were also unclear; as is the design, prerequisite and history of such a CMS that may reduce fines.

Judgment of the BGH of May 9, 2017

The judgment of the Federal Supreme Court ("**BGH**") was made on the appeal proceedings against a decision of the Regional Court of

Munich I from 2015.[1] In the underlying judgment, a manager of a German armaments company received a suspended sentence in connection with bribery payments of Greek officials. In parallel, the armaments company was fined EUR 175,000 in accordance with § 30 OWiG. Large parts of the BGH judgment deal with particular questions regarding the fine and questions of tax evasion.

At the end of the ruling, the BGH briefly points out that a CMS can and should contribute to the reduction of fines, even if it was only introduced after the relevant violation had already taken place. It is for the first time that the BGH comments on this issue. Although many questions remain unanswered, this is still a groundbreaking signal.

The question therefore arises, how this ruling fits in with previous proposals to take into account the introduction of a CMS to reduce fines or to provide other tangible rewards for a company.

Codification proposals up to date / Advancements under the new procurement law

Draft of a corporate criminal law

Thomas Kutschaty, former Minister of Justice of North Rhine-Westphalia, presented the draft of a corporate criminal law in 2013 ("*Draft law for the introduction of the responsibility of companies and other associations*").[2] In a partly new, partly consolidated form, the draft provided for the punishment of unlawful companies by excluding them from public tender processes, the disgorgement of profits in accordance with the gross principle and even included possibility to dissolve companies. A further focus point of the draft law is a system of rewards and incentives, such as exemption from liability of the company, where proof of an existing compliance system is provided. The draft had numerous advocates, but has also received a great deal of criticism and has not yet been introduced into the legislative process.[3]

Comprehensive reform of § 30 OWiG

The Federal Association of Corporate Lawyers (*Bundesverband der Unternehmensjuristen e.V.*) ("**BUJ**") submitted a "*legislative proposal for an amendment to paragraphs 30 and 130 of the Administrative Offences Act (OWiG)*" in April 2014.[4] The above-mentioned paragraphs of OWiG are to be amended in such a way that fine-reducing considerations in relation to an existing CMS are possible and codified. In addition, the proposal provides for various other adjustments relating to rewards for a CMS. The overall intention is to make rather special German construction of administrative offences more consistent, comprehensive and create legal certainty.

Rewarding companies with a CMS under the new public procurement law

The new public procurement law, which came into force in Germany in 2016, is based on the relevant EU directive and regulates in a new way how the so-called "*self-cleaning*" of a company can avoid mandatory and optional grounds of exclusions from tender processes.[5] The basic idea being that a proactive company can "*make up*" for its exclusion from procurement procedures due to various types of misconduct, by taking appropriate pro-active measures on its own. Many of these measures will be in line with the elements of a CMS that has been put into practice and documented. The basic idea of a solid "*reward*" in case of an implemented or a to be implemented CMS is therefore already legally established in Germany in the area of public procurement law.

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[1] BGH, judgment of 09.05.2017 – 1 StR 265/16.

[2] Available under: www.justiz.nrw.de/JM/justizpolitik/jumiko/beschluesse/2013/herbstkonferenz13/zw3/TOP_II_5_Gesetzentwurf.pdf.

[3] Critiques have, among other things, argued that the draft does not correspond to the existing legal system, is not precise and un-balanced; for example BDI: https://bdi.eu/suche/?tx_solr[filter][0]=tag_stringM:Compliance#/artikel/news/geplantes-unternehmensstrafrecht-unverhaeltnismaessig-und-unpraezise/.

[4] http://www.buj.net/resources/Server/BUJ-Stellungnahmen/BUJ_Gesetzgebungsvorschlag_OWiG.pdf

[5] The so-called "*self-cleaning*" is contained in Art. 57 Para. 6 of the Directive 2014/24/EU; for further details and remaining question, see Frank Roth:

Outside of Germany

United States

The United States has enacted the prominent Foreign Corrupt Practices Act ("**FCPA**") of 1977, which includes criminal offences for bribing foreign public officials and incorrect accounting and bookkeeping. It is complemented by a "Resource Guide to the FCPA" published by the competent authorities, which describes in detail the prerequisites under which a CMS can have a liability-reducing effect.[6] However, the FCPA only applies to the very limited area of issues mentioned above, i.e. competition and antitrust law as well as tax law are not covered, for example.

Great Britain

The UK Bribery Act, which came into force in 2011, sets out, by means of an official "Guidance", the conditions under which liability arises when corrupt acts have been committed by a company or by third parties attributable to it.[7] The prerequisites are the cumulative individual elements of a modern CMS and are set out in the Guidance.[8] The UK Bribery Act is currently probably the most comprehensive law in terms of legal certainty and codification – interestingly, in the Anglo-American realm, where codification of legal principles is not the most important requirement. However, the law and the liability reducing provisions only relate to cases of corruption.

"*Selbstreinigung und Wiedergutmachung im Vergaberecht*", NZBau 2016, 672 ff.

[6] The FCPA Ressource Guide is accesible via https://assets.documentcloud.org/documents/515229/a-resource-guide-to-the-u-s-foreign-corrupt.pdf; see Chapter 5 und 6.

[7] For the requirements of the UK Bribery Act see Jochen Deister and Anton Geier: "*Business as usual? – Die Leitlinien zum UK Bribery Act 2010 sind veröffentlicht*", in CCZ 2011, 81ff.

[8] The UK Bribery Act and the Guidance are available via https://www.gov.uk/government/publications/bribery-act-2010-guidance.

European Union

The case law of the European courts does not provide for a "reward" for companies with a CMS; however, the relevant judgments all relate to antitrust violations of the respective rules.[9] To cut a long story short, the European courts have held: "What counts is the infringement" – therefore the CMS cannot have been that good.[10] In antitrust law, a "closed" remuneration system is already in place with the increasingly elaborate concept of leniency notices, which aim at the full cooperation and disclosure of any infringements ("What counts is the infringement...") and not at explaining what has been done (in vain) to prevent antitrust violations.[11]

Conclusion

There will be hardly anyone who can demonstrate convincingly that it is a sensible alternative to not have a CMS as a company, as business ethical, legal, financial and reputational reasons are clearly in favor. However, the difficulty for the proponents still lies in the fact that neither the whether a reduction in fines nor the calculation criteria for the fine have been codified, let alone the concrete requirements for the compliance system. The broadly presented forms of rewards have similar regulatory deficits.

[9] Kommission 91/532/EWG ABl. L 287/39 Rn. 29 – Viho/Toshiba.

[10] European Commision, Compliance in Competition Law, Publication Office of the European Union, 2012, S. 8, http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=KD3211985.

[11] European Commission, Enactment and Reduction of Fines, http://eur-lex.europa.eu/legal-content/DE/TXT/?uri=URISERV:l26119.

It is now up to the legislator to respond to these questions by means of codification, thereby creating legal certainty. This would not only make it easier for compliance officers and consultants to argue that the investment in a CMS would undoubtedly pay off in Germany. The willingness of management and supervisory boards to invest proactively in compliance would increase, instead of only a reluctant release of funds, because a compliance violation, along with the corresponding negative side effects, forces the company to do so. It remains to be seen what will happen during the current legislative period.

Dominique Abrokwa
is Attorney at Law (Germany) and Principal of Pohlmann & Company in Frankfurt. Previously he worked for SNC-Lavalin, a Canadian engineering and construction company, as Regional Group and Sector Compliance Officer as well as Head of Compliance Operations with a global mandate based in Abu Dhabi.

Dr. Cordula Meckenstock
is Attorney at Law (Germany) und Managing Director of Compliance Kompakt Solutions GmbH in Hamburg. She focuses on the implementation of tailor-made Compliance Systems in the Energy and Health Care sector as well as for small and medium size companies.

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update@pohlmann-company.com

Pohlmann & Company

Guiollettstrasse 48
D-60325 Frankfurt a.M.

P: +49 (0)69 260 1171 40

Nymphenburger Strasse 4
D-80335 Munich

T: +49 (0)89 217 5841 70

1000 Rue de La Gauchetière West 24th Floor
Montreal, QC H3B 4W5, Canada

P: +1 514 448 7487

www.pohlmann-company.com

update@pohlmann-company.com

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