

If you think compliance is expensive, try non-compliance

On the possible consequences of non-compliance, as illustrated by a current example

Over the last few years many companies have introduced compliance programmes, but have not done enough to ensure that they are implemented internally. If things go wrong, this can entail huge negative impacts. When laws are broken, much is at stake for a company, its executives and the responsible employees. In the worst-case scenario this may even jeopardise the company's very existence.

The full force of this problem is demonstrated by a recent case in point.

The Volkswagen Group is accused of having manipulated emission values for various vehicle models. The United States Environmental Protection Agency's (EPA) investigations into the matter are causing a stir worldwide.

What are the possible implications for the Volkswagen Group?

First of all, the EPA can, acting independently, punish violators of the Clean Air Act by imposing heavy fines. For each vehicle in question a fine of up to \$37,500 is charged. The EPA estimates that between 2009 and 2015 a total of 482,000 cars were tampered with, which means that Volkswagen faces a whopping fine of up to \$18 billion.

Moreover, Volkswagen may face criminal prosecution in the United States, because in the US, unlike in Germany, corporations can be held criminally liable. The New York District Attorney's Office and other states have already begun investigating.

But that is not all. Volkswagen also faces a wave of civil suits. Disappointed customers, authorised dealers and investors are demanding compensation for the damage caused. Amounts awarded in compensation before American courts can quickly cross the billion-dollar threshold. The plaintiffs are not just private individuals. The American state of Texas, for example, is also suing Volkswagen, in order to secure an injunction as well as refund and compensation payments.

In addition to the colossal financial reparations, Volkswagen also faces reputational damage that is difficult to account for in money terms. Years of investment and work on building trust and credibility has been eroded in a single stroke. The ensuing loss of reputation may have a lasting negative effect on the Volkswagen Group's business. Beyond that, the reputation of German auto industry (especially the automotive industry) may also suffer a set back.

What consequences may individual executives have to face?

Members of the Management Board may face claims for compensation running into hundreds of millions. The US authorities even investigate foreign citizens who are not in the USA. The situation has become particularly precarious for German Volkswagen executives as a result of the Yates Memorandum, which came into force at the beginning of September 2015. A settlement agreement

between a company and the District Attorney's Office no longer leads to impunity for executives. On the contrary – investigations now zero in on responsible individuals. They are no longer able to hide behind a Group and are held personally accountable. Some experts believe that an example may be made of Volkswagen and its executives.

Volkswagen faces a slew of suits in Europe, too. The Public Prosecutor's Office in Brunswick, Germany, has also launched preliminary proceedings.

The liability of the Board members arises from the 'directors' duties'. The management board of a company must ensure through an adequate compliance programme that no violations of the law are committed. If the Board fails to meet this obligation it is obliged to compensate the company (Article 93 of the Joint Stock Corporation Act – AktG). Members of the management and supervisory Boards are held liable if they fail to meet their duty of oversight sufficiently. Whether or not they were aware of specific cases is of no legal significance.

Liability insurance cover

To limit their personal liability, members of a company's management and supervisory Boards protect themselves against claims for compensation by their employer by undertaking directors and officers (D&O) liability insurance. D&O liability insurance does not, however, give executives carte blanche. This insurance cover is tied to numerous conditions, and only extends up to a certain amount. D&O liability insurance usually does not cover offences committed knowingly. If it were to be proved that the Volkswagen Board of Management knew of the manipulation of vehicle emissions, this insurance cover would be null and void and the directors would bear unlimited liability with their personal assets.

To sum up, the example of Volkswagen demonstrates once again that it is not sufficient to establish a compliance system only formally. **Compliance must be mainstreamed as a vital and active element of the corporate culture.** Each employee must be aware of the fact that compliance with legal regulations and ethical standards shape the company's public image, and is a significant deciding factor in determining the sustainability and economic success/ global competitiveness.

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