

CRITIQUE: COMPLIANCE ELLIANCE JOURNAL

Global Corporations in a World of Local Market Specifics: How to Create a 'Glocal' Identity of Compliance^[1]

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Michele DeStefano/Hendrik Schneider (founders & content curators), CEJ, Volume 1, Number 1, Summer 2015

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The "Compliance Elliance Journal" (CEJ) is a bilingual, open-access journal, published biannually and dedicated to addressing different issues in compliance with a focus on jurisprudential issues and the implications for the legal practice. The CEJ's target audience are individuals in the legal field: practitioners, scholars, and students both domestic and abroad. What follows is an assessment of the CEJ's first issue, released in August 2015. The CEJ's inaugural issue addresses the topic "Global Corporations in a World of Local Market Specifics: How to Create a 'Global' Identity of Compliance".

Authored by the CEJ's two publishers, Professor Michele DeStefano (University of Miami School of Law) and Dr. Hendrik Schneider (Universität Leipzig), the CEJ'S first editorial piece (pp. 1-2) explains the origins and ambitions of the journal. The project was born of two academic programs which DeStefano and Schneider developed for students at the University of Miami School of Law and the Universität Leipzig: "LawWithoutWalls" (see Amir Singh Dhillon's article); and "Compliance Elliance". These programs were established as online intercultural and interdisciplinary seminars, de-signed to address relevant issues practitioners faced in the area of compliance. Out of this academic program came forth the ambition to create an online platform which would promote an exchange of ideas and experiences, gathered not only from scientific and academic spheres, but from professionals in the field. In addition to focusing on an overarching theme relevant to the "compliance-industry", each issue will include other academic articles, book reviews, case studies, video interviews, and student contributions ("Student's Corner").

Although this journal will tease out a broad understanding of compliance, it should be noted that this journal should not restrict itself solely to issues in legal conformity, but should explore other areas such as regulation conformity (even considering conformity to ethical

principles). Furthermore, this journal will not restrain itself to discussions on preventing infringement on regulations, but will also include discussions on the dynamics of repression through in-house processes (internal investigations).

The first two articles consider the common and universal risks associated with compliance in the global economy. In his article, "Legal and Compliance Risk in a Global World: Nemesis or Catharsis?" (pp. 4-16) Swiss jurist, manager and author Peter Kurer discusses the legal risks to global entrepreneurial activity. His experience as former CEO of the Swiss bank USB contributes to the insights he brings to global entities in regards compliance. He first orients the discussion with his observation that in comparison to earlier economic risks associated with commercial activity, internationally active companies have come to find the legal risks of conducting business of higher importance. Kurer calls these legal risks "the modern time nemesis for global companies" (pp. 6). Aware that such a commentary could be seen as an exaggeration, Kurer mentions several recent episodes which illustrate the potential legal risk of doing business in the global sphere: the BP Deepwater Horizon disaster in the Gulf of Mexico; and the recent scandal following investigation into VW car model's exhaust measurement systems and the ensuing legal ramifications. Although business management is reacting to these challenges, their efforts do not go far enough. By understanding the legal risks, and establishing fully-developed risk management departments, businesses can trigger a catharsis or purification in the business sector.

Accompanying this cleansing will be what Kurer labels "Legal Postmodernism" (pp. 8). This will be marked by varying degrees of uncoordinated state action as national legal systems try to constrain and manage the risks posed to international economies. This will lead to a retrenchment of traditional legal principles (for example, the common law principles), and to a transformation of the relationship between the law-making and law-executing branches of national governments. In the face of such immense challenges, Kurer holds the traditional approach to the overcoming and administration of legal risks as no longer adequate and too bureaucratic. He finds these tasks should no longer solely be handed off to (in-house) legal counsel.

Instead, Kurer suggests "strategic management of legal and compliance risk" (pp. 11) by upper management (such as board of directors, managers, and CEOs): "Boards and CEO have to take control; they have to understand and perceive the nature of these risks and what is behind them; they have to give a strategic response on the level of business planning and new business approvals; and they have to create an open and honest culture around

this” (pp. 15). Kurer calls for the implementation of new technologies to systematically identify legal risks, and a personnel support focused on problem solving. These are essential to success. Kurer concludes his piece by suggesting that this new strategic implementation plan would be an important contribution in preserving legal culture in the global world.

In the next article, John P. Giraudo—Fellow at the Aspen Institute, and former Chief Compliance Officer for a globally operating energy company—reviews Anna Bonime-Blanc’s book, *The Reputation Risk Handbook, Surviving and Thriving in the Age of Hyper-Transparency*, Oxford 2014 (pp. 16-20).

It is beyond question that even with the transparency of modern times, there are entities with reputations for risk, and this is attested to by numerous cases occurring in the recent past. Bonime-Blanc outlines several practical solutions for entities managing risk, including the creation of a Chief Integrity and Reputation Officer position. Giraudo finds these helpful, yet insufficient. It is essential to promote a structural and methodical reappraisal of “Reputation Risk Management”. This will provide approaches to resolving the discrepancy between how a business understands its reputation and what their reputation is in reality.

The next three articles probe deeper into the nuances of creating global identity of compliance. The focal point becomes risk management as informed by the interplay between Globalization and Localization. The risks associated with operating on a global scale while simultaneously having a base of operations rooted in local markets, whose features must be consulted for marketing and risk management purposes—this inter-play between globalization and localization has been labeled “Glocalization”.

Theodor L. Banks’ article, “Compliance: The New International Law” (pp. 21-28), provides a good overview of what “international law of compliance” encompasses. Banks is a partner at the U.S. Office of the Solicitor General, a professor at the Loyola University Chicago School of Law, and publisher of a compliance handbook through Wolters-Kluwer. According to Banks, compliance in the modern day is “much more than a principle of business operation or just an aspect of national law; it has also become part of the regime of international law” (pp. 22). Banks states that the United Nations Global Compact could function as an indicator of this development. Subsequently, Banks put together and analyzed all the important national and international guidelines and policies. His interpretation of the results led him to conclude that multi-national compliance standards are on par with international obligations and standards, for instance in the area of fighting corruption (“Foreign Corrupt Practices Act” in the US, or the UK Bribery Act) or money

laundering. In the long run, Banks found that the standardization of compliance through the reformation of global ethics and legal standards in national jurisprudence has at minimum been advantageous. It would be interesting from a legal theory perspective to observe which of the compiled guidelines actually is about compliance-law.

In his article “GSK in China. A New Dawn in the Fight Against International Corruption” (pp. 29-61) Thomas Fox provides an extensive examination of the 2007 corruption scandal in China. As an active compliance advisor in the U.S. specializing in anti-corruption compliance, Fox stands unique in the field. This is true even without mention of his numerous publications. The focal point of Fox’s article is the 2007 corruption scandal which led to allegations against a Chinese subsidiary of the British pharmaceutical company GlaxoSmithKline (GSK). The Chinese subsidiary allegedly paid out approximately \$ 500 Million in bribes to doctors, hospital administrators, and high officials. These bribes were to ensure that these individuals would favor the use of GSK products in their facilities. This resulted in prices for the medicines produced by GSK to skyrocket. After confessing to these practices, GSK was ordered to pay \$ 491 Million in fines for the incidents of bribery and for corruption. The previous manager for Reilly was sentenced to three years imprisonment, while the executive personnel were sentenced to prison terms between two and four years. Not only does Fox effectively trace out the evolution of the GSK-case in a detailed and gripping style, he lays out the lessons to be garnered from GSK’s actions, specifically the lessons to be learned in furthering anti-corruption-compliance in globally engaged companies.

GSK’s case is exemplary of how in countries such as China, where corruption may initially be tolerated, a reversal can occur, resulting in domestic corruption to suddenly be systematically and strictly pursued (Fox admits that this would be a fundamental advancement of the fight against corruption). In a purportedly reliable environment, political changes like this one can have extremely adverse consequences for those companies using bribery as a tool to secure advantages for their business practice. Beyond the financial damages and the criminal consequences for management, the reputation of the company is damaged. The sole recourse available for companies operating on a global level would be “an effective best practices and anti-corruption compliance program” (pp. 61). Moreover, this may be assumed to be the only way since other countries may follow the Chinese-example. In this respect, Fox believes the GSK case could be “a watershed in the global fight against bribery and corruption” (pp. 59).

In the final article, “Globalization and Compliance”, Marcia Narine raises several questions in light of the recent reconciliation between Cuba and the U.S.—“Ten Ethics-Based Questions for U.S. Companies Seeking Business in Cuba” (pp. 62-73). Narine is assistant professor at St. Thomas University in Miami. She has gained valuable experience in compliance consulting. Narine poses the following question: whether and under what conditions would economic activities, launched in Cuba by U.S. companies, be ethically justifiable with regard to the human rights situation present in Cuba; and even assuming this, whether legal parameters should be established. As a matter of principle, Narine does not find entrepreneurial engagement in Cuba is unethical per se. She does, however, pose ten questions to “compliance and ethics officers, board members, socially responsible investors, and other stakeholders to consider as companies “rush into Cuba” (pp. 73). The challenges associated with compliance should be discussed in a separate article. In anticipation of February’s issue (title: “Ambiguous Legal Issues in Internal Investigations and Audits”) Folker Bittmann reports on internal investigations and their applicable laws in the German legal system (pp. 74-101). Since 2005 Bittmann has been the chief prosecutor for Dessau-Rosslau, and has been published as an established expert in the fields of criminal law, and compliance/internal investigations. Among his publications is the manual “Criminal Compliance”, 2015, pp. 1291 ff., distributed by Rotsch. Bittmann takes as his starting point the role of a state attorney, and from this informs his detailed considerations on internal corporate investigations. He affirms that in Germany there are no laws outlining the legal requirements for the internal investigations of a company or a corporation. Yet these entities must adhere to the numerous individual acts (for example, data privacy, §§ 201, 201a, 240 StGB), and must respect the legal limits of private investigations. Bittmann then points to the fundamentally varied procedural steps required in private, in-house investigations, and compares these procedural steps with the neutral state criminal prosecution, for example in regards to some of the exceptional powers given to state governments (such as the right to intervene or the preservation of rights for criminal defendant). As a result of varying rules and goals, private and state investigations may not be comingled, since these proceedings are to be conducted so as to maintain independence from the other proceeding. Yet there may have existed per-missive opportunities for cooperation between private and state investigations. In concluding, the most important legal questions typically present during internal investigations were discussed: right to present testimony (owing to German employment law), the use of testimony against private

investigators in the course of investigations and criminal proceedings, and the admissibility of a private investigator's seized documents, notes, etc.

The last entry from the "Students' Corner" comes from Amir S. Dhillon's essay "Law-WithoutWalls: Revolution through Education. Reforming the Legal Industry from its Roots" (pp. 102-107). Dhillon is an alumnus of the University of Miami School of Law. While at the University of Miami, Dhillon successfully completed a specialized course track, developed by publisher DeStefano. The phenomenon of globalization presents new challenges to Dhillon as well as to other law students. Stemming from globalization, these challenges seem to need a "global answer", which will demand a dialog that encompasses multiple different disciplines as well as the different cultural experiences. "LawWithoutWalls", an interdisciplinary, academic program with a focus on practical experience, shall present a worthy platform for these new challenges.

To summarize: an innovative and exciting approach allows the CEJ to win its audience over. Like other magazines, such as the German-language Corporate Compliance Magazine or the "Compliance Berater", the CEJ sets corporate compliance as its core theme. Now the CEJ will be competing with numerous other newsletters, such as those issued by law firms or criminal law societies.

The purview of compliance in this project will expand, primarily because the focal point on compliance will be framed through an American angle; furthermore, the publisher DeStefano will certainly wish to expand on areas. As a result the magazine will pursue developing a "glocal" approach: compliance must pay attention to how entrepreneurial activity affects both the global context and the local framework. This approach must be mirrored in the scientific analysis. In addition to stressing internationality, the CEJ will lay emphasis on interdisciplinary, and the synopsis of legal, economic, and ethical aspects of corporate compliance. Finally, the CEJ will provide a strong emphasis on high-lighting the practical relevance discovered while conducting research.

From the standpoint of a university professor, it must be noted that the two training programs "LawWithoutWalls" and "Compliance Elliance" have begun to take root. This is due in part to the inclusion of practitioners and the use of new teaching methods to show new methods in legal education in light of the coming global and technological changes.

The publishers of the CEJ find a selection of interdisciplinary, international, and practice-oriented approaches to be indispensable, especially in light of globalization and the

development of future compliance consulting and implementation tools and technologies. The selection of authors as well as the choice of Globalization as the program's overarching theme shows the importance of a multifaceted approach.

All in all, I wish the CEJ Project success. Considering the global dimensions of entrepreneurial activity and their accompanying challenges, the approach chosen for this journal vows to bring new stimulation for everyone engaged in corporate compliance, from legal scholars and practitioners to university instructors (though in this area, not enough is done).

Prof. Dr. Petra Wittig

[1] The original of the critique will be published in issue 1 / 2016 of the magazine "[Neue Kriminalpolitik](#)".

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