



Business Graduate (Dipl. -Kfm.)

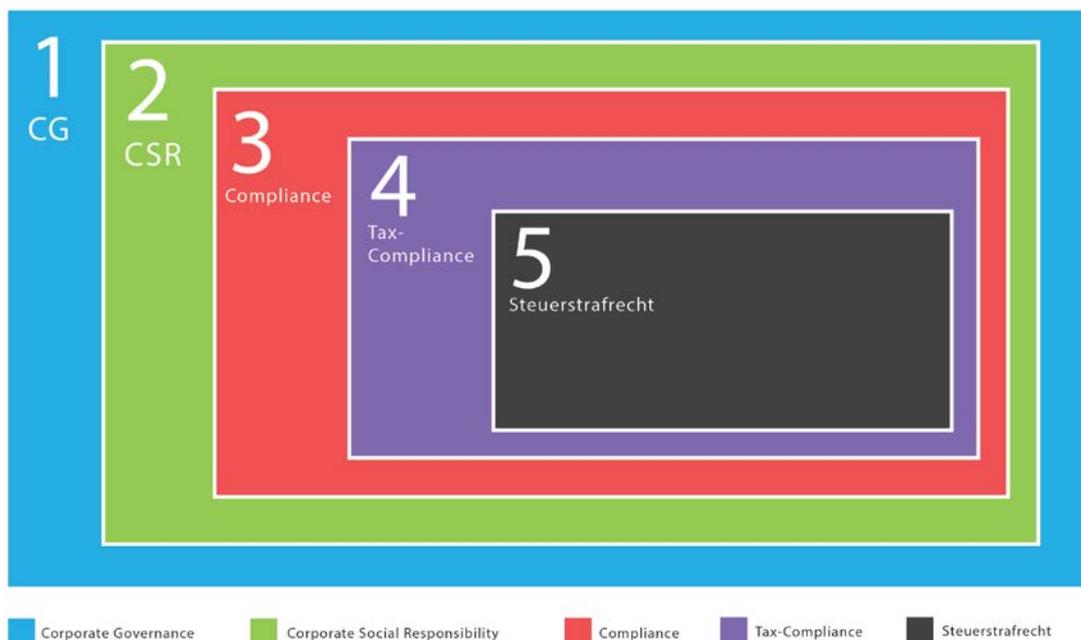
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The relationship between corporate governance, corporate social responsibility, compliance, tax compliance and fiscal offence law based on (inter)national requirements

Summary:

The relationships between corporate governance (hereinafter "CG"), corporate social responsibility (hereinafter "CSR"), compliance, tax compliance and the fiscal offence law have not yet been discussed intensively. However, through the *German Corporate Governance Code*¹ (hereinafter referred to as "DCGK"), the *CSR Reporting Guidelines*² and the corresponding German *Implementation Act*³, this issue has become more important. The following diagram is a simplified representation of the relationships between CG, CSR, compliance, tax compliance and the fiscal offence law.⁴



¹Available online at:

https://www.dcgk.de/files/dcgk/usercontent/de/download/kodex/191216_Deutscher_Corporate_Governance_Kodex.pdf

²Richtlinie des Europäischen Parlaments und des Rates RL2014/95/EK zur Änderung der RL 2013/34/EU im Hinblick auf die Angabe nicht finanzieller und die Diversität betreffende Informationen durch bestimmte große Unternehmen und Gruppen (CSR-Reporting-Richtlinie) vom 22.10.2014, ABl. EU v. 15.11.2014, Nr. L.330, S. 1.

³Gesetz zur Stärkung der nicht finanziellen Berichterstattung der Unternehmen in ihren Lage- und Konzernlageberichten (CSR-Richtlinie-Umsetzungsgesetz), BGBl. I 2017, S. 802.

⁴This chart is a very simplified and generalised presentation. In science and practice there are various exceptions to this rule and different views are held.

If an entrepreneur, employee or institute intentionally violates applicable tax regulations, they commit tax evasion in accordance with Section 370 of the German Fiscal Code. In this circumstance (see section 5 of the diagram) there is also a violation of tax compliance, compliance, CSR and CG.

However, not every violation of tax compliance leads to fiscal offence accusations. If there is a violation of tax compliance, there is also a violation of compliance, CSR and CG (see Section 4 of the diagram).

A violation of compliance regulations does not always include a breach of tax compliance or the perpetration of a fiscal offense, since the area of compliance includes other compliance complexities, such as IT compliance (see Section 3 of the diagram). However, a violation of compliance regulations also results in a violation of CSR and CG, since adherence to compliance regulations is the minimum of CSR.

A violation of CSR does not automatically mean a violation of compliance or tax compliance, let alone perpetration of a fiscal offense. Compliance includes the obligation to adhere to applicable law. However, if a company has committed itself, for example through internal guidelines, to avoid tax avoidance strategies that violate CSR, this area is not only covered by CSR, but also by compliance and tax compliance. As long as these tax avoidance strategies are to be brought into line with the applicable tax law, however, this does not include the fulfilment of a condition according to Section 370 of the German Fiscal Code. A violation of CSR regulations also includes a violation of CG regulations (see Section 2 of the diagram).

If a company violates CG regulations, this does not automatically constitute a violation of CSR, compliance or tax compliance regulations, let alone substantiate the allegation of tax evasion, since CG also includes, for example, compliance with technical regulations to which the areas of CSR, compliance, tax compliance and fiscal offence law do not necessarily refer. However, to avoid liability cases, it would make sense for a company to adopt all CG regulations. A company that complies with all CG regulations accordingly complies with the CSR, compliance and tax compliance regulations and commits no tax offences through its corporate bodies.

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1. Corporate Governance

1.1 Definition of Corporate Governance

CG is the legal and factual regulatory framework for the management and supervision of companies for the goodwill of all relevant stakeholders. In addition to management and shareholders, the stakeholder groups include, for example, lenders, employees, suppliers, the general public in the form of the State and customers.

Good corporate governance ensures responsible, qualified, transparent management of the company with a focus on long-term success. Regulations on CG basically have the task of restricting the scope and motivations of actors for opportunistic behaviour through suitable legal and factual arrangements. They aim to create the most favourable (market) conditions for productive value creation and fair value distribution, taking into account losses due to opportunistic behaviour (opportunity costs) and expenditure for regulations (regulatory and governance costs).⁵

⁵Werder, Corporate Governance, Available online at: <https://wirtschaftslexikon.gabler.de/definition/corporate-governance-28617/version-367554>

1.2 Framework for Corporate Governance

The regulatory framework for CG⁶ is largely determined by legislature, but also by the owners. Along with this, there are statutory norms and corresponding jurisdiction ("hard law") and non-statutory governance standards. Non-statutory governance standards (often referred to as "soft law") are intended to fill in the applicable legal regulations and lead to a more or less voluntary commitment by companies. Within the group of non-statutory governance standards, a distinction can be made between general regulations for a certain group of companies, such as the *German Corporate Governance Code* and company-specific guidelines.⁷ The specific structure from the general regulatory framework for the respective company is the responsibility of the supervisory or administrative board and management. A company-specific corporate governance system consists of the entirety of existing laws, guidelines, codes, declarations of intent, a corporate mission statement, and routine corporate management and supervision.⁸

1.2.1 Legal Regulations for Corporate Governance

For companies, there are mandatory objectives (without discretionary or decision-making powers) such as compliance with applicable tax regulations, which are unavoidable under existing laws. Due to a lack of room for manoeuvre, it is not possible to decide on objectives such as the complete and timely submission of tax returns.

In addition, there are topics with decision-making leeway where (in compliance with the Business Judgement Rule) decisions can be made on the setting of objectives and the achievement of (possible) objectives can be planned.⁹ A company-specific corporate governance system can regulate, for example, that companies are allowed to set up branches in countries with a low tax rate. Of course, companies can tweak the amount of tax they have to pay by means of a tax structure, as long as this complies with legal regulations. The fundamentals of a tax strategy are defined by the supervisory body. The principle of "no

6 See also Scherer/Fruth in *Governance-Management – Band I, Grundsätze ordnungsgemäßer Unternehmensführung (GoU) und -überwachung (GoÜ): Grundsätze ordnungsgemäßer (Corporate) Governance (GoGov)*, 2014; Scherer/Fruth in *Governance-Management Band II (Standard & Audit)*, 2015; Scherer/Fruth in *Governance-Management, Band 2 (Standard und Audit) Grundsätze ordnungsgemäßer Unternehmensführung (GoU) und -überwachung (GoÜ); Grundsätze ordnungsgemäßer (Corporate) Governance (GoGov)*, 8/2015; Scherer, *Good Governance und ganzheitliches und operatives Management: Die Anreicherung des „unternehmerischen Bauchgefühls“ mit Risiko-, Chancen- und Compliance-Management*, CCZ, 6/2012, 201 – 211; Scherer, „Healthcare und Pflege 4.0“ - Die digitale Transformation von Compliance, Risikomanagement und Standards im Gesundheitswesen – Teil 1“, JMG 1/2019, 33-39, available online at: <https://static.scherer-grc.net/files/fil/jmg-healthcare-scherer.pdf>; Scherer, *Healthcare und Pflege 4.0“ - Die digitale Transformation von Compliance, Risikomanagement und Standards im Gesundheitswesen – Teil 2*, JMG 2/2019, 109-119, available online at: <https://static.scherer-grc.net/files/fil/jmg-2-19-scherer.pdf>; Scherer/Pasini, „Healthcare und Pflege 4.0“ - Die digitale Transformation von Compliance, Risikomanagement und Standards im Gesundheitswesen – Teil 1“, JMG 3/2019, 171-181, available online at: [https://static.scherer-grc.net/files/fil/jmg-3-19-\(1\).pdf](https://static.scherer-grc.net/files/fil/jmg-3-19-(1).pdf); Scherer/Birker, *Healthcare und Pflege 4.0“ – Die digitale Transformation von Compliance, Risikomanagement und Standards im Gesundheitswesen – Teil 4*, JMG 4/2019, 229-244, available online at: <https://static.scherer-grc.net/files/fil/jmg-4-19-scherer-birker.pdf>

7 Werder, *Corporate Governance*, available online at: <https://wirtschaftslexikon.gabler.de/definition/corporate-governance-28617/version-367554>

8 Available online at: https://de.wikipedia.org/wiki/Corporate_Governance

9 Scherer/Kollmann/Birker in Scherer/Fruth: *Integriertes Corporate Social Responsibility(CSR) -/Nachhaltigkeits-Management-System mit GRC*, S.1, available online at: <https://static.scherer-grc.net/files/fil/epaper---gesetz.pdf>

risk" can be just as flawed as a willingness to take any risks ("downside") if the opportunity ("upside") is great enough.¹⁰

1.2.2 Principles of International Corporate Governance

At the international level, the *G20 / OECD Principles of the CG* were first published in 1999 and updated between 2004 and 2015.¹¹ At the European level, the EU Commission set up a "*European Corporate Governance Forum*" in October 2004 to examine the best practices in the Member States. This forum has the task of promoting national corporate governance codes and advising the EU Commission.

1.2.3 German Corporate Governance Code

In Germany, the Principles of Corporate Governance are set out in the *German Corporate Governance Code*.¹² The Federal Ministry of Justice adopted this code on 26th February 2002. The Code contains essential statutory regulations on corporate governance and publicity as well as numerous recommendations and suggestions for the management and supervision of listed companies.

The GCGC stipulates that the Management Board must ensure compliance with the statutory provisions and internal guidelines and must work to ensure that these are observed within the company. The Code is aimed at listed companies and companies with access to the capital market within the meaning of Section 161 para. 1 clause 2 of the German Stock Corporation Act (AktG). The Government Commission on the *German Corporate Governance Code* is a self-regulatory body for business. The Commission is financed by the economy and is completely independent in its decisions. The Government cannot give it instructions. The Code is published in the electronic Federal Gazette ("Bundesanzeiger"). The GCGC is sometimes referred to as "soft law". In this context, however, it should be noted that the Code is not a "right" that requires parliamentary legitimation.

1.3 Duties and Violations in Corporate Governance

For companies, there are mandatory objectives (without discretionary or decision-making powers) such as compliance with applicable tax regulations, which is imperative.

In the case of discretionary decisions, the company's interests limit the Management Board's scope of action in accordance with Section 76 para. 1 of the German Stock Corporation Act

¹⁰Pöllath, Unternehmensführung (Corporate Governance) und Besteuerung, S. 11 u. 14, available online at: <https://www.pplaw.com/sites/default/files/seiten/downloads/fs-poellath.pdf>.

¹¹G20/OECD Principles of Corporate Governance. Neufassung 2015, available online at: http://www.oecd.org/governance/G20-OECD-Grunsaetze-Der-Corporate-Governance_9789264250130-de

¹²Available online at: https://www.dcgk.de/files/dcgk/usercontent/de/download/kodex/191216_Deutscher_Corporate_Governance_Kodex.pdf

(AktG). in accordance with the highest court rulings of the German Federal Court of Justice (BGH). According to the German Federal Court of Justice (BGH), there is no breach of duty as long as the limits within which entrepreneurial action based on a sense of responsibility and exclusively oriented towards the well-being of the company and based on careful determination of the basis for the decision are not exceeded.¹³ In determining whether an action is geared to the well-being of the company, shareholders, shareholder creditors, employees and the public must all be taken into account.¹⁴

A legal obligation to comply with the GCGC exists only to the extent that the GCGC reflects mandatory legal regulations. However, Section 161 of the German Stock Corporation Act (AktG) stipulates that the Management Board and Supervisory Board of a listed stock corporation must submit an annual declaration on the extent to which they comply with the GCGC or which recommendations are or were not applied and why ("comply or explain"). A law-like binding effect is created via "name and shame" and a legal sanction.¹⁵ Not only the failure to submit a corresponding declaration, but also a false statement in the declaration of compliance constitutes a violation of the law.¹⁶ According to the German Federal Court of Justice (BGH), an inaccuracy in the declarations of compliance submitted by the Management Board and Supervisory Board pursuant to Section 161 of the German Stock Corporation Act (AktG) leads, due to the violation of executive body duties, to the contestability of the discharge resolutions adopted, insofar as the members of the executive bodies knew or should have known of the inaccuracy.¹⁷ The Higher Regional Court of Munich ruled that violations of the Code can lead to the invalidity of a Supervisory Board resolution or a decision made by the Annual General Meeting if it has been declared that the Code was complied with on the relevant point.¹⁸ Non-capital market oriented companies should use the recommendations and suggestions of the Code as a guide.

¹³BGH v. 21.12.2005 – 3 StR 470/04, BGHSt 50, S. 331, Rn. 15; BGH v. 6.12.2001 – 1 StR 215/01, BGHSt 47, S. 187, S. 192.

¹⁴BGH v. 21.12.2005 – 3 StR 470/04, BGHSt 50, S. 331, Rn. 27.

¹⁵*Hofmann-Beckinig*, ZIP 2011, 1173.

¹⁶BGH v. 16.2.2009 – II ZR 185/07, BGHZ 180, 9, 19; Spiehofer, NZG 2018, 441.

¹⁷BGH v. 16.2.2009 - II ZR 185/07, BGHZ 180, 9, 19.

¹⁸OLG München v. 6.8.2008 – 7 U 5628/07, available online at: <https://openjur.de/u/415881.html>

2. Corporate Social Responsibility

2.1 Definition of Corporate Social Responsibility

The EU Commission originally referred to CSR as a concept that serves as a basis for companies to voluntarily integrate social and environmental concerns into their business activities and their interactions with stakeholders. In its communication "A New EU strategy (2011 – 2014) for Corporate Social Responsibility", the EU Commission on 25th October 2011 described CSR as the responsibility of companies for their impact on society.¹⁹ In addition to compliance with applicable law as a minimum standard for corporate responsibility, CSR should introduce processes that integrate social, environmental, economic, and ethical and human rights as well as consumer concerns into its strategy and activities in close cooperation with its stakeholders. CSR should close "governance gaps" and in particular ensure that companies do not exploit lower standards in third world countries by relocating production. It is about creating a global regulatory framework for a global social market economy.²⁰

2.2 Regulations for Corporate Social Responsibility

For CSR, there is a "smart mix" of hard law (EU directives and regulations as well as national implementation law) and soft law (national and international CSR frameworks as well as various ecological, social and economic / compliance sustainability standards)

International frameworks for CSR²¹ include the public good balance sheet (determining the individual contribution of a company to the public good)²², the German Sustainability Code (DNK) (which reports on the sustainable development of a company)²³, the Global Reporting Initiative "GRI" (international organisation for the development of guidelines for the preparation of sustainability reports)²⁴, the UN Global Compact (initiative for Responsible Corporate Governance)²⁵ and the OECD Guidelines for Multinational Enterprises (recommendations to companies to behave responsibly with regard to the environment, transparency, industrial relations, competition, consumer protection, technology transfer,

¹⁹ Mitteilung der Kommission an das Europäische Parlament, den Rat, den Europäischen Wirtschafts- und Sozialausschuss und den Ausschuss der Regionen, eine neue EU-Strategie (2011 – 2014) für die soziale Verantwortung von Unternehmen (CSR), KOM (2011) 681, p 7.

²⁰ *Spießhofer*, NZG 2018, 441.

²¹ Zu Details vgl. *Scherer/Kollmann/Birker*, integriertes Corporate Social Responsibility (CSR)-/Nachhaltigkeits-Managementssystem mit GRC, S. 3 -11, available online at: <https://static.scherer-grc.net/files/fil/epaper---gesetz.pdf> sowie *Scherer*, (Compliance-) Risk Management System 4.0 - The digital transformation of norms, guidelines and standards, in Gesellschaft für Risikomanagement und Regulierung e.V., FIRM Jahrbuch 2019, S. 13 – 15, available online at: <https://static.scherer-grc.net/files/fil/firm-2019-en.pdf>

²² Available online at: <https://www.ecogood.org/de/schweiz/gemeinwohlbilanz/>

²³ Available online at: <https://www.deutscher-nachhaltigkeitskodex.de/>

²⁴ Available online at: <https://www.globalreporting.org>

²⁵ Available online at: <https://www.unglobalcompact.org>

corruption and taxes)²⁶. Furthermore, there are various ecological sustainability standards such as EMAS "ECO Management and Audit Scheme" (EU seal of approval for environmental²⁷ management system), ISO standard 50001 (energy management²⁸)²⁹, ISO standard 14001 (environmental management system), ECO profit (ecological project for integrated environmental technology³⁰), EU Ecolabel³¹, EU energy efficiency label, PEFC certificate³² (Programme for the Endorsement of Forest Certification schemes)³³, the UTZ certification (coffee, tea, hazelnuts, cocoa)³⁴, DIN SPEC 35201: 2015-04 (general model for the development of sustainable services)³⁵, the Blue Angel ("Blaue Engel" eco-label for environmentally friendly services and products)³⁶, the Forest Stewardship Council (ensuring sustainable forestry)³⁷, the Rainforest Alliance (international environmental protection organisation)³⁸ and social sustainability standards such as ISO 45001 (standard for occupational health and safety management)³⁹, ISO 30405 (recruitment standard)⁴⁰, ISO 30408 (staffing guidelines), ISO 30409 (guidelines⁴¹ and framework for personnel deployment planning)⁴², quality seal for family-friendly employers⁴³, ILO core labour standards (ending child labour, abolition of forced labour)⁴⁴, Fair Trade⁴⁵ seals and economic / compliance sustainability standards such as ISO 26000 (certified standard for Corporate Social Responsibility in companies and organisations)⁴⁶ and ISO standard 31000 (guidelines on risk management)⁴⁷. There are also industry-specific standards.⁴⁸

²⁶ Available online at: <https://www.oecd.org/berlin/publikationen/oecd-leitsaetze-fuer-multinationale-unternehmen.htm>

²⁷ Available online at: <https://ec.europa.eu/environment/emas/>

²⁸ Available online at: <https://www.umweltbundesamt.de/themen/wirtschaft-konsum/wirtschaft-umwelt/umwelt-energiemanagement/energiemanagementsystem-gemaess-iso-50001#textpart-1>

²⁹ Available online at: <https://www.umweltbundesamt.de/themen/wirtschaft-konsum/wirtschaft-umwelt/umwelt-energiemanagement/iso-14001-umweltmanagementsystemnorm#textpart-1>

³⁰ Available online at: <https://www.gum-consult.de/Texte/oekoprofit.htm>

³¹ Available online at: <https://www.eu-ecolabel.de/ueber-das-eu-ecolabel.htm>

³² Available online at: <https://www.umweltbundesamt.de/umwelttipps-fuer-den-alltag/siegelkunde/eu-energielabel>

³³ Available online at: <https://www.tag-des-waldes.de/pefc/>

³⁴ Available online at: <https://www.utz.org/language-landingpage/german/>

³⁵ Available online at: <https://www.baumgroup.de/service/meldungen/300415-referenzmodell-fuer-die-entwicklung-nachhaltiger-dienstleistungen-als-den-spec-35201/>

³⁶ Available online at: <https://www.blauer-engel.de>

³⁷ Available online at: <https://www.fsc-deutschland.de/de-de/der-fscr>

³⁸ Available online at: <https://www.rainforest-alliance.org/lang/de/work/people>

³⁹ Available online at: <https://www.iso.org/standard/63787.html>

⁴⁰ Available online at: <https://www.iso.org/standard/64149.html>

⁴¹ Available online at: <https://www.iso.org/standard/63492.html>

⁴² Available online at: <https://www.iso.org/standard/64150.html>

⁴³ Available online at: <https://www.familienfreundlicher-arbeitgeber.de/>

⁴⁴ Available online at: <https://www.ilo.org/berlin/arbeits-und-standards/kernarbeitsnormen/lang--de/index.htm>

⁴⁵ Available online at: <https://www.fairtrade-deutschland.de/was-ist-fairtrade/fairtrade-standards.html>

⁴⁶ Available online at: <https://www.iso.org/iso-26000-social-responsibility.html>

⁴⁷ Available online at: <https://www.cgerisk.com/2018/07/main-changes-in-revised-iso-31000-standard-keep-risk-management-simple/>

⁴⁸ Zu Details vgl. *Scherer/Kollmann/Birker*, integriertes Corporate Social Responsibility (CSR)/Nachhaltigkeits-Managementsystem mit GRC, S. 8-11, available online at: <https://static.scherer-grc.net/files/fil/epaper---gesetzt.pdf>

2.3 Duties and Violations in Corporate Social Responsibility

2.3.1 CSR Guidelines and CSR Reporting Requirements

The European Parliament and the Council of the European Union issued *Directive 2014/95/EU* on 22nd October 2014.⁴⁹ Germany implemented this directive on 19th April 2017 through the CSR Directive Implementation Act. Section 289 b of the German Commercial Code regulates mandatory sustainability reporting (the CSR Reporting Obligation) for capital market-oriented companies with more than 500 employees, EUR 40 million turnover and / or total assets of EUR 20 million (see Section 267 para. 3 clause 1 HGB) (German Commercial Code). The sustainability report is a non-financial corporate report and must be presented in a separate section in the management report (Section 289b para. 1 HGB). Section 289c para. 1 stipulates that the non-financial statement within the meaning of Section 289b HGB must describe the business model of the corporation. Section 289c para. 2 HGB goes further to say that the non-financial statement must also cover at least the aspects of environmental, employee and social concerns as well as respect for human rights and the fight against corruption and bribery. It should be noted that part of the information is subject to a materiality reservation. According to Section 289d of the German Commercial Code (HGB), the non-financial declaration must state which framework was used for the preparation.⁵⁰ The most common frameworks are the GRI standard and the German Sustainability Code (DNK). In this context, it should be noted that (international) CSR norms contain more general guidelines that have to be further specified.

2.3.2 OECD Guidelines for Multinational Enterprises

With regard to tax law, the *OECD Guidelines for Multinational Enterprises* state that *Boards* should implement risk management strategies in the area of taxation to ensure that financial, regulatory and reputational risk is comprehensively identified and assessed in each case.⁵¹ A comprehensive risk management strategy that includes the area of taxation enables companies not only to act as good corporate citizens, but also to effectively manage tax risks, which can help avoid major financial, regulatory and reputational risks for the company. According to the OECD guidelines, businesses should not be structured in such a way that it leads to taxable results that are inconsistent with the basic economic conditions of the respective business, unless there is specific legislation in place to achieve the same result. Transfer pricing is a particularly important area in the context of corporate citizenship

⁴⁹ Richtlinie 2014/95/EU des Europäischen Parlaments und des Rates vom 22.10.2014 zur Änderung der Richtlinie 2013/34/EU im Hinblick auf die Angabe nicht finanzieller und die Diversität betreffender Informationen durch bestimmte große Unternehmen und Gruppen, Available online at: <https://eur-lex.europa.eu/legal-content/DE/TXT/PDF/?uri=CELEX:32014L0095&from=EN>

⁵⁰ For the individual possible frameworks see *Loew/Braun*, Mindestanforderungen und Obergrenzen für die Inhalte der nicht finanziellen Erklärung, Available online at: <http://www.4sustainability.de/fileadmin/pdf/Loew-Braun-Mindestanforderungen-Obergrenzen-nichtfinanzielle-Erklärung-2018.pdf>

⁵¹ Neufassung OECD-Leitsätze für multinationale Unternehmen 2011), Rn. 100 ff, available online at: <https://mneguidelines.oecd.org/48808708.pdf>

and taxation. The arm's length principle contained in both the OECD Model Tax Convention and the United Nations Model Convention on the avoidance of double taxation between developed and developing countries is the internationally recognised standard for the adjustment of profits between associated enterprises. The application of the arm's length principle avoids the inappropriate transfer of profits or losses and minimises the risk of double taxation. Multinational corporations are encouraged to follow the principles set out in the OECD Transfer Pricing Guidelines, including their amendments and additions, so that their transfer prices comply with the arm's length principle.

2.3.3 Base Erosion and Profit Shifting Project

The OECD / G20 project – "*Base Erosion and Profit Shifting Project*"⁵² – (hereinafter referred to as the "BEPS project") is an OECD / G20 project that creates an international framework to combat tax avoidance by multinational companies using tools for basic erosion and profit shifting.

The BEPS project aims to develop a multilateral dialogue. The aim of the project is to mitigate tax loopholes and inequalities between countries so that companies cannot transfer their profits from a country with a high (corporate) tax rate to countries with a low tax rate. The practice – especially double non-taxation – is frequently legal, but often involves complex manoeuvres within tax law. Widespread tax avoidance practices can harm taxpayers' trust in tax systems. There is also a significant amount of loss of State revenue. At a conservative estimate, annual tax revenue losses of between USD 100 – 240 billion can be assumed to exist as a result of profit shifting around the globe. A Tax Justice Network study estimates that approximately USD 660 billion in corporate profits were shifted in 2012. As already stated, criminal liability for tax offences can only be considered if a current tax regulation is violated.⁵³

⁵²Available online at: https://www.oecd-ilibrary.org/taxation/oecd-g20-projekt-gewinnverkurzung-und-gewinnverlagerung_25179470

⁵³For details see chapter 5.1.1 of this article.

2.3.4 Relationship Between CSR and Tax Compliance

It should be noted that these "standards" are not legal norms. Nor may these norms be used as rules of interpretation for the legislature or the judiciary, since the legislature or the judiciary may not be influenced by private institutions.⁵⁴ However, non-compliance with standards may constitute a breach of duty if these standards reflect current legislation, case law or the acknowledged state of science and practice.⁵⁵

Not every breach of CSR rules is therefore a breach of tax compliance; much less would it constitute tax evasion. It is undisputed that (tax) compliance is the minimum requirement of CSR. In many cases, however, corporate responsibility is extended through CSR standards. The "legal license to operate" should no longer be sufficient; there should also be a "social license to operate".⁵⁶ This means a shift in the permissibility of entrepreneurial activity from legality to legitimacy, from compliance to risk management and from violation of the law to avoiding negative effects.⁵⁷ According to the CSR, corporate responsibility should have a positive objective, such as maximizing the "Shared Value", but should also identify negative impacts in order to prevent or minimise them.

⁵⁴ *Scherer/Pasini*, Healthcare und Pflege 4.0 – Die digitale Transformation von Compliance, Riskmanagement und Standards im Gesundheitswesen-Teil 3, JMG 3-2019, S. 172, available online at: [https://static.scherer-grc.net/files/fil/jmg-3-19-\(1\).pdf](https://static.scherer-grc.net/files/fil/jmg-3-19-(1).pdf)

⁵⁵ *Scherer/Pasini*, Healthcare und Pflege 4.0 – Die digitale Transformation von Compliance, Riskmanagement und Standards im Gesundheitswesen-Teil 3, JMG 3-2019, 172, available online at: [https://static.scherer-grc.net/files/fil/jmg-3-19-\(1\).pdf](https://static.scherer-grc.net/files/fil/jmg-3-19-(1).pdf)

⁵⁶ *Spießhofer*, NZG 2018, 441.

⁵⁷ *Spießhofer*, NZG 2018, 441.

3. Compliance

3.1 Definition of Compliance

The GCGC defines compliance as the responsibility of the Management Board to adhere to statutory provisions and internal company guidelines.⁵⁸ The entirety of a company's principles and measures for adhering to certain rules and thus avoiding violations of the rules is referred to by the Government Commission on the German Corporate Governance Code as a compliance management system.⁵⁹

3.2 Rules for Compliance

As part of the general duty of care, company management must establish measures to ensure compliance with statutory provisions by means of internal company rules. An obligation to ensure compliance with the rules arises, for example, from Section 91, 93 German Stock Corporation Act (AktG) and Section 43 German Limited Liability Companies Act (GmbHG) to prevent economic damage to companies.

3.3 Obligations and Violations of Compliance

The due diligence obligations of Section 43 para. 1 GmbH, Section 93 para. 1 clause 1 AktG generally include the obligation to ensure the legality of the company's actions, in particular also the fulfilment of its accounting and tax obligations. Violations of legality obligation cannot be justified in relation to the company itself through the argument that they are in its interest.⁶⁰ A breach of duty (which is also profitable for the company) does not lie within the scope of action of the corporate body; rather, the obligation to comply with statutory provisions takes precedence.⁶¹ Following a decision by the Hamm Higher Regional Court⁶², there was a breach of duty and good cause for termination of the employment contract if a GmbH managing director releases a payment on what he knows is a fictitious claim in order to honour a commission agreement that violates the company's internal compliance regulations on business requiring approval. According to the decision of the Higher Regional Court of Hamm, a violation of compliance regulations constitutes a serious breach of duty in itself. This does not change the ability of the process to be approved, since the procedural

⁵⁸Available online at:

https://www.dcgk.de/files/dcgk/usercontent/de/download/kodex/191216_Deutscher_Corporate_Governance_Kodex.pdf

⁵⁹IDW PS 980, Tz.6. See also draft IDW practice note 1/2016: Ausgestaltung und Prüfung eines Tax Compliance Management Systems gemäß IDW PS 980, available online at: <https://www.idw.de/blob/90012/9013892a6abf0b25485ebcf0a21f9fe9/down-idw-praxishinweis-tax-compliance-data.pdf>

⁶⁰BGH v. 27.08.2010 – 2 StR 111/09, BGH St 55, 266, Rn. 29.

⁶¹BGH v. 27.08.2010 – 2 StR 111/09, BGH St 55, 266, Rn. 29.

⁶²OLG Hamm v. 29.05.2019 – I 8 U 146/18, GmbHR 2019, 1060.

and jurisdictional provisions of the compliance regulations serve to ensure the procedural protection of the material purpose and must therefore be strictly observed.⁶³

If employees or companies commit criminal offences, such as tax evasion (Section 370 of the German Fiscal Code), social security fraud (Section 266a of the German Criminal Code (StGB)) or corruption and bribery in business dealings (Section 299 StGB), not only does the employee or company face criminal prosecution, but administrative offence proceedings can also be initiated against the company (see Sections 130, 30 of the German Administrative Offence Act). Failure to comply with the law may result in fines, skimming of excess profits or forfeiture of the profit made by the violation.

As well as violation of compliance regulations, failure to implement a CMS also constitutes a breach of duty. The Munich I Regional Court, for example, ordered an ex-board member to pay 15 million euros to his former employer as compensation for failing to ensure that a functioning CMS was set up.⁶⁴ The obligation to create a functioning, monitored compliance system is the responsibility of the entire Management Board.

3.4 (Digitised Integrated) Compliance Management System (CMS)⁶⁵

In order to avoid violations of compliance regulations, every company is required to continuously check processes and systems for compliance with regulatory requirements. The establishment and optimisation of an effective compliance management system (hereinafter "CMS") is now often considered to be mandatory.⁶⁶ The aim of a CMS is, in particular, to support management and supervisory bodies in ensuring proper corporate governance and thus avoiding damage to the company and, furthermore, avoiding personal liability and the criminal prosecution of board members.

CSR / sustainability management systems consist of regulations and components that are formally prescribed, networked and interactive, and predominantly standardised, such as structural and process organisation, with the purpose of supporting an organisation in making decisions, setting objectives and planning, implementing, controlling and monitoring, to achieve mandatory and optional targets in the area of CSR/sustainability.⁶⁷ With individual management systems (for respective company functions such as risk prevention,

⁶³OLG Hamm v. 29.05.2019 – I 8 U 146/18, GmbHR 2019, 106, Rn. 53.

⁶⁴LG München v. 10.12.2013 – 5 HKO 1387/10, Rn. 100 f.

⁶⁵See also Scherer/Fruth, Handbuch: Integriertes Compliancemanagementsystem mit Governance, Risk und Compliance (GRC), 2018.

⁶⁶LG München v. 10.12.2013 – 5 HKO 1387/10, Rn. 100 f; Scherer, Fit gegen Krisen im Zeitalter der Digitalisierung: Der "Ordentliche Kaufmann 4.0" und (ökonomische) Nachhaltigkeit, available online at: <https://jas.bayern/index.php/JAS/article/view/68>

⁶⁷Scherer/Kollmann/Birker in Scherer/Fruth (Hrsg.), Integriertes Corporate Social Responsibility (CSR)-/Nachhaltigkeits-Management-System mit GRC, S. 1, available online at: <https://static.scherer-grc.net/files/fil/epaper---gesetz.pdf>

environmental protection, occupational safety, occupational health, human resources etc.) it is apparent that many components or requirements are redundant or at least analogous.⁶⁸

The establishment of an integrated management system (IMS) in which several company functions are integrated is ideal for companies.⁶⁹ The goals of an integrated CSR and sustainability management system are, in particular, to ensure compliance with mandatory requirements and, in the area of decision-making leeway, to make appropriate decisions and plans, as well as to control and monitor necessary measures that promote a sustainable increase in company value and the fulfilment of management requirements and the achievement of stakeholder satisfaction, especially in the area of CSR and sustainability. In addition to this, risks (dangers and opportunities or the effects of uncertainties on the achievement of corporate goals) should be recognised, evaluated and controlled in order to reduce the risks caused by weaknesses in the integrated CSR / sustainability management system to an appropriate extent and to seize opportunities. Furthermore, management target deviations and / or violations, which are not completely excluded despite a functioning integrated CSR / sustainability management system, should be discovered and assessed at an early stage.⁷⁰

Intelligent IT systems can map the internationally, horizontally and vertically standardised architectures for proper corporate management and monitoring, and provide users with support for basic requirements. The establishment of a digitised integrated CMS will be a trend-setting development.⁷¹

68 *Scherer/Kollmann/Birker* in Scherer/Fruth (Hrsg.), Integriertes Corporate Social Responsibility (CSR)-/Nachhaltigkeits-Management-System mit GRC, S. 17, available online at: <https://static.scherer-grc.net/files/fil/epaper---gesetzt.pdf>

69 Vgl. zu Details *Scherer/Kollmann/Birker* in Scherer/Fruth (Hrsg.), Integriertes Corporate Social Responsibility (CSR)-/Nachhaltigkeits-Management-System mit GRC, available online at: <https://static.scherer-grc.net/files/fil/epaper---gesetzt.pdf>

70 *Scherer/Kollmann/Birker* in Scherer/Fruth (Hrsg.), Integriertes Corporate Social Responsibility (CSR)-/Nachhaltigkeits-Management-System mit GRC, S. 16.

71 Vgl. *Scherer/Kollmann/Birker* in Scherer/Fruth (Hrsg.), Integriertes Corporate Social Responsibility (CSR)-/Nachhaltigkeits-Management-System mit GRC, available online at: <https://static.scherer-grc.net/files/fil/epaper---gesetzt.pdf>, *Scherer/Birker*, „Unternehmensführung 4.0“ in der Health-Care- und Pflege-Branche: Der „Ordentliche Kaufmann 4.0“ und sein digitalisiertes Integriertes GRC-Managementsystem: „Das Richtige richtig tun“ in unsicheren Zeiten! 1 Oder: Die Verknüpfung von Digitalisierung² und GRC mit Strategie, Zielerreichung und (Nachhaltigkeits-)Berichterstattung, available online at: <https://static.scherer-grc.net/files/fil/jmg-1-20-scherer-birker.pdf>

3.5 Significance of CMS in Terms of Criminal and Administrative Law

In its ruling of 9th May 2017⁷², the German Federal Court of Justice (BGH) determined for the first time that both the existence of a CMS and the optimisation measures relating to the CMS which were taken after the initiation of state sanction proceedings are of importance when setting fines against legal entities and associations of persons.⁷³ In its ruling of 9th May 2017, the BGH⁷⁴ stated:

"When calculating the fine, it is also important to consider the extent to which joint interested parties have fulfilled their obligations to prevent infringements of rights from within the business sphere and have implemented an efficient compliance management system that must be designed to avoid violations of the law (see room in Hastenrath, Compliance Communication, 2. Ed., clause 31 f.). What can also play a role here is whether or not joint interested parties have optimised corresponding regulations as a result of these proceedings and whether they have designed their internal processes in such a way that comparable violations of norms will be significantly more difficult in any future case."

According to the German Federal Court of Justice, one of the corporate bodies' duties is to protect the company's advantage and prevent damage to it. This includes concern for the lawful conduct of the company towards the outside world.⁷⁵ One of the main effects of a compliance system is to exonerate the management from penalties / fines. If there is a proper compliance system in place, the company is exculpated under criminal and administrative penalties, even if no accusation of guilt can be made against it with regard to any special personal knowledge.⁷⁶

The prerequisites for a proper compliance system are the proper delegation and transfer of compliance powers⁷⁷, the appropriate selection of compliance officers, the monitoring of the functionality of the compliance system and its efficiency by the company's corporate

⁷²BGH v. 09.05.2017 – 1 StR 265/16, wistra 2017, 390, Rn. 110.

⁷³Scherer, Managerenthaftung, Transparenz, Wertbeitrag, Zielerreichung, Digitale Transformation, Nachhaltigkeit: Trotz menschlicher Schwächen mancher Manager und Mitarbeiter?, 8, available online at:

https://www.gmrc.de/images/Docs/Publikationen/Managerenthaftung_durch_Human_Workflow_Management_2018.pdf

⁷⁴Scherer, Managerenthaftung, Transparenz, Wertbeitrag, Zielerreichung, Digitale Transformation, Nachhaltigkeit: Trotz menschlicher Schwächen mancher Manager und Mitarbeiter?, 8, Rn. 110, available online at:

https://www.gmrc.de/images/Docs/Publikationen/Managerenthaftung_durch_Human_Workflow_Management_2018.pdf.

⁷⁵Raum, Compliance im Zusammenhang straf- und bußgeldrechtlicher Pflichten 2017, S. 31, Rn. 2 in Hastenrath (Hrsg.), Compliance-Kommunikation 2017.

⁷⁶Raum, Compliance im Zusammenhang straf- und bußgeldrechtlicher Pflichten 2017, S. 41, Rn. 34 in Hastenrath (Hrsg.), Compliance-Kommunikation 2017.

⁷⁷Raum, Compliance im Zusammenhang straf- und bußgeldrechtlicher Pflichten 2017, S. 33, Rn. 6 in Hastenrath (Hrsg.), Compliance-Kommunikation 2017

bodies⁷⁸, substantive criteria for the appropriateness/regularity of a CMS⁷⁹ and a positive overall attitude to compliance.⁸⁰

Guidelines and certifications such as IDW (PS 89) and ISO (19600) can set standards, which in turn can influence the decision as to whether the reasonable steps have been taken by corporate bodies to avoid such violations. However, they also help to determine the degree of a breach of duty, which is a decisive criterion for the assessment of the fines to be borne by the managers and the company itself, in the event that a breach of duty is assumed. Neither guidelines nor certifications, however, replace the individual consideration required in the event of infringement. Standardised norms cannot replace independent inspections by the courts. Certification in itself has no exculpatory effect either for the corporate body or for the company.⁸¹ In this respect, certification can at most have an individual meaning that those responsible have tried to prevent legal violations from within their company. It should be noted that the personal liability certificates requested by company management will not be achieved through certification based on any guidelines, but primarily through a committed role model function and an ambitious and trusting cooperation with competent compliance officers.⁸²

4. Tax Compliance

4.1 Definition of Tax Compliance

Tax Compliance comes under compliance and means that the company fully complies with applicable tax obligations. By complying with all tax norms, risks related to criminal tax law and liability law are avoided. In addition, damages that may occur due to improper tax treatment should be excluded. On the other hand, tax compliance does not in principle mean that a company cannot interpret the tax laws in its own favour or that it is not allowed to implement schemes that result in a tax reduction.

In individual cases, a tax decision can be extremely complex and requires a variety of checks. It should only be mentioned as an example that a company in a foreign low-tax country wants to found a subsidiary. Whether the foreign company is a domicile or P.O. box company must be verified. It must also be clarified whether the scheme is abusive within the

⁷⁸*Raum*, Compliance im Zusammenhang straf- und bußgeldrechtlicher Pflichten 2017, S. 38, Rn. 22 in Hastenrath (Hrsg.), Compliance-Kommunikation 2017

⁷⁹*Raum*, Compliance im Zusammenhang straf- und bußgeldrechtlicher Pflichten 2017, S. 40, Rn. 27 in Hastenrath (Hrsg.), Compliance-Kommunikation 2017

⁸⁰*Scherer*, Managerenthaftung, Transparenz, Wertbeitrag, Zielerreichung, Digitale Transformation, Nachhaltigkeit: Trotz menschlicher Schwächen mancher Manager und Mitarbeiter, S.11, available online at:

https://www.gmrc.de/images/Docs/Publikationen/Managerenthaftung_durch_Human_Workflow_Management_2018.pdf

⁸¹*Raum*, Compliance im Zusammenhang straf- und bußgeldrechtlicher Pflichten 2017, S. 48 ff., Rn. 56 ff. in Hastenrath (Hrsg.), Compliance-Kommunikation 2017

⁸²*Raum*, Compliance im Zusammenhang straf- und bußgeldrechtlicher Pflichten 2017, S. 48 ff., Rn. 56 ff. in Hastenrath (Hrsg.), Compliance-Kommunikation 2017.

meaning of Section 42 of the German Fiscal Code. Analysis should also be carried out on whether or not the foreign subsidiary is managed on domestic soil. Possible additional taxation according to the German Foreign Transaction Tax Law (AStG) must also be clarified. Finally, transfer prices between the companies must be checked for their appropriateness. In practice, a lot of tax schemes that have generally been qualified as legal by the Federal Fiscal Court (Bundesfinanzhof) but which the investigative authorities have doubts about the actual implementation of these models, are currently being reviewed, for example the Golffinger models⁸³. A tax compliance system must also include the actual implementation of schemes as well as a suitable provision for evidence.

The avoidance of criminal tax law risks is of enormous importance since, in addition to the danger of criminal prosecution, there are also considerable liability risks for the persons involved, in accordance with Section 71 of the German Fiscal Code. However, even if they were not involved in tax evasion, tax liabilities are possible in particular for board members or managing directors as a result of intentional or grossly negligent violation of tax regulations, according to Section 69 of the German Fiscal Code. This liability must also be avoided with the help of a tax compliance system.

In addition, there are a variety of procedural regulations in tax law, such as notification of the establishment of a business premises abroad (Section 138 para. 2 No. 1 of the German Fiscal Code). A violation of this regulation constitutes an administrative offence in the event of a careless or deliberate inspection, which is punishable with appropriate fines (cf. Section 379 para. 2 No. 1 of the German Fiscal Code).

Furthermore, incorrect tax treatment can also lead to enormous economic damage. Especially in very formalistic VAT law, substantial additional taxes are often determined by tax audits, which are only carried out several years later. Additional taxes, which partly result from an erroneous assumption of the place of business, a non-existent tax exemption or an incorrect VAT rate, often cannot be claimed by the contractual partner at a later date because the claims may have become statute-barred under civil law or because the contractual partner no longer exists or is illiquid. In the area of wage tax and social security contributions, too, there are often massive additional demands for wage tax and social security contributions (as well as the associated surcharges for late payment), particularly when it comes to "bogus self-employment". These additional tax payments, some of which threaten the existence of the company, should also be reduced or ideally eliminated with the help of a tax compliance system.

⁸³BFH v. 19.1.2017 - IV R 10/14, BStBl. II 2017, 466, Rn. 44 ff.

According to IDW PS 980 supplemented by IDW PH 1/2016, a tax compliance management system has the following 7 basic elements: tax compliance culture, tax compliance objectives, tax compliance organisation, tax compliance risks, tax compliance programme, tax compliance communication and tax compliance monitoring & improvement.

4.2 Status Quo and Outlook – Current Study on the Status of the Implementation of Tax Compliance Management Systems⁸⁴

4.2.1 Current Status of Tax Compliance

A study carried out by PwC in September/October 2019 impressively reflects the current status of the implementation of tax compliance systems.⁸⁵ In this study, more than 150 companies from over 15 industries of all company sizes and legal forms (mainly corporations) were examined. The result of this study was that the majority of the companies surveyed estimated the maturity of their tax CMS at a maximum of 50%.⁸⁶ Only 13% of the participants had already completed a tax CMS project in Germany.⁸⁷ At that time, more than a third of those surveyed had not prepared GoBD procedural documentation for any tax-relevant IT system.⁸⁸ 84% of the participants stated that the main motivation for tax CMS projects is to avoid managing directors' / board members' liability.⁸⁹ Only 38% of the participants indicated that they are fully aware of the liability consequences.⁹⁰ 100% of the companies surveyed explained that VAT is relevant when implementing a tax CMS.⁹¹

⁸⁴Die nachführenden Ausführungen beziehen sich auf die Ergebnisse einer im September/Oktober 2019 von PwC durchgeführten Studie, available online at: www.pwc.de/de/steuerberatung/pwc-tcms-studie-2020.pdf

⁸⁵Available online at: <https://www.pwc.de/de/steuerberatung/pwc-tcms-studie-2020.pdf>

⁸⁶Available online at: <https://www.pwc.de/de/steuerberatung/pwc-tcms-studie-2020.pdf>, S. 6.

⁸⁷Available online at: <https://www.pwc.de/de/steuerberatung/pwc-tcms-studie-2020.pdf>, S. 6.

⁸⁸Available online at: <https://www.pwc.de/de/steuerberatung/pwc-tcms-studie-2020.pdf>, S. 6.

⁸⁹Available online at: <https://www.pwc.de/de/steuerberatung/pwc-tcms-studie-2020.pdf>, S. 10.

⁹⁰Available online at: <https://www.pwc.de/de/steuerberatung/pwc-tcms-studie-2020.pdf>, S. 11.

⁹¹vgl. zu dem Implementierungsstand nach Steuerfachgebieten see pwc study, available online at: <https://www.pwc.de/de/steuerberatung/pwc-tcms-studie-2020.pdf>, S. 14.

4.2.2 Seven Basic Elements of a Tax Compliance Management System

4.2.2.1 Tax Compliance Culture

A culture of tax compliance forms the basis for an appropriate and effective tax CMS and is characterised in particular by the basic attitudes and behaviours of the executive bodies and management, as well as being the role of the supervisory bodies. This is characterised by regular communication of tax compliance issues at management level (tone at the top) and through management into the company (tone from the top).⁹² The larger the company, the more the legal representatives practice the behaviours mentioned in the Tax Strategy.⁹³

51% of the participants indicated that there is no economically documented tax CMS reporting between the persons responsible for tax CMS and the Board or Management in their companies.⁹⁴ 55% of those surveyed stated that the Board or Management receive reports on announced or ongoing company audits. In addition, 54% of respondents say they are informed about potential tax risks.⁹⁵

4.2.2.2 Tax Compliance Objectives

With tax compliance objectives, the company's management team provides the framework and tasks for the tax function. Tax compliance objectives form the basis for assessing tax compliance risk. Setting tax compliance objectives include the consistency, comprehensibility and practicability of the objectives, the measurability of the degree of objective achievement and their alignment with the available resources.⁹⁶

52% of the participants estimated that the defined tax compliance objectives have so far only been met to 50% or less.⁹⁷ The greatest obstacle to achieving tax compliance objectives was the availability of human resources.⁹⁸

4.2.2.3 Tax Compliance Organisation

Management regulates the roles and responsibilities (tasks) as well as the process organisation for compliance with tax obligations. Tasks and responsibilities are to be defined clearly, comprehensively and without contradiction in organisational, technical, process engineering, geographical and area-specific terms. Interfaces to other specialist areas that have reference points in fiscal matters are to be defined by the company and their responsibilities are to be assigned clearly and without overlap. The division of tasks must be

⁹²Available online at: <https://www.pwc.de/de/steuerberatung/pwc-tcms-studie-2020.pdf>, S. 20.

⁹³Available online at: <https://www.pwc.de/de/steuerberatung/pwc-tcms-studie-2020.pdf>, S. 23.

⁹⁴Available online at: <https://www.pwc.de/de/steuerberatung/pwc-tcms-studie-2020.pdf>, S. 25.

⁹⁵Available online at: <https://www.pwc.de/de/steuerberatung/pwc-tcms-studie-2020.pdf>, S. 26.

⁹⁶Available online at: <https://www.pwc.de/de/steuerberatung/pwc-tcms-studie-2020.pdf>, S. 20.

⁹⁷Available online at: <https://www.pwc.de/de/steuerberatung/pwc-tcms-studie-2020.pdf>, S. 33.

⁹⁸Available online at: <https://www.pwc.de/de/steuerberatung/pwc-tcms-studie-2020.pdf>, S. 34.

traceable in a clear and comprehensible manner from delegation decisions to company management.⁹⁹

In almost all companies, the responsibility for the tax CMS lies within the tax department. Less than half of the companies surveyed had adequately defined the roles and responsibilities for meeting the tax requirement for all process steps.¹⁰⁰ The availability of personnel and IT resources was a major limiting factor for achieving tax compliance objectives, especially for small and medium-sized companies.¹⁰¹

4.2.2.4 Tax Compliance Risks

Tax compliance risks (violations of rules to be observed) are determined on the basis of the tax compliance objectives. The risks have to be identified, classified into risk categories, weighted according to their probability of occurrence and their possible consequences analysed.¹⁰² This identification is based on the respective tax types and associated processes. The analysis and identification of tax compliance risks is a process that must be carried out continuously in order to improve the Tax Compliance System.

61% of the companies surveyed identify and document tax risks and the associated sources of error on the basis of process documentation for the individual process steps.¹⁰³ In various taxation areas, considerable improvement needs to be made to the level of transparency of preliminary processes.¹⁰⁴ 62% of the participating companies stated that the identification and documentation of tax risks is carried out in accordance with materiality thresholds.¹⁰⁵ 42% of the companies surveyed stated that the regulations on reporting cross-border tax arrangements that came into force on 31st December 2019 were not yet taken into account in the tax CMS.¹⁰⁶

99Available online at: <https://www.pwc.de/de/steuerberatung/pwc-tcms-studie-2020.pdf>, S. 20.

100Available online at: <https://www.pwc.de/de/steuerberatung/pwc-tcms-studie-2020.pdf>, S. 35.

101Available online at: <https://www.pwc.de/de/steuerberatung/pwc-tcms-studie-2020.pdf>, S. 35 u. 39.

102Available online at: <https://www.pwc.de/de/steuerberatung/pwc-tcms-studie-2020.pdf>, S. 20.

103Available online at: <https://www.pwc.de/de/steuerberatung/pwc-tcms-studie-2020.pdf> S. 41.

104Available online at: <https://www.pwc.de/de/steuerberatung/pwc-tcms-studie-2020.pdf>, S. 42, hinsichtlich der Transparenz der Vorpresse nach Steuerfachgebieten.

105Available online at: <https://www.pwc.de/de/steuerberatung/pwc-tcms-studie-2020.pdf>, S. 46.

106Available online at: <https://www.pwc.de/de/steuerberatung/pwc-tcms-studie-2020.pdf> S. 48.

4.2.2.5 Tax Compliance Programme

Measures must be established that identify tax compliance risks in good time so that violations can be avoided. The Tax Compliance System measures to be introduced and communicated to employees can be both preventive and detective in nature.¹⁰⁷ Depending on the size, organisation and business activities of the company, it may make sense to regularly review the use of tax IT solutions that are necessary and reasonable for the company.¹⁰⁸ The Tax Compliance System can be documented in the form of a risk control matrix.¹⁰⁹

Only 38% of the participants considered the results of their risk identification as quite to very suitable, in terms of their ability to cover all relevant sources of error with appropriate preventive measures.¹¹⁰ 64% of the companies surveyed stated that they documented their risks and controls in a Risk Control Matrix (RKM).¹¹¹

4.2.2.6 Tax Compliance Communication

Employees of the company and third parties who are involved in the fulfilment of the company's tax obligations are to be informed about the Tax Compliance Programme along with the defined roles and responsibilities.¹¹² In this context it is stipulated how tax compliance risks, as well as information on possible breaches of the rules, are to be reported to the responsible bodies in the company.¹¹³

Only 38-44% of the participants rated the adequacy of the reporting on the tax CMS as good to very good. ¹¹⁴ 46% of the participating companies stated that their employees are in a good to very good position to be able to perform their duties, on the basis of the tax compliance communication that has taken place.¹¹⁵ 21% of those surveyed assumed that the quality of tax data currently secured by tax compliance communication is inadequate to weak.¹¹⁶

4.2.2.7 Tax Compliance Monitoring and Improvement

A tax CMS must be monitored regularly by process-independent bodies, such as an internal audit. If deficiencies in the tax CMS or breaches of the rules are identified during monitoring, these must be reported to the management or the designated positions in the company and

¹⁰⁷Available online at: <https://www.pwc.de/de/steuerberatung/pwc-tcms-studie-2020.pdf>, S. 21.
¹⁰⁸Available online at: <https://www.pwc.de/de/steuerberatung/pwc-tcms-studie-2020.pdf>, S. 21.
¹⁰⁹Available online at: <https://www.pwc.de/de/steuerberatung/pwc-tcms-studie-2020.pdf>, S. 21.
¹¹⁰Available online at: <https://www.pwc.de/de/steuerberatung/pwc-tcms-studie-2020.pdf>, S. 52.
¹¹¹Available online at: <https://www.pwc.de/de/steuerberatung/pwc-tcms-studie-2020.pdf>, S. 53.
¹¹²Available online at: <https://www.pwc.de/de/steuerberatung/pwc-tcms-studie-2020.pdf>, S. 21.
¹¹³Available online at: <https://www.pwc.de/de/steuerberatung/pwc-tcms-studie-2020.pdf>, S. 21.
¹¹⁴Available online at: <https://www.pwc.de/de/steuerberatung/pwc-tcms-studie-2020.pdf>, S. 63.
¹¹⁵Available online at: <https://www.pwc.de/de/steuerberatung/pwc-tcms-studie-2020.pdf>, S. 65.
¹¹⁶Available online at: <https://www.pwc.de/de/steuerberatung/pwc-tcms-studie-2020.pdf>, S. 67.

contraventions sanctioned if necessary.¹¹⁷ In addition to this, identifiable measures should be taken to remedy deficiencies and to avoid future violations.

35% of the surveyed participants indicated that ongoing improvement of the tax CMS is currently not being carried out.¹¹⁸ 31% of the surveyed participants stated that, in addition to the ongoing, prompt elimination of identified weaknesses, they also discuss and document the tax-related processes with all relevant parties at least once a year.¹¹⁹

4.2.2.8 Overall Assessment of Tax Compliance Management Systems

Only 1% of the companies surveyed stated that they fulfil all 7 basic elements of a tax CMS.¹²⁰ The companies surveyed regularly estimate the added value of a tax CMS to be higher than the corresponding additional expenditure for its ongoing operation.¹²¹

4.3 Certification of a Tax Compliance Management System

A clear majority of the companies considered ensuring the quality of the tax CMS, and acceptance by the tax authorities and/or courts, as significant grounds for tax CMS examination and certification.¹²² About a third of the companies surveyed have had their tax CMS certified or plan to do so.¹²³

4.4 Outlook and Future Tax Compliance

11% of the companies surveyed stated that audit management / monitoring had already been automated in their company.¹²⁴ 44% of the companies surveyed stated that they were very likely to implement automation in the area of process documentation or that they had already done so.¹²⁵ 85% of the companies surveyed fully or largely agreed that the tax compliance requirements will increase significantly in the coming years.¹²⁶

An automated Tax Compliance¹²⁷ System automatically initiates all activities in the tax CMS, ensures the involvement of the responsible employees and centralises communication in and via the tax CMS on one platform. At all times, transparency about the status of all tax-relevant processes (including risks and controls) is guaranteed in order to ensure process

117 Available online at: <https://www.pwc.de/de/steuerberatung/pwc-tcms-studie-2020.pdf>, S. 21.

118 Available online at: <https://www.pwc.de/de/steuerberatung/pwc-tcms-studie-2020.pdf>, S. 69.

119 Available online at: <https://www.pwc.de/de/steuerberatung/pwc-tcms-studie-2020.pdf>, S. 69.

120 Available online at: <https://www.pwc.de/de/steuerberatung/pwc-tcms-studie-2020.pdf>, S. 75 f.

121 Available online at: <https://www.pwc.de/de/steuerberatung/pwc-tcms-studie-2020.pdf>, S. 75 u. 78.

122 Available online at: <https://www.pwc.de/de/steuerberatung/pwc-tcms-studie-2020.pdf>, S. 80.

123 Available online at: <https://www.pwc.de/de/steuerberatung/pwc-tcms-studie-2020.pdf>, S. 79 u. 81.

124 Available online at: <https://www.pwc.de/de/steuerberatung/pwc-tcms-studie-2020.pdf>, S. 85.

125 Available online at: <https://www.pwc.de/de/steuerberatung/pwc-tcms-studie-2020.pdf>, S. 85.

126 Available online at: <https://www.pwc.de/de/steuerberatung/pwc-tcms-studie-2020.pdf>, S. 90.

¹²⁷ Wie etwa die Tax-CMS-Automatisierungslösung von PwC

transparency. Furthermore, there is a direct data transfer in the tool between all process participants. In addition, tax risks are recorded in a structured manner and appropriate measures are implemented automatically. The tool also regulates an automated request to carry out the activities with corresponding escalation mechanisms. All activities are documented under a name, date and time stamp, so that there is a safeguard against revisions being made. Processes can be tracked in real time via an individually configurable dashboard.

The digitisation of processes will also become increasingly important in the area of tax compliance. Existing processes should be simplified, made transparent and, if possible, automated. Business Process Management (BPM) is of considerable importance for process digitalisation. BPM describes methods with which business processes can be viewed, analysed, adapted, modelled, carried out and monitored. In order to achieve the objectives of BPM, processes are mapped out as models. Various companies use BPMN for this. BPMN stands for "Business Process Model and Notation" and is the global standard for process modelling. In BPMN, individual activities in the process are mapped as tasks. In order to automate a recurring manual activity in the process, a relevant manual task can be converted into one or more automated tasks. In an automated task, programmed sequences are used which automatically reproduce the activity by means of data, algorithms and technical connections. Using "process mining software", the relevant control data is continuously monitored and evaluated via IT systems. Using "Robotic Process Automation" (RPA), software robots can help with the processing of manual tasks. If the rules for reaching a decision are clearly defined, the decision logic can be processed automatically. "Decision Model and Notation" (DMN) is suitable for implementing this. The standard is used to describe and model repeatable decisions in companies. A DMN model can be integrated into a BPMN process model and executed by an engine in the same way as BPMN can.

5. Fiscal Offence Law

5.1 Definition and Regulations of Fiscal Offence Law

Fiscal Offence Law comprises substantive criminal provisions (Sections 369–376 of the German Fiscal Code), supplemented by the German Criminal Code (StGB) and the formal provisions of the German law on Criminal Proceedings for Tax Fraud (Sections 385–408 of the German Fiscal Code).

5.1.1 Objective Facts of Tax Evasion

According to Section 370 para. 1 of the German Fiscal Code, objective facts of tax evasion are substantiated if the fiscal authorities are given incorrect or incomplete data about tax-relevant facts or the tax authorities are not informed about tax-relevant facts contrary to their duty.

According to the case law of the German Federal Constitutional Court and Federal Court of Justice, Section 370 of the German Fiscal Code is a blanket penalty norm that is filled in by the provisions of individual tax laws.

An incriminating administrative decision, such as a tax assessment, must be based on the basis of explicit authorisation (tax law). The background is that interference with fundamental rights is subject to the reservation of the law. It is the task of the parliamentary legislator to clearly delimit the possibilities for state intervention by determining the content, purpose and extent of the intervention. In tax law, the further development of the law beyond the possible literal meaning of the law must not, as a matter of principle, lead to the extension or aggravation of tax offences or the creation of new tax offences.¹²⁸ Insofar as case law permits in individual cases, legal training by way of teleological reduction at the expense of the taxpayer only applies under very limited conditions. The admissibility of legal training at the expense of the taxpayer requires that a loophole in the law can be ascertained properly and that legal principles according to which this loophole is to be closed can be clearly inferred from the wording of the law or legal materials.¹²⁹ Against the backdrop of legal reservation, the legislator must have authoritatively predetermined the result that would be obtained through further legal training. What is decisive in this respect is whether the end result can be traced back to a deliberate decision by the legislator, so that further legal training would be determined (at least indirectly) by parliamentary legislature itself.¹³⁰

¹²⁸BVerfG v. 14.08.1996 -. 2 BvR 2088/99, NJW 1996, 3146.

¹²⁹BFH v. 20.10.1983 -IV R 175/79, BStBl. II 1984, 221.

¹³⁰FG Münster v. 24.07.2015 - 4 K 1494/13 F, EFG 2015, 1806 Rn. 30.

According to Article 103 para. 2 of the Basic Law for the Federal Republic of Germany, there is also an explicit prohibition of analogies and the requirement of certainty in relation to fiscal offences. The guarantee content of Article 103 para. 2 of the Basic Law includes the legislator's obligation to define the prerequisite of criminal liability so precisely that the extent and scope of the criminal offences can be recognised by the norm addressee from the law itself and can be identified through interpretation, determination and specification.¹³¹ From the requirement of legal certainty, case law infers a ban on punitive or aggravating analogous tax.¹³² According to the case law of the German Federal Constitutional Court¹³³ and Federal Court of Justice¹³⁴, Section 370 of the German Fiscal Code is a blanket penalty norm that is filled in by the provisions of individual tax laws. Therefore, the interpretation and application of the implementing tax provisions must also be measured against the yardstick of Article 103 para. 2 of the Basic Law for the Federal Republic of Germany.¹³⁵ An accusation of fiscal offences thus presupposes that there is a violation of an existing tax norm and that the violation of this tax norm is covered by its wording.

5.1.2 Subjective Facts of Tax Evasion

According to the established case law of the Federal Court of Justice (BGH), the intention of tax evasion includes that the perpetrator knows or at least considers the tax claim to be possible in terms of its reason and amount and also wants to reduce it. Criminal liability for tax evasion does not require intent or a direct intention to evade tax; it is sufficient (by way of a contingent intention) that the perpetrator recognises the aspects that can make a legal offence an actual and not entirely remote possibility (knowledge element), and that (s)he approves of it or at least resigns him/herself to the offence taking place in order to achieve the desired objective (will element).¹³⁶

5.2 Legal Consequences of Deliberate Tax Reduction

In accordance with Section 370 paragraph 1 of the German Fiscal Code, deliberate tax reduction is punishable with a fine or imprisonment up to five years. In particularly serious cases, the sentence is between 6 months and 10 years in prison. A particularly serious case of tax evasion is, for example, tax evasion of more than 50,000 euros per tax type and year.

¹³¹BVerfG v. 20.03.2002 - 2 BvR 794/95, BVerfGE 105, 135, 153; BGH v. 10.10.2017, wistra 2018, 214.

¹³²BVerfG v. 19.12.2004 -. 2 BvR 930/04, BVerfGE 4, 261, 265.

¹³³BVerfG v. 16.6.2011 – 2 BvR 542/09, wistra 2010, 396, 403.

¹³⁴BGH v. 7.11.2001 – 5 StR 395/01, BGHSt 47, 138, 141

¹³⁵BVerfG v. 16.06.2011 - 2 BvR 542/09, wistra 2011, 458; BGH v. 10.10.2017 -1 StR 447/14, BGHSt 63, 29.

¹³⁶BGH, NStZ 2012, 160, Rn. 21; BGH v. 24.9.2019 – 1 StR 346/18, NJW 2019, 3532, Rn. 17.

6. Importance of Tax Compliance Management Systems

Establishing an effective tax compliance management system is extremely important for avoiding tax liability and liability risks.

In 2016, the Fines and Criminal Proceedings Office processed about 73,000 criminal cases for tax offences. In the same period, the tax investigation department dealt with a total of 36,667 cases nationwide, whereby additional taxes amounting to 3.2 billion euros were discovered and prison sentences totalling 1513 years were imposed. In 2017, the Fines and Criminal Proceedings Office processed approximately 62,000 criminal cases for tax offences. In the same period, the tax investigation department dealt with an approximate total 35,000 cases nationwide, whereby additional taxes amounting to 2.9 billion euros and prison sentences totalling 1586 years were imposed. In 2018, the Fines and Criminal Proceedings Office processed approximately 58,000 criminal cases for tax offences nationwide. In the same period, the tax investigation department dealt with an approximate total of 34,000 cases nationwide, whereby additional taxes amounting to 2.6 billion euros and prison sentences totalling 1472 years were imposed. The slight decline is probably due to the fact that in the period 2016 to 2018 the number of cases with untaxed foreign investment income declined. The enormous annual number of criminal tax proceedings initiated and processed, along with the amount of the reduced taxes and imprisonment imposed clearly illustrate the importance of dealing with the subject of tax compliance.

A tax compliance system can not only help to avoid the risk of filing inaccurate tax returns, but may also be an indication of a lack of intent. In a letter dated 23rd May 2016¹³⁷ under Note 2.6, the Federal Ministry of Finance explained:

"If the taxpayer has set up an internal control system for the purpose of fulfilling tax obligations, this may constitute an indication of intent or recklessness, but does not exempt the taxpayer from examining each individual case."

¹³⁷ BMF v. 23.05.2016 – IV A 3-S 0324/15/10001, BStBl. I 2016, 490.

7. Relationship between CG, CSR, Compliance, Tax Compliance, Fiscal Offence Law

If an entrepreneur, employee or institute intentionally violates applicable tax regulations, they commit tax evasion in accordance with Section 370 of the German Fiscal Code. In this circumstance, there is also a violation of tax compliance, compliance, CSR and CG.

However, not every violation of tax compliance leads to Fiscal Offence accusations. Tax compliance also includes countless tax procedural regulations, such as the obligation to notify about the establishment of foreign business premises within the meaning of Section 138 para. 2 clause 1 No. 1 of the Fiscal Code. Their violation can result in an administrative offense within the meaning of Section 379 para. 2 No. 1 of the German Fiscal Code, but give no grounds for a tax offence. For example, the failure to pay taxes on time does not usually constitute a criminal tax offence.¹³⁸ However, if the untimely payment of taxes results in the setting of (unnecessary) default surcharges, this can also result in liability of the legal representative according to Section 69 clause 2 of the German Fiscal Code. If there is a violation of tax compliance, there is also a violation of compliance, CSR and CG.

A violation of compliance regulations does not always include a breach of tax compliance or the perpetration of a fiscal offense, since the area of compliance includes other compliance complexities, such as IT compliance. However, a violation of compliance regulations also results in a violation of CSR and CG, since adherence to compliance regulations is the minimum of CSR.

A violation of CSR does not automatically mean a violation of compliance or tax compliance, let alone perpetration of a fiscal offense. Compliance includes the obligation to adhere to applicable law. Corporate Responsibility is extended through CSR standards. A "social license to operate" is added to a "legal license to operate". However, if a company has committed itself, for example through internal guidelines, to avoid tax avoidance strategies that violate CSR, this area is not only covered by CSR, but also by compliance and tax compliance. As long as these tax avoidance strategies are brought into line with the applicable tax law, however, this does not constitute an offence, according to Section 370 of the German Fiscal Code. A violation of CSR regulations also includes a violation of CG regulations.

If a company violates CG regulations, this does not automatically constitute a violation of CSR, compliance or tax compliance regulations, let alone substantiate the allegation of tax evasion, since CG also includes, for example, compliance with technical regulations to which

¹³⁸An exception to this is regulated by § 26c UStG.

the areas of CSR, compliance, tax compliance and Fiscal Offence Law do not necessarily refer. A company that complies with all CG regulations accordingly complies with the CSR, compliance and tax compliance regulations and commits no tax offences through its corporate bodies.

8. Conclusion and Outlook

In recent years, the tendency to tighten liability, as well as criminal and other legal risks, has increased.¹³⁹ Not only does a violation of compliance regulations lead to liability and possibly termination for important reasons, but the failure to establish a compliance system can also lead to claims for damages against executive bodies.

Also in the area of tax law, the establishment or improvement of a tax compliance system is of great importance for companies due to the enormous number of tax criminal proceedings and the substantial payment of tax arrears, in particular through tax audits. The PricewaterhouseCoopers study showed that 85% of the companies surveyed fully or largely agreed that tax compliance requirements would increase significantly in the coming years.¹⁴⁰ 44% of the companies surveyed stated that they were very likely to implement automation in the area of process documentation or that they had already done so.¹⁴¹

Ideally, companies should establish an Integrated Management System (IMS), in which several company functions are integrated.¹⁴² Intelligent IT systems can map the internationally, horizontally and vertically standardised architectures for proper corporate management and monitoring, and provide users with support for basic requirements. The establishment of a digitised integrated CMS will be a trend-setting development.¹⁴³

Even though an (automated) Integrated Management System will be a considerable help in reducing infringements of CG, CSR and compliance as well as criminal tax law risks, there will still be a residual risk of criminal and liability claims. With these fully automated

¹³⁹ Scherer, Fit gegen Krisen im Zeitalter der Digitalisierung: Der "Ordentliche Kaufmann 4.0" und (ökonomische) Nachhaltigkeit, S. 451, Available online at: <https://jas.bayern/index.php/JAS/article/view/68>; Fruth/Scherer, Gesellschafter-Compliance Praxispflichten, Haftungsrisiken und Vermeidungsstrategien für GmbH-Gesellschafter, 2010, 1. Aufl. Berlin; Scherer/Fruth, Geschäftsführer-Compliance, Praxiswissen zu Pflichten, Haftungsrisiken und Vermeidungsstrategien, 2009 Berlin.

¹⁴⁰ Available online at: <https://www.pwc.de/de/steuerberatung/pwc-tcms-studie-2020.pdf>, S. 90.

¹⁴¹ Available online at: <https://www.pwc.de/de/steuerberatung/pwc-tcms-studie-2020.pdf>, S. 85.

¹⁴² Vgl. zu Details Scherer/Kollmann/Birker in Scherer/Fruth (Hrsg.), Integriertes Corporate Social Responsibility (CSR)-/Nachhaltigkeits-Management-System mit GRC, available online at: <https://static.scherer-grc.net/files/fil/epaper---gesetzt.pdf>
¹⁴³ Vgl. Scherer/Kollmann/Birker in Scherer/Fruth (Hrsg.), Integriertes Corporate Social Responsibility (CSR)-/Nachhaltigkeits-Management-System mit GRC, available online at: <https://static.scherer-grc.net/files/fil/epaper---gesetzt.pdf>, Scherer/Birker, „Unternehmensführung 4.0“ in der Health-Care- und Pflege-Branche: Der „Ordentliche Kaufmann 4.0“ und sein digitalisiertes Integriertes GRC-Managementsystem: „Das Richtige richtig tun“ in unsicheren Zeiten! 1 Oder: Die Verknüpfung von Digitalisierung2 und GRC mit Strategie, Zielerreichung und (Nachhaltigkeits-)Berichterstattung, Available online at: <https://static.scherer-grc.net/files/fil/jmg-1-20-scherer-birker.pdf>

configurations, the commissioning of a specialised lawyer or tax advisor will be required in order to bring any procedures to a conclusion or bring about the best possible settlement.

In addition, the commissioning of a tax advisor or (specialist) lawyer for tax law in the preparation of tax returns or the examination of legal issues offers the protection that any tax errors made by the tax advisor/lawyer cannot be attributed to the taxpayer under criminal law if the taxpayer has disclosed the relevant facts to his advisor and the error made by the tax advisor/lawyer was not obvious to him. The background is that the accusation of guilt is purely subjective and the question of a frivolous or intentional tax reduction is determined by the personal abilities of the offender, so that an attribution of fault to the tax adviser is not possible under criminal and administrative offence law.¹⁴⁴

¹⁴⁴BFH v. 29.10.2013-VIII R 27/10, DStR 2013, 2694, 2697; vgl. auch FG München v. 20.04.2011, Az. 13 V 446/11.