Corporate compliance

As a multidisciplinary firm of lawyers, tax consultants and auditors, Esche Schümann Commichau supports clients avoid violations of the law in their business. We offer our clients tailor-made solutions for compliance programs that can be implemented in small and large companies in a practical and non-bureaucratic manner.

If requested, we also determine the company’s respective risk class and review existing structures when we design compliance programs. Building on that basis, we draw up the necessary documents (e.g. code of conduct and guidelines for employees) and assume responsibility for involving the works council, employee training and overseeing the compliance program on an ongoing basis (e.g. as ombudsman or provider of a whistleblower system). Upon request (for example in case of an initial suspicion), we also offer to conduct targeted internal investigations for our clients to uncover wrongdoing.
Duties to comply with the law in a business

A business is required to organize itself in such a way that it complies with all legal duties at all times and everywhere to avoid violations of the law. In a limited liability company (GmbH), this duty affects the managing directors, in a joint stock corporation (Aktiengesellschaft) the board of directors.

To meet this legal obligation, companies set up compliance programs to establish internal processes and procedures in order to identify material legal risks, take preventive action against violations, investigate suspicious cases and respond appropriately to violations that are detected.

Internal investigation in a corporate crisis

If a law has been violated in a company (despite the existence of a compliance program) or if there is a suspicion of non-compliance, the directors’ organizational duty requires them to clarify the suspicion or action in full. In such cases, it is in particular necessary to check whether all the information is available and whether further violations of the law were committed.

By searching specifically for violations, an affected company can take action to terminate non-compliance and possibly agree on advantageous cooperation arrangements with the authorities or third-party companies (e.g. by applying for leniency in exchange for evidence or self-disclosures).

Esche Schümann Commichau conducts such investigations to clarify the facts with an integrated and experienced team of lawyers, tax consultants and auditors.
Reasons for internal investigations

If authorities make inquiries or conduct investigations, a company should take immediate steps to clarify all the relevant facts internally as a matter of urgency. In such cases, a very rapid response is generally required to enable the company to benefit from favorable options such as applying for leniency or filing voluntary tax self-disclosures on a timely basis.

Information about violations also frequently comes from within the company itself. Employees often use existing reporting systems (e.g. compliance hotline, web portal, ombudspersons). The company must also respond quickly in such cases to ensure that evidence is not destroyed and that it does not suffer further disadvantages.

Moreover, certain matters are regularly reviewed in financial statement audits and tax audits (tax office, health insurer, customs) and these may uncover violations. Justified queries or even the findings of the auditors should prompt the company to conduct its own investigations where there is a suspicion of wrongdoing.

Responsibility for notifications, reporting to the board of directors

To ensure that a company can react quickly if misconduct is suspected, a compliance program should define who is responsible for accepting and dealing with information about violations, what type of information is to be treated as a compliance case, and the process to be used to clarify such violations.
Duty to conduct internal investigations

According to the principle of legality and the duties of care of a prudent and diligent management, the board of directors of an AG or the managing director of a GmbH are required to clarify specific cases of suspicion or other indications of serious violations of the law immediately and comprehensively. They have no discretion in this regard.

If the board of directors in an AG or the managing director in a GmbH fail to meet their obligation to clarify suspicious matters, damaging illegal conduct may continue or be repeated because it has not been detected or sanctioned. This may lead to considerable legal and reputational risks for the company. In addition, the possibility of taking suitable action to mitigate the consequences of non-compliance is lost. If there had been an opportunity to prevent damage to the business, the board of directors or the managing director that have remained inactive may be liable in damages to the company.

Plausibility of suspicion

The implementation of an internal investigation interferes with the normal processes of a business and often causes unrest especially among employees. Before an internal investigation is initiated, each relevant suspicious case should first be reviewed for its factual and legal plausibility.

The plausibility check should proceed quickly and silently in the background and be performed by someone with no direct personal interest in the matter under investigation. Information about the informant, the (alleged) facts and the allegation must be treated in the strictest confidence in order not to jeopardize a later investigation (risk of destruction of evidence).

Structuring of the internal investigation

Esche Schümann Commichau has particular experience in structuring and conducting internal investigations. In such projects, our experienced multidisciplinary team enables us to provide clients with uniform one-stop advice. In most cases, an internal investigation comprises various modules.
Typical modules of internal investigations

- Employee Interviews
- Data Review / Emails
- Securing of Evidence
- Forensic Examinations

Securing of evidence

At the start of the investigation, the company’s directors must ensure that no relevant evidence is destroyed. This relates in particular to business documents, including emails, which should be backed up by data mirroring.

Email review / Forensic examinations

The secured data (paper files, servers, mobile devices, chat protocols, etc.) should be evaluated by suitable procedures (e-discovery, electronic evaluation of accounting records, email review, IDEA software and the like). With its experienced team of auditors and forensic experts, Esche Schümann Commichau can perform this task quickly and securely. If protected personal data is also affected (which is normally the case), the relevant data protection rules of the countries affected by the investigation must be complied with. Structuring an email review to comply with the law may depend, among other things, on whether the company also permits the IT system to be used for private purposes. Moreover, it may be necessary to consult the works council. Esche Schümann Commichau therefore also considers aspects of employment law in an internal investigation.

If an internal investigation uncovers evidence of tax non-compliance, a targeted examination of the available data is performed in that area in order, among other things, to obtain the basis for later corrections or tax self-disclosures.
Interviews

Employee interviews offer the most effective way to obtain relevant information in a compliance case. Esche Schümman Commichau has a wealth of experience in conducting such interviews. In general, employees have a duty to provide comprehensive information to their employer. This applies even if employees that provide truthful information thereby incriminate themselves. It may be advisable to conclude so-called amnesty agreements with the relevant employees so that they will assist in clarifying the facts.

Follow-up measures

The results of the internal investigation must be reported internally in accordance with the competences and process defined in the company – and also to the board of directors and the managing director at least. Knowledge of violations by board members in an AG must be reported to the supervisory board (audit committee or supervisory board chairman).

In matters with tax implications (e.g. bribes) we advise clients whether tax returns should be corrected or whether self-disclosures are appropriate. We assist them in communications with tax offices and prepare the data and information for the tax office in a suitable form. We assist the company throughout the proceedings with the tax office. In the case of antitrust violations, we consider whether the client should cooperate with the cartel authorities and apply for leniency programs.

If our clients are listed companies, we monitor whether the causes, implementation or results of internal investigations require them to publish an ad hoc notice – for example due to significant changes in the financial results or personnel decisions.

When companies have confirmed the violations, we also review all disciplinary measures under employment law and assist in restructuring action that may be necessary to rule out non-compliance in the future.
Defending companies in government investigations

If the authorities become aware of violations of the law, government investigations may ensue and enforcement action may be taken against the business and the relevant employees. We also assist clients in such a crisis.

In official investigations, the business and its employees regularly face specially severe and radical government action.

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<tr>
<th>Searches / Seizures</th>
<th>Risks of Criminal Liability</th>
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<tr>
<td>Searches frequently lead to media reports and reputational damage</td>
<td>Certain violations of the law constitute criminal offenses, which result in especially severe criminal sanctions</td>
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<th>Cooperation with Authorities</th>
<th>Pretrial Detention</th>
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<tr>
<td>The pros and cons of cooperation must be weighed up carefully</td>
<td>We offer advice on how pretrial detention can be avoided</td>
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In principle, the business is not required to report knowledge of criminal acts to the authorities. There are exceptions, for example in connection with money laundering and taxes (duty to report). However, it is necessary to consider whether the company should cooperate voluntarily with the authorities with a view to avoiding enforcement measures or reducing corporate fines.

If there is a specific risk that a search will be carried out, it may be advisable to contact the public prosecutor’s office in good time to avert the search in a particular case or at least mitigate its impact.

In a particular matter, it may well also be appropriate for the company itself to file a criminal complaint. The company can also thereby signal to its employees that wrongdoing will not be tolerated. However, it is necessary to weigh up the risk of negative reporting in the media and reputational damage.
Esche Schümann Commichau

We offer comprehensive advice on all key compliance issues, including compliance programs, internal investigations and corporate criminal law. Our team supports businesses in introducing, reviewing and implementing compliance structures and also in handling compliance violations in a comprehensive manner internally and externally.

Our compliance advice aims to help clients avoid serious liability and reputational risks by taking proactive preventive action. Our experts can draw on many years of experience in this field.

In a crisis, our consulting practice covers the planning and implementation of internal investigations, supporting clients when searches are carried out and representing them in all matters – including criminal – that involve investigating authorities in Germany and other countries.

WirtschaftsWoche ranks us among the “Top Law Firms” in Germany in the area Compliance in 2019. Dr. Philipp Engelhoven from our law firm is named as the “Top Lawyer - Compliance”.

To compile this ranking, the Handelsblatt Research Institute (HRI) asked more than 775 corporate criminal lawyers and compliance lawyers in 118 law firms for renowned colleagues. The ranking was drawn up after subsequent evaluation by a jury of experts. The complete ranking can be found in WirtschaftsWoche issue no. 15/2019.

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