

Compliance and Governance from A-Z

Bearbeitet von

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[Recht > Handelsrecht, Wirtschaftsrecht > Unternehmensrecht > Compliance](#)

Zu [Inhaltsverzeichnis](#)

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DIE FACHBUCHHANDLUNG

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Though originally intended to pose a standard for data centers of the British Government, ITIL has, in the meantime, become a de-facto standard for “Best Practice” within the enterprise. The contents are directed towards the lifespan of services: “Service Strategy”, “Service Design”, “Service Transition”, “Service Operation” and “Continual Improvement”, whereby it is particularly emphasized on “Change Management”, “Problem Management”, “Configuration Management”, “Incident Management”, “Release Management”.

IT Policy An IT Policy is a fundamental element of the →IT Security of an enterprise. It helps to spread awareness amongst the →Employees and establishes at the same time certain rules of behavior, which do not arise out of legal standards with sufficient certainty. A typical object of regulation is the use of IT infrastructure in the office. Due to the unclear border between official and private use and whether the latter is permitted, an IT Policy typically contains regulations concerning this matter. Typical objects of regulation are the permissibility of private use, intensity and mode of private use, a duty to identify and archive private e-mails, handling of passwords or regulations regarding absences.

IT Security (Concept) Security of all IT systems in order to prevent unauthorized access to computers and networks. For this purpose one must detect and eliminate security-critical software and configuration errors in unsafe networks, for example the Internet. An IT Security Concept is a fundamental element of IT Security and should therefore – alongside certain elements fitted to the enterprise in question – describe the following measures: (i) for securing of data (short-term securing of data, programs and configurations in such a way as to enable access even in the case of complete disaster), (ii) for the →Archiving (long-term record of data, also in the case of migration of systems and data), (iii) for protection from viruses (virus scanners and employee training), (iv) for emergency precautions (development of possible disaster scenarios) and (v) for planning of counter-measures. A training plan adjusted to the specific needs of the enterprise (as well as conducting regular trainings) is also part of the IT Security Concept.

IT Security Officer An IT Security Officer is an →Employee or external expert who is responsible for →IT Security and monitors it in the name of the enterprise. Even though he might not be explicitly legally required, because of the importance of information technologies for an enterprise,

his appointment should be an obligation. Unlike the → Data Protection Officer, the IT Security Officer solely operates in the interest of the Management. Important questions which must be raised within the proper conduct of business are, in this context: is the appointment of an IT Security Officer objectively necessary? Is the IT Security Officer objectively suitable, is he sufficiently supervised, and does he have sufficient resources?

Item Subject to Legal Privilege²⁰³ Under the → Prevention of Corruption Act (→ Corruption), an item is subject to → Legal Privilege if: (a) it is a communication made between a lawyer and a client, or a legal counsel acting as such and his → Employer, in connection with the lawyer giving legal advice to the client or the legal counsel giving legal advice to the employer, as the case may be; (b) it is a communication made between 2 or more lawyers acting for a client, or 2 or more legal counsel acting as such for their employer, in connection with one or more of the lawyers giving legal advice to the client or one or more of the legal counsel giving legal advice to the employer, as the case may be; (c) it is a communication made — (i) between a client, or an employer of a legal counsel, and another person; (ii) between a lawyer acting for a client and either the client or another person; or (iii) between a legal counsel acting as such for his employer and either the employer or another person, in connection with, and for the purposes of, any legal proceedings (including anticipated or pending legal proceedings) in which the client or employer, as the case may be, is or may be, or was or might have been, a party; (d) it is an item, or a document (including its contents), that is enclosed with or referred to in any communication in paragraph (a) or (b) and that is made or prepared by any person in connection with a lawyer or legal counsel, or one or more of the lawyers or legal counsel, in either paragraph giving legal advice to the client or the employer of the legal counsel, as the case may be; or (e) it is an item, or a document (including its contents), that is enclosed with or referred to in any communication in paragraph (c) and that is made or prepared by any person in connection with, and for the purposes of, any legal proceedings (including anticipated or pending legal proceedings) in which the client or the employer of the legal counsel, as the case may be, is or may be, or was or might have been, a party, but it is not any such communication, item or document that is made, prepared or held with the intention of furthering a criminal purpose.

²⁰³ Singapore.

JCPO → Joint Comprehensive Plan of Action

Job Control²⁰⁴ In accordance with Section 11 para. 2 clause 4 → FDPA, the → Data Controller is required to → Audit the → Technical and Organizational Measures implemented by the data processor (→ Data Processing on Behalf of Others) prior to the beginning of the → Processing and in regular intervals thereafter. The requirements for Technical and Organizational Measures to be implemented will be governed by Art. 32 → GDPR as soon as this is in full force and effect in May 2018 and it is not to be expected that the understanding of Job Control will change under the GDPR.

Job Rotation The term “Job Rotation” describes the systematic change of the → Employee’s job function. The Job Rotation process can be applied for the purpose of further training, variation of the work routine, as well as mitigating → Compliance and/or → Fraud risk which can occur if the same Employees continuously work together as a group.

Joint Comprehensive Plan of Action The Joint Comprehensive Plan of Action (JCPO), sometimes also referred to as the “Iran Deal” is an → Agreement concluded between China, France, Russia, the United Kingdom, the United States and Germany on the one hand and Iran on the other hand. In the JCPOA, Iran has agreed to limit its nuclear program and to allow the International Atomic Energy Organization (IAEO) access to its nuclear facilities. In return, the EU and the US agreed to lift or, respectively, waive part of the → Embargos and → Sanctions that they had imposed on Iran before. The JCPOA was adopted by the United Nations Security Council in October 2015. After Iran had implemented the initial measures as required, the partial lifting/waiving of the embargo and sanctions measures by the EU and the US was implemented on January 16,

²⁰⁴ European Union/Germany.

2016 (the so-called → Implementation Day). If one party seriously violates its obligations under the JCPOA, the parties must enter into mandatory settlement and mediation talks. If a settlement cannot be reached within ca. 3 months' time, the embargo and sanctions measures of the EU and the US will be re-implemented. This mechanism is referred to as the → "Snapback".

Joint Defense Agreement A Joint Defense Agreement is an → Agreement whereby multiple parties with a common interest in actual or threatened litigation can communicate with one another and coordinate strategy. It allows parties and their lawyers to share work product and information, prepare a joint strategy, and share costs, without waiving the → Attorney-client Privilege and work product protection.

Joint Purchasing Joint Purchasing → Agreements usually aim at the creation of buying power which can lead to lower prices and better quality of products/services. However, they may also lead to a → Restriction of Competition on the purchasing or downstream selling markets if the parties to the agreement have market power. According to the → European Commission's practice, market power is unlikely, if the combined market shares of the parties to the agreement do not exceed 15% both on the relevant purchasing and selling markets. The → Horizontal Guidelines set out the principles for the assessment of Joint Purchasing Agreements under → Article 101 TFEU.

Joint Selling → Commercialisation Agreement

Judicial Commissioner (Commissario Giudiziale)²⁰⁵ An individual appointed by the judge as a precautionary measure (Articles 15 and 79 of the → Law 231), should the application of the restraining measures result in the interruption of the company's business that could damage the community or the employment. Within the powers and the duties indicated by the judge, the Commissioner takes care of the adoption and effective implementation of the → Compliance Program, and the continuation of business activities for a period equal to the duration of the → Disqualification that would have been applied. He is not permitted to perform acts of extraordinary administration without judicial authorization. Every three months, the Commissioner shall report to the Court on his activities. The

²⁰⁵ Italy.

profit resulting from the continuation of business transactions, as calculated in the final report, will be confiscated (→ Search and Seizure (under Law 231)). The expenses related to the activities and the remuneration of the Commissioner are charged to the Company Law 231).



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Kick-back Kick-back refers to the proportion of the money paid for commodity returned to the opposite entity or individuals by a → Business Operator by cash, physical objects or → Other Means → Off the Book Secretly. In practice, the term is often used for labeling payments or benefits in return to incompliant actions or offerings; but there are certain circumstances and situations where granting a kick-back might have a legal background and purpose – hence, a thorough investigation into an incident linked to a kick-back is recommendable.

KYC – Know your customer See → customer due diligence

Knowledge²⁰⁶ → Liability under the → FCPA's → Third Party payment provisions can arise from actual or constructive Knowledge, which includes conscious disregard and deliberate ignorance. For example, Knowledge can be established in circumstances where a company was aware of a high probability that a bribe was or would likely be paid.

²⁰⁶ United States.

Labor Contract Law²⁰⁷ → Employment Contract Law

Labor Dispatch²⁰⁸ An arrangement whereby a company indirectly hires staff/personnel through an employment service agency. Use of Labor Dispatch is restricted to certain types of job roles and Labor Dispatch personnel may only make up at most 10% of a company's total workforce. In practice, usually the host company is responsible for all → Employer obligations/→ Liabilities in relation to Labor Dispatch personnel (including termination-related liabilities) even though it is not the direct employer.

Lapse of Time As a legal term, "Lapse of Time" signifies the loss of the right to enforce rights or pursue claims after a certain period of time has expired. In civil law, for example, the Lapse of Time enables a debtor to escape the claim of his lender. In → Criminal Law, on the other hand, the Lapse of Time precludes the state from prosecuting or sentencing an alleged → Offender.

Laranja²⁰⁹ Although, Laranja also means orange in Portuguese, it is a word used to define a person who makes its identity (e. g., name, bank account, IDs) available for another person who uses such identity for wrongdoings and irregularities without exposing his/her real identity. A Laranja could be used, for instance, as a shareholder of a company to be used for unlawful purposes, so that the identity of the real owner is covered.

Last in (Drugs in) First Out A tainting theory holding that when criminal proceeds are received in a bank account, all subsequent spending from that account up to the amount of the criminal funds received will be considered as transferring proceeds of crime. Once this amount has left the ac-

²⁰⁷ China.

²⁰⁸ China.

²⁰⁹ Brazil.

count, the remaining balance is fully legitimate, and transactions with the account are no longer susceptible of → Money Laundering. In other words, the criminal proceeds can be imagined to be a layer of cream floating on top of the account, which cream is skimmed off through the subsequent transaction. This theory limits the time window for possible Money Laundering involving the bank account of such proceeds. For the prosecution, that tainting theory has the disadvantage of the time window for possible forfeiture of criminal proceeds being limited to a typically short time, leaving the prosecution thereafter with compensatory claims. In most jurisdictions, there is no clear-cut case of being in favor or against this tainting theory.

Last In (Drugs in) Last Out A tainting theory holding that upon receipt of criminal proceeds in a bank account, these proceeds must be imagined as sinking to the bottom of the account. The remaining account balance floats on top and is deemed to be used by all subsequent account spending, so long as the remaining funds in the account suffice for that purpose. In consequence, → Money Laundering transactions involving the bank account are only possible to the extent the remainder of funds does not suffice to cover the spending subsequent to the receipt of criminal proceeds. Like the → Last In (Drugs in) First Out tainting theory, the last in last out theory limits possible Money Laundering to spending in the amount of the criminal proceeds received, but defer the relevant time window to a virtually unknown point in time. That theory bears the → Advantage for the prosecution that forfeiture of criminal proceeds remains possible for a long time, and the advantage for all affected persons that tainting remains limited in scope. In most jurisdictions, there is no clear-cut case law against or in favor of this tainting theory.

Last Line of Defense → Three Lines of Defense

Law Abidingness Law Abidingness is a suitability criterion which needs to be fulfilled by an → Undertaking in order not to be excluded from → Public Tender procedures conducted by → Contracting Authorities (See Sec. 123, 124 GWB). Law Abidingness requires the general adherence to the laws, directives, ordinances, and other binding legal provisions such as binding labor → Agreements. Law Abidingness is an essential feature of the suitability criterion → Reliability.

Law Relating to Economic Offences Law Relating to Economic Offences is a generic expression which covers all offences set out in the law,