



Bundeskriminalamt

Compliance systems and their Effects on the Prosecution and Prevention of Economic and Corruption Crimes

Executive Summary

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1 Introduction

Crime in the context of economic activities is increasingly attracting the attention of politics, of the media and of society. Over the recent years, particularly the media coverage has contributed to an essentially more critical reflection on the issues of ethics and morality within the economy, which has led to a stronger social condemnation of criminal behaviour displayed by and directed against companies as well as to legislative action.¹

Such developments have meanwhile been reflected in the organisational structures of major German companies where so-called "compliance programs", "compliance guidelines" or "compliance departments" are increasingly created so as to meet ethical and legal requirements. Rather than resting solely with state organs, the task of preventing and prosecuting economic crime and corruption is increasingly fulfilled by the private sector.

The present summary depicts the results of an empirical study designed to examine the question in how far compliance systems have an effect on the fulfilment of duties arising for law enforcement authorities in cases of economic crime and corruption and on the communication between companies and law enforcement authorities.

This study sees compliance as a mechanism anchored in a company in order to guarantee adherence to restrictions and prohibitions imposed by laws and regulations as well as in-house do's and don'ts.² This broad definition results from the fact that there is no universally recognised or uniform definition of compliance in Germany.³ In terms of the crime phenomenon, the field of study is limited to economic crime in a broader sense and corruption. The study focuses on crimes that may cause damage not only to companies but also to the economic system or to the general public. This includes breach of trust, fraud, economic and industrial espionage, insider offences, product and trademark piracy, money laundering and corruption.

To be able to assess the influence of compliance systems on the work of law enforcement authorities in economic crime cases more accurately, the attitudes and experiences of staff representing companies and law enforcement/prosecution authorities were examined. As a result, a comprehensive while at the same time aggregate image of the subject matter has been created.

This report is a concise version of the project report and summarises the most important results and conclusions obtained from the empirical study.

¹ An example to be mentioned here is the German Corporate Governance Codex (DCGK).

² In the further course of this document the terms "compliance", "compliance system" and "compliance department" will be used interchangeably and within the meaning of the above definition.

³ Compare: Engelhart, Marc: Sanktionierung von Unternehmen und Compliance. Eine rechtsvergleichende Analyse des Straf- und Ordnungswidrigkeitsrechts in Deutschland und den USA. Duncker & Humblot. Berlin 2010: 41ff.

2 Methodology

Data were gathered by using collection instruments for quality and quantity. Based on a previously conducted feasibility study and an analysis of relevant literature as well as a group discussion with experts from the areas of business, law enforcement and academia, standardised questionnaires were developed for the examination of four groups (police, public prosecution service, companies with a compliance system, companies without a compliance system).

Personal and institutional data as well as judgments made by the actors on the following set of issues were recorded in detail:

- Changes perceived as a result of compliance
- Reporting behaviour
- Cooperation experience
- Measures aimed at promoting cooperation

In the police group examined 161 specialised units for economic crime and corruption were contacted. As a result, a total of **238 male and female police officers** took part in the survey.

To carry out the survey of **prosecution authorities** all German public prosecutor's offices (without branch offices), public prosecutor general's offices and the Federal Public Prosecutor General were contacted (144 emails sent). A total of **145 questionnaires** were received in response.⁴

A random sample of major German companies was taken from a database of German corporations to conduct the **survey of companies**. Companies with at least 500 staff employed in Germany were subject to this examination, which at the same time accounts for the definition of major companies within the meaning of this study. At the time the companies were selected the sample taken comprised 4,997 companies (figure 1).

Out of these 4,997 companies all those with more than 4,999 employees subject to statutory social insurance contributions were included so as to ensure that the sample was made up of a meaningful number of companies with a compliance system. Consequently, 467 companies were eligible for the complete survey. A random sample of 1,000 companies was taken from the other companies having between 500 and 4,999 employees.

A total of 1,467 mayor companies received the written request to pass the questionnaire to the person and/or department responsible for dealing with cases of economic crime and corruption (management board, internal investigations, compliance, risk management etc.).

⁴ The fact that the number of public prosecutor's offices contacted in writing (144) and the number of questionnaires returned (n = 145) are almost congruent, is owing to chance and does not indicate that the judicial authorities contacted returned one questionnaire each.

371 companies responded to the questionnaire. Consequently, the response rate is 25.3 per cent. Out of all 371 companies 65 per cent (n = 242) stated that they had a compliance system. The portion of companies without a compliance system was therefore 35 per cent (n = 129).

Figure 1: Selection of companies for the company survey

Following the collection of data in terms of quantity and the analysis of the data material, a group discussion with experts from the areas of law enforcement, business and academia was held in order to review the results obtained and to extend the scope of knowledge.⁵

⁵ The results presented below refer to both, findings obtained from the standardised questionnaire and from the analyses of the group discussions. To protect the anonymity of the expert respondents who participated in the workshops, only male expressions, such as "expert", will be used subsequently, even if the statement was made by a female expert.

3 Summary of the main results

3.1 Survey of the Police

Almost all the participating police officers were assigned to a **Specialised Economic Crime Unit and / or an Anti-Corruption Unit** when the survey was conducted. Forty-six per cent of those questioned had been dealing with these types of crime for more than 10 years - the average term of assignment to such a special unit is 9.4 years.

Half of those questioned received **further training in the area of economic crime and/or corruption** on more than five occasions. The majority (86 %) are (overall) satisfied with the quality of the further training. As regards the issue of compliance the majority (81 %) feels that **knowledge of and information on the issue of compliance** are advantageous for the fulfilment of police tasks. Dedicated further training opportunities are, however, known only to a few.

3.2 Survey of public prosecutor's offices

80 per cent of the participating public prosecutors were assigned to a **specialised department for economic crime and/or corruption** when the survey was carried out. As opposed to the results obtained from the police survey only 19 per cent have been dealing with this type of crime for more than 10 years. On average, they have been working for the specialised department for 5.4 years.

Half of those questioned has, to date, taken part in **further training in the area of economic crime and/or corruption** on two to five occasions. 28 per cent have not, or only once, taken part in further training conducted within the judiciary. This high percentage also has to do with the fact that the majority has not been assigned to their specialised department for a very long time. Of those who took part in further training at least once almost all (94 %) were (overall) satisfied with its quality. When compared to the police officers questioned, a smaller number of public prosecutors but more than half of them (65 %) state that **knowledge of and information on the issue of compliance** are advantageous for the fulfilment of prosecutorial tasks. Here again, dedicated further training opportunities are known only to a few.

3.3 Assessment of specialised units and departments

The **specialised knowledge** of staff in the home unit or in the home department was on average rated as *good* both by the members of police authorities and by those of public prosecutor's offices (police: 2.4; public prosecutors: 2.3). The targeted deployment of economic crime investigators or economic officers and specialisation of staff are regarded as key success factors by both groups examined.

The **staffing** of the unit and/or the specialised department is rated as *satisfactory* (police: 3.5; public prosecutors: 3.2). In this context the law enforcers/prosecutors questioned emphasise the increasing complexity of investigative proceedings as they are highly demanding in terms of manpower. Comments made by the public prosecutors questioned illustrate, however, that police authorities, in particular, are affected by understaffing.

The **speediness of investigations** is rated as *satisfactory* by both groups (police: 3.3; public prosecutors: 3.4). In this context, respondents who rated the availability of human and technical resources as comparatively poor also gave comparatively poor ratings to the speediness of investigations.

The **availability of technical resources** at units and/or specialised departments is also rated as *satisfactory* by both groups examined (police: 3.1; public prosecutors: 3.0). The ratings are not only confined to the technical resources of specialised units and departments, but also include the options available for analysing seized data storage media.

3.4 Survey of companies

Primarily **executive and/or managing staff** of mayor companies participated in the survey. More than half of them was assigned to Compliance when the survey was conducted.

Companies having between 1,001 and 4,999 staff account for 39 per cent, forming the biggest portion of those examined, and are therefore overrepresented as a result of the deliberately chosen selection criteria. Conclusion: **The higher the number of staff the higher the number of compliance systems**. 80 per cent of the companies with more than 5,000 staff have a compliance system.

Companies with a compliance system more frequently belong **to a foreign parent company** and are more frequently **listed on the stock market** (either including or excluding the US Stock Exchange) than companies without a compliance system. As regards **branch offices based abroad** companies with (64 %) and without (59 %) a compliance system are not significantly different from each other.

All lines of business are represented on the survey as participants. The existence of a compliance system is by and large **independent of the line of business**. As required by law, all companies in the insurance and financial sector have a compliance system.

3.4.1 Companies without a compliance system

Out of the 129 companies without a compliance system 36 per cent state that they are planning to implement a compliance system in the course of the subsequent months. Half of the companies (50 %) justify the non-implementation of a compliance system by claiming that their current structures fulfil all compliance requirements for which reason the (formal) introduction of such a system is redundant. 44 per cent of the companies hold on to the notion that the organisational effort is too much. Only 18 per cent clearly state that financial aspects play a role for this decision.

Trainings aimed to raise awareness and the development of a code of conduct are measures that have been taken or are currently being planned by the vast majority of the companies without a compliance system.

3.4.2 Companies with a compliance system

Most of the 242 companies that have a compliance system introduced their compliance system in the years 2008 and 2010. When the survey was held (October 2013 until January 2014) compliance systems had **been implemented for the duration of 5.4 years, on average**. The introduction of relevant rules, publicly discussed scandals and cases involving damage seem to have had a positive influence on the German development of compliance. (figure 2).

Figure 2: Year of introduction of the compliance system

A strong argument in favour of implementing compliance structures is the protection of the company against possible **liability risks**. Almost all companies view compliance structures as part of modern corporate governance . It can be seen that not only regulatory measures increase the pressure for introducing compliance systems but companies themselves pass on the pressure to other companies (partner companies in the chain of supply, competitors).

39 per cent of the companies including very big-size companies in particular (> 10,000 staff) have **independent and separate compliance divisions**. In most of the companies, however, compliance tasks are fulfilled together and/or in parallel to those of the **legal division**.

The **staffing** of the compliance areas varies considerably (0,25-150 staff). Most of the companies allocate a full post of employment to the compliance system. There is a tendency that the number of full posts in the area of compliance and the number of staff exclusively committed to the fulfilment of compliance tasks also increase with the size of the company. Regarding the question as to the **level of satisfaction with the staffing** of the compliance system there is a tendency towards middle ratings evident from what company members respond (35 % "undecided" responses). Only about half of the company members (55 %) are (fully) satisfied with the personnel resources of the compliance system.

For the companies questioned the compliance system has a **primarily preventive character**. In half of the companies, checks and investigations of suspicious cases are carried out by the compliance division. Approximately three quarters of the respondents (74 %) state that their compliance system is responsible for the prosecution of non-compliance cases. Only a few (34 %) of the compliance areas are entrusted with deciding on consequences in concrete cases of non-compliance.

3.5 The influence of a compliance system on the cooperation with public authorities

Question to be examined

- *Does the establishment of compliance systems impact on police work in terms of preventing and prosecuting crimes?*

Analyses reveal that the issue of compliance **primarily concerns internal company processes** and to a lesser extent external spheres of action. Consequently, the companies recognise in fact that employees at all levels within a company have become much more aware of the issues of economic crime and corruption than previously and that, in general, their specialised knowledge of how economic crime and corruption can be prevented and prosecuted has improved. The relevance of compliance systems to the internal affairs of a company prevails over the external effects.

From the point of view of the companies, the **cooperation with the authorities** has not changed essentially as a result of introducing their compliance system. Only a few state that the cooperation with police (15 %) and public prosecution services (10 %) has increased and/or become more intensive. A change in the cooperation with the law enforcement/prosecution authorities is more noticeable with regard to investigative proceedings: Approximately a quarter of the company workforce state that the investigative cooperation with police (25 %) and public prosecutors (22 %) has increased and/or become more intensive.

The influence of the compliance system impacts more on the **cooperation with external service providers**: From the point of view of most of the companies consulted the cooperation with external consultants has increased and/or become more intensive, especially with regard to prevention efforts. This becomes clear also when one looks at the experience gained in the cooperation with external service providers: Only 13 per cent of the companies with a compliance system have never cooperated with external consultants in the area of prevention. This figure is significantly higher, namely 42 per cent, in companies that don't have a compliance system. A **more professional approach of the companies** to preventing and fighting economic crime has become recognisable thanks to the influence of their compliance systems. Obviously, compliance systems of major German companies have a strong preventive orientation, and companies, as a rule, seek advice from external consulting firms.

But also for the purpose of **examining suspicious transaction reports** external advice is sought to a larger extent as a consequence of the establishment of compliance systems. In addition to gaining specialised knowledge, the involvement of such external services has the objective of warranting the transparency and the independence of any action taken and of making suspicious cases more concrete. This trend towards an independent examination of suspicions (internal investigations) is intensified through **US American regulations**. In the process of deciding on whether or not to indict a case and on fixing a penalty US exchange supervisory and sanctioning authorities consider investigative efforts self-initiated by the companies a mitigating circumstance. Consequently "it needs to be ascertained that state initiatives [taken by US sanctioning authorities; author's note] provide the primary justification for the conduct of internal investigations" ⁶.

These US American regulations inevitably have an influence on decision-making and actions also of internationally operating German companies in a case of non-compliance. However, the German law is significantly different from the US American set of regulations. The wording of the German provisions allows the conclusion that compliance is categorised first and foremost as an instrument of prevention, which is also reflected in the results of the study relating to the content orientation of the compliance systems. Concrete Instructions,

⁶ Reeb, Philipp: Internal Investigations. Neue Tendenzen privater Ermittlungen. Verlag Duncker & Humblot (Publisher). Berlin 2011: 24.

German law contains no provisions on how a company is obliged to or should handle a case of non-compliance and if and when the law enforcement/prosecution authorities have to be involved. The involvement of the law enforcement/prosecution authorities therefore remains at the discretion of the company management despite the fact that the cooperation with law enforcement/prosecution authorities is also recognised as a mitigating circumstance in Germany.⁷

As a consequence of these differences in the legal systems, the parties involved **have different expectations about the nature of cooperation** in a case arousing suspicion. While in the USA investigative action is expected of companies and will be regarded as a mitigating circumstance, German law enforcers/prosecutors frequently display a critical view as to the objectivity and court admissibility of investigative results supplied by companies (figure 3). When it comes to clearing up suspicious cases internally, a procedural "Anglo-Americanisation" can be observed with globally operating German companies. However, unlike the USA Germany does not have the legal foundations for the forms of cooperation between companies and law enforcement/prosecution authorities. Consequently, there is a clash of expectations with regard to cooperation, which leads to tensions and can make the cooperation between law enforcement/prosecution authorities and companies more difficult.

Companies that have a compliance system cooperate with law enforcement/ prosecution authorities much more frequently than companies without a compliance system. With regard to investigative cooperation, the number of companies with a compliance system that have a record of previous cooperation with police and/or prosecution services in the area of prosecuting economic crime is twice as large as that of companies without a compliance system. Analyses reveal that **companies with a compliance system are more experienced in cooperating** with police, public prosecution services and especially external service providers than companies without a compliance system - however, the cooperation with law enforcement/prosecution authorities is confined to concrete investigative proceedings. This is in line with the finding that companies with a compliance system which, as a rule, also have the biggest workforce have a much larger record of suspicious cases within their company and therefore automatically file more complaints than companies without a compliance system. As regards the prevention of economic crime and corruption almost all the companies have little or no experience in cooperating with law enforcement/prosecution authorities.

Responses from law enforcers and public prosecutors suggest that the effects of compliance systems are recognised only in isolated cases and then more frequently within the framework of investigative work. Within the police and prosecution groups examined there is an inconsistent perception as to the question whether or not the establishment of compliance systems has led to a stronger cooperation between companies and law enforcement/prosecution. The group of those who have observed stronger cooperation is as big as the groups that maintain the opposite position or appear to be undecided over this question.

⁷ Compare Reeb 2011: 25ff.

The differing perceptions of the groups of law enforcers and prosecutors underline the notion that contrary experiences have been gained. Besides personal prior knowledge of the subject of compliance, the area of jurisdiction where law enforcers/prosecutors operate and the extent to which there are contacts in practice with companies that have a compliance system certainly also play a role.

3.6 Law enforcement/prosecution authorities - cooperation experience

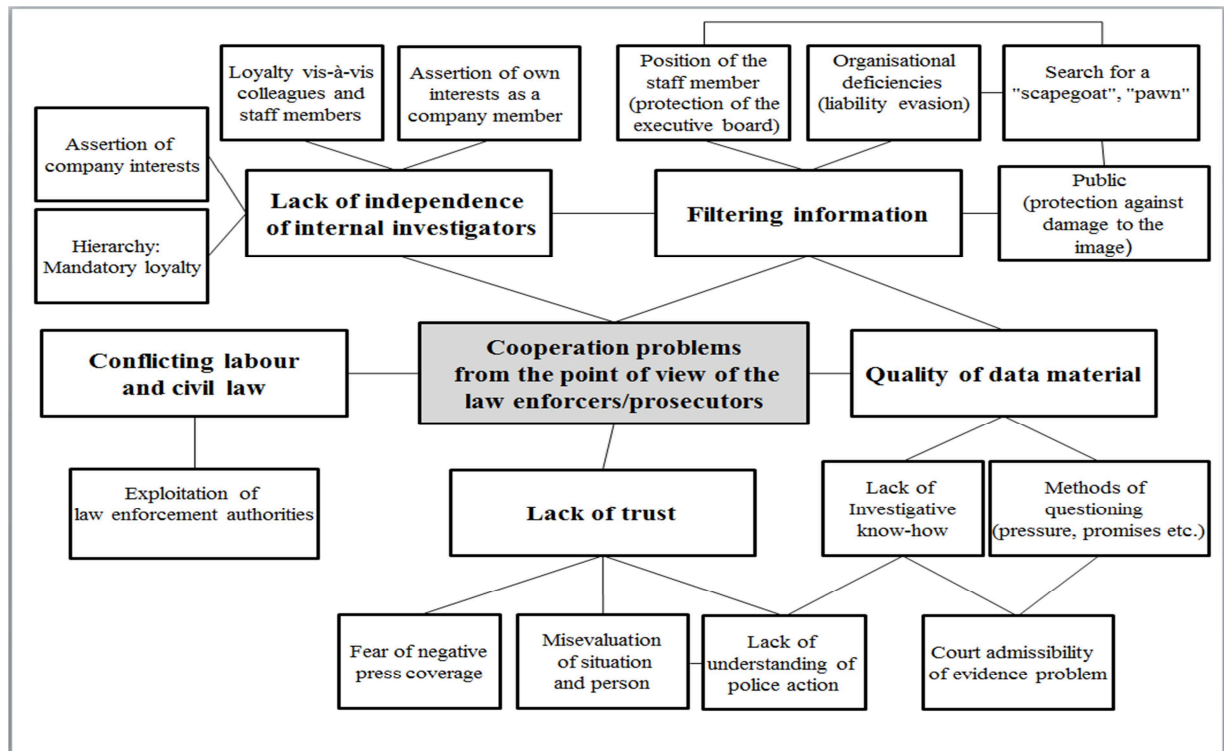
Question to be examined:

- *Where are the appropriate persons to be contacted in the companies (Compliance Division, Internal Revision, Legal Division)?*
- *Which problems do law enforcement/ prosecution authorities face when it comes to cooperating with companies?*
- *What are the opportunities and the risks resulting from provisional investigations conducted by compliance sections?*

Communication between the law enforcement/prosecution authorities and the company affected is frequently routed through a staff member acting as a gateway. In companies with a compliance system such a staff member is most frequently to be found in the company's legal and/or compliance division. In companies without a compliance system this task is most frequently performed by the management.

Three quarters of the police officers (75 %) and half the public prosecutors (52 %) have experience in **cooperating with internal investigators** in concrete criminal proceedings. Clearly more than half of these law enforcers/prosecutors regarded the cooperation with internal investigators as appropriate and satisfying so that in this respect **a positive overall image** has become visible. Nevertheless, a similar number of law enforcement/prosecution officers state that the nature and orientation of cooperation is influenced by instructions issued by the company management and therefore may take a different course depending on the given case. Correspondingly and from the point of view of the law enforcers, cooperation difficulties may vary in each case. The cooperation problems mentioned most frequently were summarised and their relation to each other was visualised (figure 3).

Figure 3: Cooperation problems from the point of view of the law enforcers/prosecutors



The **lack of independence of internal investigators** is frequently perceived as a problem by law enforcement/prosecution. As other previous studies have shown, the position and the status of internal experts within the company are decisive for the way in which a company responds to a case of suspected economic crime and corruption. Active and powerful internal experts succeed more frequently in having a complaint filed.⁸

Consequently, many law enforcers/ prosecutors give accounts of **information filtering** driven by interests, which gives rise to doubts about the validity of the data material supplied by the company concerned. Such selection activities can frequently be observed by law enforcers/ prosecutors when high-ranking company staff are under suspicion or when the company is believed to have a share in the guilt - as a result of having violated organisational obligations, for example.

As regards the **quality of the data material** law enforcement/prosecution authorities are faced with the additional obstacle of receiving information, internally collected in interviews for example, that is frequently unfit for court use as it does not meet the requirements applicable to interviews under the rule of law. On the one hand, this has to do with the fact that internal investigators initially collect the information for a different purpose and for a different end and that internal inquiries are precisely not

⁸ Compare: Ziegler, Diana: Wirtschaftskriminalität im Geschäftsleben. Eine empirische Untersuchung formeller und informeller Handlungsstrategien von Unternehmen am Beispiel Deutschlands. Nomos Verlag (Publishers). Baden Baden 2010: 195.

subject to the formal requirements of criminal procedural law. On the other hand, it may be owing to the fact that company staff lack the investigative know-how needed to understand how the data material needs to be prepared for the purpose of criminal prosecution.

Such lack of investigative knowledge often has the consequence that police and prosecutorial action are frequently not understandable (internal communication structures, securing of evidence, e.g.) so that law enforcement/prosecutorial action is "misinterpreted", which again makes communication and cooperation more difficult. Many law enforcers/prosecutors report that the companies have no **confidence** in the work of law enforcement/prosecution authorities. In this respect, it is primarily feared that sensitive information may be leaked to the press.

Another obstacle to cooperation is the problem of **conflicting legal provisions**. Measures taken under labour law may, for example, jeopardise the success of investigations conducted under penal law. Additionally police officers and public prosecutors increasingly become aware of the fact that criminal prosecution fulfils the sole purpose of vesting companies with the power to enforce any claims under civil law so that complaints are exclusively lodged to serve this aim.

3.7 Companies - Reporting behaviour and cooperation experience

Questions to be examined:

- *Does the establishment of compliance systems have an influence on the companies' willingness to file complaints?*
- *Which factors influence companies in their decision to file a complaint in cases of economic crime and corruption? What are the threshold criteria, if any? Are there catalogues of criteria?*
- *What are the problems to be faced by those responsible for compliance when it comes to cooperating with the law enforcement/prosecution authorities?*

When looking at the size of companies in terms of the number of employees, independent of the existence of a compliance system, it becomes obvious that the **number of suspicious cases increases with the company size** while the **average reporting rate** goes down.

Figure 4: Average reporting rate (in percent) in relation to company size

The larger a company the more likely is the existence of a compliance system, for which reason such companies report clearly more suspicious cases than companies without compliance structures. Companies with a compliance system are, on average, affected by **11.7 identified suspicious cases** and companies without a compliance system by an average of 1.8 cases. In addition, such companies may conduct stricter controls aimed at detecting cases of non-compliance. However, companies with a compliance system **show no stronger willingness to file complaints** than those without a compliance system. The **reporting rate is approximately 50 per cent in either case**. As a result of the clearly higher percentage of suspicious cases that come to notice at companies with a compliance system and at very large companies, they inevitably file complaints in more cases.

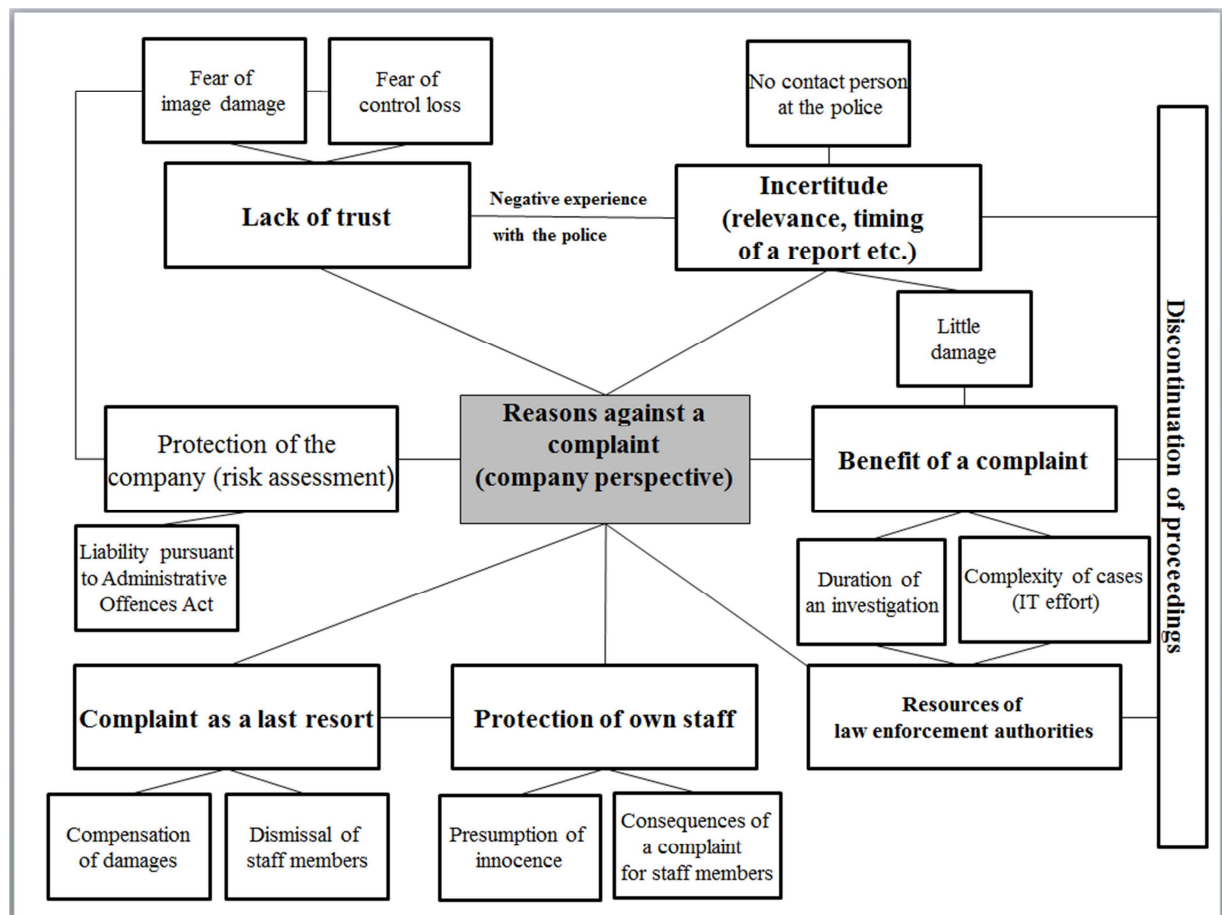
Catalogues clearly listing criteria in writing to provide guidance in deciding if a case needs to be reported to the law enforcement/prosecution authorities are available only in a few companies (n = 16). From the perspective of the companies, the **decision to file a complaint** is primarily taken on a case by case basis and independent of the field of crime. A large amount of loss incurred and the expected prosecution of the suspect/s with the assistance of the state's investigative powers encourage companies to decide in favour of filing complaints. However, a **compensation for damages incurred** and a **cooperating perpetrator** have the effect of the company's refraining from filing a criminal complaint.

However, the law enforcement/ prosecution authorities believe that there are clearly more factors that prevent companies from filing a complaint. Among the reasons given are, for example, a high-ranking position held and a long period of employment at the company, a likely damage to the image and a legal self-inculpation of the company. According to information obtained from the majority of the companies these factors

are irrelevant to the decision. The findings reveal that the different groups examined have different opinions about the reporting behaviour.

An analysis of the free-text information obtained from the companies has shown the essential reasons to justify **withholding a complaint** from the point of view of the companies. This also describes the problems that exist in the cooperation with the law enforcement/prosecution authorities from the point of view of the companies (figure 5).

Figure 5: Reasons against filing a complaint from the point of view of the companies



Companies frequently do not see any benefit in filing a criminal complaint. When proceedings have been discontinued this experience is particularly conducive to abstaining from reporting suspicious cases. A further reason given by companies is that the **resources available to law enforcement authorities** are insufficient for effectively clearing up the circumstances of economic crime investigations that are frequently quite laborious.

Many companies also express their **incertitude** as to assessing the penal relevance of individual circumstances and deciding on the "right" moment for reporting a suspicious case so that in this respect many external service providers are consulted. This is also due to the fact that frequently **no contact persons at law enforcement/prosecution authorities** are known to the companies.

Companies do not only select on grounds of discretion, but are frequently not sure if a given case is relevant to law enforcement/prosecution authorities. Below please find explanations by the head of a compliance division why it is difficult to consequently report cases that have become known within a company:

*"I do not know if you are happy with the [...] cases. You really wouldn't want to see them. You'd like to see those [...] that are interesting. But I can tell you, in many of these cases you won't see clearly as they are very specific to the company. [...] Violation of rules, coming down to fraud in the final analysis, but there's hardly a German criminal investigator able to clear them up, [...]. But these cases again include 50 percent that turn out to be unsubstantiated [...] following an internal analysis. [...]. If you want us to file complaints you must tell us at which stage you want to have the cases, and which cases you want to have, and, above all, what makes sense to you? Do you want to have only German cases or is it of interest to you if a German staff member has gotten up to something in China? Lots and lots of questions. And therefore, [...] requesting companies to file as many complaints as possible, let me put it provocatively, is something you should think about very carefully."*⁹

In this respect, both quantity and quality of the cases identified in a company are regarded as problematic. Besides the uncertainty arising from the question as to when and in which condition a suspicious case should be handed over to the law enforcement/ prosecution authorities, there are also qualms about the reaction of the law enforcement/prosecution authorities, as the subsequent description of a company representative reveals:

*"I think it is important [...] to create transparency [...] so as to facilitate a higher level of consistency. What are the reactions of the law enforcement/prosecution organs, how does a public prosecutor's office react, how does the criminal police react? On the one hand, we once experienced a hundred gunmen combing residential dwellings and, on the other hand, a truly coordinated investigation conducted as a joint effort to clear up the circumstances of the case. We have experienced the full gamut."*¹⁰

Negative cooperation experiences gained by the companies result in a **loss of trust**, which fuels the companies' fear about the uncontrollability of the situation and possible damage to the image. In such a case the **risk assessment** will result in avoiding the filing of a criminal complaint. Here, the protection of the company is paramount and the criminal complaint is regarded as the **ultima ratio**.

The **protection of the staff member/-s** may be a further consideration to refrain from filing a criminal complaint. In consideration of the presumption of innocence and of possible personal consequences for the staff member/-s concerned in the event of a criminal complaint, again at this level the ultima ratio principle is applied.

⁹ Group discussion I: Verbatim account of expert 3 (company perspective).

¹⁰ Group discussion I: Verbatim account of expert 4 (company perspective).

However, penal law mechanisms of imposing sanctions are also used to **exert pressure** in the sense of a negative general prevention effort.¹¹

This is also owing to the fact that there are sufficient options for alternative and effective responses rendering interventions of law enforcement/prosecution authorities obsolete:

*"Rather than giving priority to clearing up crimes, most of the companies are concerned with getting rid of disloyal staff members should this be required [...]. They are also interested and, in case of doubt, they are obligated to enforce any title for damages. And then it is to some extent a very simple calculation to say we reserve the right to file a complaint [...] as a last resort. And this may be the bargaining chip we can include in our discussion and say that we will now go separate ways either by the end of the month or immediately. We want to have our money back and to ensure that you have at least some perspective and won't have to leave as an all-out loser we will refrain from filing a criminal complaint. This is, as one has to admit quite clearly, part of the legal reality in Germany"*¹²

The reasons against lodging a criminal complaint may be countered **by only a few reasons in favour of lodging a complaint**. Considerable damage and the expectation that the suspect/s will be brought to justice with the assistance of the state's investigative competence are factors of relevance conducive to filing a complaint from the companies' perspective. However, decision-making is primarily focused on the **monetary benefit of a criminal complaint**. Suspicious cases of relevance are selected independently by the companies.

Besides the cost-benefit consideration, it is of relevance to reporting economic crime and corruption if and what kind of control mechanisms are available within a company. In terms of quantity, the number of suspicious cases detectable within a company can be increased by raising investments in and making stronger use of **control mechanisms**. This is described as follows by an expert of the compliance area:

*"Informants use our informer systems, useable also anonymously through an ombudsman, via an electronic communication system [...]. And thanks to the number of incoming cases we are able to share something with the authorities on a much larger scale in terms of quantity. And I don't think that similar numbers of comparable cases were brought to the attention of the authorities earlier."*¹³

Police data are also indicative of such an increase. Consequently, the 2011 Situation Report Corruption stresses for the first time that the increase of corporate sector corruption cases recorded by police is believed to be due to heightened awareness among companies as a result of an increase in the number of compliance systems operated.

¹¹ Comp. KPMG AG Wirtschaftsprüfungsgesellschaft: Compliance Benchmark Studie 2011. Aktuelle Trends der Organisation und Ausgestaltung von Compliance Management Systemen bei deutschen DAX30plus-Unternehmen. 2011: 26.

¹² Group Discussion I: Verbatim account of expert 10 (academia perspective).

¹³ Group discussion I: Verbatim account of expert 3 (company perspective).

¹⁴ Internally provided leads are regarded as essential sources for uncovering economic crime and corruption.¹⁵

In this context companies particularly emphasise the **benefit of electronic informer systems**. The fear that unsubstantiated information would primarily be received or that the system might be abused by denunciators has not found fulfilment in reality from the experience gained by the private sector experts that were interviewed for the purpose of this study. Faulty information would be identified quickly and sorted out accordingly. The benefit of such an informer system would, on the whole, outweigh the corresponding effort.¹⁶ If such informer systems became more widespread this could be a contribution to uncovering further crimes. As compliance systems become more widespread German companies increasingly consider the idea of introducing an informer system, and the political requirement of improving the protection of whistle-blowers will further fuel this development.¹⁷ Companies that have established such systems can act as advisers to interested companies and, besides sharing experience gained, they can provide an estimation as to the resulting costs. This development can be promoted also by law enforcement authorities if they advocate informer systems vis-à-vis the public and act as role models for the corporate sector by introducing such informer systems in law enforcement and prosecution agencies as well. With a small number of exceptions, including Lower Saxony, Brandenburg and Baden-Württemberg and recently also Berlin, most of the Federal States refrain from using an Internet-based informer system. Negative examples in dealing with internal informants within major corporations (influence exerted by superiors, outplacement) illustrate the need for external anonymous reporting systems to be made available to employees.¹⁸ Some Federal States have a critical opinion as to the operation of electronic informer systems by police since electronic communication makes it almost impossible to gain a personal impression of the informer.¹⁹ Experience gained by police authorities until today confirms, however, that an increasing number of leads is provided to police and, in Lower Saxony alone, an average number of 93 corruption and / or economic crime cases is newly initiated every year so that the number of cases has increased.²⁰ To facilitate a better assessment of any negative consequences (no added value, extra effort, misuse) of an extended or even area-wide roll-out of electronic informer systems it would be advisable to make a dedicated evaluation of the systems' efficiency.

¹⁴ Compare: Bundeskriminalamt (ed.): National Situation Report on Corruption 2011. Wiesbaden 2012 20.

¹⁵ Comp. KPMG AG Wirtschaftsprüfungsgesellschaft: Analyse des aktuellen Stands der Ausgestaltung von Compliance Management-Systemen in deutschen Unternehmen. 2013: 16; Bundeskriminalamt (ed.): National Situation Report on Corruption 2012. Wiesbaden 2013: 12.

¹⁶ Group discussionII: Indirect quotation of the experts 3 and 5 (company perspective).

¹⁷ Comp. Motion of the Coalition SPD „Wirtschaftskriminalität effektiv bekämpfen“ (17/13087).

Available at: <http://dip21.bundestag.de/dip21/btd/17/130/1713087.pdf> (as of 27/06/2013).

¹⁸ Comp. press article „Regime der Angst“ by Martin Hesse and Marcel Rosenbach in DER SPIEGEL 4/2015. Available at: https://magazin.spiegel.de/digital/?utm_source=spon&utm_campaign=inhaltsverzeichnis#SP/2015/4/131355102 (as of 19/01/2015).

¹⁹ Group discussionII: Indirect quotation of expert 14 (police perspective).

²⁰ Comp. Dubs, Stefan: Whistleblowing zur Entdeckung schwerer Kriminalität? Einsatz internetbasierter Hinweisgebersysteme zwecks Gewinnung von Ermittlungsansätzen. in: Kriminalistik, 6/2014: 406f.

To ensure that such measures will not remain ineffective and be made available to the general public, there is also a need for investments in appropriate public relations work.

3.8 Cooperation expectations of both sides

Question to be examined:

- *What do both sides expect from each other to ensure a promising cooperation?*
- *In how far can the respective expectations be brought in line with each other?*
- *What would be concrete improvements of such cooperation?*

The **wish for closer cooperation** between law enforcement/prosecution authorities and companies, independent of specific penal proceedings, is stronger among the police and companies with compliance systems than among companies without compliance systems and public prosecutor's offices. More than one third of the public prosecutors are expressly opposed to a generally closer collaboration with companies as there is no legal basis for the public prosecution service to take preventive action.

Both sides take the view that transparent and cooperative action, open and regular communication as well as confidentiality and dependability with regard to agreements are the foundation for successful cooperation in investigative proceedings. In addition, the law enforcement/ prosecution authorities highlight the importance of an early complaint or contact to be made and the joint review and analysis of documents relevant to proceedings. Companies, on the other hand, wish that data from within a company be handled with sensitivity. They consider it imperative that their law enforcement/prosecution contacts have a sound knowledge of macro and micro economics. In addition to professional expertise, the law enforcement/prosecuting officers' experience in handling major investigations is regarded as key to successful cooperation as competent and experienced officers are frequently more open to a cooperation with companies.²¹

²¹ Group discussion I: Indirect quotation of expert 4 (company perspective).

3.9 Measures aimed at promoting cooperation

Preventive efforts, such as building joint networks, holding joint conferences/ workshops and issuing newsletters for the companies meet with approval rates of less than 50 per cent among law enforcers/prosecutors whereas the approval rates given to such activities by companies are higher and regarded as appropriate and target-oriented to a larger extent.

All interviewees are in agreement that the appointment of **permanent contact persons** to be made available to companies by police and/or public prosecution service is the most efficient measure to promote cooperation. A contact person readily identifiable on the homepage of a company is also regarded as helpful by the prosecutors. In summary, it becomes evident that measures aimed at facilitating a direct exchange at a personal level are regarded as most sensible by both sides.

3.9.1 Appointment of permanent contact persons

Most of the companies that participated in this study neither know contact persons at the police, nor at the public prosecutor's office. The results reveal that **companies with a compliance system** (38 %) are more likely to **know contact persons at public prosecutor's offices** than companies without a compliance system (13 %). The reason lies in the fact, inter alia, that external consultants contracted by the companies frequently have the corresponding contacts. Occasionally, however, those employed in the compliance sector are found to actively approach the competent public prosecutors independent of any investigative proceedings.²² Moreover, experience gained from existing networking activities indicate that the contacts with law enforcement/ prosecution authorities are also used for exchanging the details of an incident and for obtaining assessments from the law enforcement/prosecution authorities. Such communication platforms are available to a limited number of companies only.²³ The appointment of specialised contact persons at law enforcement/prosecution authorities could be conducive to reaching out to a larger group of companies. This could create structures providing companies with the opportunity of discussing the details of an incident in theoretical terms so as to obtain an assessment of the penal relevance and useful information on how to proceed in a given suspicious case. The success of such interaction is primarily dependent on the acting persons so that companies have gained very diverse experience in the communication with law enforcement/prosecution authorities.²⁴ The appointment of contact persons provides an opportunity to establish structures for reliable communication and would therefore contribute to the understanding of actions and expectations on both sides so as to build mutual trust and minimise any anxieties as to a loss of control.²⁵

²² Group discussion II: Indirect quotation of expert 16 (public prosecutors' perspective).

²³ Group discussion II: Indirect quotation of expert 2 (academia's perspective).

²⁴ Group discussion II: Indirect quotation of expert 12 (company perspective).

The possibility of presenting a case in general terms could reduce company inhibitions of filing a complaint, especially for companies without a compliance structure or for small-scale and medium-sized businesses.

3.9.2 Preventing economic crime and corruption

The wish for closer cooperation, independent of specific penal proceedings, is stronger among the police and companies with compliance systems than among companies without compliance systems and public prosecutors. Based on the legal task assigned, the public prosecution service largely denies a responsibility for preventive efforts and is very critical about a cooperation with companies as this bears the risk of jeopardising the principle of impartiality.

Companies with a compliance system present themselves as **more open in their willingness to cooperate** with law enforcement/prosecution authorities and attach greater importance to a positive cooperation with the law enforcement/prosecution authorities in respect of their future policy on filing complaints. For the law enforcement authorities such forms of close cooperation open up the opportunity of taking efficient **preventive action**. Efforts aimed at preventing economic crime and corruption are largely covered by the compliance activities of the companies themselves. It appears, however, that companies have a strong demand for external expertise, advice and support in the area of prevention. This could be a broad field of activity for police work, especially if the corresponding action were not confined to large-scale companies, as a police officer explains below:

*"Prevention clearly remains a politically fixed mission of the police. [...] to be honest one has to raise the question if everything possible actually gets done. And here I'm not referring to the prevention efforts made in cooperation with major companies. [...] Here we can provide maximum support. However, this is only possible if people know each other, if contact was made previously and if you know who you are dealing with. [...] And this is already the first step, also in the area of prevention work. If one knows who the contact persons are etc. [...] But I am firmly convinced that more needs to be done in this respect. Particularly with regard to small-scale businesses. Those that simply cannot allow themselves or afford to contract a management consulting company or an external law firm. And we need to ask ourselves if we really have an offer for them? If we succeed in convincing them that we want to commit ourselves to a long-term commitment in the fight against corruption we need to give them the corresponding instruments, the corresponding instructions on how to cooperate with us. And here I believe we have an awful lot of catching up to do."*²⁶

What has turned out to be problematic in respect of preventive efforts is the ignorance of best practise models and possibly their reduced general applicability as a result of individual company needs and profiles. Through forms of cooperation such as establishing local networks the above problems can be taken into account.

²⁵ Group discussion II: Indirect quotation of expert 15 (academia's perspective).

²⁶ Group discussion II: Verbatim quotation of expert 13 (police perspective).

Local networks have the advantage of providing different parties with a platform for getting to know each other and for reducing fears of contact and reservations. Moreover, companies will be given the opportunity to involve law enforcement /prosecution authorities in prevention projects and to jointly develop and implement measures.²⁷ Individual exchange facilitates the discussion and expression of cooperation expectations on both sides, independent of any concrete incident involving damage. Nevertheless, successful communication also requires a clear and realistic notification of the other party when the **limits of cooperation** have been reached in consideration of own interests and legal obligations. Consequently, such communication structures could also be exploited to outline the possibilities and limitations of successful cooperation in investigative proceedings on the basis of case examples.²⁸

3.10 Legal framework

Question to be examined:

- *Are there any legal obstacles that would impede cooperation?*

Most of the law enforcers/prosecutors do not see **any legal obstacles** that would impede communication with companies outside a criminal investigation. A small number of statements make reference to the principle of mandatory prosecution and to data protection provisions perceived as being too restrictive.

Most of the legal shortcomings mentioned by law enforcers/prosecutors have to do with repression. In this respect the following aspects are repeatedly described as inimical to the practise of law enforcement: the imprecise definition and legal classification of the phenomena of corruption and breach of trust, the absence of corporate penal law, elements of the right of refusal to give evidence as granted to security cleared officers, a lack of powers to use covert measures, shortcomings in confiscating assets, investigative delays caused by banking and tax secrecy rules, strangling data protection provisions, the absence of a data retention system as well as conflicting spheres of prosecutorial responsibility caused by the federal structure of Germany. At the international level, the aforementioned crime control problems are primarily connected to mutual legal assistance in criminal matters. In this respect, the duration and complexity of the modalities for making requests plus the poor quality of responses received from some countries are considered to be obstacles to criminal prosecution.

Many of the problems and legal obstacles mentioned here in the context of fighting economic crime and corruption are neither new or unknown nor are they limited exclusively to this phenomenon.

²⁷ Group discussion II: Indirect quotation of expert 13 (police perspective).

²⁸ Group discussion II: Indirect quotation of expert 13 (police perspective).

Given the complexity of the individual legal issues, the above problems can only be addressed by intensively dealing with the individual aspects and by outlining the possibilities of their legal reformation (taking the form of special studies, expert opinions, for example).

In this context, the controversial discussion about **introducing a corporate penal law** and the corresponding responsibility of companies under penal law is worth mentioning. The bill for a German corporate penal law contains for the first time clear incentives for the introduction of compliance structures.²⁹³⁰ This would also be in line with the companies' demand to clarify the role of compliance in investigative proceedings. If the legislator placed more emphasis on compliance this would also enhance the status of compliance systems within companies and thereby the position of the compliance commissioner/-s. With this, the legislator would encourage companies to make a stronger investment into prevention and control mechanisms. This would also provide a clear legal framework for legal practice as the principle of discretionary prosecution (§ 47 Administrative Offences Act) would be replaced by the principle of mandatory prosecution (§ 14 Corporate Penal Law - Draft). The figures that have so far been derived from legal practise reveal that fines are hardly ever imposed although the requirements laid down in § 130 of the Administrative Offences Act are fulfilled.³¹ This also underlines the fact that the issue of compliance has hardly been considered in legal practice and that there is a "lack of implementation"³².

26 % percent of the public prosecutors questioned answered "don't know" in response to the question if knowledge and information on the subject of compliance would be advantageous for the fulfilment of judicial tasks. The fact that many respondents could not or would not take a clear stand in this respect can possibly be justified with the legislator's refusal vis-à-vis the majority of the companies to demand compliance structures for the fulfilment of organisational duties.³³ Investments in prosecutor trainings on how to apply the Administrative Offences Act plus introducing a catalogue of tougher fines and penalties might also provide a suitable framework for according more weight to the issue of compliance and consequently to the prevention of economic crime and corruption.³⁴

²⁹ Comp. § 5 Corporate Penal Law-Draft. Motion of the federal Land of North Rhine-Westphalia: Draft for a law introducing the penal responsibility of companies and other associations. 2013: 9. Available at: https://www.justiz.nrw.de/JM/justizpolitik/jumiko/beschluesse/2013/herbstkonferenz13/zw3/TOP_II_5_Gesetzentwurf.pdf (as of 10/12/2014)

³⁰ According to the amendment of § 299 GE Penal Code provided for in the desk officers' draft on corruption suppression of June 2014 violations of duties to be fulfilled vis-à-vis the companies (non-compliance) would also be covered by penal law. Comp. desk officers' draft of the Federal Ministry of Justice and Consumer Protection (BMJV) Draft of a law on corruption suppression. 2014: 22. Available at: http://www.bmjbv.de/SharedDocs/Downloads/DE/pdfs/Gesetze/RefE_KorrBekG.pdf?__blob=publicationFile (as of 22/12/2014); comp. Kneise, Julia: Still und heimlich, (secretly and stealthily) the latest BMJVdesk officers' draft on corruption suppression, core aspects and consequences. In: Neue Kriminalpolitik, 04/2014: 324pp.

³¹ Comp.: Legislative proposal of the federal Land of Nordrhein-Westfalen 2013: 23.

³² Group discussion II: Verbatim quotation of expert 13 (police perspective).

³³ Comp. Engelhart 2010: 511f.

³⁴ Group discussion II: Indirect quotation of expert 16 (prosecutors' perspective).

The establishment of a reliable database on the enforcement of administrative fine proceedings in the event of a company's failure to discharge the duty of supervision could additionally provide insights into the application of the Administrative Offences Act and the development of offences in companies.³⁵

Also in this context, it needs to be borne in mind that law enforcement/prosecution authorities only learn about a portion of the total number of cases that have come to notice in a company. The introduction of a corporate penal law and the resulting change-over to the principle of mandatory prosecution might have the consequence that companies bring a decreasing number of suspicious cases to the attention of law enforcement/prosecution authorities out of fear that they cannot comply with all organisational duties and/or that their prevention and control regimes are regarded as insufficient.³⁶ A model compliance system or a template of requirements as to how the organisational duties should be fulfilled cannot be provided as each company has an individual profile. Consequently, the legislator should, however, be able to specify how a compliance system needs to be laid out for a company to avoid being fined.³⁷ Minimum standards, for example, could be defined for the layout of compliance systems.

As earlier studies have shown the present one also reveals that most of the companies with more than 5 000 staff do have a compliance system. Irrespective of the legal rules applicable to the financial sector and the existing liability risks in cases of non-compliance, the widespread distribution in this business sector indicates that compliance helps keep up competitiveness and is implemented as a result of pressure from other companies. At the national level, major companies transfer this pressure unavoidably to suppliers and subcontractors and with this also on medium-sized businesses.³⁸ At the same time, the findings indicate that **there is still potential for an even greater distribution**: In this study, approximately one third of the companies without a compliance system claim that they are in the planning phase of implementing a compliance system. Even if this development is welcome, in principle, it inevitably bears the danger that the readiness to introduce compliance voluntarily is limited by the conflicting interrelations and by taking the availability of such a system for granted.³⁹ If compliance is introduced "by coercion" this may be at the expense of the efficiency and usefulness of such self-regulating measures. Rather than asking if a compliance system is in place, the questions to be raised in the future are as follows: How is such a system integrated into the organisation and how has it been laid out, what are the compliance instruments available and can they be applied efficiently?

³⁵ Comp. Engelhart 2010: 486pp.

³⁶ group discussion I: Indirect quotation of expert 4 (academia's perspective).

³⁷ Group discussion II: Indirect quotation of expert 12 (company perspective).

³⁸ Group discussion II: Indirect quotation of expert 9 (academia's perspective).

³⁹ Comp. Summary paper and presentation of Dr. Heiko Willems (BDI) on the subject „Aktuelle Compliance-Entwicklung in Deutschland: Zwischen Selbstregulierung und Unternehmensstrafrecht“ at the 2nd Viadrina Compliance Congress in Frankfurt (Oder) on 25.03.2014.

An assessment of the efficiency of measures to be made from an external position is very difficult.⁴⁰ Here a balance would have to be sought between standardisation models facilitating external control and the necessary flexibility. To date, a company decides at its own discretion in each suspicious case if the compliance measures taken are in keeping with the legal requirements. It is to be feared that a corporate penal law will reduce the willingness to file complaints, as the subsequent explanation of an expert from the company sector indicates:

*"And if, what is correct of course, the law enforcement/prosecution authorities say, well, very interesting to learn about your corruption case; now let's check if in this context you as managers have fulfilled your organisational duties, then this will no doubt impact on the readiness of all those involved to file complaints, especially if one arrives at the conclusion that we have identified a gap that we will now close."*⁴¹

In this respect, it needs to be borne in mind that an increasing number of companies establish their own investigation departments, and more professionalism is expected to be found in the area of internal investigations. For companies this may have the consequence that there will be a lesser need to involve law enforcement/prosecution authorities.⁴² In parallel and to counter this effect, efforts should be taken to reduce any communication reservations between law enforcement/prosecution and companies, increase the risk of detecting crimes and eliminate legal obstacles to prosecuting economic crime and corruption.

⁴⁰ Group discussion II: Indirect quotation of expert 4 (academia's perspective).

⁴¹ Group discussion I: Verbatim quotation of expert 10 (company perspective).

⁴² Group discussion II: Indirect quotation of expert 4 (academia's perspective).

4 Recommendations for action

- Appoint permanent and specialised contact persons (establish contact points) on the law enforcement/prosecution side (especially at police) and companies
 - Publish and distribute contact data (by optimising search engines and ranking, to be featured on the corresponding homepage)
 - Intensify public relations including associations and chambers, to increase the popularity of contact persons/points and reach out to small and medium-sized businesses (give presentations at companies and agencies, special conferences etc.)
- Create a central website operated by security agencies for companies
 - Pool information on local contact persons, reporting systems, jurisdictions of agencies, prevention offers (e.g.: "SICHERES UNTERNEHMEN" (secure company) issued by the Land Criminal Police Office of Saxony⁴³), announce conferences, issue warning notices etc.
- Establish local networks
 - Create a platform for facilitating interaction between companies and police over options for cooperating in the area of prevention work
 - Develop and publish best practice models for successful cooperation in the area of prevention and investigative proceedings (role of compliance, define chances and limits of cooperation, define successful communication structures, such as jours fixes etc.)
- Organise basic and advanced training, conferences
 - Cooperate with universities acting as mediator for updates on current scientific knowledge and research
 - Cooperate with associations and chambers acting as mouthpiece for companies
 - Conduct case studies and analyses (e.g. positive and negative examples of cooperation, identification of success factors)
 - Describe the role and perception of compliance from different perspectives (academia, private sector, prosecution)
 - Explain legal chances and limits of cooperation
 - Discuss current phenomenological, legal and international developments
- Enhance procedural efficiency by increasing the level of professionalism of staff at police and public prosecution services and optimise the procedural management of economic crime cases
 - Use external advanced training offers and targeted training on compliance-relevant issues more intensively (such as options for applying the Administrative Offences Act, internal investigations)

⁴³ In this connection please see: <https://www.polizei.sachsen.de/de/24175.htm> (as of 09/07/2015)

- Promote in-service studies accompanied by corresponding promotion perspectives
- Promote careers in a targeted manner and encourage an extended dwell time in a specialised unit or department (especially at the public prosecutor's office)
- Enhance coordination with regard to the allocation of personnel resources at public prosecutor's offices and specialised police units
- Roll out electronic informer systems at both police and companies (enhance control measures)
 - Evaluate control measures while being applied
 - Invest into public relations to enhance the popularity of informer systems (optimise search engines and ranking, position on the corresponding homepage, give presentations within companies)
 - Improve the legal basis for the protection of whistle-blowers
- Create a database for reporting suspicious cases
 - Create voluntary and anonymous reporting channels for companies and suspicious cases coming to pass in companies
 - Gain new insights into new modi operandi distribution of suspicious cases, reporting behaviour etc.
 - Analyse anonymised data on a regular basis
- Interview victims of economic crime and/or corruption regularly within the scope of police research (trend survey)
 - Consider questions of relevance to security at authorities with a special focus on phenomena
 - Assure quality through a dedicated plan of methods, transparency as to the application of methods and a sharper definition of terms used on a regular basis (such as damage, for example)
 - Measure victim rates, complaint rates, sizes of losses etc.
- Review the need of reforming individual legal conditions for prosecuting economic crime and corruption (such as defining and legally categorising the phenomena of corruption and breach of trust in more concrete terms, open up possibilities for covert measures, corporate penal law)
 - Where compliance systems lead to exoneration and/or the reduction of fines it should be defined more precisely what is meant by an "effective" compliance system and inherent measures of prevention and control
 - Within the scope of revising international legal assistance and asset confiscation, expert knowledge should be applied to examine the question if special aspects need to be considered in the area of economic crime and corruption