Holistic compliance: a more effective and efficient solution

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As the world of business becomes more global and complex, there has been an explosion in the number and importance of ‘compliance areas’ that senior management and legal and compliance departments must take into account.

Risks are multiplying across subject areas (e.g., data, tax, Human Rights) - as are the geographies in which those areas of law are being actively enforced. The stance of regulators is changing in terms of their expectations around how companies manage their risk and the level of the penalties they impose where breaches occur (billions are now replacing millions).

Corporates looking to secure elusive growth, particularly in emerging markets, face a range of corporate compliance challenges throughout their supply chain.

An illustration of the trend towards more joined-up enforcement across a range of compliance areas is the recent vote by German lawmakers to introduce a national electronic register of companies that can be excluded from public procurement projects because they have committed economic or other serious offences, including those relating to antitrust, bribery, money laundering and tax evasion.

German law already provides for those companies to be excluded but the register enables contracting authorities to check, with a single electronic query, whether a company has committed relevant legal infringements anywhere in the country. In fact, for contracts above €30,000, authorities are obliged to check before awarding the contract.

This development reflects a worldwide trend of more joined-up enforcement. Recent high profile examples include banks being fined by antitrust agencies and financial services regulators in relation to the manipulation of benchmarks. Players in the gig economy and tech sector have attracted the attention of enforcers in relation to tax, data protection, employment and antitrust issues. Most high profile antitrust cases (whether relating to mergers or market dominance) now seem to raise issues relating to the complex interface between antitrust and data.

The link between antitrust and corruption investigations is perhaps the most obvious – probably because bid-rigging can involve ‘horizontal’ collusion between suppliers with corrupt ‘vertical’ payments being made to a procurement official (and sometimes between those companies too). The trend plays out across the world:

• The US has had a number of high profile cases. In 2011, Bridgestone pled guilty to one count of conspiracy to antitrust and bribery charges and was sentenced to pay a fine of $28 million. The corrupt payments were discovered by the company during the course of an internal investigation triggered by the announcement of antitrust investigations by the DOJ, European Commission, and Japan Fair Trade Commission.

• Brazil’s sprawling investigation into corruption and bid rigging in its construction industry was partly fuelled by a series of related leniency applications filed by companies allegedly involved in the scheme. The investigations reflect the combined efforts of myriad institutions, including the Federal Prosecutors’ Office, CADE, the Ministry of Transparency, Brazilian Federal Audit Office, and the Federal Police.

• German antitrust officials recently searched the premises of steel companies in connection with potential bid-rigging in construction tenders. The public prosecutor is also investigating the issue which may also involve corruption.1

1 https://app.parr-global.com/intelligence/view/1502062
Spain’s Anti-Corruption Prosecutor’s Office recently opened a criminal investigation into a major electricity distributor after Spain’s competition agency fined the company €25 million.

Canada’s Competition Bureau has launched numerous joint antitrust and anti-corruption investigations. For example, Quebec’s police force and the Competition Bureau launched a joint investigation into alleged bid-rigging affecting Quebec infrastructure contracts in 2012. 83 criminal charges have been laid against 13 individuals and 11 companies so far.

Recognising the link between antitrust and anticorruption Mexico and Colombia recently amended the terms of their amnesty programs so that self-reporting could lead to amnesty from both antitrust and anti-corruption charges.

Indonesia’s state-owned electricity firm is expected to face simultaneous antitrust and anti-corruption prosecutions over bid-rigging allegations. The Corruption Eradication Commission has reportedly received evidence from the UK SFO indicating possible bribes to win tenders for power plant engine service contracts.

The investigating agencies in these countries obviously derive a number of benefits from working together. They improve at detection/prevention (including through sharing information where permitted). They can pool resources and also create more publicity when cases are opened and when charges are brought.

Investigated companies, on the other hand, have to handle multiple negotiations and implement case strategies across jurisdictions and areas of exposure in order to successfully mitigate their exposure. That may include balancing up the merits of making disclosures to various agencies, fines, follow-on damages, criminal sanctions, reputational harm, loss of management focus etc.

Accordingly, companies must use compliance resources to respond to this changing landscape. They still need to achieve a 'culture of compliance' without unnecessarily chilling legitimate business practices and entrepreneurship.

**An explosion in the number of compliance areas you need to cover**

Employees at all levels of an organisation now often face a barrage of top-level encouragement, training sessions, guidelines, protocols and internal rules to instil a compliant and ethical attitude in everything they do. Even in organisations with a relatively sophisticated approach to compliance, there can be concerns that lack of integration opens up worrying blind spots.

This results in two key questions: what can be done to drive efficiencies within these growing functions and are accepted models/structures actually effective in mitigating companies' corporate compliance risks?

**Efficiencies in compliance**

Legal and compliance departments must work intelligently and constantly to allocate (all too often scarce) resources, without engendering 'compliance fatigue' within the work-force i.e., the sense that there are so many rules to comply with that they cannot all possibly be that important.

There are real challenges for businesses when compliance is approached in a subject by subject (non holistic) manner. There can be duplication of efforts, e.g. setting up hotlines, on-boarding third parties or monitoring the effectiveness of the programme, and even conflict between different compliance areas.

Even well-intentioned training can have mixed results. It can be challenging for employees to retain and differentiate from one legal area to the next. A laudable attempt to focus on one area can overlook gaps leading to exposure which a holistic approach might have filled. For example, a purely antitrust focussed team might not follow up on conduct which seems suspect if it would not be a cartel or abuse of dominance even though it might suggest corruption. Sometimes failing to think across legal 'fiefdoms' may miss trends, e.g. that there is one individual or business unit which is most at risk of breaking the rules.
Revisiting the models and structures

Just like the agencies who may investigate them, companies have to think about a more joined up approach. It is vital to recognise a new landscape and adapt corporate compliance programmes in response. Continuing with the status quo may result in more and more resource being invested in less effective compliance programmes.

One major shift toward holistic compliance is to move towards a values-based approach to compliance rather than a rule-based one. A more holistic approach enables a number of benefits:

- Better prioritisation and understanding of risk across the whole business landscape. Where does, for example, antitrust risk arise and where might it exacerbate (or be exacerbated by) other risks. For example, tension might arise between the antitrust advantages and the tax/employment disadvantages of arguing that a business model involves a single group of entities all under common control. Further, where does antitrust risk as a whole fit in any given company’s matrix of corporate compliance risks?
- More consistent and aligned communication from leadership and other stakeholders
- An enhanced understanding and recognition of the reasons for compliance failings and how to respond to them
- Efficiencies and consistency in terms of methodologies deployed to mitigate and remove risk
- Training programmes that are consistent and balanced across risk areas and which go beyond legal issues
- A compliance programme which is enhanced on an on-going basis and benefits from learnings across risk areas
- A more joined up approach between the business, Legal and other control function, broadening the responsibility for compliance away from Legal, Audit etc to the wider business

Deeper compliance based on values

Companies need a framework around which they can frame conversations around this topic and start the process of enhancing their approach. The Five Essential Elements of Corporate Compliance below provides this.

The goal is to develop meaningful values and ethics which resonate and are relevant for all compliance areas. Of course companies will still need specific guidelines for specific areas but those are built in at a second level, mapped to the values.

Paired with this approach is a holistic way of looking at the other key aspects of a compliance programme - sharing structures, best practices in terms of training, screening, evaluating. Cross-pollination from one compliance area to the next.

This approach is not without its challenges. The responsibilities of in-house compliance professionals and their employer’s legal/operational set-up may not line up. Plus, there is a risk that an integrated approach to individually complex legal areas could lead to a loss in expertise; a blunting of specialised instincts.

However, there are simple steps that can be taken towards joined up compliance. Companies might identify operations which are particularly at risk of a siloed approach and then look at the sorts of activities which could be brought together. Reporting and other hotlines might be combined; the same IT/forensic resources could be used to tackle different compliance areas.

Ultimately, the end result is a more user friendly and intuitive approach which begins to fill unseen compliance gaps and drives efficiency. It is also the best form of defence against agencies who certainly see the legal and practical benefits of joining forces.
The Five Essential Elements of Corporate Compliance

1. Leadership
2. Risk Assessment
3. Standards and Controls
4. Training and Communication
5. Monitoring, Auditing and Response