

Iva Tošić*

Jovana Misailović**

COMPLIANCE OFFICERS IN SERBIA: EMPLOYEES OR INTERIM MANAGERS?

Abstract: *The first part of the paper analyzes the principle of legality in business and the basic features of the compliance function. Taking into account that the principle of legality in business is one of the core pillars for achieving good corporate governance, having a person who will perform the compliance function is of great significance. The legal position of the compliance officer may be differently regulated, whether as an employee or an outsourced expert. The second part of the paper deals with these two options taking into account the standing practice in the United Kingdom and Germany, where the compliance function has a long tradition. These examples may be challenging for Serbia to follow, since its compliance function is at the very beginning, although having a compliance officer (team) as an employee should be the ultimate objective. In the meantime, the authors propose for Serbian companies to hire compliance officers as interim managers as a solution.*

Key words: corporate governance, compliance, compliance officer, interim manager, principle of legality in business, new forms of work.

1. INTRODUCTION

The principle of legality in business is one of the basic principles of adequate corporate governance in companies. It is increasingly expressed through the establishment of the compliance function, which primarily includes monitoring of the business, as well as advising the management and employees in general.

The compliance function emerged in response to major corporate scandals, especially those in the financial sector, in order to improve corporate governance practices. One of the major corporate scandals outside

* Research Associate, Institute of Comparative Law, Belgrade; e-mail: iva_tosic@hotmail.com

** Teaching Assistant, University of Kragujevac Faculty of Law; e-mail: jovana.misailovic@yahoo.com

the Europe, the Enron scandal,¹ gave compliance a push and led to its near-institutionalization in the Sarbanes-Oxley Act,² but the roots of the compliance duties are clarified in the decision in the *Caremark* derivative litigation.³ On the other hand, the best example in Europe is the *Siemens AG* case, as one of the most famous corporate scandals that laid the foundations of the compliance function in Germany. In the case, the court found that the establishment of a functioning compliance system is part of the overall responsibility of the executive board.⁴ Even before this case, the Federal Supreme Court (BGH) pointed out that it is necessary to clearly govern the compliance function as well as the responsibilities and tasks of the compliance officer.⁵ Both these cases had a broad impact on further development of the compliance function within companies, and they demonstrated that it is necessary to clearly set the scope and limitations of the duties and liabilities of the compliance officer.

Currently, compliance “represents a melding of top-down strategies that draw on generalizations and abstract principles and bottom-up strategies that implement lessons learned from past successes and failures.”⁶ Bearing in mind all the risks that companies in the financial sector are exposed to, it is not surprising that this function is usually related to their business, although companies in other sectors also deal with compliance-related risks every day. Therefore, establishing the compliance function has become a necessary part of an adequately established corporate governance system.⁷ Stricter regulations and huge penalties against companies that are in violation of regulations have made the role of the compliance officer more significant and prestigious⁸ – from mere administration to an active advising and monitoring role.⁹ This is exactly the main

1 The Enron scandal was one of the largest corporate scandals where the company hid the truth about its business, which led to its bankruptcy. After this affair, the corporate world was in need of a complete change of the corporate governance system.

2 US Congress, Public Law 107–204, Sarbanes-Oxley Act of 2002.

3 *Caremark International inc. Derivative Litigation*, 698 A.2d 959 (1996), decision dated 25 September 1996.

4 LG Munchen I, 10 December 2013, 5 HK O 1387/10.

5 BGH, 5 StR 394/08, Judgment of 17 July 2009.

6 Miller, G. P., Compliance in Historical Context, in: Manacorda, S., Centoze, F. (eds.), 2022, *Corporate Compliance on a Global Scale Legitimacy and Effectiveness*, Cham, Springer, p. 4.

7 For more on corporate governance in the financial (insurance) sector see Leković, V., 2018, Sistem upravljanja u društvu za osiguranje prema direktivi Solventnost II, *Strani pravni život*, 1, pp. 137–152.

8 Marti, S. L., 2015, Compliance Officers: More Jobs, More Responsibility, More Liability, *Notre Dame Journal of Law, Ethics & Public Policy*, Vol. 29, No. 1, p. 181.

9 Kanzenbach, K., 2020, *The Model of the Corporate Compliance Officer*, Berlin, Peter Lang, p. 311.

basis for the authors' hypothesis that the compliance function should be indispensable in every company. For example, having a compliance officer as a fulltime employee is the practice in the United Kingdom and Germany, where the job of a compliance officer is delegated from the management board to a highly qualified employee. Additionally, none of this legislation has yet regulated in detail the specific tasks and position of the compliance officer, although these legislations have known compliance function for a long time. In that arrangement, performing the compliance function is a task delegated by the management board and as such is a part of its legally duties and responsibilities.

In the case of Serbia, the compliance function is in its infancy even in the financial sector. In particular, control of compliance with the applicable law is mentioned in regard to the internal control system in the Law on Insurance,¹⁰ while the Law on Banks contains an explicit norm regarding the compliance function.¹¹ A great step was made in August 2023, when the Government of the Republic of Serbia approved the Draft Law on the Management of Enterprises Owned by the Republic of Serbia, which stipulates that every company of capital must incorporate the compliance function.¹² Even before this Draft, the compliance function was specifically prescribed for some state-owned enterprises,¹³ such as electric utility power company Javno preduzeće Elektroprivreda Srbije and the largest infrastructure and logistic business system in the country – Javno preduzeće Pošta Srbije.¹⁴

It is only a matter of time when and how compliance function will become equally important in all areas of economy in Serbia, since operating in accordance with the law is a priority of every company. Until this goal is reached, a solution must be found for all those companies that are not prepared to have a compliance officer as a fulltime employee, since the management board often perceives wrongly that this is a significant cost to the company. The previously elaborated is the main reason why

10 Art. 151, *Official Gazette of the RS*, Nos. 139/14 and 44/21.

11 *Official Gazette of the RS*, Nos. 107/05, 91/10 and 14/15.

12 National Assembly of Serbia, 2023, Draft Law on the Management of Enterprises Owned by the Republic of Serbia, (http://www.parlament.gov.rs/upload/archive/files/lat/pdf/predlozi_zakona/13_saziv/1487-23%20-%20LAT%20PDF.pdf, 15. 9. 2023).

13 For corporate governance in these companies see Dedeić, P., Gasmi G., 2015, Corporate Governance in State-Owned Enterprises: Relevant European Standards, *Strani pravni život*, 4, pp. 43–50.

14 A similar solution has been enacted in Croatia, the latest country to join the European Union. In 2019, Decision on the obligation to introduce the compliance in all legal entities in majority state ownership was enacted. *Narodne Novine – Official Gazette of the Republic of Croatia*, No. 99/19.

the authors recommend that the compliance officer should have the status as an interim manager, although having a compliance officer as a fulltime employee should be the ultimate objective. Interim management, as one of the new forms of work recognized by the European Foundation for the Improvement of Living and Working Conditions (Eurofound), is potentially an affordable and easily performed solution for all those companies in need of hiring a highly qualified expert, such as a compliance officer, but do not have the resources or are not constantly exposed to a high level of compliance-related risks. In Serbia the compliance function is still at a basic level, whereas market development level is increasing. The possibility of having an *interim compliance manager* may significantly contribute to the further development of the market, becoming one where companies always operate in accordance with the law.

2. THE PRINCIPLE OF LEGALITY IN BUSINESS AS THE BASIS FOR THE COMPLIANCE FUNCTION

Adherence to norms is indispensable for the functioning of any company.¹⁵ For this reason and considering that it represents an expression of business ethics, operating a business in accordance with the law has long been recognized as mandatory in the business environment.

The principle of legality in business is one of the basic principles of business, which obligates company to act in accordance with the law, secondary legislation, internal acts, to monitor all changes in legal regulations, propose measures and ensure that the company and its employees comply with all these regulations.¹⁶ The Code of Business Ethics of the

15 A great example can be found in the Germany legislation, which explicitly prescribes that management board is responsible for ensuring that all provisions of the law and internal policies are adhered to and strives to achieve the enterprise's compliance.

Regierungskommission Deutscher Corporate Governance Kodex, 2019, *Empfehlungen und Anregung A.2, Grundsatz 5*, p. 4.

16 See Benedek, P., 2012, Compliance Management: A New Response to Legal and Business Challenges, *Acta polytechnica Hungarica*, Vol. 9, No. 3, pp. 135–148. For more see Vasiljević M., 2008, Korporativno upravljanje – od problema do rešenja, *Pravo i privreda*, 5–8, pp. 3–32; Vasiljević M., 2003, Corporate governance akcionarskog društva – modeli i trendovi u uporednom pravu i praksi, *Pravo i privreda*, 9–12, pp. 3–22; Vasiljević M., Petrović Tomić, N., 2020, Odgovornost uprave akcionarskog društva za osiguranje za sprečavanje nezakonitog poslovanja, *Pravo i privreda*, 1, pp. 7–39; Petrović Tomić, N., Načelo zakonitosti poslovanja u sektoru osiguranja – tezice o odgovornosti članova uprave društva za osiguranje u svetlu compliance funkcije, in: Radović, V., (ed.), 2021, *Usklađivanje poslovnog prava Srbije sa pravom EU*, Begrade, Pravni fakultet Univerzitet u Beogradu, pp. 99–115.

Republic of Serbia also defines the principle of legality in business as one of the core principles.¹⁷ Having in mind the importance of the mentioned principle, the performance of employees' obligations conscientiously and in accordance with the law will largely depend on the company's policy and attitude towards the principle of legality in business.¹⁸ Therefore, many companies are becoming aware that their "existence" in the market depends on doing business in accordance with ethical principles and beliefs. Companies that have understood that profitability and ethics are consistent concepts, show better business results than those that put their own interests first.

Business ethics is essential for the long-term success at both the macroeconomic level (immoral behavior can lead to market disruptions and inadequate resource allocation) and the microeconomic level (where it is often associated with trust in the suppliers, customers, employees and community), and every company has certain social and economic responsibilities.¹⁹ The application of ethical principles in business provides protection for the owners of capital as well as third parties who have an interest in the market.

Business in accordance with the law has become much more than just a business principle.²⁰ For each business activity, compliance with the rules is not only a matter of compliance with national laws but also the need to abide by international principles.²¹ For these reasons, it is necessary to establish a special function within the company as an expression of the principle of legality in business (compliance function),²² and to pay attention to the role of the compliance officer.

17 Code of Business Ethics, Art. 10, *Official Gazette of the RS*, No. 1/06.

18 "For example, a lot of companies struggle to comply with the law in the area of labor. A US survey on labor compliance at the enterprises has shown that 80% of the respondents are trying to comply with labor legislation, 73% have problems with complying with labor legislation and changes introduced, and only 66% of respondents are taking measures to effectively implement changes in legislation." Kiselyova, E., 2020, Labor Compliance as an Instrument of Labor Relations Control, *Central European Journal of Labour Law and Personnel Management*, Vol. 3, No. 1, p. 22.

19 Cvijanović, D., Mihailović, B., Pejanović, R., 2012, *Poslovna etika i komuniciranje*, Belgrade, Institut za ekonomiku poljoprivrede, p. 11.

20 Doing business in accordance with the law not only protects employees from liability, but also protects the company from losing its reputation. Dreher, M., 2015, *Treatises on Solvency II*, Berlin–Heidelberg, Springer, p. 285.

21 Banks, T. L., 2015, Compliance: The New International Law, *Compliance Elliance Journal*, 1, p. 22.

22 See Miller, G. P., 2014, The Compliance Function: An Overview, *NYU Law and Economics Research Paper*, pp. 14–36; Ramirez, S. A., 2018, Diversity and Ethics: Toward an Objective Business Compliance Function, *Loyola University Chicago Law Journal*, Vol. 49, No. 3, pp. 581–609.

3. THE COMPLIANCE FUNCTION

As Warren Buffet said in his famous statement “it takes 20 years to build a reputation and five minutes to lose it.” Driven by the expanding regulations and the increasing risk of non-compliance,²³ compliance has developed rapidly into its own industry and profession.²⁴

In order to understand the compliance function and its development, it is necessary to determine its definition, basic features and the significance.

3.1. THE DEFINITION AND BASIC FEATURES OF THE COMPLIANCE FUNCTION

Following the corporate scandals and the ensuing financial crisis, it was necessary to improve corporate governance systems. The crisis made it possible to determine the shortcomings of the existing systems. Fortunately, the compliance function appeared as one of the key functions among companies, as a form of improvement of corporate governance. Based on this, companies are required to hire a person who will continuously monitor changes in legal regulations, regulations that are in the process of being adopted or are certain to be adopted, and advise the management and employees on how to implement the regulations and harmonize their business with them.

In addition, compliance focuses not only on making decisions in accordance with the law, but also on making decision that are risk-free, by examining the correctness of certain forms of behavior, even when they are legally permitted. Hence, the goal is to comply not only with legal regulations but also with ethical principles, thus making companies socially responsible and creating a good business reputation and maintaining the trust of their clients. In this way, the compliance function becomes part of the comprehensive system of corporate governance.

The compliance function primarily covers monitoring and control of compliance and application of laws and regulations²⁵ from an internal

23 It is up to the compliance officer to create the mechanisms, policies and procedures that protect the company from non-compliance. Krambia-Kapardis, M., Dimitriou, S., Stylianou, I., *Disentangling the Expectation Gap for Compliance Officers*, in: Krambia-Kapardis, M., (ed.), 2019, *Financial Compliance Issues, Concerns and Future Directions*, 1st ed., Cham, Palgrave Macmillan, p. 197.

24 Soltes, E., *The Professionalization of Compliance*, in: Rooij, B. van, Sokol, D. D., (eds.), 2021, *The Cambridge Handbook of Compliance*, Cambridge, Cambridge University Press, p. 35. See Fanto, J. A., 2021, *The Professionalization of Compliance: Its Progress, Impediments and Outcomes*, *Notre Dame Journal of Law, Ethics and Public Policy*, Vol. 35, No. 1.

25 The roots for this statement may be found in the documents in the area of finance, specifically insurance. For example, Delegated Regulation (EU) 2015/35 states that

perspective, while special attention is given to operational risk management. This function is not the same as the function of the traditional legal department, which concentrates on operational tasks instead of providing advice or taking responsibility for prevention and control.²⁶ Although independence is one of the main characteristics of the compliance function, it does not mean that cooperation between compliance and the legal department or any other organizational part of company is discouraged.²⁷ Namely, this cooperation may be key to targeting and controlling compliance risk at an early stage.²⁸ Compliance officers must be independent from the operational part of the company²⁹ and should not perform or be responsible for operational activities.³⁰ However, in comparative jurisprudence, independence of the compliance officer is considered sometimes as a potential issue, when they are appointed from within the employees in the same company.³¹

insurance and reinsurance undertakings should comply with applicable laws, regulations and administrative provisions, and ensure the effectiveness and efficiency of their operations in light of its objectives. Delegated Regulation (EU) 2015/35 of 10 October 2014 supplementing Directive 2009/138/EC of the European Parliament and of the Council on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), *OJ L 12*, 17 January 2015, Art. 270.

- 26 Moorman, L., 2013, Key functions in the system of governance – Responsibilities, interfaces and outsourcing under Solvency II, *Munich RE*, p. 4 (<https://docplayer.net/20055088-Key-functions-in-the-system-of-governance-responsibilities-interfaces-and-outsourcing-under-solvency-ii.html>, 15. 8. 2023).
- 27 Regulations in the field of compliance should offer relative freedom to companies in terms of structuring the compliance function (proportionality principle). Hence, only the requirement to have this function should be provided by the law, leaving it up to the companies to determine whether this function will be performed by one or more persons or in cooperation with some other organizational part of the company. However, this is acceptable as long as there is no threat of non-compliance. Bürkle, J., 2020, *Compliance in Versicherungsunternehmen – Rechtliche Anforderungen und praktische Umsetzung*, Munich, C.H. Beck, p. 62.
- 28 Braun, T., 2019, *Compliance Norms in Financial Institutions: Measures, Case Studies and Best Practices*, Cham, Springer International Publishing, pp. 151–152.
- 29 In the case, when the compliance officer is an employee at the company, they have to be professionals who work within company but with recognized independence given to them by their professional status. Fanto, J. A., The Uncertain Professional Status of Compliance, in: Krambia-Kapardis, M. (ed.), 2019, *Financial Compliance Issues, Concerns and Future Directions*, 1st ed., Cham, Palgrave Macmillan, p. 77.
- 30 If there is a compliance department, the employees who perform this function should be prevented from working with organizational parts of the company they are responsible for monitoring. IIA Norge, 2015, *Guidelines for the Compliance function*, (<https://iia.no/wp-content/uploads/2019/09/2017-Guidance-for-the-Compliance-function-FI-NAL.pdf>, 1. 9. 2023).
- 31 This is specifically the case in the German jurisprudence. For example, BAG, 5 AZR 123/92, Judgment of 9 June 1993; BAG, 7 AZR 31/91, Judgment of 13 November 1991.

In the broadest sense, the compliance function is defined as the monitoring of compliance of the company's operations with applicable legal regulations. However, it should be borne in mind that the obligations of the compliance officer include much more than mere control of whether the company operates in accordance with the law,³² and therefore this function cannot be so vaguely defined. In order to fully understand and define this function, all obligations of the compliance officer, i.e., the department that performs this function, should be analyzed.³³

The compliance officer usually has five responsibilities – identification, prevention, monitoring and detection, resolving, and counseling. On the first place, they identify compliance-related risks and advice management how to avoid them; implement control over company in order to protect company against these risks; monitor and report on effectiveness of compliance risk management. The compliance officer also solves compliance problems and advises the management board on rules and controls.³⁴ It is important to emphasize that the advisory function of the compliance department does not compromise the execution of control measures. On the contrary, the advisory role is established as a guiding force for business activities, intended to facilitate accurate and consistent oversight of the implemented standards. This function is anticipated to play an active role in advancing strategic business objectives through consultation (including providing guidance, instructions, responses to specific inquiries, involvement in the implementation of new business initiatives, ad hoc risk assessments, and regular participation in committees

32 For more on compliance officer duties see Tošić, I., Usklađenost poslovanja u osiguravajućim društvima – koje su obaveze compliance officer-a?, in: Petrović, Z., Čolović, V., Obradović, D., (eds.), 2023, *Prouzrokovanje štete, naknada štete i osiguranje*, Belgrade, Institut za uporedno pravo, pp. 539–552.

33 The organizational structure of the compliance function may be set up in such a way that the compliance department consists of a single officer. In that case, however, several members of other departments assist in performing the compliance function, in addition to their “primary” tasks. On the other hand, in large companies, a large number of employees may be assigned to the compliance department, possibly organized in smaller groups (Braun, T., 2019, p. 153). The responsibilities of compliance officers should not be set so as to discourage persons from accepting this position within the company, since sometimes they threaten to reduce the number of efficient, qualified candidates who aspire to this position or those who should remain in it. See Golumbić, C. E., 2017, “The Big Chill”: Personal Liability and the Targeting of Financial Sector Compliance Officers, *Hastings Law Journal*, Vol. 69, No. 1, pp. 49–81; Broughton, K., 2019, Recruiting and Retaining Compliance Staff Is Key Risk for Banks, Regulator Says, *Risk and Compliance Journal/ Wall Street Journal*, May 20, (<https://www.wsj.com/articles/recruiting-and-retaining-compliance-staff-is-key-risk-for-banks-regulator-says-11558395878>, 20. 8. 2023).

34 Kanzenbach, K., 2020, p. 302.

and working groups).³⁵ Compliance officers are required to cooperate with management and other employees to identify and manage regulatory risk. Their goal is to ensure that the company possesses internal controls that effectively assess and handle the risks it encounters. Nonetheless, it is worth noting that compliance officers are not involved in the decision-making process; this activity is performed exclusively by the management board. They offer an internal service that efficiently aids the company in meeting its obligations under the applicable laws, regulations, and internal protocols. Consequently, the compliance officer frequently serves as the company's chief advisor.³⁶

3.2. SIGNIFICANCE OF COMPLIANCE FUNCTION

Establishing an effective compliance function³⁷ is the basis of doing business with integrity, which includes responsibility and conscientiousness as an essential part of the behavior of the management and all employees.³⁸

The compliance function must be included in the overall business culture of the company,³⁹ so it can be competitive in the market, preserve its reputation and good governance, as well as to retain shareholder and customer trust.⁴⁰ The importance of this function is reflected in the possibility for all employees and management to have a highly educated person who can advise them on how to operate in accordance with regulations.⁴¹ Compliance is much more than formally following a set of

35 Tanjević, M., 2018, Komplajans funkcija – status i perspektive, *Bankarstvo*, 1, p. 124.

36 Hayes, A., 2021, Compliance Officer: Definition, Job Duties, and How to Become One, *Investopedia*, 28 October (15 September 2023).

37 Regarding the recognition of compliance function significance, Bürkle's statement should be highly emphasized: *The greatest enemy of the compliance is the bureaucracy*. Bürkle, J., Hauschka, C. E. (eds.), 2015, *Der Compliance Officer – Ein Handbuch in eigener Sache*, Munich, C.H. Beck, p. 10.

38 "For compliance to work, it needs to be part of a united effort, starting from the highest stratum of the organization all the way to the frontline personnel; it needs to be part of the organizational culture." Krambia-Kapardis, M., Dimitriou, S., Stylianou, I., 2019, p. 209.

39 Strachan, D., Walsh, R., 2015, *The Changing Role of Compliance*, London, Deloitte, (<https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Financial-Services/gx-financial-changing-role-compliance.pdf>, 5. 9. 2023), p. 9.

40 Soltes, E., 2021, p. 32.

41 The greatest value of compliance may be the anticipation of potential unlawful behavior of employees and their reaction to a system with positive or negative incentives. Centonze, F., The Imperfect Science: Structural Limits of Corporate Compliance and Co-regulation, in: Manacorda, S., Centoze, F., (eds.), 2022, *Corporate Compliance on a Global Scale*, Cham, Springer Nature, p. 48.

rules;⁴² it should represent a way of thinking and needs to be included in all activities and processes within the company, in order to ensure corporate social responsibility and ethical behavior.

A good compliance culture can have many benefits for the company. For example, it can lower organizational, individual and reputational risk, increase employee confidence in doing business, retain employees, attract better quality candidates for new positions, improve transparency, which enables better decisions by company staff, etc.⁴³ It is inevitable that an adequately established compliance function (in addition to client trust and reputation) can affect employee trust in the company business, making them feel safer and improve their work motivation. Hence, it is not surprising that one of the most important functions that should be emphasized regarding compliance officer position is their position as the “protectors” of whistleblowers.⁴⁴ Whistleblowing is defined as “the disclosure by organization members (former or current) of illegal, immoral, or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action.”⁴⁵ The compliance officer would prevent employees from reacting at their own initiative to violations of regulations at the company and other irregularities that may occur in the workplace.⁴⁶ It is suggested that whistleblowing can uncover misconduct

42 Khanna, V. S., Compliance as Costs and Benefits, in: Rooij, B. van, Sokol, D. D., (eds.), 2021, *The Cambridge Handbook of Compliance*, Cambridge, Cambridge University Press, p. 15.

43 Jain, M. K., 2019, Regulatory and Supervisory Expectations on Compliance Function in Banks, *RBI Bulletin*, 23, p. 89.

44 What further supports the importance of the compliance officer position in terms of whistleblower protection is the fact that it is claimed: “whistleblower reward programs increase costs for business as they undermine companies’ internal compliance programs by introducing incentives for whistleblowers to go directly to regulators in hope of a reward, rather than raise their concerns in-house.” The previously stated may be alleviated in situations where there is a responsible person for compliance at the company, to whom employee can address their concerns regarding company business. Austin, J., To Reward or Not to Reward: A Cross-Jurisdictional Comparison of the Reasons Why Securities Regulators Have Adopted or Rejected Policies to Pay Whistleblowers, in: Lombard, S., Brand, V., Austin, J. (eds.), 2020, *Corporate Whistleblowing Regulation: Theory, Practice and Design*, Singapore, Springer Nature, p. 67.

What is also interesting is the fact that the concept of compliance, like the origins of the term whistleblowing, is linked to the US capital markets law and in particular to the Sarbanes-Oxley Act, although the phenomenon of whistleblowing is much older. Rudkowski, L., Schreiber, A., 2015, *Aufklärung von Compliance-Verstößen Whistleblowing, Arbeitnehmerüberwachung, Auskunftspflicht*, Wiesbaden, Springer Gabler, p. 16.

45 Near, J. P., Miceli, M. P., 1985, Organizational Dissidence: The Case of Whistle-Blowing, *Journal of Business Ethics*, 4, p. 4.

46 The issue of whistleblowing keeps courts and supervisory authorities busy. It regularly gives rise to emotions and expressions of free very different associations that range from sublime enlightenment to malicious denunciation. For example, if transnational

at an early stage, giving companies the chance to address it promptly and enhance their organizational processes to prevent such occurrences in the future. This proactive approach can help companies avoid subsequent financial and non-financial losses.⁴⁷

The knowledge of irregularities related to business often puts employees in a position of suspicion in the company, and can be associated with a loss of trust and security at work. However, over the past two decades, the negative attitude towards employees who have become whistleblowers has partially changed and whistleblowing is increasingly associated with positive connotations, such as civic courage and altruistic pursuit of the public interest. Therefore, it is not surprising that numerous authors point out that whistleblower systems are an appropriate instrument for ensuring compliance with legal norms by companies, which thus strengthens corporate governance.⁴⁸ Nonetheless, a professional, i.e., the *compliance officer*, would be a “perfect address” for all those employees who are certain that something is not being done in accordance with the law but do not have the courage to report it.⁴⁹ This fear is usually linked to social repercussions or the risk of being fired.⁵⁰

3.3. COMPLIANCE OFFICERS AS EMPLOYEES – EXAMPLES OF THE UNITED KINGDOM AND GERMANY

As we have seen, the compliance function has many benefits for businesses. Still, there are not many countries that can boast of a legally regulated compliance function and position of compliance officer. However,

companies want to use whistleblowing systems as a corporate governance and compliance tool, they find themselves caught between the promotion of a uniform corporate culture and the need to respect different national legal cultures, which have different assessments of the opportunities and risks of whistleblowing. Klaus, S., 2012, Whistleblowing-Systeme als Corporate Governance-Instrument transnationaler Unternehmen, *Recht der internationalen Wirtschaft*, p. 224.

47 Cheema, M. U., Munir, R., Su, S., 2021, *Corporate Governance and Whistleblowing Corporate Culture and Employee Behavior*, London–New York, Routledge, p. 85.

48 Krause, R., 2016, Duty to Loyalty, Fundamental Rights, and Public Policy: German Whistleblowing Law Between Conflicting Values, *Whistleblowing – A Comparative Study*, Cham Switzerland, Springer International Publishing, p. 158.

49 This is especially important since in many European countries, whistleblowing is regulated by statutes on data protection (e.g., in the Czech Republic, Finland, France, Germany and Italy), striking a balance between the right of the accused person to be informed of the source of information relating to them and the interest of the whistleblower to have their identity kept confidential. Thüsing, G., Forst, G., 2016, Whistleblowing Around the World: A Comparative Analysis of Whistleblowing in 23 Countries, *Whistleblowing – A Comparative Study*, Switzerland Cham, Springer, p. 9.

50 Momsen, C., Benedict, P., 2020, Limited Protection and No Reward: An Overview of Whistleblowing in Germany, *Kriminalpolitische Zeitschrift*, 4, p. 238.

those that have, usually regulate the position of compliance officers as employees to whom the management board has delegated this responsibility. The position of the compliance officer as an employee will be further elaborated using examples of legislation of the United Kingdom, where this function originated, and Germany, where this institute is widespread and legislation is usually considered as a good guideline to follow. However, this does mean that these experiences will be the best solution for the Republic of Serbia at this moment, but rather the ultimate objective to be achieved in the future.

3.3.1. Legal Position of Compliance Officers in the United Kingdom

It is presumed that the roots of compliance originate in 19th century in the United States of America. On the other hand, the first attempt to regulate compliance was noted in the United Kingdom in the 17th century, in an attempt to achieve compliance in order to limit unfair practices of brokers and stake-holders.⁵¹ Therefore, one could argue that common law system is the origin of the notion of compliance.

In the United Kingdom, the compliance function – as well as position of the person who should perform this function, an officer – is closely connected to the duties and responsibilities of directors. Hence, it is not surprising that the Companies Act⁵² is the basic source for the regulation of the legal position of officers, managers and directors, and therefore also includes the compliance officer. The main problem may be the fact that the position of any officer under the Companies Act does not differ from that of a director. According to this Act *officer* includes “a director, manager or (company) secretary, and any person who is to be treated as an officer of the company for the purposes of the provisions in question.”⁵³ It should be further underlined is that, surprisingly, the legal position of a company secretary may be closely related to the legal position of compliance officer, although it would be difficult to reach such a conclusion by linguistic interpretation alone. This is based on the fact that the Institute for Chartered Secretaries and Administrators has noted that one of the key duties of a company secretary is to “ensure compliance with the corporate law, regulation and the company’s constitution and advise board of directors,”⁵⁴

51 Kanzenbach, K., 2020, p. 521.

52 Companies Act 2006, §1437.

53 *Ibid.*, §1121(2).

54 Dickinson, R., (N.D.), *The Company Secretary in the UK and Their Role in Upholding Best Practice in Corporate Governance in Banks and Other Organisations*, (<http://www.ebrd.com/downloads/legal/corporate/icsa.pdf>, 7. 9. 2023).

both of which are considered the main duties of the compliance officer. It appears that the company secretary is to be considered an officer with extensive responsibilities, which include legal duties and responsibilities concerning the administration of the company and compliance with company law and the company's constitution. The analysis of the legal position of the compliance officer in the United Kingdom, leads to the conclusion that the company secretary, as a compliance officer in a broader sense, has employee status under United Kingdom employment law (Employment Rights Act 1996). This means that the compliance officer is completely covered by the protection provided under the Employment Rights Act and other acts related to the status of an employee.⁵⁵ Having a fulltime employee as a compliance officer is a sound solution, although transferring the duties of the compliance officer to the company secretary may be a serious burden on the employee who is already responsible for many major legal issues within company. This is why the United Kingdom experience is not a completely adequate guideline for the Republic of Serbia.

3.3.2. The Compliance Function and Compliance Officer in the German Legal System

The compliance function was introduced from the United States of America and the United Kingdom to Europe and Germany for the same reason – as a legal response to the corporate scandals.

When it comes to the introduction of the compliance in the Germany, the term compliance is enshrined in the European Investment Services Directive,⁵⁶ adopted in 1994. The development of the compliance function in European businesses has been driven by the necessity to implement directives into national laws. This evolution has primarily been a response to legal enforcement and shifts in the regulatory landscape, particularly within the financial services and securities sectors.⁵⁷ For example, based

55 EU Council Directive No. 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, *OJ L* 288, 18 October 1991. Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time, *OJ L* 299, 18 November 2003. Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, *OJ L* 204, 26 July 2006.

56 Council Directive 93/22/EEC of 10 May 1993 on investment services in the securities field, *OJ L* 141, 11 June 1993.

57 Kanzenbach, K., 2020, p. 159.

on MiFID Directive⁵⁸ requirements, the German legislator inserted requirements of compliance and the compliance function into the German Securities Trading Act⁵⁹ and the Securities Trading Implementing Provision.⁶⁰ Additionally, in January 2014, the Basel III international framework for banks entered into effect, as did the capital requirements Directive IV⁶¹ and the Capital Requirements Regulation.⁶² Although there are no explicit requirements of compliance and the compliance function, both the compliance function⁶³ and compliance officer are required as mandatory within credit institutions,⁶⁴ under the German Banking Act.

Similar to the solution in the United Kingdom, the compliance officer position is closely related to responsibilities of the management board, bearing in mind that according to the German Corporate Governance Code, it is the management board that establishes an appropriate compliance management system reflecting the enterprise's risk situation, and discloses the main features of this system.⁶⁵ The responsibilities of the management board include, among other things, the obligation to ensure

58 Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU, *OJ L* 173, 12 June 2014.

59 Wertpapierhandelsgesetz in der Fassung der Bekanntmachung vom 9. September 1998 (BGBl. I S. 2708), das zuletzt durch Artikel 56 des Gesetzes vom 10. August 2021 (BGBl. I S. 3436) geändert worden ist, §32, §87 and §88.

60 Wertpapierdienstleistungs-Verhaltens- und Organisationsverordnung vom 17. Oktober 2017 (BGBl. I S. 3566), die zuletzt durch Artikel 57 des Gesetzes vom 10. August 2021 (BGBl. I S. 3436) geändert worden ist.

61 Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, *OJ L* 176, 27 June 2013.

62 Regulation (EU) No. 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No. 648/2012, *OJ L* 176, 27 June 2013.

63 Kreditwesengesetz in der Fassung der Bekanntmachung vom 9. September 1998 (BGBl. I S. 2776), das zuletzt durch Artikel 90 des Gesetzes vom 10. August 2021 (BGBl. I S. 3436) geändert worden ist, Art. 25a.

64 "Credit Institutions shall appoint a compliance officer (money laundering), who shall be directly subordinate to the management board. The compliance officer is responsible for carrying out the provisions regarding the combating and prevention of money laundering and terrorist financing and is the contact person for the criminal prosecution authorities, the Federal Criminal Police Office – Financial Intelligence Unit – and BaFin". Kreditwesengesetz in der Fassung der Bekanntmachung vom 9. September 1998 (BGBl. I S. 2776), das zuletzt durch Artikel 90 des Gesetzes vom 10. August 2021 (BGBl. I S. 3436) geändert worden ist, §25h (4).

65 Regierungskommission Deutscher Corporate Governance Kodex, 2019, *Empfehlungen und Anregung* A.2, p. 4.

compliance. To mitigate the liability of the board members, compliance tasks can be delegated to compliance officers who possess the necessary qualifications. Consequently, these duties can be altered as needed. German legislation mandates the appointment of a compliance officer as a permanent, effective, and independent compliance function.⁶⁶ As a consequence, the compliance officer is predominantly regarded as employees with all associated rights and responsibilities, including the statutory duty to perform their work.⁶⁷ The compliance officer's responsibilities are derived from a specific job description in their employment contract, instructions provided by the employer, or specific tasks delegated by the management board.⁶⁸ Having in mind that compliance officer is a higher-level position, it may be disputable whether their independence is an obstacle to them being considered employees. On this regard, the German Federal Labor Court (BAG)⁶⁹ has stated that it is usual for employees with high-level duties and responsibilities to be independent. Hence, in this regard there is no barrier to compliance officers having the status of an employee under German law.

4. THE COMPLIANCE OFFICER AS AN INTERIM MANAGER

Interim management is considered as a new form of work, although it was first introduced by Eurofound in 2015.⁷⁰ Still, there is no legal regulation that contains detailed provisions regarding this type of work. Despite its absence, many countries are familiar to this form of work, as a useful tool for companies to overcome business challenges by contracting highly qualified managers. Accordingly, this work arrangement may be a convenient solution for all those companies that are in need of a person to perform the function of compliance officer, but cannot afford paying them fulltime, or for those in the early stages of introducing the compliance function to their business. The position of this legal expert may be considered as an *interim compliance manager* – a new type of compliance officer engagement within the company.

66 Kanzenbach, K., 2020, p. 160.

67 Bürgerliches Gesetzbuch in der Fassung der Bekanntmachung vom 2. Januar 2002 (BGBI. I S. 42, 2909; 2003 I S. 738), das zuletzt durch Artikel 2 des Gesetzes vom 21. Dezember 2021 (BGBI. I S. 5252) geändert worden ist, Art. 611(1).

68 Kanzenbach, K., 2020, pp. 472–473.

69 BAG, 5 AZR 123/92, Judgment of 9 June 1993; BAG, 7 AZR 31/91, Judgment of 13 November 1991.

70 Mandl, I. *et al.*, 2015, *New Forms of Employment*, Publications Office of the European Union, p. 40.

In a broader sense, interim management may be considered a work form where a company hires a worker temporarily and for a specific purpose.⁷¹ The engagement of a highly specialized expert for a defined period of time is what may precisely be seen as a prevailing reason (among others) for considering the compliance officer as an interim manager. Furthermore, interim management is widely understood as a *service* that involves the temporary assumption of management tasks by someone from outside the company.⁷² In contrast to this, some authors state that interim management is a sort of staff externalization, as an atypical work form, which is based on a *work or service contract* and is aimed at management positions in companies. Instead of the traditional long-term employment, there is now a market-oriented short-term relationship between a manager and the company.⁷³ They can also be hired on a basis of fixed-term employment contracts, like any other professional whose work the company requires temporarily (e.g., legal advisor). In addition, the need for the engagement of a manager can be met by hiring a seconded worker who is employed by a temporary employment agency. The option exists for the company to hire a company specializing in business management activities, instead of directly hiring an interim manager, which means that no contractual relationship is established between the beneficiary company and the interim manager. In this regard, it should be noted that companies regularly resort to interim management in times of economic and financial crisis and other situations in which the company faces difficulties,

71 See Marica, M. E., 2021, Interim – Management as a New Form of Employment – Opportune in a Globalized Context, *Proceedings of the 15th International Conference on Business Excellence 2021*, Bucharest, Bucharest University of Economic Studies, pp. 976–977. Similarly, in German literature, “interim management” means “the temporary transfer of management tasks to self-employed managers outside the company. These are often made available to companies via interim management agencies that specialize in placing interim managers (so-called providers)”. Uffmann, K., 2015, *Interim Management*, Tübingen, Mohr Siebeck, p. 1, translated by authors.

72 A distinction must be made between the two basic models of contractual design of interim management. In the Anglo-Saxon model, the provider and company conclude a so-called *service procurement contract*, which results in a direct contract being concluded between the company and the interim manager. In contrast, the Dutch model, which is more common, creates a contractual triangular relationship: the interim manager concludes a contract with the provider, and the provider in turn with the company where the interim manager is to be deployed. Buschbaum, J., Klösel, D., 2012, Interim Management aus Sicht der arbeitsrechtlichen Vertragspraxis, *Neue Juristische Wochenschrift*, 21, p. 1482.

73 Rybnikova, I., 2010, Interim Management. Analyse einer atypischen Beschäftigungsform für Führungskräfte, *Zeitschrift für Personalforschung / German Journal of Research in Human Resource Management*, 24(3), p. 316.

as well as in the case of the reorganization of the company.⁷⁴ Accordingly, the function of compliance officer may just be perfect for the interim manager in the case of small companies that are not in the position to pay an expert as a fulltime employee, but rather as an outsourced manager with a service contract, who can help them to overcome challenging business time. It is not only the size of the company that dictates the need for separate compliance department in the company, but rather the fact that many companies are not in need of a fulltime employed compliance officer, based on the fact they are not constantly facing compliance-related risks. Furthermore, when the compliance function is performed by an outsourced interim manager (interim compliance manager), there is a greater possibility of avoiding conflict of interest, which is beneficial for doing business in accordance with the law.⁷⁵ An additional reason in favor of hiring an interim compliance manager is that in many countries (especially in Serbia) there are not many compliance professionals who are particularly educated and trained for pursuing the job of compliance officer.

Interim management is used in the strategic preparations of companies for entering the international market or certain innovations, because it allows for the engagement of experts with special skills when there is no possibility for their permanent employment. Finally, interim management is a solution often resorted to by companies striving to reduce the scope and costs of training⁷⁶ as well as investment in human resources management, while the professional career of interim managers is based on the accumulation of knowledge through working in various organizations.⁷⁷

The knowledge and experience of interim manager must be assessed before they are appointed to the position of interim compliance manager. They are expected to possess all the skills needed to fulfill all their obligations in a professional and impartial manner. In order to adhere to the aforementioned obligations, they need to possess competence, motivation, continuous education, as well as to maintain a close relationship with associates in order to preserve and disseminate knowledge and skills.⁷⁸ For example, in the financial sector, which was the starting

74 Kovačević, Lj., 2021, *Zasnivanje radnog odnosa*, Belgrade, Pravni fakultet Univerzita u Beogradu, p. 104.

75 Braun, T., 2019, p. 239.

76 Compliance training, as an important part of an effective compliance management system, helps employees to become familiar with policies and procedures, as well as to foster a culture of integrity. Li, T., 2017, *Compliance Management and Compliance Training in China*, *Compliance Elliance Journal*, 3, p. 74.

77 Kovačević, Lj., 2021, p. 104.

78 Magyar Bankszovetseg Compliance Working Group, 2017, *The Best Practice for Operating the Compliance Function*, *Code of Best Practice*, (<https://www.bankszovetseg>).

point for the development of this function, fit and proper requirements are defined for persons performing this function.⁷⁹ In order to be engaged in performing the compliance function, an interim compliance manager must meet two groups of conditions: the objective (concerning professional qualifications and certain experiences) and the subjective (related to ethical behavior and integrity).⁸⁰ Hence, interim compliance manager focus on preventing administrative penalties and avoiding potential property losses and damage to reputation associated with violations of the law and internal regulations.⁸¹

Moreover, interim compliance manager should focus on transparency, customer protection, as well as proactive introduction of the compliance benefits to the employees. This entails the interim compliance manager being acquainted with the positive regulations, regulations that are in the enactment phase, as well as the impact that they might have on the company and its business. They have an obligation to ensure that all employees act in accordance with the regulatory framework, both external and internal.⁸² Laws can sometimes appear abstract, even incomprehensible to a large portion of employees. For this reason, the person performing the compliance function must consider how to best introduce practices that will ensure compliance within the company.⁸³ Since this is an extremely

hu/Content/alapdokumentumok/6_melleklet_Compliance_Code_of_Best_Practice_ENG.pdf, 15. 8. 2023), p. 15.

79 Art. 42, Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), *OJ L* 335, 17 December 2009.

80 Tomić, Z., Petrović Tomić, N., 2011, O licenciranju kandidata za članove organa društva osiguranja – osvrt na odluke Ustavnog suda Srbije, *Pravo i privreda*, 4–6, p. 101.

81 Considering that prevention of non-compliance is the main goal, the interim compliance manager should have the obligation and responsibility to propose measures to establish compliance: *ex post*, in situations where the risk of non-compliance has already occurred; *ex ante*, when it is necessary to prepare the company for changes that occur within the legislative framework, through adequate actions and decisions within the company itself, as well as when it is necessary to clarify the impact of the changed legal framework on the company's activities in all its segments.

82 For the efficient functioning of the company, it is necessary for the compliance programs to include respect of both internal and external laws and regulations. That way the company creates a strong sense of moral responsibility. See Weber, J., Wasieleski, D. M., 2012, Corporate Ethics and Compliance Programs: A Report, Analysis and Critique, *Journal of Business Ethics*, Vol. 112, No. 4, p. 613.

83 Various ways of adequately managing the compliance function can be found in the literature. For example, the following presented by Kurer. "The strategic approach to the management of legal and compliance risks rests on three pillars: The first one is the notion that managing these risks must not be left to the experts but rather should be steered from the very top of an organization, the senior management and the board. [...] The second notion is that companies should define the legal and compli-

sensitive area, education and counseling are of special importance because in most cases violations occur due to ignorance of the mostly new and sometimes unclear regulations.

5. CONCLUSION

Bearing in mind that modern businesses operate in a legal and regulatory environment that is constantly and rapidly evolving, the role of the compliance officer becomes very important. The authors see two solution companies can choose from: having a compliance officer as an employee (insourcing) or as an expert who is not their employee (outsourcing). As it was presented on the examples of United Kingdom and Germany, companies engaged in the mass markets, both locally and internationally, opt for the compliance officer as an employee. This is a sound solution for developed markets where companies have to constantly deal with compliance-related risks and hence must strive to overcome them. Contrary to this, in Serbia, having a compliance officer as a fulltime employee may be a burden for smaller companies, which do not face such a need all the time. It could also be counterproductive to transfer this obligation to any other organizational part of the company (as is practice in the United Kingdom). However, since all companies, regardless of their size or market, face compliance-related risks, a solution must be found for them. In the given circumstances in Serbia, an interim compliance manager could be a good transitional solution, although it is the authors' conclusion that having a compliance officer as a fulltime employee should be the ultimate objective.

Nevertheless, during the period of the adaptation and legal regulation of the compliance function in Serbia, it could be beneficial for companies to utilize new forms of work, e.g., interim management, especially with the aim of adapting to the new challenges, both in the field of business and in the establishment of new professions.

ance risk management as a core management process which engages all elements of the company [...] like a business planning, strategy, or product development process does. A company might push this process even to an extent where it gets a distinctive capability of it and sets it apart from its competitors. The third notion is that companies should [...] use specific tools to develop and support the process of legal and compliance risk management. [...] The top tool is [...] that the company [...] should go through a process which consists of seven steps: (1) understanding the roots, (2) defining a strategy, (3) setting the risk governance, (4) implementing processes and operations, (4) sourcing experts and advisors, (5) using technology, (7) influencing behavior of staff." Kurer, P., 2015, Legal and Compliance Risk in a Global World: Nemesis or Catharsis?, *Compliance Elliance Journal*, Vol. 1, No. 1, pp. 11–12.

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LICE ZADUŽENO ZA USKLAĐENOST
POSLOVANJA U REPUBLICI SRBIJI:
ZAPOSLANI ILI PRIVREMENI MENADŽER?

Iva Tošić

Jovana Misailović

APSTRAKT

U prvom delu rada autorke analiziraju načelo zakonitosti poslovanja i osnovne karakteristike funkcije praćenja usklađenosti. S obzirom na to da je načelo zakonitosti poslovanja jedan od preduslova za postizanje dobrog korporativnog upravljanja, od velikog je značaja uređivanje pravnog položaja lica (odeljenja) koje će obavljati funkciju usklađenosti poslovanja. Pravni položaj lica koje obavlja ovu funkciju može biti različito uređen, te ovo lice može biti angažovano kao zaposleni ili eksterni stručnjak.

U drugom delu rada autorke analiziraju načine angažovanja lica koje obavlja *compliance* funkciju uzimajući u obzir postojeću praksu u Ujedinjenom Kraljevstvu i Nemačkoj gde ova funkcija ima dugu tradiciju. Usklađivanje sa ovim primerima, u trenutku kada je ova funkcija tek u razvitku, može biti izazovno za Republiku Srbiju. U međuvremenu, autorke predlažu da kompanije u Republici Srbiji angažuju lice zaduženo za usklađenost poslovanja u formi privremenog menadžera.

Ključne reči: korporativno upravljanje, usklađenost, lice zaduženo za usklađenost poslovanja, privremeni menadžer, načelo zakonitosti poslovanja, novi oblici rada.

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