

ANTICORRUPTION COMPLIANCE: INTERNATIONAL EXPERIENCE IN LEGAL REGULATION AND INNOVATION FOR UKRAINE

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Abstract

Purpose: To explore and to analyze the global experience in anticorruption compliance management and to highlight exceptional importance of the anticorruption compliance system to be implemented in Ukraine for fighting corruption; to determine necessary steps to involve workers to the local anticorruption program; to offer specific recommendations for reforming the existing anticorruption compliance system in Ukraine.

Methodology: The study was conducted with general scientific (formalization, abstraction, analysis, and synthesis) and specific scientific (formal and legal, comparative and legal, and legal forecasting) cognitive methods applied.

Result: Upon thorough investigation of the issue, the author concluded that the anticorruption compliance system should be approved upon discussion with public officials, offered a new form of this discussion to be effective and to function in fighting against corruption offenses in domestic practice, and noticed that compliance management should involve professional standards, powers distribution regulation, and ethics rules determination.

Applications: The study is known to be innovative in Ukraine and the results might be interesting and useful for domestic legislators and public administration subjects at the building of the highly effective anticorruption compliance system.

Novelty/Originality: The study is believed to cast some light on the gaps in this issue which needed to be clarified since previous poor efforts seem still contradictory. The subject of the study is considered in Ukraine for the first time. The results of the study are obtained based on the independent investigation of the current anticorruption program in the public service and might be promising for effective application.

Keywords: *compliance, anticorruption program, corruption prevention, public service.*

INTRODUCTION

Corruption is nothing new in the world, its history is long enough. However, the corruption nature, causes, consequences, anticorruption measures have not been studied yet properly. Despite scientific researches focused upon nature and systematic measures to fight corruption seem to be urgent, there are not many of them. Because of lack of scientific developments on this issue, the legislative framework is considered to be imperfect, and civil servants are not encouraged to comply with regulations. The problem is further deepened by insufficient study of foreign experience in effective counteraction to corruption. An international compliance practice is definitely worth to be thoroughly investigated. However, national scientists are not interested in problems of anticorruption complicity.

Modern anticorruption methods should be integrated since the current anticorruption legislation seems unstable, underdeveloped and imperfect, and state authorities work ineffectively. The compliance practice is believed to be innovative and promising for the national legal system as a preventive method of combating corruption.

LITERATURE REVIEW

Local scientific publications dedicated to the compliance management system generally relate to financial markets and the banking system, in particular by: O. [Danilin and E. Pustovalova \(2010\)](#), T. [Musin \(2011\)](#), L. [Pravdyva \(2011\)](#), A.L. [Tsyuciak and I.L. Tsyuciak \(2011\)](#) and others. The issue of developing concepts for the compliance policy implemented as a corporate culture component is described in the scientific paper by I.M. [Paltsun \(2013\)](#).

Foreign scientific publications pay great attention to the issue of compliance management in different areas, including environmental protection and social issues related to labor: M.V.S. [Leite et al. \(2018\)](#), T. [Bağ et al. \(2019\)](#), O.A. [Bunakov et al. \(2015\)](#), to medicine: P. [Hidalgo-Lopezosa et al. \(2017\)](#). The issue of anticorruption compliance management in labor seems important to our research. Unfortunately, there are no many domestic works related to this issue. But foreign scientists are interested in these issues, in particular: S.J. [Frenkel and D. Scott \(2002\)](#), S. [Marlow \(2003\)](#), L.M. [Tanassi \(2004\)](#), A. [Pyman \(2005\)](#), V. [Pavlovska \(2008\)](#), S. [Kahn-Nisser \(2013\)](#), D. [Weissbrodt and M. Matthew \(2014\)](#), F. [Brandt and F. Ncapayi \(2016\)](#), M.Sh. [Chowdhury \(2017\)](#), B.A. [Deragon \(2018\)](#) and others.

Despite the urgency and relevance of the issue of anticorruption policy, national scientists have not studied it yet sliding just over one-sided studies on these issues. Thus, the nature, causes, and mechanisms of corruption, deep incentives of financial and economic corruption in Ukraine are studied insufficiently, as well as the role of the state in counteracting various manifestations of economic corruption. The study of anticorruption compliance is supposed to be the first effective step towards developing systemic anticorruption measures. Therefore, compliance management is first explored as a systemic anticorruption measure herein.

The purpose of the article is to analyze the global experience of using compliance management and to highlight the exceptional importance of studying and applying the anticorruption compliance system in the domestic practice as an innovative preventive method of countering corruption at the state level.

The article begins with an analysis of the global experience of anticorruption compliance in order to demonstrate the diversity of compliance management in different activities. The second part of the article analyzes the initial stage of implementation of compliance management in domestic practice in the banking system and argues that compliance management is reasonable to use in other activities. Then the anticorruption compliance in the public service and international experience in its application are analyzed. The end of the article is dedicated to determination of promising directions for improving the legal regulation of anticorruption compliance in the public service in Ukraine.

RESEARCH METHODOLOGY

The issue was studied with general scientific and specific scientific methods of cognition.

To reveal the causes and essence of the processes and phenomena studied herein, general scientific (general philosophical, theoretical) methods of formalization, abstraction, analysis, and synthesis were used during the research.

To study certain aspects of the subject hereof, specific scientific methods (approaches) were used, such as: technical (anticorruption compliance as a legal phenomenon not related to other public spheres, and its significance for the Ukrainian legal system), comparative and legal (experience of anticorruption compliance using in different countries and its practicability in Ukraine), legal forecasting (probable consequences of the anticorruption compliance system implemented into the domestic legislative and law enforcement or practice).

RESULTS

Worldwide Experience in Implementing Anticorruption Compliance

The concept of “compliance” appeared in the second half of the twentieth century to describe the internal control within commercial and non-profit companies over compliance with general requirements of the legislation, as well as industry standards, regulations, requirements for the companies’ activities, etc.

Nowadays, the concept of “compliance” in the broad sense is used to refer to an enterprise’s control system over the compliance of its activity, as well as activities of its employees, managers and third parties with the requirements of regulations. At the same time, in the narrow sense, “compliance” means a system of measures to comply with the requirements of anticorruption legislation and requirements to prevent conflicts of interest.

For the first time a compliance system appeared to be built in American and international companies due to the US Foreign Corrupt Practices Act (FCPA) adopted in 1972, which assigned responsibility for corruption offenses abroad to American companies and those operating in the United States, or represented on the American stock market or acting on behalf of American companies.

Severe penalties as stipulated in the FCPA, with the principled attitude of the US law enforcement and judicial system against corruptive offenses committed by companies, including abroad, led international companies operating in the United States to introduce an effective system for monitoring compliance with anticorruption legislation in order to avoid criminal and financial liability established by American legislation.

Over time, most of the developed countries, imitating American experience, have adopted own laws to oblige companies to enforce their own employees and representatives to comply with their anticorruption legislation (Britain, Germany, Switzerland, France, etc.), and therefore the notion of “compliance” as a system for preventing corruption and interest conflict, has become internationally important.

International companies, while protecting the reputation and legal responsibility, have developed the best practices in the implementation and operation of compliance systems, which eventually led to accumulation of significant world-wide experience to be applied by any company, regardless of country or economy branches ([Suyusanova, 2015](#)).

In Europe, the compliance function is regulated primarily by the following documents: the EU Markets in Financial Instrument Directive (MiFID) states that investment companies have to establish and maintain a compliance function; Report of the International Organization of Securities Commissions (IOSCO) (2006 Report of IOSCO on the Compliance function at Market Intermediaries); The Act of the Basel Committee on Banking Supervision (2005) on Compliance and the Compliance Function in Banks establishes principles of compliance function; The FSA Regulation (UK Financial Regulation and Supervision Authority) provides for sections on compliance, internal control, regulation of the Bank of Italy.

The International Standard ISO 19600:2014 “Compliance management system: Guidelines” developed by the International Organization for Standardization in 2014 and the International Standard ISO 37001:2016 “Anti-bribery management system” developed by the International Organization for Standardization in 2016.

These acts are believed to be benchmarks for building a system of control over compliance risks to be known to all companies belonging to major international financial groups ([Konovalova and Kevorkova, 2017](#)).

Anticorruption Compliance - an Innovative Tool to Counteract Corruption in Ukraine

Ukraine is now at the initial stage of the development of this anticorruption policy. The term “compliance” is new in the business environment of Ukraine and used in the financial and banking sector. Thus, in 2005, the Basel Committee on Banking Supervision (2005) published the “Compliance and the Compliance Function in Banks”. Based on this document, mandatory compliance policy (compliant risk management policies) is regulated by the Methodological Guidelines on Corporate Governance in Ukrainian Banks ([National Bank of Ukraine, 2018](#)).

Compliance is a system of measures applied at enterprises or organizations in order to prevent corruption offense committed by their employees, as well as in order to ensure the compliance of the enterprise’s activity with the requirements of anticorruption legislation and requirements to prevent conflicts of interests.

Compliance is a complex system with elements determined by specifics of each particular company, but the following elements are mandatory:

1. An anticorruption program at the enterprise, and a person responsible for its implementation (compliant specialist);
2. Internal audit system;
3. Assessment of corruption risks;
4. Measures to prevent violations by third parties acting in the interests or on behalf of the enterprise;
5. Tools of informing on intention or commission of corruption and related violations;
6. Response measures from management to reports on corruption and related violations;
7. Protection of whistle-blowers, people reporting on corruption and related violations to be committed;
8. Rules of interaction with law enforcement bodies in the investigation of corruption and related violations;
9. Conflict settlement regulations.

Compliance forms a foundation for monitoring. That is, compliance is an integral part of the management system, consisting of the internal control system. Compliance management is a set of measures and tools aimed at revealing difficult situations and monitoring enterprises’ activities. The essence of compliance management is determined in its main functions. An analytical function involves systematic procedures for revealing potential compliance risks. An information function involves the collection and processing of information that characterizes the duties execution for a specified time. A warning function provides for precautionary measures to prevent unlawful actions by employees. A function of effective risk management is in risk revealing and assessing, in the determination of an acceptable level and neutralization.

Compliance management function is implemented in the following areas:

- Institutional compliance management, which includes activity for compliance with the regulations of internal interaction and decision-making process;
- Operational compliance management, which includes control over bank transactions in order to reveal and assess compliance risks, for example, related to the legalization of income from crime, terrorist financing, identification of unreliable counterparties, and fraud and corruption risks.
- Compliance management with professional conduct rules, including identification, assessment, and monitoring of compliance risks related to professional conduct and corporate ethics ([Kolyada, 2016](#)).

An anti-bribery program should be developed not only in the banking system but also in other areas, in particular, in the public service in order to avoid risks of disciplinary or criminal offenses due to non-compliance with the requirements for the corruption prevention and counteraction. Therefore, the issue of developing and implementing an anticorruption program is believed to be relevant for all enterprises.

Anticorruption Program in the Public Service: Legal Regulation in Ukraine and International Experience

The Law of Ukraine “On the Prevention of Corruption” ([Verkhovna Rada of Ukraine, 2014](#)) in Articles 62 and 63 sets requirements for an anticorruption program of each legal entity. An anticorruption program of a legal entity is a set of rules, standards, and procedures for revealing, counteracting and preventing corruption in the legal entity’s activities. The anticorruption program is mandatory to be approved by heads and chiefs of: 1) state, utility enterprises, economic entities (with the state’s 50 percent share) with over fifty person staff in the reporting (financial) year, and the gross income from the sale of products (works, services) exceeding UAH 70 million during this period; 2) legal entities, participants in the procurement procedure in accordance with the Law of Ukraine “On State Procurement”, if the cost of purchasing goods, services, works is equal to or exceeds UAH 20 million.

The anticorruption program should be approved upon discussion with employees of the legal entity. The text of an anticorruption program should be permanently public to employees of the legal entity. Provisions on the obligatory anticorruption program compliance are to be included in labor contracts, internal regulations, and may also be added to contracts concluded by the legal entity. A person responsible for the anticorruption program implementation should be assigned as an authorized person at the legal entity.

The anticorruption program of legal entities may include, in particular, the following provisions: 1) the scope of application and the range of persons covered; 2) an exhaustive list and description of anticorruption measures, standards, procedures for their implementation, including the order of regular evaluation of corruption risks in the legal entity's activities; 3) professional ethics standards for the legal entity's employees; 4) the rights and duties of the legal entity's employees and founders associated with prevention and counteraction of corruption in the legal entity's activities; 5) the rights and obligations of the authorized person responsible for prevention of corruption and subordinate employees (if any); 6) the order of regular reporting by the authorized person to the founders of the legal entity; 7) the order of the proper supervision, control and monitoring of compliance with the anticorruption program in the legal entity's activities, as well as evaluation of results of its implementation; 8) the confidentiality terms regarding informing the authorized person on facts of incitement to or commitment of corruption or related offenses; 9) procedures for protection of employees who have reported about corruption or related offenses; 10) the procedure for informing the authorized person on actual or potential conflicts of interests, as well as the procedure for resolving conflicts of interest; 11) the procedure for individual consultations with the legal entity's authorized person on anticorruption standards and procedures; 12) the procedure for regular training of employees in corruption prevention and counteraction; 13) application of disciplinary measures to employees violated the anticorruption program provisions; 14) the procedure for response to revealed facts of corruption or related offenses, in particular, informing state authorities, internal investigations; 15) the procedure for amendments to the anticorruption program.

Unfortunately, in practice, the developed and adopted anticorruption programs have not led to positive changes in the fight against corruption. In our opinion, this situation can be explained by the fact that the legislator was not able to determine the regulations on the ethical conduct of civil servants, as it was done at the international level. An attempt was made to approve the Regulations of ethical conduct of civil servants ([Cabinet of Ministers of Ukraine, 2016](#)), but this attempt was unsuccessful, since this normative act lasted only a year, and subsequently was abolished it. Currently the General Rules of ethical conduct of civil servants and local self-government officials ([National Agency of Ukraine for Civil Service, 2016](#)) are valid, which do not contain any specific rules of civil servants' conduct, but only description that is not clear to actions of civil servants.

The regulations of ethical conduct of civil servants have been detailed in the Model Code of Conduct for civil servants (Appendix to Recommendations of the Committee of Ministers of the Council of Europe of May 11, 2000 No. R (2000) 10). This act contributed not only to adoption of national codes but also to the establishment of special state institutions on ethical issues, implementation of ethical education, etc.

The key rules of compliance management in this Code are requirements for the gifts to civil servants. Civil servants should not demand or accept gifts, favours, hospitality or any other benefit for himself or his or her family, close relatives and friends, or persons or organizations with whom he or she has or has had business or political relations which may influence or appear to influence the impartiality with which he or she carries out his or her duties or may be or appear to be a reward relating to his or her duties. This does not include conventional hospitality and minor gifts. If the public official is in doubt whether he or she can accept a gift or hospitality, he or she should seek the advice of his or her superior.

The public official should not make any proposals or give any benefits in connection with the work, other than those permitted by law. The public official should not attempt to influence any person or body for personal reasons, including other civil servants, using the work position or offering personal benefits.

Compliance should become the basis of labor relations in the public service, since the current system of labor relations in the public service is ineffective because of the absence of compulsory mechanisms for combating corruption, through lengthy bureaucratic procedures and non-compliance by many public officials with professional ethics and qualifications ([Chowdhury, 2017](#); [Tastan & Davoudi, 2017](#)).

[The United Nations Convention against Corruption \(2018\)](#) should be mentioned as well. According to Article 8 of the UN Convention, in order to achieve the anticorruption goals, each State member should develop standards of the faithful performance by civil servants of their duties. According to the UN Convention, they include the [International Code of Conduct for Public Officials \(1996\)](#). The International Code lists the main principles of conduct (efficiency, competence, attentiveness, justice, impartiality) and defines main rules for preventing conflicts of interests, declaring income information, accepting gifts, handling information, etc.

Prospects for Legal Regulation of Anticorruption Compliance in the Public Service in Ukraine

Modern compliance practices have several key points, first and foremost, it is effective prevention of corruption, counteraction, and prevention of fraudulent operations with resources of the public authority. To achieve these tasks, the public authority should develop certain internal documents. An important tool of compliance practice should be internal

rules restricting the handling of gifts to public officials, rules of hospitality, procedures for coordination of charitable contributions, etc. Particular attention should be paid to checking the reputation of business partners, intermediaries, and agents that provide different services to the public authority. Such procedures should be focused upon hidden risks when corruption actions disguise as quasilegal advisory services, marketing researches, etc. An effective component of compliance practice may be internal inspections and investigations to detect and prevent cases of violation of professional ethics by the public officials. Such investigations and inspections in public authorities result in control over situations contributing to implementation of corporate rules (Voloshenko, 2014).

The anticorruption compliance program should be presented as a separate written document, approved by the corresponding order of the head of the enterprise. The anticorruption program should be approved only after its discussion with the public officials, however, the legislation does not provide for its obligatory form, so we believe that it may be a general staff meeting. The draft program should be provided (in soft or printed) before, be learned and subsequently approved at the general staff meeting.

The anticorruption program should be public to government officials. It should be available on the enterprise's corporate site or placed as printed on a notice board. It is important to mention the way for employees to read the anticorruption program in the employment contract, job duty description, or internal labor code. In addition, the public authority should keep documents confirming by signing that the employees read and learned the anticorruption program.

CONCLUSION

Integration of Ukraine into the world economy forces to adhere to international standards and rules. Correspondingly, compliance practice should play a key role. Because the compliance control system is aimed not only at the protection of the reputation of the public authority, but also creation of the competitive market environment and development of the economy in general, therefore the procedure for compliance practice establishment and operation in key areas should be regulated at the legislative level in the national economy. However, first and foremost, effective compliance should include a systemic anticorruption policy. This approach is very important since attempts to implement the anticorruption policy are useless when legislators, executive authorities, large and regional business representatives are involved in this process.

Anticorruption compliance should be not a local act, but a functional document, aimed at establishing rules of professional ethics in each particular field. Professional standards should be a key to the compliance management, since it is impossible to identify risks of conflicts of interest unless the powers distribution is regulated and specific ethics rules are stipulated, and therefore, according to our belief, anticorruption compliance should include the circle of persons covered by the provisions, an exhaustive list and description of anticorruption measures, standards, and orders for their implementation (application), including the procedure for regular assessment of corruption risks in the activities of the public authority and norms of professional ethics. Anticorruption compliance should become a mandatory addition to a public official's employment contract.

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