WAYS OF IMPROVING COMPLIANCE MEASURES AND IMPLEMENTATION OF FOREIGN EXPERIENCE INTO THE LEGISLATION OF UKRAINE

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Abstract. The purpose of the article *is to study relatively new phenomenon of compliance for Ukraine and to identify its priority areas of development that should bring the domestic regulatory framework closer to world practice.* **Methodology.** *The presented research was conducted within the ontological framework of post-neoclassical science using historical, comparative, systematic, structural-functional and dialectical methods. These methods allowed to describe the current state of the international legal framework in the field of compliance and to outline the most important areas for implementation of international experience in the legislation of Ukraine.* **Results.** *A well-known fact, supported by the vast majority of both scientists and practitioners, is a direct relationship between expected profitability (which is usually embedded in business' technical and economic performance of) and possible risks when doing business. The presence of both subjective and objective factors existing in modern conditions in Ukraine should be taken into account when determining such a ratio. Such factors as instability of political situation, corruption risks impact, economic crises, including the impact of the Covid-19 pandemic, devaluation of the national currency and, above all, the war in eastern Ukraine influence on business risks. Such measures as improving of corporate governance culture aimed to provide compliance with generally accepted norms, anti-corruption legislation, rules that are generally accepted in the relevant field of business can reduce such business risks, ensure the stability of business' activities in the existing conditions and eliminate negative factors.* **Practical implications**. *Compliance measures, which have been widely used for a long time by companies of economically developed countries, are beginning to be implemented by domestic business entities in their activities and serve as an important element of integration of Ukrainian companies into the world economy.* **Value/originality.** *A mentioned vector of scientific intelligence, specifically the ways of improving compliance measures and implementation of foreign experience in the legislation of Ukraine has not yet received due attention in any profile study on compliance in business field despite its demand in practice, which already has positive experience in developed economies. Emphasizing the importance of compliance for the sustainable development of Ukraine's economy is very important from the point of existence of such components in the activities of any compliance department as prior consistency of regulations and algorithms aimed to identify, assess and timely avoid identified risks.*

Keywords: *compliance, compliance system, compliance functions, compliance risks, compliance requirements, compliance control, business entities.*

1. Introduction

«***Ukraine is facing aggression from two sides: Russia from the outside and corrupt forces from the inside that divert it from the democracy it is trying to build. There are a number of areas in which it is important for Ukraine to make progress. In particular, in having an independent judiciary that will be functional, carefully elected and have independent oversight, corporate governance, especially in state-owned enterprises, as well as real implementation, in particular, of anti-corruption laws***».

U.S. Secretary of State Anthony John Blinken

The importance of compliance in the context of socio-economic development of modern life is evidenced by the thesis voiced in Davos (Switzerland) at the World Economic Forum that compliance as an active use of internal control belongs to such important areas of economic improvement as fighting corruption, cutting bureaucracy and availability of crediting.

Ukraine's European integration processes determine not only the harmonization of national and European legislation, but also the implementation of certain standards of doing business and its development. One such legal instrument is compliance.

The term «compliance» comes from the English «to comply» (perform, meet certain requirements, standards, etc.). Compliance with laws, rules, and standards typically addresses issues such as adhering to appropriate standards of market conduct, managing conflicts of interest, treating clients fairly, and ensuring a fair approach to advising clients. The

scope of compliance also includes specific areas, such as:

- counteracting the legalization of funds obtained from criminal activity and terrorism financing;
- development of documents and procedures that ensure compliance of the company's activities with applicable law;
- protection of information flows, counteraction to fraud and corruption, establishment of ethical norms of behavior of employees, etc. [1]

The Oxford English Dictionary provides the following definition of the term: «compliance» - an activity that meets the established requirements or instructions, or obedience (in English - compliance is an action in accordance with a request or command, obedience) [2].

The International Compliance Association defines the concept of «compliance» as the ability to act in accordance with an order, set of rules or guidelines. In the context of compliance with financial services, businesses operate at two levels: level 1 - compliance with external rules imposed on the organization as a whole; level 2 - compliance with internal control systems, which are imposed to achieve compliance with external rules. [3].

The Basel Committee on Banking Supervision (2005) defines compliance risk as the risk of legal or regulatory sanctions, financial losses or reputational damage that bank may suffer from non-compliance with laws, regulations, rules related to organizational standards and codes of conduct applicable to its banking activities [4].

In general, it should be noted that the basis that mediates the organizational, legal and methodological requirements for the implementation of compliance are both general legislation and regulatory (eg, Sarbanes-Oxley, Basel II, HIPAA), standards and codes of practice (eg, SCOR, ISO9000), agreements with business partners [5], as well as corporate (internal) rules of local action (for example, ethical norms of behavior that are established and correspond to a certain area of activity).

At the moment, it should be borne in mind the serious omission of the legislator that did not determine the mandatory application of compliance measures at the mandatory level. Accordingly, any entity may determine at a dispositive level the need for compliance measures depending on the scope of its activities and take responsibility for identifying potentially dangerous potential risks and the consequences of their realization.

However, such discretion in the application of compliance measures by the entity itself does not in any way affect its presumption of guilt.

Given the possibility of mandatory application of compliance measures by each entity in the law, it should be agreed that an exclusive list of such compliance measures is unlikely to be contained in the law, as their detail will still be the responsibility of the entity. This is logical given that such a detailing of possible mandatory compliance measures is necessary given the peculiarities of internal organization, statutory documents and specifics of the activity.

2. Research methodology

The presented research on ways to improve compliance measures and implementation of foreign experience in the legislation of Ukraine was conducted within the framework of the ontology of post-non-classical science.

The latter is characterized by consensual scientific knowledge (transdisciplinarity, organizational diversity, social responsibility and reflection), and methodological plurality. The fundamental foundations of ontology in post-non-classical science have led to use of historical, comparative law, system and structural-functional, as well as formal-logical methods in this study.

In particular, the historical method of research was used in the study of the origins of legal regulation of compliance, which originate in countries with developed economies; comparative legal method that used for the analysis of legislation in the field of compliance in Ukraine and other countries, international legislation in this area, determining the features of legal regulation of relations arising in the process of application of compliance measures and compliance procedures in different countries and legal systems, as well as in clarifying the advantages and disadvantages of existing theoretical constructions of legal doctrine in this area; systemic and structural-functional method that used during the analysis of the achievements of legal science in the field of compliance, the current legislation of Ukraine and the practice of its application, in the formation of own theoretical generalizations, conclusions and proposals; formal-logical method, in order to analyze the legislation of Ukraine in the field of compliance in order to identify its shortcomings and to provide proposals for their elimination.

3. Results

3.1. Historical retrospection of the formation and development of legal regulation of compliance

Today, the compliance system in Ukraine is undeveloped and is at an early stage of its development. Therefore, when intending to implement this system in business, the use of international standards is relevant.

The origins of legal regulation of compliance originate in countries where the importance of its effectiveness has long been recognized.

The main international acts in the field of compliance were the UK Bribery Act 2010, the US Foreign Corrupt Practices Act 1977 and the French Sapin II Law, 2016.

The scope of these laws regulates anti-corruption activities within the framework of the prohibition of bribery of foreign officials, including employees of foreign public authorities, public international organizations or their representatives, and individuals in

commercial organizations. It should be noted that in Ukraine the extraterritorial principle has already proved to be an effective tool for combating corruption.

An international act that has a cross-border character and has a significant impact on foreign companies is the UK Bribery Act [6], adopted on April 8, 2010 and entered into force on July 1, 2011, is one of the most famous national laws governing compliance.

The above-mentioned Act has a cross-border application, so its provisions must be taken into account not only by British but also foreign companies, including those who do not have a physical presence and do not work in the UK. There are several main features of the UK Bribery Act, namely:

- the concept of «bribery» covers both giving and receiving bribes, the law is also aimed at introducing mechanisms to prevent corruption by potential bribe-takers - British and foreign companies;
- liability is established not only for bribery of officials in the UK, but also for bribery by a British company (or in its interests) of an official abroad. This is where the principle of cross-border operation of the law is realized;
- liability is established for bribery not only of public officials, but also of officials in the private sector;
- The law does not provide a legal definition of «bribery» and what should be understood as bribery, leaving this issue to the discretion of judges.

In the Recommendations issued by the UK Ministry of Justice on 30 March 2011 [7], formulated six principles that should underlie the company's anti-corruption procedures:

1. Proportionate procedures. Procedures should be appropriate to the level of risk faced by the company, its scale and the nature of the business.
2. Top-level commitment (tone at the top, top level management). The practical implementation of this principle should be reflected in the code of conduct or ethics of the company, which formulates a general negative attitude - «zero tolerance» for corruption by company, its shareholders and top-level management.
3. Risk assessment. The company must assess the potential internal and external risks of corruption. The evaluation should be carried out periodically and its results should be documented.
4. Due diligence. Due diligence procedures should be applied to persons acting on behalf of the company in order to reduce the risk of their involvement in bribery.
5. Communication, in particular education. Communication implies the need to ensure the availability of information among employees, the availability of information to external partners, as well as trainings.
6. Monitoring of procedures (adequate procedures). Companies should regularly monitor their procedures and make changes if needed. It is necessary to provide regular reporting on the application of procedures and evaluation of the effectiveness of their application.

Further, we turn to the US [8]. This is the world's first law banning the bribe of foreign officials, which provides for the adoption of compliance programs by companies. Therefore, the United States can be considered a pioneer in the introduction of compliance regulation.

It should be noted that the main differences between the US Anti-Corruption Act and the UK Bribery Act are: 1) The US Act applies only to public corruption and does not affect commercial or private sector corruption; 2) U.S. law does not consider facilitation payments to public servants for performing their usual functions in a timely manner as a bribe.

In the United States, as in the United Kingdom, the existence of an effective compliance system is a mitigating circumstance. Thus, measures to organize it are important in addressing the size of penalties.

In countries with an effective legal system, compliance measures help reduce the number of offenses and, consequently, penalties. But it is a mistake to assume that compliance serves as a guarantor of crime prevention. Practice shows what price companies have to pay due to the lack of a compliance system within the company.

Thus, the German company Siemens after the scandals in 2006 conducted an audit of its internal control system, which updated the company's approach to the creation and operation of compliance function [9].

Another scandal illustrating the consequences of the company's lack of a compliance program in 2012 affected the international pharmaceutical company Pfizer. Interestingly, the amount of detected corruption payments amounted to 2 million dollars. US, however, sanctions against Pfizer turned into a fine of $ 15 million and commitment to implement a comprehensive compliance program [10].

It should be noted that the United States and the United Kingdom dictate their terms of doing business in the world in the field of compliance. This is due to a number of factors, namely: the first scandals with giant companies regarding violations of the law, which led to a change in business, were in the United States (scandal with energy giant Enron [11]);

US and UK anti-corruption laws are extraterritorial in nature and therefore extend to other countries that are in any way, even indirectly, related to US and UK partners; as a consequence of the first two factors, it is in these countries that there is a practice of implementing compliance in the organization. The United States and the United Kingdom are countries with long-established compliance systems, with their own specific legislation, different approaches to regulation.

That is why other countries, including Ukraine, will have to integrate and adjust the compliance mechanism within their country, taking into account the legislation and experience of the United States and the United Kingdom. Otherwise, the country will fall out of the international requirements of doing business, and opportunities for economic, trade, business and other areas of activity in the international arena will be negatively affected.

Strengthening economic cooperation between Ukraine and other countries has created the conditions for joining forces in the fight against corruption. Such cooperation takes place within the framework of international organizations, which define the prevention and combating of corruption as one of the priorities of their activities. Ukraine has ratified and actively integrates into national legislation the main international acts on combating corruption, namely:

- United Nations Convention Against Corruption [12];
- Criminal Convention of the Council of Europe on Combating Corruption (CriminalLawConventiononCorruption) [13];
- United Nations Declaration on Combating Corruption and Bribery in International Commercial Transactions [14].

Convention for the Suppression of Bribery of Foreign Officials in International Business Transactions [15].

At the legislative level in Ukraine, the concept of «compliance» has no legal definition, but is reflected in the financial documentation, in particular in the provisions of the NBU. Thus, in the Regulations on the organization of internal control system in banks of Ukraine, compliance means to be in line with the banking legislation, market standards, as well as standards and internal documents, including procedures. The same document defines the concept of «compliance risk» as the risk of legal sanctions, financial losses or loss of reputation due to non-compliance with the banking legislation, market standards, as well as standards and internal documents, including procedures.

Compliance goals for banks are to ensure their compliance with the legislation of Ukraine, regulations of the National Bank of Ukraine, internal documents, standards of professional associations that apply [16].

In Ukraine, the Law of Ukraine "On Principles of preventing and fighting Corruption" was adopted in 2011, which was replaced in 2014 by the Law of Ukraine "On Prevention of Corruption" [17]. However, the adoption of these laws has not lead to the obligation of economic entities to introduce compliance systems in their activities.

The norms of the Law of Ukraine «On Prevention of Corruption» stipulate that the anti-corruption program of a legal entity is a set of rules, standards and procedures for detecting, combating and preventing corruption in the activities of legal entity. Also, the norms of the above-mentioned Law stipulate that such programs are mandatory for:

- state, communal enterprises, business associations (in which the state or communal share exceeds 50%), where the average number of employees exceeds 50 people, and the gross income exceeds UAH 70 million;
- legal entities that are participants in the procurement procedure in accordance with the Law of Ukraine «On Public Procurement» [18], if the purchase price is equal to or exceeds UAH 20 million.

It follows from the above that there is no obligation for other business entities to implement compliance systems. However, it is appropriate to have such systems in place for international companies, their branches and representative offices operating in Ukraine. Much less often, such systems are implemented at the initiative of shareholders, in order to control the transparency of business processes, and hence their competitive advantage.

Today in Ukraine, compliance control is mostly applied by big business, for example, since 2010, DTEK Group 2010 has a separate Compliance Management Department [19], PJSC VF «Ukraine» (Vodafone) also has a separate compliance unit [20]. Compliance is also used in the activities of state-owned enterprises, for example, NNEGC Energoatom [21], Ukroboronprom. [22].

It should be noted that the existence of compliance system will not provide desired effect without an effective mechanism of control and responsibility, when each employee understands that there is responsibility for violating the relevant rules. Also, there are individuals in this mechanism who monitor compliance with these rules. Most often, these functions are entrusted to compliance officers or management.

Given the above, we have to state that in Ukraine there is a necessity to study the mechanisms underlying internal control, despite the fact that they are based on the relevant mechanisms that exist in the United States and the United Kingdom.

In particular, currently in foreign theory and practice, the most common subtype of internal control in the enterprise is compliance, which is closely related to the risk-oriented approach.

3.2. Improving the legislation of Ukraine on the implementation of compliance in the national practice of business entities

Formally, the Ukrainian legislator has made attempts to introduce the mentioned sub-institution in certain sectors of the economy, but due to the imperfection of legal regulation it is not perceived by business entities as a productive way to manage risks.

It should also be noted that in Ukraine there are no common approaches to the scientific substantiation of "compliance" definition, which certainly has a negative impact on the further implementation of this sub-institution.

But it should be noted that theorists-researchers distinguish three different approaches which are

based on an attempt to reveal the essence of compliance [23, s. 5]: the first is to understand that the entity has to comply with the provisions of international and national laws, established rules and standards (in a broad sense); the second, in the sense of compliance of business entities with anti-corruption legislation (in the narrow sense); third, as a systematic internal comprehensive audit of business entity's own initiative on a regular basis (methodological aspect).

All this is also confirmed by the fact that in the United States and the United Kingdom the legal definition of "compliance" has significant differences. In the United States, it is largely a matter of due diligence on the part of business entity to detect criminal behavior of employees, as well as the formation of corporate culture and compliance with the law.

In the UK, overwhelming content is associated with the development of internal programs and strategies, risk management and compliance monitoring.

While in Ukraine, compliance is the provision of legal requirements, as well as the operation of mechanisms aimed at eliminating commercial risks.

At the same time, compliance remains a new sub-institution to which entities operating mainly in the financial sector are subordinated.

Compliance is also sectoral in nature, as it is directly linked to anti-corruption measures.

Analysis of foreign legal documentation and doctrinably enshrined provisions on the regulation of the compliance function allows us to identify a number of features of its implementation:

a) regulations of Ukraine do not detail the structural elements of the compliance system due to their attribution to the internal control of enterprise;
b) in the United States and the United Kingdom compliance measures as a form of internal control are used in regulations of the central level, which emphasizes their importance;
c) the fact of use of compliance measures by business entity can be considered as a prejudicial (mitigating) factor in case of committing an offense;
d) in the United States and the United Kingdom, the compliance function is determined by the instrument of minimizing financial, economic and reputational risks by applying criteria at the level of bylaws.

The above allows us to conclude that compliance is a practice-oriented form of control aimed at minimizing risks of financial and economic activities (both existing and hypothetical), which allows us to expect positive results from its implementation as a form of internal control.

Taking into account the unsystematic nature of the development and regulation of internal economic control of economic entities in Ukraine, we must emphasize that the lack of definition of compliance control at the legislative level has a negative impact on the effectiveness of such a relevant mechanism.

Therefore, the provisions of a number of regulations of Ukraine should reflect the wording of the following content: compliance control is a form of internal control, as a set of audit measures aimed at minimizing economic, financial and economic and reputational risks that may arise in the activities of economic entities.

Also, we propose to make changes by supplementing the list of control measures with the above form, by supplementing part 7 of Art. 62 Law of Ukraine of 14.10.2014 № 1700-VII "On Prevention of Corruption", as well as to amend Part 5 of Art. 8 of the Law of Ukraine "On Accounting and Financial Reporting in Ukraine" of № 996-XIV of 16.07.1999 [24].

As for the structural elements of this subtype of control, we consider it appropriate to reflect them and some issues of implementation of such control in the above acts, namely Art. 63 and 121 respectively. In turn, in the Law of Ukraine "On protection of economic competition" from 11.01.2001 № 2210-III [25] it is advisable to add a separate section "Internal antitrust control", which should, in our opinion, detail the features implementation of antitrust compliance.

It has already been mentioned above that the experience of the United States and the United Kingdom shows the use of compliance in various areas of management. In our opinion, the most effective from the point of view of its effectiveness of implementation in the system of internal economic control of the business entity of Ukraine should be distinguished taking into account the scale of the entities and the type of their activities. Accordingly, this should be taken into account in Part 4 of Art. 8 of the Law of Ukraine "On Accounting and Financial Reporting in Ukraine" from № 996-XIV from 16.07.1999 by allocating areas of compliance procedures and taking into account the costs of their provision.

In order to ensure consistency of the provisions of regulations, we consider it appropriate to supplement Art. 63 of the Anti-Corruption Law, Part 6, which enshrines compliance as a form of corruption prevention that can be used by business entity.

4. Conclusions

The studied features of compliance procedures allow us to conclude that the so-called prejudicial (preventive, soft, advisory) approach prevails in the context of establishing the main directions of compliance procedures at the domestic level, but with due regard for generally accepted international approaches.

The peculiarity of state influence on the development of compliance in Ukraine is the need to be guided by the Regulations of the National Bank of Ukraine and legislation on anti-corruption activities, which significantly limits the ways and swiftness of compliance development in our country.

At the moment, it should be borne in mind the serious omission of the legislator who did not determine the mandatory application of compliance measures

at the mandatory level. Accordingly, any entity may determine at a dispositive level the need for compliance measures depending on the scope of its activities and take responsibility for identifying potentially dangerous risks and the consequences in case of their realization.

However, such discretion in the application of compliance measures by the entity itself in no way affects its presumption of guilt.

Given the possibility of mandatory application of compliance measures by each entity in the law, it should be agreed that the exclusive list of such compliance measures is unlikely to be contained in the law, as their detail will still be the responsibility of business entities. This is logical given that such a detail of possible mandatory compliance measures is necessary given the peculiarities of internal organization, statutory documents and the specifics of activity.

When improving the effectiveness of compliance development in Ukraine, international experience should be taken into account in the context of the peculiarities of the adaptation of domestic legislation to foreign legislation in this area. Such adaptation should involve the development of system of compliance measures built in accordance with internal organizational standards.

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