Compliance at universities – nightmare or overdue structural element?

A German law perspective on the possible advantages and drawbacks of law abidance systems at public universities

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I. Introduction

Phrasing its concern less pointedly than its title[1], this paper analyses the question of whether it can be recommended to public universities to step up their efforts to integrate compliance into their organisational structures and administrative culture, considering the advantages and – to some extent often neglected – possible setbacks of compliance. It will further discuss whether the freedom of science limits compliance at universities, specifically.

Sometimes objects in nightmares or in real life appear to be threatening precisely because they are not identifiable initially. So the compliance issue may possibly become less daunting once it becomes clear what the underlying subject matter of the term "compliance" is. Therefore, discussing the expression compliance in more detail, together with its advantages and disadvantages, is what will be pursued first (II.). Subsequently, the paper will move on to the question as to whether, based on the premises developed so far, compliance should be in fact an important structural element of universities that their administrative bodies ought increasingly to implement (III.).

II. Part One: Compliance – Approaching the term and its use in private sector enterprises

The term compliance defies a simple definition. Literally, it implies adherence to somebody or something. Thus far, this generalised definition does not cause any problems. The question arises – especially for a native speaker of German – whether the difficulties in specifying the term compliance outlined in the following originate from the fact that a term that had been coined in the "Anglosphere" has been conferred unaltered and/or unreflectingly. Alternatively, this conceptual issue could mainly, if not exclusively, be due to the complex regulatory environment in which it is used.

1. Translation issues

If an English phrase such as "compliance" (which has at the same time been the term used for a specific debate in the USA) is discussed in Germany, then the control question needs to be raised, namely whether the denotation of the two identical expressions is the same, as well. After all, the adoption of an English technical term often coincides with a change in meaning – whether it is subtle and unwitting or deliberate because the use of the term is supposed to serve as a euphemism or another instrument of deception in modern German management language.

However, the findings are above suspicion when it comes to "compliance". At its heart, the German jurisprudential and business studies discussion is adopting a topic that has been debated in a similar manner for 30 years in the "homeland"[2] of compliance, the USA. Now and then, and in the USA as well as in Germany, the main subject of compliance is "the organisation of legality"[3] in private enterprises, especially in order to avoid liability. However, the term has arguably been used even earlier as a medical expression in order to describe the patient's willingness to fully cooperate with the therapy selected for him. The legal term of business management which is of interest here was developed at the end of the eighties in the last century. At that time, the US financial industry in particular came under administrative pressure due to corporate criminal liability of stock corporations for the illegal behaviour of the companies' employees. For that reason, these enterprises began to introduce compliance codes. These were not only aiming at the avoidance of further misconduct, for since 1991 the "United States Federal Sentencing Guidelines"[4] have stipulated that an "Effective Compliance and Ethics Program" is an important prerequisite for an organisation[5] to be entitled to mitigation in criminal proceedings against legal entities.[6] From this basis and because of further enhancements to their compliance management systems by numerous US companies (due to a further tightening of the FCPA[7] in 1998 and because of the passage of the Sarbanes-Oxley Acts in 2002[8]) compliance slowly began to grow outside the USA, too.[9] In Germany, compliance initially

[1] The headline of this abstract was also the title of a speech presented by the *author* at the 15th Israeli-German Administrators Conference ("IGAC") at the University of Heidelberg on 16 March 2015. This paper is an augmented adaption of this speech.

[2] See *Moosmayer*, Compliance, 3rd ed. 2015, para. 17.

[3] See *Stober*, in: Curti/Effertz (eds.), Die ökonomische Analyse des Rechts, Entwicklung und Perspektive einer interdisziplinären Wissenschaft, Festschrift für Michael Adams, 2013, p. 85 (86).

[4] See United States Sentencing Commission (ed.), Guidelines Manual [USSG], Nov. 1, 1987, as amended.

[5] With regard to the obligation to conduct all necessary compliance measures the USSG addresses "organizations" which are in turn defined as "a person other than an individual" (see USSG § 8 A1.1).

[6] See *Momsen/Tween*, in: Rotsch (ed.), Criminal Compliance, Handbuch, 2015, § 30 para. 10 f.; *Petsche/Larcher*, in: Petsche/Mair (eds.), Handbuch Compliance, 2nd ed. 2012, p. 1; *Behringer*, in: Passarge/Behringer (eds.), Handbuch Compliance international, 2015, p. 9.

[7] See Foreign Corrupt Practices Act (FCPA), 19.12.1977, 91 Stat. 1494, as amended.

[8] See Sarbanes-Oxley Act (SOX), 30.7.2002, 116 Stat. 745.

[9] For the international development of compliance see *Rotsch*, in: Rotsch (fn. 6), § 1 para. 24 f.; for instructive country reports on the respective current status of compliance efforts (with an emphasis on criminal law on corruption) see

became known as a specific provision within economic law as, since 1994, pursuant to the German Securities Trading Act[10], securities service providers have been obliged to establish a compliance function. Further, statutory provisions with regard to compliance are increasingly being added to the risk management provisions of the German Banking Act[11]. Simultaneously, at the beginning of the 1990s, the first German banks began to set up compliance divisions, at that time regarding capital markets law.[12]

Anti-corruption legislation then became another important factor for the further development of compliance in Germany. Only in 1996 – and following an OECD recommendation – it became comprehensively prohibited for the first time to deduct corruption payments as company-related losses as regards income tax.[13] Also in 1999, bribing foreign public officials became a criminal offence under German law.[14] A further tightening up of German anti-corruption legislation took place in 2002 when taking and giving bribes in commercial practice became punishable also with regard to competition abroad.[15]

Public attention to compliance matters subsequently soared in Germany due to the Siemens scandal revealed from 2006 onwards. At that time, it became apparent that within the Siemens group there had been a widely ramified and worldwide system of slush funds and dubious consultancy agreements in order to bribe decision-makers within the public and private realm. In the end, experts believe that the scandal cost Siemens approximately EUR 3 billion,[16] an accumulation of criminal and administrative fines, retrospective tax payments and remuneration claims by law firms and external auditors.

This and further outrages triggered a higher public sensitivity regarding corporate crime and large German businesses in particular began to understand the negative consequences of non-compliance, not only with regard to the immediate personal and financial risks involved but also to the danger for the company's reputation. At the same time, regulatory pressure increased because German und US law enforcers also became more and more aware of the legal implications of a non-compliance culture in German enterprises. Finally, the increasing intensification and interaction of national, supranational and international legislation which need to be observed in daily business of many industry branches has further strengthened the insight that "organised legality" is a necessity.[17] As a side note, the fact that Siemens was able to collect damages from former executive board members and that these legal cases enjoyed a wide media coverage may also have contributed to the belief among today's CEOs and other (supervisory) board members that compliance is – at least factually – indispensable in large-scale companies and groups facing multiple and complex legal risks.[18]

2. Broad interpretation and vagueness of the term "compliance"

In essence, therefore, the compliance term used in Germany with regard to private economy means the same as in the homeland of compliance: Compliance describes adherence to the law and further regulation within and by organisations. Thus, compliance may only describe a mere platitude[19] – everybody knows that one ought to comply with the law. Therefore in the legal discussion most scholars agree that – as already mentioned – compliance does not only express an attitude towards material law but also an orientation towards a well-structured management of adherence to law.[20] That is why compliance can be defined as the entirety of systematic measures implemented by a company or business sector in order to achieve rightful behaviour by the addressees or at least to significantly impede wrongful behaviour with regard to statutory law at least.[21]

Babeck/Hellmann/Wyld, in: Passarge/Behringer (fn. 6), p. 65 f.

[10] Gesetz über den Wertpapierhandel (WpHG), § 33 para. 1 sentence 1 nos. 1 and 5.

[11] Gesetz über das Kreditwesen (KWG), § 25a.

[12] *Petsche/Larcher* (fn. 6), p. 1.

[13] Einkommensteuergesetz (EStG – Income Tax Act), § 4.

[14] Gesetz zur Bekämpfung internationaler Bestechung (IntBestG – Act on combatting international bribery); since 2015 incorporated within the German Criminal Code.

[15] Strafgesetzbuch (StGB – German Criminal Code), § 299 (as of 13.11.1998, BGBl. I 1998, p. 3322).

[16] See estimate by *Rotsch* (fn. 9), § 1 para. 38, including fn. 177.

[17] See *Behringer* (fn. 6), p. 9 f.

[18] See *Rotsch* (fn. 9), § 1 para. 35 f., rightly pointing out that the rulings in criminal law matters by the Bundesgerichtshof (BGH – Federal Court of Justice) had, as early as the year 1990, already laid the foundations to make individual board members responsible for their wrongdoings under the principle of general responsibility at least in times of company crises or, beyond that, due to their entrepreneurial command over the respective organisation ("Organisationsherrschaft"); see BGHSt 37, 106.

[19] See *Schneider*, ZIP 2003, 645 (646).

[20] *Hauschka*, in: Hauschka/Moosmayer/Lösler (eds.), Corporate Compliance, 3rd ed. 2016, § 1 para. 2; *Bock*, ZIS 2009, 68; *Kuhlen*, in: Maschmann (ed.), Corporate Compliance und Arbeitsrecht, 2009, p. 12; *Rathgeber*, Criminal Compliance, Kriminalpräventive Organisations- und Aufsichtspflichten am Beispiel der Wirtschaftskorruption, 2012, p. 34; *Burgi*, CCZ 2010, 41. *Knierim*, in: Wabnitz/Janovsky (eds.), Handbuch des Wirtschafts- und Steuerstrafrechts, 4th ed. 2014, ch. 5 para. 5, is willing to concede that a procedural/organisational understanding of the expression "compliance" can at least still be viewed as moving within the boundaries of its literal sense (however, on the edges) whereas *Rotsch* (fn. 9), § 1 para. 4, holds that using the expression compliance in a material sense on the one hand and in a procedural/organisational sense on the other leads to completely different usages of the term.

[21] Scepticism, however, is advisable regarding broader definition attempts holding that compliance could be described as the entirety of all measures that are necessary to establish and safeguard law abidance by an enterprise, its management and

However, at the latest when the organisation of adherence to law is put into practice, it becomes apparent that the object of this management task (adhering to law) is by no means so trivial and self-explanatory as it may have appeared at first glance.[22] The question of which rules are to be in the focus of compliance management (and management always works on tight budgets) is in fact a crucial part of decision-making that can ultimately lead up to "compliance" being implemented as a meaningful and controllable task of business management. If, on the contrary, the objects and objectives of compliance are not clearly defined (see next section, a),[23] there is a serious risk that compliance will achieve very little or even aggravate the risks of liability for the addressees affected (see next section, b).

a) Modifiable elements of the term compliance – Narrowing down the term by means of business decisions

Following on from the management's decision to follow rules in a well organised way (from now on), further subsequent decisions need to be taken with regard to the rules to follow (see next section, aa) as well as to further management issues (see section bb).

aa) Deciding on which rules to follow

The term "compliance" itself does not provide any insights into which rules specifically are to be followed. When confronted with this question by the management, its internal or external counsel would presumably reply that it is at least statutory legislation – "hard law" – that has to be adhered to. In this context the question will arise as to whether hard law itself requires legal entities to establish a compliance management system. As already mentioned, German legislation has clearly affirmed this question with regard to wide areas of the financial services sector.[24] Even though not undisputed,[25] it needs to be assumed that at least a factual obligation to embrace compliance exists within complex organisations facing various (international) legal risks because of the severe consequences under civil[26], penal[27] and administrative[28] law – local and often foreign, too – for companies and their management in cases of structural non-compliance.

employees with regard to all legal regulations; see *Reichert/Ott*, ZIP 2009, 2173; *Schneider*, ZIP 2003, 645 (646); *Bock*, Criminal Compliance, 2011, p. 21. For this conception seems in danger of missing its ambitious targets and, even worse, generating liability risks of its own (see below, II. 2. b).

[22] See *Rotsch* (fn. 9), § 1 para. 6 f.

[23] See *v. Busekist/Hein*, CCZ 2012, 41 (46), also exemplifying this necessity using the example of the various understandings of the terms "Corruption" and "Anti-Corruption Law" within the international realm.

[24] See *Knierim* (fn. 20), ch. 5 para. 58 f.

[25] See *Knierim* (fn. 20), ch. 5 para. 32; *Rotsch* (fn. 9), § 1 para. 20, for a current summary of the forensic and academic dispute (each with further references).

[26] See LG München I NZWiSt 2014, 183 („Neubürger"). In this civil law case the LG München sentenced a former board member of Siemens AG to pay damages to the company in the amount of EUR 15 million (the action taken by Siemens AG was only a partial claim), arguing that a board member only fulfils his or her organisational duties (regarding the executives' legality obligations) if a compliance organisation focusing on damage prevention and risk control is established. By contrast, a deficient compliance management system and, further, its inadequate surveillance constitute a breach of duty by the board members responsible. As a consequence, the employing entity was entitled to have recourse to its management if, following breaches of law stemming from within the enterprise, expenditures arise (e.g. for legal fees).

[27] Firstly, active deeds by the management staff may be punishable under German criminal law with regard to the general rules of perpetration and participation §§ 25-27 StGB. This may also include criminal responsibility for indirect perpetration due to organisational control of business enterprises; see BGH NStZ 2008, 89. Secondly, members of corporate management can also be held responsible for their own omission to prevent company-related criminal acts committed by management colleagues or subordinate staff. See BGHSt 57, 42; *Mansdörfer/Trüg*, StV 2012, 432; *Knierim* (fn. 20), ch. 5 para. 51 f.; *Bülte*, NZWiSt 2012, 176; *Rotsch* (fn. 9), § 4 para. 10. On the basis of this legal obligation for the executive management to act as described, (chief) compliance officers have the warrantor duty ("Garantenpflicht") to prevent company-related criminal acts once they have effectually taken over this responsibility. See BGHSt 54, 44; *Ransiek*, AG 2010, 147; *G. Dannecker/C. Dannecker*, JZ 2010, 981.

[28] Pursuant to the Gesetz über Ordnungswidrigkeiten (OWiG – Act on Regulatory Offences), § 130 para. 1 sentence 1, a person shall be deemed to have committed a regulatory offence when he or she, as the owner of an operation or undertaking, intentionally or negligently omits to take the supervisory measures required to prevent contraventions, within the operation or undertaking, of duties incumbent on the owner and the violation of which carries a criminal penalty or a regulatory fine in a case where such contravention has been committed as would have been prevented, or made much more difficult, if there had been proper supervision. If executives of a legal entity commit an offence under § 130 OWiG, this may lead to further detrimental consequences for the affected legal entity itself. Notably, a regulatory fine pursuant to § 30 OWiG may be imposed and an entry with possible negative implications for public tendering in the commercial central register under the Gewerbeordnung (GewO – Trade Regulation Act), § 149 para. 2 nos. 3 and 4, may follow as well. The publication of law infringements from within legal entities may further increase should the currently advocated federal competition register be implemented. On 29.3.2017, the German government has issued a draft bill, see: https://www.bmwi.de/Redaktion/DE/Artikel/Wirtschaft/wettbewerbsregister.html (27.5.2017).

However, regarding the necessary concrete extent and design of compliance, current German law[29] only provides reference points, a fact which has just recently been confirmed by a German court ruling in the Siemens case from a corporate law perspective.[30] Therefore, any attempts to answer the question of how to implement compliance lead responsible management into the broad field of "regulated self-regulation"[31].

In this regard, the provisions of the German Corporate Governance Code are neither mandatory nor concrete, even though it allegedly decrees with regard to joint stock corporations: "The Management Board ensures that all provisions of law and the enterprise's internal policies are abided by and works to achieve their compliance by group companies (compliance)."[32] Nonetheless, the German Corporate Governance Code is not a binding regulation as it only contains recommendations for self-commitment which German stock corporations have to comment on annually under the German Stock Corporation Act[33] (the concept of "comply or explain"). Besides, the provision just quoted merely echoes existing law. Therefore, the German Corporate Governance Code's circumscription of compliance should be assessed as being of only declarative nature.[34] Further instances of "soft law"[35] are codes published by associations of industry branches often operative in high risk areas which compel the association members to commit themselves collectively to certain standards of behavior and organisation.[36] Finally, cases of self-commitment occur if companies submit their compliance efforts to a certain auditing standard which has been developed, e.g. by statutory auditors.[37]

The question therefore still remains open as to which legal obligations in particular need to be dealt with by means of compliance. A possible restriction has been identified by the parameter of legal complexity. Only if a certain impenetrability of the respective legal requirements prevailed was compliance needed. Under conditions of limited resources companies are presumed not to invest time and money to emphasise normative imperatives that are already obvious to everyone.[38] However, a differentiation by means of criminal laws reflecting the Ten Commandments (if this was implied) would be far from adequate because these rules are in many cases not self-evident: In certain areas of generally legal professional activities, it can be challenging to observe even the – supposedly blatant – prohibition of killing another human being. Examples of these difficulties that are not at all far-fetched are the introduction of new vital medical devices or construction works under hazardous natural surroundings. In these cases, only the organised adherence to due diligence will allow for continuation of the aforementioned activities in a way acceptable to society.

Therefore, the regulations which are especially important for a compliance organisation have to be determined individually for each entity or industry branch. In the course of such analysis, it is essential to define the goals of compliance and to establish a map of the existing legal (and possible further, e.g. reputational) risks. During this procedure it may become apparent that compliance in the specific entity should not focus mainly on criminal law (something which may perhaps be unexpected, given the well-known serious legal consequences of criminal provisions). Rather, the decision may be taken to pay particular attention to other sectors of law – for

[29] This distinguishes German law from, for example, the U.S. sentencing guidelines under the Foreign Corrupt Practices Act (FCPA), 19.12.1977, 91 Stat. 1494, as amended or the U.K. provisions under the Bribery Act 2010 (UKBA), effective 1.7.2011, 2010 c. 23, as amended (See: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/181762/bribery-act-2010-guidance.pdf [27.5.2017]). U.S. and U.K. anti-corruption legislation in particular is of considerable importance for German enterprises that feature a sufficient nexus to the respective legal systems. See *Knierim* (fn. 20), ch. 5 para. 82; *Rotsch* (fn. 9), § 1 para. 51.

[30] According to LG München I NZWiSt 2014, 183, the following criteria are essential for defining the scope of an – obligatory – compliance organisation: nature, size and organisation of the enterprise, quantity and complexity of the regulatory framework applicable, geographic presence of the entity or group, quantity and severity of suspected cases of law infringements in the past.

[31] See *Sieber*, in: Sieber (eds.), Strafrecht und Wirtschaftsstrafrecht, Dogmatik, Rechtsvergleich, Rechtstatsachen, Festschrift für Klaus Tiedemann zum 70. Geburtstag, 2008, p. 449 (476), see also *Zimmermann*, Strafbarkeitsrisiken durch Compliance, 2014, p. 21.

[32] No. 4.1.3 of the German Corporate Governance Code in the current version dated 7.2.2017, available at: http://www.dcgk.de//files/dcgk/usercontent/en/download/code/170214_Code_clean_en.pdf (27.5.2017).

[33] Aktiengesetz (AktG – Stock Corporation Act), § 161.

[34] See *Hauschka* (fn. 20), § 1 para. 23.

[35] In this context, "soft law" may be defined as rules that are recognised and codified by contractual parties but that cannot be enforced by third parties. See *Petsche/Larcher* (fn. 6), p. 6, and *Zimmermann* (fn. 31), p. 20 f. However, it has been disputed whether the term "soft law" implies any sizeable and meaningful content at all; see *Arndt*, Sinn und Unsinn von Soft Law, 2010, p. 41 f., 222.

[36] See, for example, the codes of the "Freiwillige Selbstkontrolle für die Arzneimittelindustrie e.V." (FSA – Registered Association for voluntary self-monitoring in the pharmaceutical industry) available at: http://www.fsa-pharma.de/verhaltenskodizes (27.5.2017) or the Best-practice-Richtlinien für Wertpapier-Compliance (Best Practice Guidelines for Securities Trading), published by the Bundesverband deutscher Banken (Federal Association of German Banks), available at: https://bankenverband.de/fachthemen/finanzmaerkte/best-practice-wertpapier-compliance/ (27.5.2017).

[37] See, as a noteworthy example, the "Prüfungsstandard 980 des Instituts der Wirtschaftsprüfer (IDW PS 980 – Auditing Standard 980 of the Institute of Public Auditors in Germany), discussed by *v. Busekist/Hein*, CCZ 2012, 41.

[38] See *Rotsch* (fn. 9), § 1 para. 8.

example tax law, data protection law, environmental law or competition law. It may be mentioned in passing that several corresponding sub-categories of compliance have already been developed – ennobled with a title of their own (for example "Human Resources Compliance", "Social Compliance" or "Tax Compliance"[39]). Further, the risk analysis will show whether and, where certain areas of foreign law need to be followed, too, and to what extend this is necessary. Moreover, it has to be decided whether the scope of the compliance management system should only cover the legal duties facing the company itself in relation to others or whether the scope should be extended sufficiently in order to allow for "fraud prevention"[40] to be included, too.[41] Fraud prevention may be defined as fighting crimes directly harming the legal entity (e.g. fraud and theft by employees and industrial espionage). Shortcomings in fraud prevention are not covered by the German administrative fine provision[42] in place for managers violating obligatory supervision.[43]

Organised adherence to law in large-scale companies or high-risk industry branches will in the vast majority of cases also be associated with the creation of the entities' own rules and adherence to them. These entity-made rules may aim at two goals. Firstly, they might be necessary to promote compliance with applicable state law – and to explain its implications for the area of work the respective employee is integrated into. Secondly, entity-made rules may promote further, possibly extralegal objectives of compliance.[44] By pursuant declarations of will, companies or branches may furthermore commit themselves to certain minimum standards as regards, for example, working conditions in Third World Countries, minimum prices for purchases of raw materials or the protection of the environment. As a current prominent example the "UN Global Compact" may be mentioned.[45] Furthermore, when companies enter highly innovative fields of business, they may encounter the situation that the necessary regulatory framework concerning this sector has not yet been developed or adjusted. In these cases companies may decide to set up their own (interim) standards, not least because of reputational considerations. In these cases, "soft law" is the only law available until "hard law" catches up and steps in.[46]

Finally, when entities are in the process of drafting internal regulations that are intended to promote the adherence to hard law, there should be thorough consideration as to whether it seems advisable to outbid the basic and necessary requirements deducible from state-issued rules and prohibitions[47] or to do without a "best practice" approach.

bb) Further commitments necessary

Effective compliance implies that its goals are reflected both at the outset and ongoing and that these goals (i.e. past and present) are set in an appropriate relationship to each other. This is particularly expedient in order to identify potential conflicts of objectives and possibly to mitigate them. The most important aim of organisational compliance efforts is presumably to avoid liability. However, depending on whether a certain group within the compliance organisation is to be particularly protected and if so, further, which group it is, the focus of the compliance organisation and its contents may shift appropriately. In a large number of instances the interest in compliance between the groups will be a common one but there are certain set-ups that provide for interests drifting apart. For instance, a company's management may decide that the marginal usefulness of further compliance training and legal education within the organisation has diminished solely on the basis that the compliance measures in place already seem to be sufficient to defend the board against allegations of violating obligatory supervision pursuant to the German Act on Regulatory Offences.[48] Interests will often move even further diverge in cases of inquiries by state prosecutors and/or private investigators.

A further goal of compliance can be to enhance the reputation of a company or industry branch in the eyes of the general public. Typically, these efforts affect areas such as the aforementioned topics: workers' conditions, environmental protection and further questions of sustainability even though, of course, keeping corruption at bay will contribute to the organisation's reputation as well. Furthermore and highly important, compliance may have the goal of already avoiding the appearance of wrongdoing.[49] By aiming at these further goals compliance has a stronger emphasis on marketing purposes. Compliance aiming at a competitive advantage becomes even more apparent when the company's own state-of-the-art compliance management system is used in negotiations with (international) business partners in order to prove the integrity necessary for the partner to sign the contract in the first place. This can for instance be the case if the counterpart is bound by its own strict and elaborate business partner code of conduct or because the business partner is under scrutiny by its local regulators and enforcement agencies.

[39] See *Heuking/Coelln*, DÖV 2012, 827 (828).
[40] See *Bantleon/Thomann*, DStR 2006, 1714, discussing the term of "fraud" in more detail.
[41] For terminological and practical differences between compliance and fraud prevention see *Bock* (fn. 21), p. 23 (with further references).
[42] See above supra fn. 28.
[43] This important legal distinction can be highly relevant for the compliance management system of an enterprise if the management directs its purpose especially towards the avoidance of liability (for a dissenting notion see *Bock* [fn. 21], p. 23 para. 16: there was "no requirement" for this distinction). Nonetheless, a deliberate eschewal of any organised prevention and (private) enforcement measures with regard to fraud, theft, industrial espionage, etc. may lead to allegations of embezzlement and abuse of trust (§ 266 StGB) against the management staff.
[44] See below at II. 2. a) bb).
[45] United Nations Global Compact (UN Global Compact), available at: https://www.unglobalcompact.org/ (27.5.2017).
[46] See *Rotsch* (fn. 9), § 1 para. 52.
[47] For possible detriments see below at II. 2. b).
[48] See above at fn. 28.
[49] See *Rotsch* (fn. 9), §1 para. 45.

Depending on the identity of the respective organisation, it ought to be decided what level of commitment needs to be applied to the intended compliance programme. With regard to branch associations the means of choice will often be best practice recommendations and codes of conducts – which is due to the fact that compliance measures will only be enforceable on a rather limited scale. On the contrary, compliance carried out regularly within companies will have to be equipped with more binding force. Avoiding liability of the board for employees' misconduct at the level of criminal or regulatory offences will, under current German law, be very difficult if the board has restrained its compliance measures to mere non-binding recommendations and guidelines.

From an organisational aspect, the operational tasks of compliance need to be allocated within the entity. With the cooperation of corporate management, an existent or new unit has to be identified that compliance will be officially assigned to. Depending on size and existing risks, it may not be necessary to build up a new compliance organisation but suffice instead to instruct the company's legal department, for example, to take care of compliance. This department will then select the necessary elements and measures for an adequate compliance strategy. Compliance topics that require special knowledge are sometimes better left to an expert unit (for example issues of tax and human resources compliance). In this context, it also has to be determined whether the compliance department investigates suspicions of misconduct or whether this task is assigned to a unit of its own (for example the group security team).[50] And finally, there must be safeguards to ensure that the integrity and effectiveness of the compliance organisation are monitored continuously by impartial entities, either internally (for example through the internal audit department[51]) or externally (for example through external auditors or law firms) or, ideally, both.[52] In view of organisational resources on the one hand and liability risk reduction on the other hand it may be appropriate in some cases to restrict at least the main focus of compliance measures to staff that are especially exposed to the specific compliance risks of the respective organisation (e.g. employees holding decision-making or representation authority).

b) Criminal liability risks caused by compliance – particularly through its deficient organisation

Obviously, what lies behind the term "compliance" in detail can therefore not be determined by the expression itself but needs to be consciously stipulated by the designer of the individual compliance programme. Depending on the size of the organisation concerned, the aims linked to compliance and the individual entity's disposition and exposure to legal risks (as well as the corresponding emphasis of the compliance organisation) will diverge from each other. At its heart compliance will pursue adherence to public regulations which, if infringed, would have dire consequences for the affected organisation and its members.

A compliance programme, however, that is implemented in the absence of these necessary preliminary considerations may fail to have the desired exculpatory effect for the affected organisation, its management as well as further staff members and may even increase their exposure to criminal law or, at least, criminal investigations.[53] This risk can be further illustrated by reference to the following examples:

Compliance that scrupulously stipulates "best practice rules" (regardless of whether in a mandatory form or not) – and therefore strives to achieve standards that conspicuously exceed legal requirements – may inadvertently help to form a "self-validating circle"[54]. Namely (and questionably), law enforcement authorities have recently assessed that a violation of self-imposed compliance standards were indicative for the committal of criminal offences. This is particularly the case with evidence of an illegal barter that is the core element of most bribery offences under German law.[55] Thus, in these cases self-regulation creates a dubious reaction within public criminal law for it achieved a criminalisation effect in the absence of democratic legitimacy.[56] In a similar approach a German criminal court ruled in connection with the Siemens corruption scandal and with regard to the statutory offence "Embezzlement and abuse of trust" (§ 266 StGB) that the breach of fiduciary duties necessary to commit this crime (in this case the secret installation of slush funds) simply resulted from the fact that bribery payments of any kind were forbidden by the compliance regulations in place at Siemens.[57]

[50] See *Rotsch* (fn. 9), § 1 para. 43 f.

[51] For the importance of internal audit for compliance see *Jakob*, in: Momsen/Grützner (eds.), Handbuch Wirtschaftsstrafrecht, 2013, ch. 2 B. para. 1 f.

[52] See *Lampert*, in: Hauschka/Moosmayer/Lösler (fn. 20), § 9 para. 7 f.; *Kretschmer*, in: Petsche/Mair (fn. 6), p. 77.

[53] At this point – but only briefly – further developments of compliance shall be addressed that are viewed critically. Namely, with regard to private "internal investigations" several authors identify a state of tension between the duty to cooperate under labour law aspects on the one hand and, on the other hand, the lack of protection for potential culprits that they would be entitled to under the regime of criminal procedure law in cases of public law enforcement; see *Momsen*, in: Rotsch (fn. 6), § 34 para. 2 f.; *Rotsch* (fn. 9), § 2 para. 27; *Gerst*, CCZ 2012, 1; *Greco/Caracas*, NStZ 2015, 7. Further, vigorous compliance measures may lead to violations of employee data protection; see *Schmidl*, in: Momsen/Grützner (fn. 51), ch. 2 C. para. 1 f. Besides, the establishment of the position "compliance officer" leads to a personal expansion of the originally executive management's legal obligation to act just (see above at fn. 28). Finally, the establishment of compliance has at all times been linked to high costs and the increasing bureaucratisation of business units; see *Kuhlen* (fn. 20), p. 26 f.

[54] See *Kuhlen* (fn. 20), p. 26.

[55] See *Kuhlen* (fn. 20), p. 26; *Hugger*, CCZ 2012, 65 (67); *Rotsch* (fn. 9), § 2 para. 5; *Zimmermann* (fn. 31), p. 255 f.

[56] *Dannecker/T. Schröder*, in: Kindhäuser/Neumann/Paeffgen (eds.), Nomos Kommentar, Strafgesetzbuch, Vol. 3, 5th ed. 2017, § 299a para. 138 f.

[57] See LG Darmstadt CCZ 2008, 37; *Kuhlen* (fn. 20), p. 27; *Zimmermann* (fn. 31), p. 98 f.

Further, exceptional compliance efforts by individual forerunners may also increase legal risks for all other market participants of an industry sector, namely, if the "best practice" benchmark set by these compliance enthusiasts is declared to be the general minimum standard of due care.[58]

Moreover, "best practice" efforts in the field of "sustainability compliance" (e.g. environmental protection, the fight against child labour, the payment of minimum wages etc.) that in actual fact lag behind the standards communicated to the general public may lead to criminal allegations against company managers with regard to fraud (§ 263 StGB) due to consumer deception. These allegations could be made by arguing along two different lines of reasoning: On the one hand law enforcement authorities may claim that a higher price demanded for the product in question was unjustified and based on deceptive advertising (e.g. with regard to fair purchase prices for local third world farmers). On the other hand even justified prices for the respective product may be seen as fraudulent if the consumers' benevolent motives for deciding upon it are frustrated.[59]

Moreover, compliance rules and management systems that are only existent in printed form (plausibly labelled "paper compliance"[60]) but are not implemented and maintained in day-to-day business by means of distinct responsibilities, constant training, risk assessment and the sanctioning of misconduct, presumably pose greater legal threats to an organisation than the previous rudimentary efforts to remain law-abiding: Written "mock-compliance" may allow the management to be lulled into a false sense of security.[61] Also, once public authorities have assessed the compliance management system in place to be something of a "paper tiger", they will not consider it positively, to say the least, and they may even deem it to be deceptive.

Further, carelessly planned and subsequently poorly organised compliance cannot result in the desired exoneration for the management board. For supervisory functions that are not clearly and precisely anchored within secondary units of the organisation (but have rather fallen between two chairs) remain in their entirety the task and responsibility of the management board itself (principle of obligation to legality under German law). Serious organisational defects by the management regarding compliance may subsequently lead to monetary fines against members of the executive board under the German Act on Regulatory Offences[62] (thus making them responsible for employees' statutory offences as regards criminal or administrative offences law) and/or to compensation claims against them by their organisation.

Finally, irrespective of these specific points of criticism it has so far been assumed that Compliance in general has a positive effect and therefore is expedient. However, it should at least be noted that criminological studies surveys give rise to some reservation regarding the efficacy of Compliance.[63] Also, especially "compliance emergencies" (i.e. governmental investigations following law infringements within the organisation) at times reveal that compliance programmes already in the first place were not designed to efficiently reduce risks of legal responsibility for the organisation members in general but were rather tailored for the protection of the managerial staff or the organisation itself (see above, II. 2. a) bb).

III. Part Two: Compliance at universities?

The above overview has shown that compliance is a – relatively – recent development in private economy introduced in order to manage legal and reputational risks within an organisation. Compliance is intended to organise rule abidance especially within complex corporations and group structures and to safeguard natural and legal persons against personal (criminal) liability, financial losses and reputational damage. However, it has also become apparent that while it seems to be essential to implement compliance within complex business enterprises or branch associations in order to reduce liability risks, the same subject matter (i.e. complex rules facing multilayered organisations) necessitates a well-considered tailoring and standard in order to achieve the advantages of compliance sought for and to minimise new criminal law risks potentially arising through compliance itself.

On the basis of this evaluation, how would compliance fit in with the German university landscape? Or, more precisely: How does it fit in? For certain sub-sectors of universities have already embraced the idea of compliance. For example, Heidelberg University Hospital employs its own chief compliance officer within the framework of its legal team and further lawyers concerned with third-party funding.[64] Also, independent, university-affiliated public bodies such as the German Cancer Research Center or the Max-Planck-Gesellschaft are currently establishing their own compliance management system or have already done so. Furthermore, the University of Heidelberg is currently analysing corruption prevention in medicine and economy by means of an elaborate and interdisciplinary research project stretching over several years.[65] Besides, in several German federal states

[58] See *Kuhlen* (fn. 20), p. 27.
[59] The frustrated aims of a financial transaction can by themselves establish a financial loss within the meaning of the German criminal offence "fraud" (§ 263 StGB); see *Dannecker*, in: Graf/Jäger/Wittig (eds.), Wirtschafts- und Steuerstrafrecht, 2nd ed. 2017, § 263 StGB para. 225; *T. Schröder*, in: Momsen/Grützner (fn. 51), ch. 5 A. para. 92.
[60] See *Hugger/Röhrich*, BB 2010, 2643 (2646).
[61] See *Fuhrmann*, in: Demel/Heck/Schäfer (eds.), Auf festem Fundament, Festschrift für Christean Wagner zum 70. Geburtstag, 2013, p. 109 (125).
[62] § 130 OWiG.
[63] See *Kölbel*, in: Rotsch (fn. 6), § 37 para. 17 f. with further references on the surveys he evaluated.
[64] See: https://www.klinikum.uni-heidelberg.de/Recht-und-Drittmittelmanagement.119333.0.html (27.5.2017).
[65] See: https://www.uni-heidelberg.de/presse/news2015/pm20150120_wie-koennen-wirtschaft-und-medizin-korruption-und-manipulation-vorbeugen.html (27.5.2017) and:

administrative provisions are in force regarding corruption prevention which are binding for university staff, too.[66] In addition, anti-corruption guidelines are handed out to university employees at the outset of their employment.[67] Finally, at many German universities the head of internal audit is at the same time the anti-corruption officer and the contact person for informants regarding cases of suspected corruption and any further consultation needs in connection with corruption[68].[69]

Still, it cannot be said that the idea of compliance has so far permeated universities in the same way that it has pervaded the private realm. The emphasis of compliance measures at universities – if any – so far lies predominantly in the area of anti-corruption, and other areas are often not brought up at all. As far as further legal reference areas of compliance (for instance data protection law) are administrated (e.g. by a data protection officer) there are rarely connections visible to anti-corruption officers or, on a larger scale, to a consolidated compliance organisation. Besides, compliance tasks are often taken care of by university employees who are (pre-)occupied with other comprehensive tasks. Confirming these observations, the proceedings of a conference of 80 chancellors, vice-chancellors and further managerial staff of leading German universities and research facilities in November 2012 ("Compliance management at universities – more than rule abidance?") state that the issue of compliance remains widely unrecognised at German institutions of higher education.[70] Likewise, academic discussion of this question has as yet hardly developed.[71]

This raises the question as to whether greater efforts to implement compliance at universities are a sensible or even necessary measure. Besides the general advantages and disadvantages of compliance already discussed, the following cost-benefit considerations have to be made: Depending on its scale and depth, a compliance organisation will bind considerable staff and financial resources (compliance will cost universities money!). But on the other hand compliance may noticeably help to mitigate legal and reputational risks to the extent they are present (see 1.). Then again, these risks are perhaps already sufficiently hedged by the traditional instruments of administrative law designed to safeguard the law abidance of public servants and, therefore, of university staff as well (see 2.). Furthermore, compliance efforts at universities may in parts be perceptibly constrained by the freedom of science under the German constitution (see 3.).

To put it bluntly: If only minor legal risks existed at universities and, further, if these minor risks were already amply prevented by the traditional measures of public administration and, finally, if compliance met university-specific constitutional limits, it would not seem meaningful for university administration bodies to shoulder the expenditure and possible drawbacks associated with compliance.

1. Legal risks at universities

A ramified, personnel-intensive organisation, often highly complex legal rules that, when breached, entail personal (including criminal) liability and substantial financial consequences and reputational damage – these ingredients that make it indispensable to organise rule abidance (i.e. compliance) can easily be found at universities, too. The following examples are intended to substantiate and illustrate this thesis.

https://portal.volkswagenstiftung.de/search/projectDetails.do?ref=89481 (27.5.2017).

[66] See, for example, an administrative provision ("Verwaltungsvorschrift") of the federal state of Baden-Württemberg providing the possibility of appointing a counsel of trust ("Vertrauensanwalt"), available at: https://mwk.baden-wuerttemberg.de/fileadmin/redaktion/m-mwk/intern/dateien/pdf/Korruptionsbekaempfung/VwV_Korruptionsverhuetung_und_-bekaempfung.pdf (27.5.2017). As of January 2013, the Ruhr University Bochum ("Ruhr-Universität Bochum") passed its own compliance policy that is beyond the scope of merely combatting corruption; see: http://www.uv.ruhr-uni-bochum.de/dezernat1/amtliche/ab951.pdf (27.5.2017).

[67] See, for example, the guideline published by the Ruprecht-Karls-Universität Heidelberg (Heidelberg University), available at: http://www.uni-heidelberg.de/md/zentral/universitaet/beschaeftigte/service/ir/antikorruptionsrichtlinie_universitaet_heidelberg.pdf (27.5.2017).

[68] For example, this is the case at the universities of Berlin ("Freie Universität Berlin"), Erfurt, Hamburg, Heidelberg, Göttingen, Hannover, Leipzig and Mainz.

[69] See *Heuking/Coelln*, DÖV 2012, 827 (831), for the discussion of further individual elements of compliance already established in public administration.

[70] See *Nagel/Pallme König*, in: FOM Hochschule in Kooperation mit dem Verein zur Förderung des deutschen & internationalen Wissenschaftsrechts (eds.), Compliance-Management an Hochschulen – Mehr als Regelkonformität?, Vorwort (Preface), p. 3, available at: https://www.fom.de/fileadmin/fom/downloads/Tagungsbaende/Tagungsband_Compliance2ONLINE.PDF (27.5.2017).

[71] Apparently, the question of whether universities, too, should systematically discuss and implement sensible measures to prevent violations of law has so far only been discussed by a few scholars. See *Armbruster*, duz Magazin 3/2013, 8, available at: http://www.duz.de/duz-magazin/2013/03/damit-alles-schoen-ordentlich-ablaeuft/156 (27.5.2017); quoted by *Hilgendorf*, in: Rotsch (ed.), Criminal Compliance vor den Aufgaben der Zukunft, 2013, p. 19 (20); again quoted by *Rotsch* (fn. 9), § 1 para. 50. Comparatively more attention has already been devoted to the more general question of whether the idea of compliance should be adopted by public administration as a matter of principle; see *Burgi*, CCZ 2010, 41; *Heuking/Coelln*, DÖV 2012, 827; *Fuhrmann* (fn. 61), p. 109; *Stober* (fn. 3), p. 85; *Vogelsang/Nahrstedt/Fuhrmann*, CCZ 2014, 181; *Sonder*, VR 2014, 229; *Neufeld/Hitzelberger-Kijima*, öAT 2015, 23; *Passarge*, NVwZ 2015, 252.

a) Compliance-relevant risks at faculties of medicine

The implications of working at a medical faculty make university hospitals a vitally important area for compliance. Quite apart from individual legal issues the financial dimensions of medical faculties are impressive. For example, according to the annual report of the Heidelberg University Hospital for 2015, income amounted to EUR 691 million and third-party funding added up to EUR 97 million.[72]

These revenues arise from work fields that are often challenging from an ethical and legal perspective. To name just a few examples in brief:

- Observance of the fundamental right of informational self-determination (with respect to the day-to-day handling of inpatients' data as well as scientific research relying on "Big Data", such as whole genome sequencing[73] and other DNA analyses[74]).
- Avoiding infringements of law regarding organ allocation (especially with regard to the German Organ Transplant Act but also regarding homicide and bodily harm[75]).
- Abiding by the core statutory rules of criminal law when using new research methods. For instance, the questions arise as to whether new operation techniques (e.g. fetal surgery) necessarily need to be introduced at several university hospitals at the same time ("multicentric approach") in order to reduce treatment errors and what the statutory offences are that have to be considered in the first place.
- Standards of hygiene to be observed by staff on hospital wards (especially in intensive care units) and development of appropriate standards of hygiene to counteract the emergence of multi-drug-resistant organisms?
- Efforts by university hospitals to fight billing fraud committed by members of staff vis-à-vis health insurance funds.[76] Is there a necessity to regularly train accounting staff in order to improve their vigilance in this regard?
- How do medical faculties already avoid the impression that third-party funding is connected with inappropriate or even criminally relevant deliberate influence by the pharmaceutical or medical device industry? Insufficient procedures may lead to painful learning processes as in the case of the Heidelberg medical faculty and the "artificial heart valve scandal" that began to emerge there in 1994 and resulted in a criminal conviction for taking bribes against a highly regarded heart surgeon at Heidelberg university hospital at that time.[77] It is not uncommon that only after this "shock therapy" a chief compliance officer was appointed at Heidelberg university hospital in order to guarantee the future lawfulness of third-party funding there.
- And to give one last example: How can medical faculties deal with dead bodies and human remains in a lawful and ethically acceptable way? This question, which in the first instance may appear ghoulish, seems rather to describe an important case for the application for compliance at universities. At least, this assertion does not appear to be farfetched in the light of 2012 headlines such as "Scandal at the institute of anatomy in Cologne: Chaos in the morgue" and the suicide of the former head of the institute immediately after the accusations were made public.[78]

b) Compliance-relevant risks at university faculties in general

Compliance-relevant risks are however in no way limited to medical faculties.

- Outside the medical field the threat of corruption allegations also exists, especially when in the process of third-party funding the rules established for this kind of financing are not observed and, in particular, the requirement of transparency in connection with the acquisition process – highly assessed by German criminal courts[79] – is neglected.
- Further, allegations of subsidy fraud (§ 264 StGB) may be brought up, for example, when a research institution uses funds contrary to the dedicated purpose – inter alia, in this case even a non-intentional subsidy fraud is punishable if committed thoughtlessly.
- Criminal investigations with regard to budgetary embezzlement and abuse of trust (§ 266 StGB) can threaten university management staff (including tenured professors) if budget funds are not used within the scope of the intended

[72] See UniversitätsKlinikum Heidelberg (ed.), Annual report 2015, p. 56, 63, available at: https://www.klinikum.uni-heidelberg.de/Geschaeftsbericht.111694.0.html (27.5.2017).

[73] As an example of joint efforts to systematically address the data protection (and further legal and ethical) issues arising from major medical research projects the interdisciplinary Heidelberg "EURAT Project" ("Ethical and Legal Aspects of Whole Genome Sequencing") may be mentioned: It deals with the normative issues of whole genome sequencing and brings together humanities scholars from Heidelberg University, the Heidelberg University Hospital, the German Cancer Research Center (DKFZ), the European Molecular Biology Laboratory (EMBL), the Max Planck Institute for Comparative Public Law and International Law and the Research Center for Health Economics at the Hannover University (see: http://www.uni-heidelberg.de/totalsequenzierung/english.html [27.5.2017]).

[74] See *Cornelius*, MedR 2017, 15.

[75] See *Haas*, HRRS 2016, 384.

[76] See *Kudlich*, in: Kubiciel/Hoven (ed.), Korruption im Gesundheitswesen, 2016, p. 111.

[77] See BGHSt 47, 295; *Ambos*, JZ 2003, 345; *Tuffs*, British Medical Journal 2001, 946, available at: http://www.bmj.com/content/322/7292/946.2 (27.5.2017).

[78] See *Himmelrath*, Spiegel Online of 8.3.2012, available at: http://www.spiegel.de/lebenundlernen/uni/anatomie-skandal-in-koeln-chaos-im-leichenkeller-a-820001.html (25.4.2017).

[79] See BGH NJW 2002, 2801.

purpose or in a wasteful manner. A case of budgetary embezzlement and abuse of trust may also be assumed in cases in which contracting took place without preceding tendering or when in spite of an widely accepted invitation for tender the most reasonable offers were ignored for no apparent reason.[80]

- It is fundamental for the high reputation of a university that the basic principles of good scientific practice are observed.[81] It could therefore be the responsibility of university administrations to ensure that scientists at university faculties and other research facilities do not commit fraud in science or infringe copyrights. But then, it could be argued that we are looking at an area of academic autonomy for the scientific community which is safeguarded by the German constitution and which should be left to its own measures of self-responsibility. On the one hand, the freedom of the sciences is of great importance and protected as a fundamental right under German and European law.[82] On the other hand, scientific research is prone to irregularities because the success of scientists' own research efforts and of their doctoral candidates and research assistants is vital with regard to their reputation as well as to the financial means of the respective professorial chair or institute (see below, III. 3.). This constant pressure on the scientific community is one of the reasons for – unfortunately by no means rare – cases of plagiarism, falsification of data and further manipulation of experiments. As research within German university faculties is regularly further organisationally divided up by means of research institutes it could further be argued that not only universities and faculties are responsible for the "hygiene" of scientific research but also the institutes' directors (including not only the work of their staff but also of their peers).
- Further, copyright infringements in publications and lecture material are only seemingly cases of trivial petty offences, especially if pictures and videos from the internet are used. The subsequent law cases and claims for compensation by the copyright holders are in sum very costly for the universities sued.
- At universities, intricate legal questions often arise with regard to value added tax (VAT). National VAT regulations – often complex enough by themselves – have to be brought in line with the statutory provisions of European law, namely the council directive on the common system of value added tax.[83] Official duties, such as foundational research, are VAT-exempt while commercial activities are not. For instance, according to the European Court of Justice, commissioned research in return for payment is part of the latter mentioned commercial activities and a German tax regulation arguing for its VAT-exemption was ruled to be contrary to European law by the European Court of Justice in the year 2002.[84] Misjudgments as regards the demarcation between public and commercial activities of universities may have severe consequences under (criminal) tax law.
- When it comes to protection of data privacy and IT-security, it is crucial especially for (medicinal) research facilities engaged in joint multinational research projects that the disclosure of personal data for (and stemming from) joint research, peer review and future (commercial) use has to be covered by German data protection law – which is much more severe than, for example, the respective U.S. regulations. To cite a further example, a culture of mindfulness needs to be upheld (or even established in the first place) with regard to sensitive personal student data, e.g. regarding the documentation of test results. Violations of German data protection law can be a criminal offence and are at least punishable with administrative fines.

This enumeration could nearly be extended ad infinitum. Instead, a few additional keywords with regard to other compliance issues may suffice: Universities need to be acquainted with the rules regarding civil servants and labour law (for instance in order to avoid accusations of fictitious self-employment or of discrimination prohibited under German general equal treatment legislation and with regard to transparent job placing procedures), assessment of student exam papers free of arbitrariness as stipulated by the German constitution,[85] protection from industrial espionage in research facilities or the regulations regarding foreign trade law and trade embargos when transferring knowhow abroad, paying wages or making other economic resources available.[86]

Apart from the liability risks which the individual prohibitions exemplified above pose, there are in general no significant limitations of liability connected with being a member of a university. Notably, committing crimes in office is by no means a reason for mitigation or even indemnity. On the contrary, criminal responsibility is significantly aggravated due to the existence of various statutory criminal laws cover-

[80] See *Perron*, in: Schönke/Schröder, Strafgesetzbuch, Kommentar, 29th ed. 2014, § 266 para. 44.

[81] For Germany, see the memorandum "Proposals for Safeguarding Good Scientific Practice", published by the Deutsche Forschungsgemeinschaft (DFG – German Research Foundation) and drafted by its commission "Selbstkontrolle in der Wissenschaft" (Commission on Professional Self Regulation in Science), 2nd ed. 2013, available at: http://www.dfg.de/download/pdf/dfg_im_profil/reden_stellungnahmen/download/empfehlung_wiss_praxis_1310.pdf (27.5.2017).

[82] See below at III. 3. for a further debate of the freedom of science and its relation to compliance efforts at universities.

[83] See Council Directive 2006/112/EC on the Common System of Value Added Tax, 11.12.2006, OJ EU No. L 347/1.

[84] See ECJ, Judgment of 20.6.2002 – C-287/00, available at: http://curia.europa.eu/juris/liste.jsf?language=en&num=C-287/00 (27.5.2017).

[85] See BVerfGE 84, 34 (BVerfG – Bundesverfassungsgericht – Federal Constitutional Court).

[86] For further case groups see *Friese*, in: FOM Hochschule in Kooperation mit dem Verein zur Förderung des deutschen & internationalen Wissenschaftsrechts (fn. 70), p. 89.

ing malpractice. At the level of administrative offences law, the management staff of public universities may to a certain extent be exonerated by the fact that the negligence of supervisory duties which, if observed, would have at least impeded the commitment of certain crimes and regulatory offences by other university staff members does not entail monetary fines for the management. This is because the relevant provision (§ 130 OWiG) does not cover the omission of supervisory duties within units of public administration. The assessment of legislature in this respect is that the supervisory and disciplinary measures provided by administrative law were sufficient to prevent infringements of law.[87] Even though the assessment set out in the following is not undisputed, it seems to be the more convincing legal position that it is nonetheless possible for a public university itself to be subjected to an administrative penalty set if certain crimes and regulatory offences are committed by its management staff.[88] However, as with § 130 OWiG, some do not seem it to be necessary in most cases to employ § 30 OWiG on public legal entities.[89]

In view of the plentitude of important legal duties and often dire consequences in cases of contravention merely touched upon above it seems as if a corresponding organisation of law abidance at public universities was elementary – just as it is for complex organisations within the realm of private economy. Apart from the objections that can generally and justifiably be brought forward against unbalanced, inappropriate and disorganised compliance (see above, II. 2. b), now the objections should be taken into account that can be raised specifically against Compliance at public universities.

2. Alternative traditional instruments for law abidance?

Compliance could simply be superfluous at public universities. Some believe that law obedience is self-evident for public administration staff.[90] At least the predominant part of the general public expects public administration staff to have a greater willingness to follow rules than personnel within the free economy.[91] This ensues partly from the professional ethics within public administration and from motivators distinguishing themselves from the pecuniary incentives (still) dominating the private economy. But most importantly, pursuant to the rule of law, an essential principle of the German constitution,[92] the public administration and its staff are legally committed to respect and to execute the law.[93]

Such an excellent, outstanding standard of law abidance may actually exist among public administration staff. Not least, it could result from the fact that public service staff are not forced to be efficient and economically successful with the same intensity and to the extent that seems to be prevalent with free-market participants. Then again, one may argue that at least for German civil servants liability under administrative offences and civil law for violations of law committed in office is fairly limited, especially when compared to manager liability for deficient supervision in private enterprises. For this reason the motivation to follow the law could gradually become lower for the management staff of public authorities.[94]

For questions of law abidance at public institutions – and thus, also, at universities – the issues of general willingness towards law abidance or even of the underlying image of society[95] discussed above seem to be less important than the fact that the complexity and constant change of rules as outlined so far is liable to overtax public service staff to the same extent as is the case with the personnel of private enterprises. The necessity of organised rule abidance (i.e. compliance) at universities therefore does not so much arise from a different culture of legality or, vice versa, a different propensity of its staff to seduction when compared to employees of private enterprises but rather from a decisive common feature of both groups of persons: In professional contexts the law often asks too much of the individual and he or she is in need

[87] See *Niesler*, in: Graf/Jäger/Wittig (fn. 59), § 130 OWiG para. 17; *Rogall*, in: Senge (ed.), Karlsruher Kommentar zum Gesetz über Ordnungswidrigkeiten, 4th ed. 2014, § 130 para. 32; *v. Galen/Maass*, in: Leitner/Rosenau (eds.), Wirtschafts- und Steuerstrafrecht, 2017, § 130 OWiG para. 15; *Achenbach*, in: Küper/Welp (ed.), Beiträge zur Rechtswissenschaft, Festschrift für Walter Stree und Johannes Wessels zum 70. Geburtstag, 1993, p. 545 (554).

[88] OLG Frankfurt NJW 1976, 1276; *Niesler* (fn. 87), § 30 OWiG para. 10; *Rogall* (fn. 87), § 130 OWiG para. 32; *v. Galen/Maass* (fn. 87), § 130 OWiG para. 9; *Achenbach* (fn. 87), p. 553 f.; *Eidam*, wistra 2003, 447 (449); *Laue*, Jura 2010, 339 (343); for the opposing view see *Hirsch*, ZStW 107 (1995), 285 (308); *Pohl-Sichtermann*, VOR 1973, 411.

[89] *Gürtner*, in: Göhler (ed.), Gesetz über Ordnungswidrigkeiten, Kommentar, 16th ed. 2012, § 30 para. 2.

[90] See *Vogelsang/Nahrstedt/Fuhrmann*, CCZ 2014, 181; *Fuhrmann* (fn. 61), p. 110.

[91] See *Orthmann*, Compliance, Anforderungen an rechtskonformes Verhalten öffentlicher Unternehmen, 2009, p. 29; *Heuking/Coelln*, DÖV 2012, 827 (837).

[92] Grundgesetz für die Bundesrepublik Deutschland (GG – Basic Law for the Federal Republic of Germany), art. 20 para. 3.

[93] See *Vogelsang/Nahrstedt/Fuhrmann*, CCZ 2014, 181; *Burgi*, CCZ 2010, 41 (44); *Fuhrmann* (fn. 61), p. 110.

[94] See *Heuking/Coelln*, DÖV 2012, 827 (833), for a juxtaposition of the liability risks for staff of private vs. public organisational forms. It is correctly pointed out that the executive personnel of public enterprises and other entities engaged in providing minimum standards of infrastructure and welfare ("Daseinsfürsorge") run a high risk of being subject both to special provisions under German criminal law applicable for public servants only and to German criminal law safeguarding duties of board members and other business executives under civil company law.

[95] See, for example, *Stober* ([fn. 3] p. 90) for the perception that in society the general consensus to adhere to law is dwindling: Legitimate behaviour, according to *Stober*, no longer seems to be self-evident.

of appropriate guidance and daily support.[96] This applies all the more since universities are supposed not only to fulfil their classical administrative tasks and duties but are increasingly viewed as modern service institutions that are obliged to act with utmost transparency pursuant to European[97] and German[98] transparency provisions. In the long term and within these coordinates it seems hardly conceivable for public institutions (including universities) to consistently act in compliance with all legal provisions as well as according to everyone's expectations if the support for law abidance is not institutionalised and cast into monitored procedures.[99]

However, compliance in public administration and, in particular, at universities would not need to be pursued any further should the specific instruments of public administration to safeguard the principle of legality turn out to be sufficient in themselves.[100] The traditional instruments or institutions intended to ensure law abidance in the public sector are internal revision, external audit, legal, subject-specific and disciplinary supervision ("Rechts-, Fach- und Dienstaufsicht"), further disciplinary law and other means of public personnel management such as dual control or the principle of rotation.[101] Even though this range of measures features a certain degree of congruence with the current instruments of a compliance management system, it appears necessary to review critically and profoundly the overall performance of these public administration instruments. One particularly important question that arises is whether the legal and subject-specific supervision authorities that take action only by means of decrees and directives within a strict subordination relationship are in touch with the organisational units in need of guidance with the same requisite intensity as a modern compliance organisation can be. This seems doubtful. Further, it is questionable as to whether the density of controls and adjustments to the organisational system and individual behaviour is sufficient. These doubts also apply to the question as to whether the supervisory authorities' understanding of the respective organisation's current risk exposure corresponds to the actual legal and reputational threats and to the informational and advisory requirements of its personnel.

While these considerations should not lead to the drastic decision to substitute completely the traditional instruments of promoting law abidance within public administration with an advanced compliance management system – this perception does not seem feasible for constitutional reasons alone –, the traditional instruments for guiding compliance which still predominate at universities, too ought to open up further to approaches and methods already implemented in the realm of private economy.[102] Therefore, in the near future, the major challenge from a legal and practical perspective ought to be synchronising and linking these two different approaches to compliance at public universities as efficiently and effectively as possible. In this regard, it supposedly is going to be of special importance to complement the traditional safeguards for law abidance within public administration with certain compliance elements.[103] Even though the appropriate components are not easily identified for each sector a priori, it can be safely assumed that supervisory tasks at universities that are orientated towards a preventive strategy more than before ought to achieve at least basic risk analyses.[104] On this basis (which can be further visualised e.g. by means of a "risk map"[105]), further measures may be devised in order to counter the identified specific legal risks.

3. Compatibility of compliance and the freedom of science

At universities, compliance efforts encounter specific normative conditions, namely the freedom of sciences as guaranteed by the German constitution: ("[…] sciences, research and teaching shall be free"[106]) and European law[107]. This fundamental right is likely to impose tight constraints, at least in

[96] *See Fuhrmann* (fn. 61), p. 110.

[97] See Charter of Fundamental Rights of the European Union (CFR), arts. 41 para. 2 lit. b, 42 in conjunction with Treaty of Lisbon amending the Treaty on the European Union and the Treaty establishing the European Community (TEU), art. 6 para. 1.

[98] See Gesetz zur Regelung des Zugangs zu Informationen des Bundes – Informationsfreiheitsgesetz (IFG – Federal Act governing Access to Information held by the Federal Government – Freedom of Information Act), § 1 para. 1.

[99] See *Vogelsang/Nahrstedt/Fuhrmann*, CCZ 2014, 183.

[100] For this position see *Schober*, DVBl 2012, 391 (399): "Compliance is inherent in the system of public administration […] for the state owns the monopoly on the use of force and is responsible for observing constitutional rights and therefore has to be concerned primarily and particularly with permanently ensuring the legality of its actions" (translation by the *author*).

[101] See *Stober* (fn. 3), p. 104.

[102] See *Stober* ([fn. 3], p. 104) for the opposite standpoint: There is no constitutive surplus value to be gained by compliance.

[103] See *Vogelsang*, in: Maschmann (fn. 20), § 60 para. 52 f.

[104] For the high importance of initial risk analysis (and its regular rollback) for efficient compliance see *Bock* (fn. 21), p. 588 f.; *Gilch/Schautes* (fn. 51), ch. 2 A. para. 39 f.; *Hauschka/Galster/Marschlich*, CCZ 2014, 242 (246); *Moosmayer* (fn. 2), para. 71 f.; *Pauthner/Stephan*, in: Maschmann (fn. 20), § 16 para. 23 f.; *Sahan/Urban*, in: Rotsch (fn. 6), § 35 C para. 7.

[105] Drawing up charts of legal risks is already practised in private economy (see: http://www.compliance-manager.net/fachartikel/unser-risikoatlas-hat-uns-die-augen-fuer-die-zukunftsthemen-von-compliance-geoeffnet [27.5.2017]) as well as in public administration (see the annual report 2015 on "corruption prevention in the federal administration", p. 29, available at: https://www.bmi.bund.de/SharedDocs/Downloads/DE/Themen/ModerneVerwaltung-OeffentlicherDienst/Korruption_Sponsoring/jahresbericht-2015-korruptionspraevention.pdf [27.5.2017]).

[106] Art. 5 para. 3 sentence 1 GG.

[107] European Convention on Human Rights (ECHR), and art. 13 CFR in conjunction with art. 6 para. 1 TEU.

certain areas, on the efforts of university self-administration and its governmental supervisory authorities to impose binding rules of behaviour that are aimed at avoiding infringements of law.

Although the term "science" can only with difficulty be defined precisely, the German Federal Constitutional Court (Bundesverfassungsgericht – BVerfG) has nevertheless identified several structural elements that are understood to be distinct features of this legal concept. Hence, freedom of the sciences concerns "the processes, behaviours and decisions based on scientific entelechy utilised to discover, interpret and relay insights"[108]. Further, there is a common understanding that "research" and "teaching" are only dependent subsets of a comprehensive liberty of science.[109] The BVerfG defines "research" as the "serious and systematic attempt to determine the truth, following a methodically organised procedure and based on a state of knowledge ordinarily stemming from a scientific course of studies"[110]. This constitutional protection of scientists and science is interpreted in a broad sense and therefore also covers preparatory and auxiliary activities as well as the organisation of science and the publication of research findings.[111] Holders of the basic right to the freedom of science, thus conceived, are, above all, university professors but also other academic university personnel (including students) as far as they also conduct their own research and/or independent teaching.[112] Furthermore, the universities themselves – as legal persons under public law – and their faculties are entitled to the freedom of science as guaranteed by the German constitution.[113] Besides, contract research in return for payment is not outside the scope of protection of this fundamental right.[114] Within the limited scope of this paper, it can only be hinted that considerably less certainty regarding the freedom of science exists if the view is broadened towards privately founded universities and cooperation between public universities and private research institutions: As, under German law, basic rights are first and foremost "defensive rights" against the state, it is still disputed to what extent scientists' research is protected by the German constitution vis-à-vis their private employers.[115] In any case, the state itself should not be allowed to circumvent its constitutional obligations by incasing its universities with a legal structure provided by private law.[116]

Regarding the potentially tense relationship between the freedom of science on the one hand and certain compliance measures on the other hand it further has to be taken into account that, at least according to the preferable school of thought, ethically controversial basic research (such as stem cell research or studies by means of animal testing) is also within the general scope of protection for the freedom of science under German constitutional law.[117] The reach of this fundamental right would be unduly limited if from the outset only authorised and risk-free research was protected.[118]

Just as the term of "freedom of science" is not easily identified, the same applies to encroachments on it, since the scope of this fundamental right is to a large extent already institutionalised by public regulations.[119] At any rate, it can be said that compliance measures resulting in the impairment of certain research, cooperation and teaching activities exceed the mere organisational configuration of science and therefore have to be qualified as encroachments on the freedom of science itself.

However, the above outline of the freedom of science under the German constitution has not been presented in order to imply that the legal liberties of science exist irrespective of third-party rights. Even though the German constitution does not mention explicit legal reservations ("Gesetzesvorbehalt"), the freedom of science is not boundless. Under the German constitution all fundamental rights that are guaranteed without mentioning a distinct Gesetzesvorbehalt (the freedom of science is one of these rights) may be constrained by laws that specify constitution-immanent barriers (i.e. conflicting third-party fundamental rights as well as state objectives of constitutional status) in a proportionate manner.[120]

Therefore, scientists who, in connection with their research, engage in criminal offences involving, for instance, bodily harm or corruption, are by no means immunised against statutory penalties by the freedom of science pursuant to the German constitution. For as a rule, the statutory offences applied by criminal courts in these cases (provided this application takes place by a constitutional interpretation of the law) already represent the appropriate legal balance between the freedom of science on the one hand and the constitutionally protected values impaired by scientific activity on

[108] See BVerfGE 47, 327 (367, translation by the *author*).
[109] See *Scholz*, in: Maunz/Dürig, Grundgesetz, Kommentar, 78th installment, As of: September 2016, art. 5 para. 3, para. 85 f.
[110] See BVerfGE 35, 79 (112).
[111] See *Manssen*, Staatsrecht II, Grundrechte, 12th ed. 2015, para. 408.
[112] See BVerfGE 122, 89 (105); *Hufen*, Staatsrecht II, Grundrechte, 4th ed. 2014, § 34 para. 14 f.
[113] See *Pieroth/Schlink/Kingreen/Poscher*, Grundrechte, Staatsrecht II, 31st ed. 2015, para. 695 (with further references).
[114] See *Starck*, in: Mangoldt/Klein/Starck (eds.), Kommentar zum Grundgesetz, 6th ed. 2010, art. 5 para. 3, para. 355.
[115] See *Battis/Grigoleit*, ZRP 2002, 65; *Däubler*, NJA 1989, 945.
[116] For a discussion of the legal obligations of state authorities towards the constitution within "Administrative Private Law" see *Kirchhof*, in: Maunz/Dürig (fn. 109), Art. 83 para. 103.
[117] See *Hufen* (fn. 112), § 34 para. 13.
[118] For this perception of the freedom of science see *Pieroth/Schlink/Kingreen/Poscher* (fn. 113), para. 699.
[119] See *Hufen* (fn. 112), § 34 para. 20.
[120] BVerfGE 47, 327 (368 f.); 107, 104 (120); 108, 282 (297); *Hesse*, Grundzüge des Verfassungsrechts, 20th ed. 1995, para. 72; *Michael/Morlok*, Grundrechte, 5th ed. 2016, para. 712; see for critique of this technique of a "pragmatic trade-off" ("Abwägungspragmatismus") *Fischer-Lescano*, KJ 2008, 166.

the other hand. The freedom of science can arguably also conflict with itself. This is namely the case if the high-risk research profile of a given scientist endangers the reputation of his faculty and thus the funding of colleagues' research projects by private industry partners, as these partners may shy away from a further engagement due to their own compliance standards.[121]

In the most general sense (and in view of the respective current legal and ethical issues at a given time) it may be discussed, as it always has been, whether some of the statutory regulations in place limiting research (and/or the interpretation of these regulations by courts and law enforcement authorities) sufficiently consider the freedom of science as formulated in the German constitution. This question has also occupied German courts that, for instance, had to weigh up the value of empirical medical research against the fundamental right to self-determination over personal data[122] or the freedom of science at theological faculties against the constitutional right to self-determination for religious societies[123].

However, it is crucial to note that the concerns which specifically universities have about compliance regarding the constitutional guarantee of the freedom of science do not arise from the comparatively mundane fact that compliance programmes direct the personnel of an organisation (here: university staff) to abide by the law. Instead, reservations can arise from the concrete measures introduced to reach this target and/or from possible further compliance objectives.

As already discussed,[124] compliance guidelines regularly do not confine themselves to a verbatim citing of the statutory instructions and prohibitions that are the most relevant for the respective organisation. Rather, compliance codes of conduct usually exceed these requirements. It was explained that the underlying strategy for this scope of compliance provisions is to avoid in advance any suspicious facts alleged against the organisation or its members (and at the same time any burdening investigations) and/or to establish the organisation's own guidelines (this, in turn, either for the sake of good [corporate] citizenship and a solid reputation or to support the staff's willingness to abide by statutory law). If compliance guidance at universities requires these "soft-law-contents" to be followed, too (and should therefore not be formulated as mere non-binding advice for best-practice behaviour) this anticipatory line of defence can quickly conflict with the freedom of science as guaranteed by the German constitution. This is especially the case for medical and empirical research as well as for studies conceived as collaborations with the private sector and/or involving third-party funding. For instance, controversial constrictions may be imposed on genomics or on cooperation between surgeons and producers of medical devices (in order to minimise the risk of corruption allegations). By contrast, a generic problem currently facing most faculties on a daily basis is, as already mentioned, fraud in science – for example regarding PhD theses. Still, a majority of university professors would supposedly be hesitant to accept ground rules for doctoral supervision (especially with regard to plagiarism assessment) and regularly auditing on their observance of these rules.

The role of university self-administration in connection with the possible freedom-restricting effects of compliance can be described as Janus-faced: On the one hand, as holders of the freedom of science universities – understood as self-governed research organisations – must be vigilant about repelling constitutionally questionable instructions issued by the competent supervisory bodies, thus exceeding their authority to execute legal supervision only. On the other hand, universities in turn appear as regulatory agencies vis-à-vis the individual faculties, research institutes and their research personnel. Thus, compliance guidelines drafted by university authorities could question the freedom of science.[125]

Similarly, the professional status of university professors in particular is predetermined by twofold ties laid down in the German constitution: On the one hand scholars are holders of the freedom of science and on the other they belong to public service. This service status is shaped by civil service law, that is, by the customary principles of the civil service system ("Hergebrachte Grundsätze des Berufsbeamtentums") pursuant to the German constitution.[126] In this respect, it is certainly worthy of discussion as to what extent the freedom of science has to be understood as a fundamental right depending on a minimum level of structuring by civil service law.[127] Yet, in any case it has to be taken into account that the civil service law status university professors are subjected to is by no means only intended to impose and enforce official duties on them. For an equally important aim of this status is "to provide qualified researchers with the level of personal and material independence essentially required for the freedom of science"[128]. Therefore, dependency on instructions from superiors is precisely what is undesirable in the field of research and academic teaching.[129] Things get even more com-

[121] See *Armbruster*, duz Magazin 3/2013, 8 (9).

[122] See OLG Hamm NJW 1996, 940 (regarding the publication of personal data in a medicinal habilitation treatise); for more details on the underlying constitutional conflict situation see *Kalberg*, Datenschutz an Hochschulen, Eine Analyse der Rechtsgrundlagen und ihrer Umsetzung in integriertem Informationsmanagement und Forschung, 2014, p. 227 f.

[123] See BVerfGE 122, 89 (105, "Lüdemann case": the appellant, a professor of theology, turned against the decision of the university presidium to convert his university chair into a confessionless teaching unit after he had renounce his faith. Further, he was no longer authorised to conduct exams in theology). On this case see *Hufen* (fn. 112), § 34 para. 44.

[124] See above, at II. 2. a) aa).

[125] See *Hufen* (fn. 112), § 34 at para. 49 (with further references) for the present underlying trend to disempower the decentralised decision-making bodies of universities (namely the faculty councils) in favour of strong presidents and deans as well as university counsils.

[126] See art. 33 para. 5 GG; *Scholz* (fn. 109), art. 5 para. 3, para. 172.

[127] See *Kaufhold*, NJW 2010, 3276.

[128] See *Scholz* (fn. 109), art. 5 para. 3, para. 172 (translation by the *author*).

[129] See *Scholz* (fn. 109), art. 5 para. 3, para. 172.

plicated when the aims of civil service law conflict with each other: Is it a necessity or a boundary crossing of civil service law if it prohibits scholars to sign confidentiality agreement regarding the results of their externally-founded research?[130]

Inevitably the question arises as to how the possible conflict between compliance and the freedom of science can be resolved. A comparatively clarifying but tedious and unpleasant solution may come from taking legal action (either by the organisation willing to impose and enforce compliance regulations or by its addressees). As always, other options are preferable as long as they encourage greater hopes of striking a steady settlement of interests in a balanced and cooperative manner. In this respect, an option could be to provide (financial) incentives for those willing to follow university compliance programmes. However, the assignment or withdrawal of funds as a steering instrument may be reviewed as a mediate impairment of the freedom of science and may also entail further legal difficulties, such as budgetary and equality issues.[131] Therefore, much the same as for compliance measures in the realm of private economy, the vital component for the success of a compliance programme at universities lies in convincing the entire staff that it is for the mutual benefit of all to adhere to compliance regulations. Ideally, this understanding is promoted by a permanent interdisciplinary institution (for instance a standing compliance committee) involving not only compliance and administration experts but also scientists closely involved with the field to be regulated.[132]

Yet, in cases where a compulsory set of compliance rules affects the central area of research interests, a negotiated peace outside the courtrooms between the particular legislator and the scientists concerned may be hard to achieve. To a certain extent, universities can be expected to give their scientists the benefit of the doubt or at least to accept compromises, not least on the grounds that it cannot be in their own interest to incur substantial losses in researchers and research capacities due to unreasonable compliance demands. Then again, it can prove advantageous for universities and their compliance efforts to be restrained by court rulings on the basis of the freedom of science: It is then affirmed that the attempted compliance measures could not be implemented for legal reasons – and not for a lack of good will. In these cases, the university compliance designers will need to limit their efforts to non-binding best practice guidelines. The supposed disadvantage of recommendatory provisions only is however (generally) relativised by the fact that mandatory rules merely convey a false sense of security when they lack enforcement – as is often the case. Noncommittal regulations on the other hand can be more effective –perhaps because of their nonbinding nature – when special intention is paid to advertising and explaining them.

Compliance standards which are neither rigorously set out nor enforced – i.e. which provide for sufficient freedom for the addressees – may also be favourable for another reason seemingly outlandish for the juridical mindset: Non-rigid compliance guidance may leave room for negligible transgressions which are helpful for the everyday functioning of the organisation – something described by *Niklas Luhmann* as "useful illegality".[133]

IV. Conclusion and outlook

As a result of the above discussion it should at least be noted that the traditional instruments to promote law abidance within university administrations should at any rate be supplemented by those compliance elements that so far have been underrepresented there. This may especially involve continuous risk analyses (see above, III. 2.), ideally designed by a joint effort of compliance experts, representatives of the faculties and, where appropriate, further staff from executive departments (e.g. internal revision, human resources, tax office, legal department etc.). Also, university personnel should be made aware of the possible compliance issues their respective fields of work especially entail. At least this should be the case with staff working in high risk areas such as accounting or procurement. Ideally, the aforementioned professional group of compliance experts could be consolidated in the form of a compliance committee that could become a competent and permanent contact group for all compliance issues within the university. In this manner the justified expectations of the public as regards the principle of legality within public administration could be further ensured and public confidence in public administration could thus become stabilised.[134] At the same time, such an institution would provide the best opportunity to reconcile the demands of effective compliance measures and the legitimate interests of researchers for the freedom of science as safeguarded by the German constitution and European law.

Not least, university administrations act in the interest of their staff when they are not harried by the further culture change towards a (legally enforceable) transparent service providing administration but are able to actively co-design this process themselves by means of a contemporary and self-adjusting self-organisation of law abidance. The traditional instruments for legal and subject-specific supervision which already exist also have the advantage for university administrations that – after careful risk analysis and compliance target definition – only those compliance measures are taken

[130] See, for example, the compromise formula in Gesetz über die Hochschulen in Baden-Württemberg (LHG – Law for the Universities of Baden-Württemberg), § 41 para. 1 sentence 2: "As a general rule, the results of third-party funded research are supposed to be published in the foreseeable future" (translation by the *author*).

[131] See *Hufen* (fn. 112), § 34 para. 21 f.

[132] See *Armbruster*, duz Magazin 3/2013, 8 (10).

[133] See *Luhmann*, Funktionen und Folgen formaler Organisation, 1964, p. 304 f. See *Schimank*, duz Magazin 3/2013, 12, for the implications of this aspect of system theory for compliance at universities.

[134] See *Stober* (fn. 3), p. 108. For examples of further elements of a university-specific compliance management system see *Nettekoven*, in: FOM Hochschule in Kooperation mit dem Verein zur Förderung des deutschen & internationalen Wissenschaftsrechts (fn. 70), p. 4 f.

over that promise a noticeable additional value. This approach would have the advantage of minimising the possible drawbacks of compliance in private economy (see above, II. 2. b) which would otherwise result from an unreflecting and hypertrophic formation of a thus far inadequately represented system of organised law abidance.

One last objection against a stronger consideration of compliance at universities though could prove to be particularly substantial: Establishing and maintaining a compliance management system is costly and it is the tax payers' money funding it.[135] In numerous enterprises within the private economy the necessary funds only became available after the occurrence of serious infringements of law that entailed dire financial and legal consequences for the organisation as well as for its management staff. It can be recommended and hoped for the sake of the universities that the well-invested financial resources for proportionate compliance are put to use at an earlier stage.

[135] See *Schimank*, duz Magazin 3/2013, 12.