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German Federal Court of Justice treats compliance management systems as mitigating factor

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With its decision of 9 May 2017, the German Federal Court of Justice, the highest criminal court in Germany, commented for the first time on the significance of compliance management systems. In corruption cases at least, the German Federal Court treats compliance management systems as a mitigating factor when calculating corporate fines. Given repeated past discussions about the role of compliance management systems in reducing liability and fines, the German Federal Court's indication is warmly welcomed among practitioners.

The case

The defendant was a managerial employee of a German defence company. In 2001, the company sold 24 self-propelled howitzers to Greece for €188 million. To do this, it engaged the services of two sales agents, whose activities were coordinated by the defendant.

Sales agent B was hired specifically for this arms deal on a commission basis of 3%. According to the Court's findings, the arms deal was based on a bribery agreement between the defence company and the Greek minister of defence; sales agent B had personal access to this minister. The commission agreement was concluded to provide the funds required for the bribery agreement.

In 2002, sales agent B issued an invoice for a €1.85 million commission. The defendant, together with his superior, approved the invoice for payment. The invoice was paid and declared in the tax return of the defence company as ordinary business expenses for 2002. The defendant left the company in 2004. After his departure, further payments were made to the sales agents and were treated as business expenses.

The defence company employed another sales agent (P), a personal friend of the defendant, in Greece for the arms deal; this sales agent forwarded bribery payments from commission payments to the deputy armament director in Greece. In addition, between 2002 and 2004, the defendant received kick-back payments in excess of €657,000—paid into his Swiss bank account—from sales agent P. The defendant concealed these payments from the German tax authorities.

Although it could not be established that the defendant definitely knew that sales agent P was involved in bribery, P did start to tell the defendant that the deputy armament director in Greece was demanding part of P's commission. The defendant "stopped" P in mid-sentence, however, by saying that he didn't want to hear about it and that it only concerned P.

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