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CRACKING THE WALL OF SILENCE

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Just imagine for a moment that you are dreaming and in your dream the authorities are interested in your company and you have no idea why. You try to ask your employees questions but everybody is very evasive. You have done everything you could, put a whistleblowing hotline in place, installed corporate governance etc. but somehow you are unable to get the information you need to stir the company out of trouble. Admittedly this is not a pleasant daydream but we will try to show you how to avoid its turning into a nightmare.

1. Information:

Once a company is investigated – be it for **antitrust infringements, bid rigging or tax evasion** – it will usually start its own internal investigation. However, most of the time employees are not forthcoming with information for fear of implicating themselves or others. Many a times the directors will therefore face the **wall of silence**. To crack this wall of silence and eventually get vital information, companies like Siemens have started so called Immunity or Amnesty Programs. The latest rather well known company to put this measure in to place was Thyssen-Krupp. Having been convicted in the so called rail cartel, management announced that anyone coming forward with vital information until 15th of June this year could expect immunity.[1] Although we are of course not sure whether that was the case with Thyssen-Krupp, Amnesty programs generally have the following provisions:

[1] According to the Sueddeutschen Zeitung

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- The employer promises not to take action against the employee (be it employment wise or for damages)
- Confidentiality
- Not to report the employee to the authorities
- In some cases: the coverage of legal costs

Such a program does not only help intra company compliance but also help the company to profit from numerous leniency provisions (e.g. for the participation in a cartel). Even if it does not lead to the company not being fined, it could mean a massive reduction of a fine. Although, the aforesaid seems logical, there are, as always things to be observed.

2. Types of Amnesty Agreements:

Since the term amnesty agreement is now commonly used for these types of agreements, one has to keep in mind that the term itself does not have any civil or criminal legal consequences and that it is up to the employer to define these. First of all, he has to decide whether to issue a general or a specific amnesty. The general amnesty, rather less common for the reasons to be shown later, benefits all employees. When issuing a specific amnesty the company usually grants the employee amnesty in exchange that the employee takes part in the investigation and provides vital information. In some cases the two measures will be combined so that the company first issues a general amnesty, promising not to press criminal charges against whoever comes forward and then grant certain employees specific amnesties with the above mentioned terms.

Whatever measure is taken the employer has to ensure that it is legally binding since the employee is otherwise unlikely to participate and that the content of the agreement does not violate other legal provisions.

3. Content of the Amnesty Agreement:

The main part of any Amnesty Agreement is the protection against sanctions based on employment law (e.g. reprimand or dismissal). According to Austrian law an employer may

freely decide whether to waive his rights. If the employees engage in corruption or a cartel, this does not only lead to the company being damaged but the company in return may have claims against the employee for damages. The company may include in the amnesty agreement a so called standstill agreement (pactum de non petendo) or waive any claims. The difference is a technical legal matter with no consequence for the employer. Whether such a standstill agreement/waiver can be included will be shown below since there are some restrictions as to when management may waive damage claims.

Most employees also hope for some sort of assurance by the company that there won't be any criminal charges against them personally. However, this is not altogether possible since most offences will be prosecuted by the state regardless of what the company has promised. What the company can do and very often will do is that it will not file a criminal complaint against the employee and if the employee is charged inform the prosecution of the employee's cooperation and decisive support in clarifying the facts.

Equally important for most employees is the assurance of confidentiality since whatever the information is it is likely to implicate themselves and others (no point in keeping your job if everybody else knows you were responsible for your co-employees' dismissal). Confidentiality clauses should therefore be phrased that the information will only be passed on to a very select set of people. This will usually include management and outside counsel.

4. Specific content:

Amnesty agreements are usually very restricted as to who is allowed to take part. Upper management is usually excluded. Otherwise whoever may provide extensive and truthful information with regard to the subject of investigation may participate in the Amnesty Program. To provide truthful information is a resolutive condition for the Amnesty Agreement: If the information is not truthful, the company is no longer bound by the Amnesty Agreement and may take actions based on employment law or pursue damage claims. Apart from that Amnesty Agreements will usually be time limited as we have shown with the Thyssen-Krupp-case. The reason behind it is that there needs to be some pressure for employees to fear consequences at some point in time for them if they do not come forward. In addition, the

amnesty will usually be restricted to certain facts and certain deeds. In some cases it might be recommendable to exclude intentional misdemeanours or felonies (a felony in Austria is punishable with a minimum three year sentence.

5. Problems when setting up an Amnesty Agreement:

When considering an Amnesty Program, this always includes the question in how far the organs of a company may waive claims for damages or whether the management makes itself liable towards the company for such a waiver? This is decided according to the **business judgment rule**. Actions by management are thus justified if a director when making a business decision could reasonably assume – based on the available information – that the decision was for the best of the company. This raises the question whether management would have to take other actions first before waiving potential damage claims. The problem is that other investigative measures if done secretly face serious data protection and/or violation of human rights issues and if done openly have let in the past to evidence being destroyed before management could get to the bottom of it. Hence, it is generally assumed that these Amnesty Agreements are good business practice.

When setting up such a program, management then has to ask itself whether it is legally necessary to inform the works council. In Austria the relevant legal provision to consider is Para 89 *Arbeitsverfassungsgesetz - ArbVG* (Employment Constitutional Act). Until now we assume that this would not be necessary since this is a measure of corporate governance which does not interfere with employment but rather aims at giving wayward employees additional rights. It can however be advisable to inform the works council for it not to interfere with the program once it started, i.e. advice its members not to participate or challenge certain provisions in court. This might cost time which a company under investigation usually does not have.

Once the company promises confidentiality it has to observe corporate law disclosure provisions. Directors have a duty, if asked by shareholders or the supervisory board, to provide a complete and truthful report about the course of business of the company (Para 22 *GmbHG*, Limited Liability Code; as well Para 112 *Aktiengesetz – AktG,* Stock Corporation

Act). These duties may not be altered by any duty resulting from a confidentiality agreement with an employee.

If a company is listed at a stock exchange, in addition capital markets law provisions need to be observed. Any breach of law may constitute insider information necessitating an ad-hoc announcement according to Para 48d *Börsegesetz* (Stock Exchange Code). However, this will generally only require a general description of what happened and the potential consequences for the company. Individuals do not have to be named.

The people involved however do face the risk of shareholders filing a criminal complaint. This is why we mentioned above that it might be necessary for the company to promise to cover legal costs for the employee involved. When drafting such an Amnesty Agreement, one must therefore take care to show the limits with regard to confidentiality.

6. Relevance of Amnesty Agreements with regard to Public Procurement:

Another aspect of Amnesty Agreements is that in order to participate in a public tender one has to be a „secure operator“. If a company is convicted of an offence it might lose the right to participate in public tenders (so called “discretionary exclusion”). A conviction for membership in organised crime, bribery, fraud or money laundering leads to mandatory exclusion and the company is potentially barred from participating in any tenders in the future. As a measure to avoid these consequences, a company may engage in so called “self-cleaning in public procurement”. The company has to demonstrate that it has made a credible and promising effort to avoid such future violations. However self-cleaning in public tenders requires the following:

1. The company has to investigate the facts,
2. cooperate with the investigative body and/or agency involved in the tender,
3. compensate potential damages,
4. take the necessary structural, organizational and personal measures to avoid future transgressions.

As you can see an Amnesty Program can help the company to take all these measures. In public procurement terms it will also require however that those in charge who were involved are actually removed from their posts.

7. Conclusion:

As we have shown there are measures you can take to crack the wall of silence. These programs should be handled very carefully and interpreted narrowly. Management has to keep in mind that sometimes employment consequences will not be avoidable and most of the time an employee may not receive a promise of total confidentiality. Management has also to address the question of morality in each case. Good business judgement is always required.

Last but not least, could such a program be done by in house counsel? The answer is NO. The ECJ has ruled in Akzo-Nobel[2] that with regard to cartels law firms are privileged and in-house counsels are not. Your information is only safe in the hands of your outside counsel.

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[2] Case C-550/07 P