



New Tendencies in Corporate Governance Rules

PIU Reinsurance Seminar
16th June 2015

Michael Theilmeyer , Gen Re

Definition of „Corporate Governance“



Corporate governance broadly refers to the mechanisms, processes and relations by which corporations are controlled and directed. Governance structures identify the distribution of rights and responsibilities among different participants in the corporation (such as the board of directors, managers, shareholders, creditors, auditors, regulators, and other stakeholders) and includes the rules and procedures for making decisions in corporate affairs.

Other definitions

Corporate governance has also been more narrowly defined as "a **system of law and sound approaches** by which corporations are directed and controlled focusing on the internal and external corporate structures with the intention of monitoring the actions of management and directors and thereby, mitigating agency risks which may stem from the misdeeds of corporate officers."

Wikipedia



The OECD Principles of Corporate Governance

- I. Ensuring the Basis for an Effective Corporate Governance Framework
- II. The Rights of Shareholders and Key Ownership Functions
- III. The Equitable Treatment of Shareholders
- IV. The Role of Stakeholders in Corporate Governance
- V. Disclosure and Transparency
- VI. The Responsibilities of the Board

Source: OECD, 2004

Note: the OECD is currently conducting a review of the Principles... [The review is scheduled for release in September 2015.](#)

Definition of „Compliance“



"Compliance is generally understood the observance of applicable laws, regulations and administrative provisions applicable including the safekeeping of the according-to-law behavior in a business organization.

Compliance starts with the management of a company. Management has to ensure appropriate governance and proper compliance.

In order to ensure compliance with applicable laws and regulations companies establish appropriate policies and internal systems of control all employees, directors, officers and representatives have to adhere to.

A company may suffer severe losses as a result of failure to comply with laws, regulations, and administrative provisions:

- Legal or regulatory sanctions
- material financial loss or
- loss of reputation

Solvency II requirement to establish a formal Compliance Function and a Compliance-Management System (CMS)"

Example: GDV Compliance Guideline“



A code of conduct binding all employees and officers of GDV

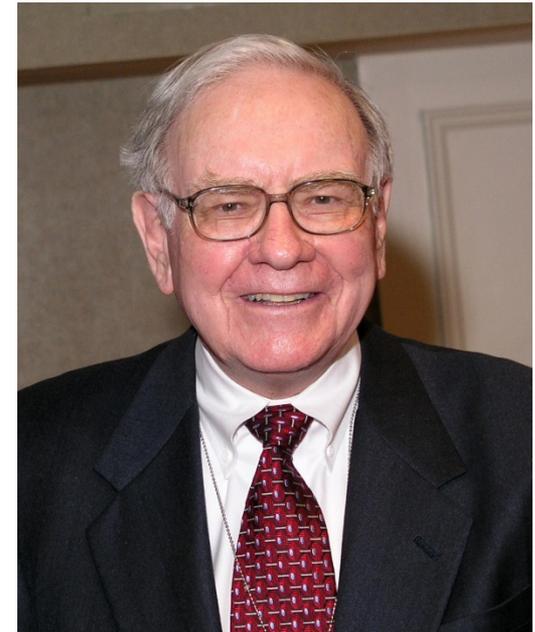
- Comply with legal rules, act with integrity, ethical and taking care of reputation of GDV
- No discrimination
- keeping confidentiality
- Data protection
- Complying with Antitrust & Competition Laws
- Avoid conflicts of interest
 - Personal conflicts of interest
 - Receiving gifts and invitations
 - Granting gifts and invitations
 - Invitations and gifts for officials
 - Tax compliance
- Corruption
- Contractual agreements
- Political and social activities
- Use of Property of GDV



- “Compliance” (within Corporate Governance) is more than just legal behaviour – it is as well about fair and ethical business conduct
- Transparency vs Confidentiality
- Legal rules may leave room for interpretation. In case of doubt ethical values can supply a relevant measure – Example: „Front Page Test“

Buffett's Front-Page Test

"I want employees to ask themselves whether they are willing to have any contemplated act appear the next day on the front page of their local paper, to be read by their spouses, children and friends, with the reporting done by an informed and critical reporter."



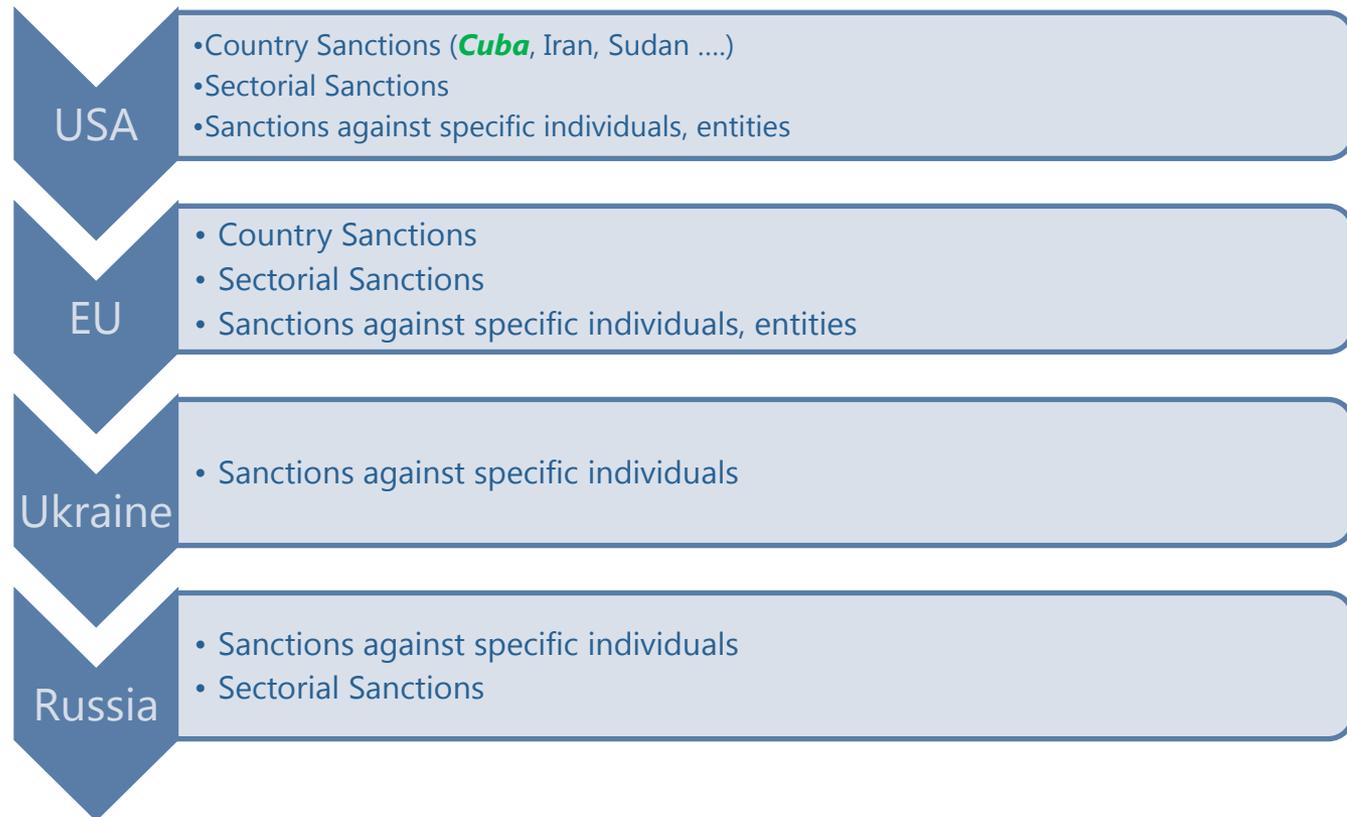


- Sanctions; some practical aspects from a reinsurance point of view
- Corruption
- Money laundering
- *Others*



Practical aspects of handling sanctions in (re)insurance

Current Structure of Sanctions - 1



+ many other countries (e.g. UK, Australia, Japan, Canada, Singapore, Hong Kong ...)

Caveat! No common set of rules and potential variations how rules are interpreted. The EU has its set of sanction rules, but there may be additional local sanction rules, e.g. UK; the US have their set of sanction rules (OFAC regulations) and other countries mentioned.



Adressees: US Sanctions – U.S. Persons
EU Sanctions – EU Persons



Definition of “E.U. Person”

Under the E.U. Trade Sanction Laws, the definition of “E.U. Persons” includes all of the following:

- *natural persons and entities located within the European Community (including its airspace);*
- *any person who is a national of an E.U. Member State, regardless of where the person is located;*
- *any entity incorporated or constituted under the law of an E.U. Member State;*
- *any person on board an aircraft or vessel under the jurisdiction of a E.U. Member State; or*
- *overseas branches of E.U. incorporated companies (but not the separately incorporated foreign subsidiaries of E.U. incorporated companies).*



Definition of “U.S. Person”

The United States Office of Foreign Assets Control (“OFAC”), a branch of the United States Treasury Department, administers and enforces an extensive series of U.S. Treasury Department regulations implementing the U.S. Trade Sanction Laws (the “OFAC Regulations”). Under the OFAC Regulations, the definition of “U.S. Person” includes all of the following:

- *natural persons who are U.S. citizens, regardless of where physically present or transacting business;*
- *natural persons and entities physically present in the U.S.;*
- *entities incorporated or otherwise formed in the U.S.;*
- *branch offices of entities formed under U.S. law.; or*
- *natural persons and entities engaged in a transaction that takes place in whole or in part in the U.S., e.g., payment of a claim to a company located in the U.S. or the transfer of funds to a U.S. bank, with respect to the particular transaction.*

However, in the case of U.S. sanctions against **Cuba** and, in certain aspects, **North Korea**, the definition of “U.S. Persons” includes the above, as well as:

foreign subsidiaries of companies formed under U.S. law.



Addressees: US Sanctions – U.S. Persons
EU Sanctions – EU Persons

Content of Sanctions: Total ban or ban on defined activities; esp. ban of any economic advantages for certain SDNs (Special Designated Nationals), see sanctioned entities/individuals, i.e. payments, asset protection, services

Failure to comply: fines (civil, administrative, criminal) for companies and/or acting individuals or even prison; other penalties: e.g. prohibition of certain activities; withdrawal of licences

Important! Depending on country, not only laws of place of registration apply; also, countries in which activities or context of sanctioned behaviour have any impact; very specific here: USA; example: Payment Transactions in US currency.
Example for Germany: Section 7 Foreign Trade and Payments Ordinance (§ 7 AWW). As a result German entities may carry out their own due diligence but not "blindly follow" any foreign boycott laws.)

Some important aspects relating to sanctions concerning Russia/Ukraine in (re)insurance - 1



(1) Transparency of the ownership of a specific company important due to the complex list of designated entities and individuals; potential questions relating to recent changes in shareholders

- *„majority“ ownership may be interpreted differently from country to country: the formal majority of shares vs. the actual controll over a company*

(2) Questions related to the banking sector:

- Surveillance of banks has been very close examples later
- Specific Banks being sanctioned for all activities: no payments or other economic benefits allowed. *Rules if such bank is a named beneficiary in insurance policy? Becomming a beneficiary during period of coverage? With/without knowledge of insurer?*
- Specific Banks for which granting new debt/equity exceeding duration of 30/90 days is forbidden

Some important aspects relating to sanctions concerning Russia/Ukraine in (re)insurance - 2



(3) Sectorial Sanctions (e.g. offshore drilling in Arctic): *insurance sanctions follow restriction of activity in question*

(4) Sanctions related to Crimea: *large projects (financing and insuring); property insurance for assets belonging to international group: e.g. Hotel in Yalta. Some experience from Cuba could help.*

(5) Cases of „third parties“ having a relationship to sanctioned individuals

- Sanctioned individual is victim of a traffic accident or medical malpractice case: payments to dependents? *only one case known – but not documented*
- Sanctioned entity is insured (e.g. Green Card cover for truck belonging to sanctioned company: payment to victims of traffic accident involving this truck? *Any case known?*

(6) What happens to agreements in force at time of enacting sanctions? *Agreement becoming invalid or only fulfillment not possible as long as sanctions apply? Last resort: payment on escrow account*

Some important aspects relating to sanctions concerning Russia/Ukraine in (re)insurance - 3



(7) E.G. under Russian law, sanctions applying to just one party do not constitute „force majeure“ etc. and thus no right to deny to fulfill contractual obligations.

➔ ***Contractual agreement on sanction needed***

Our preferred sanction clause:

“No (re)insurer shall be deemed to provide cover and no (re)insurer shall be liable to pay any claim or provide any benefit hereunder to the extent that the provision of such cover, payment of such claim or provision of such benefit would expose that (re)insurer to any sanction, prohibition or restriction applicable to that (re)insurer.”



Sanctions do not only apply to (re)insurers

- (Re)insurance brokers, agents, consultants
- Surveyors
- Banks handling any payments (especially if using systems like SWIFT or currencies like USD)



- **Bank of Moscow:** transfer of monies of Bank Melli Iran (local Russian subsidiary) using SWIFT; civil settlement with OFAC for \$ 9.5m in 2014
- **BNP Paribas:** mainly activities of BNPP in CH and F; payments „to or through the US“ in USD using SWIFT; actively concealing sanctioned parties (mainly in Iran, South Sudan) involved; changed processes to circumvent OFAC rules; did not obey their own guidelines and wrongly communicated with OFAC upon their enquiry; US operations of BNPP were not involved. Overall fines/agreed penalties of OFAC close to \$ 10 Billion
- **OFAC statement (Jan 2015):** Banks' compliance with U.S. sanctions has been closely scrutinized in recent years. Big potential sanctions risks may lurk within the business operations of securities firms and reinsurers. (*Wall Street Journal*)



Corruption and Bribery



- OECD Anti-Bribery Convention (officially Convention on Combating Bribery of Foreign Public Officials in International Business Transactions); in force since 1999; so far ratified by 41 countries (including PL, D, USA); key goal: fight bribery of foreign public officials



PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN POLAND

June 2013

Smith & Wesson pays SEC \$2 million to resolve FCPA violations

By Richard L. Cassin | Monday, July 28, 2014 at 12:08PM



Smith & Wesson Holding Corporation agreed Monday in an out-of-court settlement with the Securities and Exchange Commission to pay \$2 million to resolve Foreign Corrupt Practices Act offenses.

The U.S.-based parent company paid bribes in Pakistan, Indonesia and other countries to win gun sales to military and police forces, the SEC said.

- USA Foreign Corrupt Practices Act of 1977 (FCPA): law got “new teeth” with specialized unit of SEC for FCPA enforcement in 2012; decisions of Federal Appellate Court on 16th May 2014 (US vs. Esquenazi) and SEC settlement with Smith & Wesson on 28th July 2014 were “wake up calls”



- Defining „official“ can be tricky
- Defining the term „giving anything of value“ to officials:
 - Money
 - Gifts *small things like a pen?*
 - Expensive meals & drinks *where is the boarder? What role do the intentions for the invitation play?*
 - Entertainment
 - Donations to genuine charity „hinted“ by official
- Private vs. official contacts *my friend works at the insurance supervisor – can I invite him for a beer?*



Money Laundering



DIRECTIVE (EU) 2015/849 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 20 May 2015

on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Central Bank ⁽¹⁾,

Having regard to the opinion of the European Economic and Social Committee ⁽²⁾,

Acting in accordance with the ordinary legislative procedure ⁽³⁾,



ЕВРОПЕЙСКИ ПАРЛАМЕНТ PARLAMENTO EUROPEO EVROPSKÝ PARLAMENT EUROPA-PARLAMENTET
EUROPÄISCHES PARLAMENT EUROOPA PARLAMENT ΕΥΡΩΠΑΪΚΟ ΚΟΙΝΟΒΟΥΛΙΟ EUROPEAN PARLIAMENT
PARLEMENT EUROPEËN PARLAIMINT NA ĦEORPA EUROPSKI PARLAMENT PARLAMENTO EUROPEO
EIROPAS PARLAMENTS EUROPOS PARLAMENTAS EURÓPAI PARLAMENT IL-PARLAMENT EWROPEW
EUROPEES PARLEMENT PARLAMENT EUROPEJSKI PARLAMENTO EUROPEU PARLAMENTUL EUROPEAN
EURÓPSKY PARLAMENT EVROPSKI PARLAMENT EUROOPAN PARLAMENTTI EUROPAPARLAMENTET

Money laundering: Parliament and Council negotiators agree on central registers

[17-12-2014 - 09:47]

The ultimate owners of companies would have to be listed in central registers in EU countries, accessible to people with a "legitimate interest", such as investigative journalists and other concerned citizens, under a deal struck by Parliament and Council negotiators on a draft EU anti-money laundering directive on Tuesday. The rules would also require banks, auditors, lawyers, real estate agents and casinos, among others, to be more vigilant about suspicious transactions made by their clients.



European Council
Council of the European Union

International recommendations

The texts implement recommendations by the **Financial Action Task Force (FATF)**, which is considered a global reference for rules against money laundering and terrorist financing. On some issues, the new EU rules expand on the FATF's requirements and provide additional safeguards.

The strengthened rules reflect the need for the EU to adapt its legislation to take account of the development of technology and other means at the disposal of criminals. The main elements are:

- **extension of the directive's scope**, introducing requirements for a greater number of traders. This is achieved by reducing from €15 000 to €10 000 the cash payment threshold for the inclusion of traders in goods, and also including providers of gambling services
- **application of a risk-based approach**, using evidence-based decision making, to better target risks. The provision of guidance by the European supervisory authorities
- **tighter rules on customer due diligence**. Obligated entities such as banks are required to take enhanced measures where the risks are greater, and can take simplified measures where risks are demonstrated to be smaller



Some typical indicators for (mis)use of (re)insurance for washing money

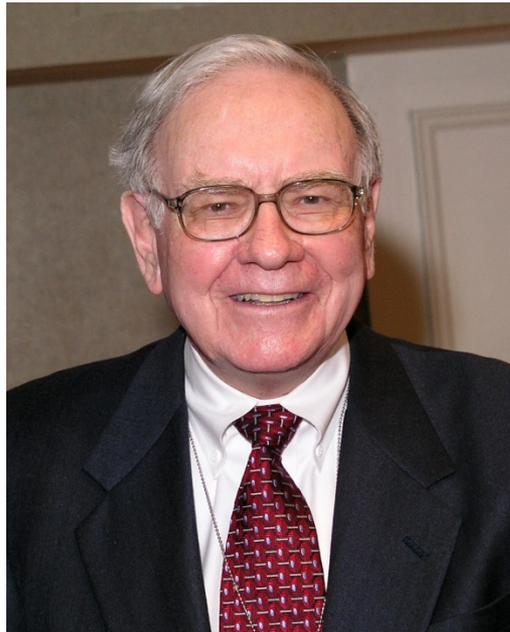
- Cash involved
- Payment of premiums in many & frequent installments
- Short duration with Benefit/loss payments soon after
- “Kick-backs” – especially in triangular arrangements and/or using institution abroad



Others



“The priority is that all of us continue to zealously guard Berkshire’s reputation. We can’t be perfect but we can try to be. As I’ve said in these memos for more than 25 years: We can afford to lose money – even a lot of money. But we can’t afford to lose reputation – even a shred of reputation.”





Michael Theilmeier

Visit genre.com for more info.

The material contained in this presentation has been prepared solely for informational purposes by Gen Re. The material is based on sources believed to be reliable and/or from proprietary data developed by Gen Re, but we do not represent as to its accuracy or its completeness. The content of this presentation is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.