

Implementation of Ethics Codes in Germany: The Wal-Mart Case

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In June 2005, a German local labour court ruled against parts of Wal-Mart's code of conduct for employees in Germany. The code of conduct, similar to the one implemented at stores in the United States, was found by the court to contradict German labour laws. The ruling could have far-reaching effects for U.S. companies with staff in Germany. So-called "codes of conduct" or "codes of ethics" are standard in U.S. corporate culture and increasingly common in Europe. The judgement sets a precedent for the implementation of business ethics codes in Germany.

1. The Wal-Mart Case

In February 2005, the German employees of Wal-Mart, an international U.S.-owned supermarket chain, were given a 33-page code of conduct attached to their pay checks. The guidelines on ethics forced employees to adhere to rules about behaviour and their private and sexual relationships. The code included a clause reading as follows: "You cannot go out or enter a love relationship with someone if this could influence the working conditions of the person involved". "Any kind of communication that could be interpreted as sexual" was banned, as were lustful looks and sexually offensive jokes. Employees were also provided with an ethics-hotline to inform their employers if the rules were broken. Violation of the code was declared as a ground for dismissal.

The employees were enraged and revolted against the code. In March 2005, the German works council filed a lawsuit against Wal-Mart Germany, the German subsidiary of the U.S. group which is based in Wuppertal.

The Local Labour Court of Wuppertal ruled in favour of the Wal-Mart employees. The clause to regulate the love life of the employees was judged to violate the personal rights of the employees, particularly the personal freedom guaranteed in Art. 1 para.1 (1) and Art. 2 para. 1 (2) of the Basic Law (*Grundgesetz*, the German Constitution). In the order of priority the Basic Law has a higher rank than all other legal norms of the German legislation. Employers have to respect the constitutional personal rights of their employees. Therefore an employer cannot force its staff to adhere to a strict code of conduct forbidding love affairs, sexually suggestive conversation, rude jokes and even lustful looks. Under German law anything regulating the personal lives of employees should first be agreed between employers and workers.

Several parts of Wal-Mart's code of conduct breached the right of co-determination of the workers representative. Employee participation and co-determination at the level of the establishment are governed by the provisions of the Works Constitution Act (*Betriebsverfassungsgesetz*). The duty of the works council is to safeguard the interests of the employees in dealing with the employer. The works council shall work together in a spirit of mutual trust and in co-operation with trade unions and employers' associations for the good of the employees and of the establishment. German works councils have a far-reaching right of participation and co-determination in matters concerning the organization of work in the establishment. Examples for matters of co-determinations are the structuring, organization and design of jobs as well as operations and working environment. The requirement for staff to report code violations via a so-called ethics hotline was judged to violate the right of co-determination according to Art. 87 para. 1 no. 1 and 6 (3). A clause that forces the staff to blow the whistle on colleagues who broke the code is a matter relating to the organization of work in the establishment (Art. 87 para. 1 no. 1). The ethics-hotline is a technical device designed to monitor the behaviour of the employees (Art. 87 para. 1 no. 6). In respect of these matters the works council has a genuine right of co-determination. Before implementing a code of conduct concerning these issues the employer has to agree with the works council. Some other regulations concerning drug and alcohol use, customer relations and harassment were also found to contradict the right of co-determination. But not all clauses of the code were judged illegal. The judgement also has permissive aspects. For example clauses about safety and security, equal opportunities, discrimination and obligations to protect and preserve the environment were not dismissed.

The judgement is, above all, a clash of business cultures. The verdict signalled a backlash against American prudishness and political correctness. Furthermore the Wuppertal judgement made clear that the US companies have to adhere to Germany's restrictive co-determination laws. Under German law business ethics concerning matters of co-determination should first be agreed between the employers and the works councils. Anything regulating the personal lives should be agreed between the employers and the workers. According to legal experts in Germany the ruling sets a precedent for the treatment of ethics codes in Germany.

2. Background

A. The Concept of Codes of Conduct

Unlike labour law, codes of conduct do not have any authorized definition. The concept "code of conduct" refers to companies' policy statements that define ethical standards for their conduct and the behaviour of their staff (4). Corporate codes of conduct are

completely voluntary. They can take a number of formats and address any issue – workplace issues and workers' rights being just one possible category. Key areas to include in a code of conduct are the purpose and value of the business, the company's policies, the importance of customer satisfaction and compliance with the spirit of laws as well as the letter.

B. Codes of Conduct in the US

Worldwide interest in corporate conduct was initially awakened in the 1980s by scandals in the US defense industry and on Wall Street. General Electric, General Dynamics or Martin Marietta are some of the companies that experienced procurement scandals. Since then companies have viewed business ethics as a way of promoting self-regulation and deterring government intervention and regulatory action. Corporate interest quickly led to the "institutionalisation" of business ethics programmes, consisting largely of codes of conduct, ethics officers and ethics training. The approach was accelerated by the enactment of US Sentencing Guidelines in 1991 (5), which provided potential monetary incentives for corporations to institute ethics or compliance programmes. According to the Guidelines, any organization is liable to sentencing, fines, and to periods of probation for federal offenses connected with antitrust, securities, bribery, fraud, money laundering, criminal business activities, extortion and embezzlement, conspiracy, and others. The preamble to the Guidelines states that the organization operates only through its agents, usually its managers, and is, therefore, liable for the offenses committed by them. Naturally, the managers are personally responsible and liable for their own behavior. The innovation of the Guidelines lies in the fact that the sentences imposed on the organization and its agents are designed to achieve the following objectives: just punishment, sufficient deterrence and encourage the development of internal mechanisms to prevent, identify and report on criminal behavior in organizations. The Sentencing Guidelines have had a great impact on the quantity and quality of corporate codes in the United States. Companies often created compliance systems as a public demonstration of effort to clean up their own ranks. But law is not the only motivator for business ethics systems. Fear of embarrassment at the hands of NGOs and the media has given an even bigger incentive. Pressure groups of consumer power are growing more professional. While in the past, unethical behaviour by a company might have kept quiet, there is now a greater likelihood that employees from within a company will alert relevant pressure groups. Furthermore globalization is a factor that has pushed multinationals to initiate uniform standards of conduct in all countries in which they operate.

In the United States there is now a veritable ethics industry, complete with consultancies, conferences, journals and "corporate conscience" awards. The situation

in Europe is different. When US companies operate abroad, they run up against all sorts of new moral issues. And one big problem is that ethical standards differ among countries. In Germany, only few companies have a comparable standard of ethics bureaucracy. This reflects the fact that the state and organized labour both still play a bigger part in corporate life. Works councils deal with issues such as workers' rights, the organization of work in the establishment and the conduct of employees, all of which might be seen as ethical issues in the United States.

3. The Implementation of Codes of Conduct in Germany

Efforts to advance corporate business ethics in Germany increased in the late 1990s when U.S. groups, including McDonald's, IBM and Ford, started to implement ethics codes in their European subsidiaries. In the early development period, only a few German companies were really interested to actively engage in the promotion of business ethics codes. Meanwhile the international operations of German firms have had substantial impact on the implementation of business ethical principles. German companies increasingly wonder what constitutes ethical corporate behaviour and how to get their employees to observe it. In the last few years a wave of voluntary company codes has appeared. The internationalization of business ethics is, however, accompanied by the persistence of national traditions, cultures and regulatory practices. Ethical sensitivities in Germany differ from those in the United States. There is some variation in subject matter of ethics codes. Codes in the U.S. are more likely to include sections on the security of proprietary information. In Germany for example workplace safety and environmental responsibility are more frequent subjects of ethics statements.

FOOTNOTES

1. Art. 1 para.1 Basic Law: „Human dignity shall be inviolable. To respect and protect it shall be duty of all state authority.”

2. Art. 2. para 1 Basic Law: „Every person shall have the right to free development of his personality in so far as he does not violate the rights of others or offend against the constitutional order or the moral law.”

3. Art. 87 para 1 no.1 and no. 6 Works Constitution Act: „The works council shall have a right of co-determination in the following matters in so far as they are not prescribed by legislation or collective agreement:

1. matters relating to the order by operation of the establishment and the conduct of employees in the establishment; (...)

6. the introduction of technical devices designed to monitor the behaviour or performance of the employees.”

4 International Labour Organization (ILO), available at: <http://www.itcilo.it/english/actrav/telearn/global/ilo/code/main.htm>

5. The guidelines are available on the Web site of the United States Sentencing Commission: <http://www.ussc.gov>.

In Germany, the discussion on international business ethics is still quite limited compared to the United States. The reason for this may not only be seen in the limited scope of exchange and the language barrier between the countries; it seems to be the result of a different understanding of what business ethics ought to be. The Wuppertal judgement highlights the potential pitfalls that U.S. companies are facing when transposing ethics codes or regulations to Germany. To American eyes Wal-Mart's code of conduct is fairly standard. Under German law the code falls foul of rights of co-determination and even violates constitutional rights.