

Mutual Recognition of Codes of Conduct

1. Background

Companies in Germany are increasingly using conduct standards (compliance codes or codes of conduct and similar). These codes are intended to ensure compliance with statutory regulations within the company but, going beyond the statutory requirements, they sometimes also lay down internal corporate rules as a voluntary commitment.

There is sometimes a requirement in business transactions to accept the business partner's code of conduct when the contract is concluded. If a company agrees to this, the business partner's code will form part of the civil law relationship between the parties, which may in certain circumstances also involve consequences under liability law. Careful consideration should therefore be given to whether the requirements associated with signing the code can actually be met. Legal and practical problems that could arise are unclear wording, the question of the suitability of another company's code for your own company, the reasonableness of the requirements, potential relevance in terms of the Co-Determination Act and the validity, under the law relating to standard business terms, of including the code in the contractual relationship – see also Zentrum für Wirtschaftsethik [Centre for Business Ethics] "Recognition of External Codes" under http://www.dnwe.de/compliance-management.html?file=tl_files/ZfW/Anerkennung%20CoC.pdf. Given these difficulties, it is questionable whether accepting an external code of conduct is in the interest of both parties.

If a company is confronted with another company's code of conduct, it is at any rate advisable to avoid double or multiple obligations. Problems can arise particularly if both partners have their own, different codes (dealt with under No. 2), or if companies without their own code (frequently small and medium-sized enterprises) are obliged by various business partners to sign a different code in each case (dealt with under No. 3). Various possible solutions can be considered for both these situations, which will be outlined here as a guide for business practice. Which solution is chosen and how it is specifically tailored will be determined by the business requirements in the individual case.

2. Companies with their own compliance codes: mutual recognition

If both contracting parties have their own code of conduct, the problem of possible inconsistencies can be solved by way of mutual recognition to avoid having one party submit to the code of the other party.

a) Informal non-acceptance/non-submission

In practice, mutual recognition frequently occurs by means of an informal reference to the company's own code of conduct, which is sent to the business partner for information. In many cases submission to the business partner's code is then avoided. This solution is non-bureaucratic and avoids complex legal follow-up questions.

b) Mutual recognition agreement

If this type of informal solution should not be possible, a written recognition agreement can be considered in which the parties recognise both their codes as having equal status and dispense on the acceptance of the other party's code. Depending on how this recognition is framed, this may result in a company's own code of conduct becoming a binding component of its legal relationship with the contracting party, which can in certain circumstances also involve issues of liability law. Careful consideration must be given to whether this is desirable.

Note: The following are non-binding suggestions and are not to be regarded as a substitute for a company's conducting its own legal examination or soliciting legal counsel. The BDI in particular accepts no liability for the legal validity of the wording guides outlined below in the event of judicial review.

aa) **The core element** of this type of mutual recognition agreement is the reference to the respective party's own code and the dispensation of submission to the own code of conduct.

Possible wording:

The contracting parties have drawn up their own codes of conduct as a voluntary commitment. Both parties recognise their codes as having equal status and neither submits contractually to the other party's code of conduct.

or

The contracting parties have drawn up their own codes of conduct, which they observe within their mutual business relationship. Both parties recognise their codes as having equal status and neither submits contractually to the other party's code of conduct.

or

The contracting parties have drawn up their own codes of conduct. They are obliged to take appropriate steps to ensure that their own code of conduct is observed within their mutual business relationship. Both parties recognise their codes as having equal status and neither submits contractually to the other party's code of conduct.

In addition, it is advisable for the parties to relay their respective codes to the other party. The contracting parties can either inform each other about any substantive amendments or refer to publicly accessible updates on the internet.

Possible wording:

The parties shall notify the respective other party of any important substantive amendments to their own code of conduct.

or

Any amendments to the code of conduct shall be published on the parties' respective websites.

bb) If necessary, agreement can in addition also be reached regarding which (affiliated) companies the mutual recognition affects, what shall happen in the event that one party

breaches its own compliance code, etc. The following could be considered as this type of **optional elements** of a recognition agreement:

(1) Scope of application of the agreement:

Depending on whether any (affiliated) companies are to be included and whether they have already approved or have still to approve the recognition, the wording could read:

Possible wording:

This agreement applies in respect of the following companies:

or

The parties shall work towards ensuring that the agreement is recognised by the relevant affiliated companies.

(2) Existing agreements between the parties or with third parties:

If previous contracts between the parties already contain references to the inclusion of compliance codes (including previous submission to the code of the business partner), the following could be agreed, for example:

Possible wording:

The provisions of this agreement replace all existing provisions and contracts within the scope of this contract between the contracting parties relating to compliance with the relevant code of conduct, provided these other contracts are subject to negotiation solely by the parties

(Comment: The subordinate clause relates to cases in which amendments to previous contracts require the consent/involvement of third parties.)

(3) Right to information

Companies' compliance codes sometimes also include auditing rights, i.e. powers to check that the contractual partner has complied with the rules. In order to avoid this type of investigation within the scope of a mutual recognition agreement, it is possible to agree a right to information related to specific events. This should ensure protection of the legitimate interests of the contractual partner and its employees.

Possible wording:

Within the scope of their mutual contractual relations, each party is entitled to request written information about the other party's compliance with its own conduct standards if there is reason to suspect a significant breach. Requests for information should in each case be made in writing and protect the legitimate interests of the contractual partner, in particular its trade and business secrets, and must respect the rights of the employees, in particular their data protection rights.

(4) Breach of contract

Codes of conduct are basically conceived as a voluntary commitment that does not establish any third-party rights. If desired, however, a legal consequence for breaches of the

compliance rules can be included in the contract itself. Precise specification of the relevant requirements and legal consequences will reduce the risk of difficulties in interpretation arising in the event of a dispute. In the case of old contracts in which other compliance agreements have been replaced with a recognition agreement (see (2) above), it may be necessary to specify the legal consequences in a recognition agreement. In relation to the legal consequences, the parties involved should always examine very carefully which consequences are intended and which are undesirable.

Possible wording (for a right to require cessation and, if applicable, termination):

If one of the contracting parties negligently or intentionally breaches a self-imposed obligation under this agreement, the other contracting party is entitled to request (in writing) the cessation of the infringing conduct, provided the breach is significant. In the event that the breach in question is not remedied within a period of.... from the date of receipt of the request, or if there is a repeated breach, the party not in breach is entitled to terminate the contract affected by the breach of contract with immediate effect. The merits and extent of any further claims and rights remain unaffected in accordance with the terms of the contract affected.

(Comment: If applicable, both parties can clearly define when a breach is to be regarded as “significant”.)

(5) Termination of this agreement

Possible wording:

This agreement is entered into for an indefinite period and may be terminated in writing by either party subject to a notice period of.... The termination shall have no effect on the validity of this agreement for existing contractual relations until these expire.

If necessary:

The termination by the parties does not affect any declarations of accession by affiliated companies; these must be terminated by the relevant affiliated companies by means of their own written notice.

(6) Written form

Possible wording:

The contracting parties shall confirm any amendments and additions to this agreement in writing without delay.

(7) Applicable law

Possible wording:

This contract is subject to German substantive law.

(Comment: If the application of some other law is agreed in the supply and performance contracts between the parties, a decision must be made as to whether the choice of law is also to apply in respect of the recognition agreement or whether German law should apply.)

3. Companies without their own compliance codes: reference to legal compliance or using an association code as a guide

Companies that do not have their own code of conduct but are obliged by business partners to accept their code may indicate that they shall comply with the legal provisions applicable to them. In this way they can, in certain circumstances, avoid being bound by an external code. If this is not an option, they may benefit from using an association's code of conduct. Some associations have developed their own codes, with wording that fits companies of different sizes. If companies without their own compliance codes are asked to sign a code of conduct by their contractual partners or if they wish to avoid having to comply with several different codes from different contractual partners, they can consider subscribing to an association's code of conduct or using an association's code of conduct as a guide when formulating their own code. Either way, they need to consider whether they have the structures required to comply with the relevant requirements.

There are already a number of association codes of conduct that are tailored to different needs. Codes of conduct that cover the most important compliance issues and that are also accepted in practice by larger companies include the Zentralverband Elektrotechnik- und Elektronikindustrie e.V. or ZVEI [[Code of Conduct of the German Electrical and Electronic Manufacturers' Association](#)], the Verband der Bahnindustrie in Deutschland e.V. or VDB [[Code of Conduct of the German Railway Industry Association](#)] and the Industrieverband Textile Services [[Code of Conduct of the German Textile Services Association](#)]. Corresponding initiatives also exist outside the BDI member associations, such as the Conduct Guidelines of the Bundesverband Materialwirtschaft, Einkauf und Logistik e.V. or BME [[Conduct Guidelines of the Association of Materials Management, Purchasing and Logistics](#)]. In addition to these codes, other association codes of conduct are currently in development. These suggestions are therefore not exhaustive.