COMPLIANCE MANAGEMENT SYSTEMS AND THEIR CONSIDERATION IN THE ASSESSMENT OF FINES

SISTEMAS DE GESTIÓN DE CUMPLIMIENTO Y SU CONSIDERACIÓN EN LA EVALUACIÓN DE MULTAS

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ABSTRACT

The following article primarily addresses the questions of whether - and if so, why - Compliance Management Systems should be taken into account by courts and authorities to reduce fines in the event of antitrust violations in companies. In addition to an overview of the prerequisites for an efficient Compliance Management System, the practices in different countries are also examined in connection with this topic. Finally, future related challenges are discussed.

KEYWORDS

compliance defense | compliance and fines | (international) compliance guidelines | compliance practice | competition law and compliance | compliance best practices

RESUMEN

El artículo aborda principalmente la cuestión sobre si los tribunales y las autoridades deben tener -y de ser así, por qué- en cuenta los Sistemas de Gestión de Cumplimiento para reducir las multas en caso de infracción de la legislación antimonopolio en las empresas. Además de una visión general de los prerrequisitos para un Sistema de Gestión de Cumplimiento eficiente, también se examinan las prácticas en diferentes países en relación con este tema. Por último, se discuten los futuros retos relacionados.

PALABRAS CLAVE

defensa del cumplimiento | cumplimiento y multas | directrices de cumplimiento (internacional) | práctica de cumplimiento | derecho de la competencia y cumplimiento | mejores prácticas de cumplimiento

ABOUT THIS ARTICLE

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SOBRE EL ARTÍCULO

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CONTENT

I. INTRODUCTION

The term *"Compliance"* derives from the English *"to comply with certain rules"*. In a company, specifically, this means to comply with all legal provisions and internal company guidelines (Desio, n.d.). Even for the misconduct of a single employee, an entire company can usually be held liable (Hauschka et al., 2016, p. 2). This can even be the case if this employee acts against company compliance and/or instructions (Desio, n.d.).

Therefore, so called *"Compliance Management Systems"* (**"CMS"**) are installed in organizations. These CMSs pursue the objective of providing a comprehensive system designed to create and promote a culture of ethical behavior, and, at the same time, to prevent, detect and correct violations of the law (Hopson & Koehler, 2008, p. 208). Even though the objectives and functions of CMSs can be summarized very concisely in theory, their practical implementation often proves to be quite complex. This is precisely why companies deserve special acknowledgement for introducing compliance measures. But what if corporate policies fail and antitrust violations occur? Should companies' compliance efforts nevertheless be taken into account in respect of the fine assessment in such a case?

The following article examines this very topic. After an overview of the basic requirements for a corporation's compliance program, the question of fine reduction in connection with compliance measures is discussed. Subsequently, the practices of selected countries in this context are examined. Finally, a look at future challenges and changes regarding CMSs serves to round off the paper.

II. BEST PRACTICES

To evaluate the effectiveness of a corporate compliance program, different factors such as comprehensiveness and adequation have to be taken into consideration. It is especially the guidelines to be found in the Anglo-American legal systems which have prevailed and become the "international gold standard" regarding CMS systems. In this context, reference should be made to the U.K. *"Bribery Act 2010"* (2011); the U.S. *"Federal Sentencing Guidelines for Organizations"* (1991, revised 2004), or the latest U.S. *"Evaluation of Corporate Compliance Programs"* (2017, updated 2020), which provide guidelines for the prosecutors when conducting an investigation into a corporation's compliance program. In particular, the following principles have emerged as CMS fundamentals:

- Top Level Commitment

  It is the senior management (or at least middle management) team which, due to its leading role in the company, is responsible for clearly and regularly communicating guidelines to the subordinate employees and for monitoring compliance with the respective guidelines (Deister, & Geier, 2011, p. 16). Based on their authority, they have to set the *"tone from the top"* (Krauskopf & Schraner, 2017, p. 69).

- Due Diligence

  Due diligence should be performed on all partners and persons involved in the business process and the supply chain (Deister & Geier, 2011, p. 16). Therefore, an employee could be appointed as a *"Chief Compliance Officer"* or external lawyers or consultants could be engaged (Ministry of Justice, 2010, p. 6). If an internal employee is selected as the supervising person, it is necessary to ensure that he or she is adequately and sufficiently instructed (Roxin, 2018, p. 345).

- Risk Assessment

  Regular identification of specific and individual corporate risks is indispensable. This includes both external and internal risks. Externally, different levels of bribery and corruption in the country where a certain company operates have to be taken into account (Ministry of Justice, 2010, p. 4f). Internally, risks may occur where employees are suffering from an informational deficit, have not been adequately trained, or internal policies on gifts, travel expenses etc. are not sufficiently clear (Deister & Geier, 2011, p. 16).

- Company Guidelines and Training

  A certain *"Code of Conduct"* or *"Code of Business Ethics"* should be established in the company and set down in writing (Hopson & Koehler, 2008, p. 208). To implement these compliance guidelines on ethical conduct, they should be communicated to the employees in periodical workshops (Roxin, 2018, p. 345). The guidelines should be accessible, unequivocal, reasonable and actually capable of being actionable, addressed to all levels of employees and should be oriented to all risk relevant areas in terms of content (Deister & Geier, 2011, p. 16). Raising awareness of internal policies and effective communication to staff is essential.[4]

- Zero Tolerance Policy

  The internal compliance standards must be enforced consistently. If certain misconduct is identified, it must be reported instantly; a preventive, ex-ante *"Zero Tolerance Policy"* has to apply, and disciplinary mechanisms must take effect (Krauskopf & Babey, p. 125). Otherwise the company risks having the internal compliance program labeled as being mere *"Window-Dressing"* and as only existing on paper (Roxin, 2018, p. 343).

- Confidential Reporting Mechanism

  Employees must be given the opportunity to confidentially report possible or actual violations related to internal compliance guidelines or antitrust laws (U.S. Department of Justice Criminal Division, 2020, p. 6). Therefore, a *"Whistleblower-Hotline"* can be established to ensure that any misconduct can be forwarded anonymously to the respective body or person in charge, e.g., to the Chief Compliance Officer (Eufinger, 2016, p. 212).

- Monitoring and Screening

  In order to continuously ensure the effectiveness of a compliance program in practice, current industry standards, applicable laws and changes within the business itself have to be constantly implemented. Functioning programs from the past are not guaranteed to necessarily work in the future too. Hence, a steady review and periodic testing of the program is indispensable. If certain misconduct is identified in this context, weaknesses

4 Ministry of Justice (2010). The Bribery Act 2010, 4. https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf.

within the program should be analyzed and remediated for the future (U.S. Department of Justice Criminal Division, 2020, pp. 16 et seq.).

Although these major guidelines provide a framework upon which a CMS should be built, they do not guarantee that the corresponding system will actually work in practice (Deister & Geier, 2011, p. 17). Due to the different characteristics of each particular company, such as type, size or structure, each corporate compliance system must also be individually tailor-made to fit the specific needs of the organization.

III. GUIDELINES OF INTERNATIONAL ORGANIZATIONS

As Compliance has developed into an international issue and topic of discussion not only within organizations but also in legislative debates, some international organizations decided to develop their own guidelines in order to assist organizations with the implementation and improvement of their CMS. The International Chamber of Commerce (ICC) introduced a Toolkit, which will be discussed in detail. Additionally, the ISO 37301 standard and the guidelines of the Organization for Economic Co-Operation and Development's (**"OECD"**) Competition Committee will be looked at more closely.

1. ICC Toolkit

In 2013 the ICC published the "ICC Antitrust Compliance Toolkit" (**"Toolkit"**). The aim of the Toolkit is to "reflect what is commonly regarded as good practice in the field" (2013, preface) of Antitrust compliance as there is, according to the ICC and antitrust agencies, no "one-size-fits-all" practice.

The Toolkit starts with what it refers to as a "Starter Kit", where four foundation elements of a CMS are listed. These include embedding an antitrust compliance and policy, compliance resources and organization, risk identification and assessment, and antitrust compliance know-how. For the reinforcement of existing CMS antitrust 'concerns-handling' systems and investigations, internal investigations/due diligence and disciplinary action, antitrust certification or incentives, as well as monitoring and continuous improvement are suggested (ICC, 2013, p. 3).

The structure of the Toolkit seems to be well thought out. Not only does it include both the implementation of CMSs and the modification of CMSs, but it also provides a quick summary at the beginning of each chapter making it possible for practitioners to gather the most relevant information in a timely fashion. The very first point is to recognize that each organization is confronted with some risks if it is non-compliant with antitrust law (ICC, 2013, p. 4). Given the height of fines (for example in Switzerland up to 10% of the turnover that a company achieved in Switzerland in the preceding three financial years)[5] this first remark is especially relevant. In the subsequent explanation, the importance of the integration of lawful behavior in the company culture is emphasized. To underline this point, it is stated that a "consensus to do the right thing" (ICC, 2013, p. 4) has to be cultivated and that "actions speak louder than words" (ICC, 2013, p. 4). From the usage of those words and everyday wisdoms, it can already be derived that the ICC Toolkit aims to explain CMS in a clear, simplistic, understandable language, for all potential readers to readily comprehend the points and reasoning in the best way possible.

(a) Under the title "Compliance embedded as a company culture and policy", the ICC recommends as a first step to recognize the risk of antitrust regulation. From the viewpoint of the ICC this is the responsibility of the legal department; in the case of a small or medium enterprise (SME) the Chief Financial Operator. The importance of a responsible person for compliance is stressed by stating that this business risk needs to be addressed and dealt with (ICC, 2013, p. 5).

5 Federal Act on Cartels and other Restraints on Competition (1995), Article 49a.

In a second step, the management of the organization and subsequently all its employees need to commit to the compliance efforts. The ICC underlines this point by citing other sources such as the OECD and the European Commission. In order to attain this commitment, the ICC suggests citing examples of consequences of ineffective compliance, using statistics, learning from informational videos of third parties dealing with the same or similar issues, as well as creating a plan for the implementation of an antitrust CMS (ICC, 2013, pp. 5 et seq.).

Subsequently a Code of Conduct needs to be drawn up (or revised). The Code of Conduct should not just include issues relating to antitrust, but also discuss other themes such as sexual harassment and corruption. It should therefore have a larger perspective. The ICCs advises uploading it onto the intranet of the organization and adding a preface or an audio or video statement by the Chief Executive Officer (CEO) from the organization (ICC, 2013, pp. 6 et seq.). Furthermore, the antifraud CMS should be integrated into other policies and supplied with sufficient resources (ICC, 2013, p. 8).

(b) The second chapter of the Toolkit provides advice on compliance organization and resources. The ICC suggests assigning the role of a compliance officer to a senior employee of the organization, who will report to the management or the board of the organization. If the position of a General Counsel or a Chief Legal Officer exists, this person should fill the role of compliance officer as well. It is important to remember that access to all important committees should be secured (ICC, 2013, pp. 10 et seq.). As for the regularity of updates, the management it is advised to at least provide them quarterly, whilst allowing for a way to communicate urgent compliance issues (ICC, 2013, p. 13). In this chapter, the need for sufficient resources is stressed again. In this context, the ICC suggests hiring an antitrust lawyer or a specialized law firm (ICC, 2013, p. 14).

(c) Risk identification and assessment is covered in the third chapter of the ICC Toolkit, where organizations are advised to assess and report risks, resolve strategies dealing with these risks and implement sufficient controls. The ICC also includes a basic risk matrix and lists some general business risks such as economic developments and supply shocks (ICC, 2013, pp. 17 et seq.). The importance of providing sufficient resources is emphasized once again. Furthermore, additional data should be considered; for example, comparative data and the use of experts, or in case of SME, peers to help with the identification of specific risks for the organization which are not just of theoretical nature. The ICC suggests the same method for the assessment of antitrust risk. Examples of risks in this domain include exchanges of sensitive information, fixation of resale prices, price fixing and collusive tendering. The likelihood of illegal conduct such as the above mentioned, has to be then assessed considering factors such as market concentration, duration of meetings with competitors and past antitrust compliance. As for the assessment of the impact, it is recommended to take legal fees, damage claims and reputational damages into consideration (ICC, 2013, pp. 16 et seq.).

In a subsequent step, controls are to be established. Controls should include both communication and guidance, for which trainings, handbooks, internal inspection and awareness actions are provided. The outcomes of the risk assessment should be reflected in the controls. The ICC provides a few questions regarding the establishment of effective controls, which stress the importance of documentation and awareness (ICC, 2013, pp. 23 et seq.).

(d) The next chapter titled "Antitrust compliance know-how" begins by (again) stressing the importance of awareness. Interestingly the ICC mentions that sufficient training can also enable employees to act confidently in their daily assignments and withstand pressure better. Furthermore, the aim of providing the necessary knowledge in the field of antitrust to employees is to enable them to seek clarification when a lack of clarity exists. Another aim of trainings is to facilitate discussions about antitrust between employees and within

the organization. In order to provide sufficient knowledge, it is recommended to create handbooks, manuals and guides, either by inhouse lawyers in the case of a large corporation or by external counsel such as specialized law firms in case of an SME. For SMEs, the ICC considers the Internet to be a helpful source for antitrust compliance materials (ICC, 2013, pp. 25 et seq.). This suggestion has to be taken with a grain of salt however, as the Internet can also be a source of misinformation and some documents are written in a rather superficial manner, not taking into account risks for specific industries. As antitrust law is constantly changing and evolving, materials from the Internet can also be outdated. It has to be noted that the ICC mentions that the materials have to be relevant for the organization and its business endeavors and take into account the specific risks the organization is faced with. As for the content of the materials, 'Do's and Don'ts' should be included; they should be easily applicable and understandable and adjusted to specific needs and risks of the company. Thought needs to be given as to the languages in which the materials are required and how the materials can be made available to every employee. For the latter, the ICC suggests publishing the materials on the intranet (ICC, 2013, pp. 26 et seq.).

Regarding trainings, it is recommended to provide employees with the possibility to ask questions, and it includes practical examples. A key for an effective training is to raise awareness for the reasons behind the organization's antitrust compliance policies and possible consequences for violations of them. In preparing trainings, thought needs to be given to who has to take part, in which format it should be given, which experts will hold the trainings and how specific risks and needs of the organization can be best addressed. During the training, management should especially be actively involved. Afterwards documentation of the training needs to be provided (ICC, 2013, pp. 28 et seq.).

The Toolkit also includes a sub-chapter on stimulating positive employee engagement for which posters, newsletters and promotional giveaways are (inter alia) recommended. The short sub-chapter shows that following antitrust advice is not just marked by prohibitions and rules, but can also help projects to be realized successfully. The ICC recommends celebrating the latter, as well as so-called compliance heroes (ICC, 2013, p. 30).

The last sub-chapter discusses the need for employees to be aware of the antitrust investigation process and the need for cooperation. It is mentioned that for this purpose some organizations use mock investigations (ICC, 2013, p. 31).

(e) For the handling of antitrust concerns, the ICC mainly suggests implementing whistleblower systems, which can be operated by an inhouse team or outsourced. The aim of this system is to cultivate a company culture, where concerns about or suspicions about unlawful conduct are raised early within the organization, to allow internal investigations to take place. It is, however, important to consider other areas of law such as data protection law when implementing a whistleblowing system. Furthermore, it is important that the system guarantees confidentiality and that the information gathered through the system is not brought to public attention, for example by ensuring the necessary cybersecurity. Another concern, especially for global corporations, should be the possibility of the system being used in different languages and time zones. The system should also allow for the interviewer to contact the whistleblower where further questions or information are needed. The ICC again provides some helpful questions in order to set up a whistleblowing system (ICC, 2013, pp. 34 et seq.).

(f) The ICC also addresses how to handle an internal investigation. It should be decided in advance who will conduct the investigation and in which format. The internal investigation should be confidential and be protected by legal professional privilege. For the eventuality of an investigation, documents should be preserved, and plans drawn up as to how to interview personnel who were potentially involved. Rumors have to be controlled and

prevented from spreading. It should also be decided as to which cases shall be disclosed to the authorities (ICC, 2013, pp. 40 et seq.).

Decisions about internal investigations alone are not sufficient to ensure that a Code of Conduct or other policy will be respected. A violation of these should also result in consequences up to and including termination of the contract. Mitigating factors could be disclosure, co-operation and living up to the principle of good faith. The ICC also considers aggravating factors, which constitute the opposite behavior of the mitigating factors, such as previous violations. The ICC also considers a managerial role and the absence of mandatory training for the employee in question to be aggravating factors. The involvement of the line manager should also be investigated. For disciplinary proceedings, the person in charge of these should be identified, accepted rights of defense be established and aggravating as well as mitigating factors be determined (ICC, 2013, pp. 44 et seq.).

The ICC also suggests conducting Due Diligence in different areas such as hiring, mergers, acquisitions and trade associations. For new hires there should at least be an onboarding process, better still a background check. In respect to the due diligence of trade associations, the ICC advises seeking legal counsel before joining one, in case of any concerns and in approving agreements on topics related to competition. There should also be sufficient documentation for the meetings and a well-founded basis of information before each meeting of the association. In case of an acquisition or a merger, the due diligence process should also include compliance due diligence; for example, the control of the existence and effectiveness of the CMS of the company to be acquired, as well as the possibility of conducting compliance investigations (ICC, 2013, pp. 50 et seq.).

(g) Furthermore, it is recommended to certify both internal compliance programs and to obtain certificates from those of third parties (ICC, 2013, pp. 58 et seq.) and to provide incentives for efforts made by employees in regard to compliance (ICC, 2013, pp. 62 et seq.). The latter could be manifested in both positive incentives –for example in monetary form– as well as in negative incentives, for which the ICC suggests withholding promotions. According to the ICC bonus structures should especially be in alignment with compliance efforts (ICC, 2013, pp. 62 et seq.).

(h) As for monitoring, the ICC suggests an assessment every three to five years. During the assessment the costs and the responsiveness of the CMS should be assessed. For carrying out the assessment, both legal counsel and the benchmarks provided by law firms and competition authorities can prove useful. Finally, a compliance program improvement plan can be drawn up. This could include the necessary steps for conducting the assessment of the current CMS, as well as its revision. Possible steps include benchmarking the CMS, recommendations for changes in the training program, planning the communication of the renewed CMS and the production of a control framework (ICC, 2013, pp. 65 et seq.).

As the ICC Toolkit proves to be rather lengthy and detailed, more concise suggestions should be taken into consideration, such as the OECD Competition Compliance Programmes.

2. OECD Competition Compliance Programmes

The OECD's Competition Committee published a discussion paper in 2021 on CMS entitled "OECD Competition Compliance Programmes", in which compliance policy developments, the effectiveness of compliance efforts and effective compliance programs are discussed. The paper aims to provide tips for competition authorities and has therefore a different angle than the ICC Toolkit. For the sake of this article, only the latest should be summarized and discussed.

The OECD's Competition Committee states that many national competition authorities consider CMS to be effective if illegal action is detected and reported to them, whilst businesses do not view

reporting to an authority as an essential part of its compliance efforts. The Committee itself supports the authorities' viewpoint by stating that ethical claims can only be considered to be truthful if reporting does occur (OCDE, 2021, pp. 32 et seq.).

The importance of a so-called compliance culture is stressed as well. The lawful and supportive conduct of management is considered to be an important factor in assessing the effectiveness of a CMS. The Committee takes into account the viewpoints of different competition authorities, which consider the companies' culture as an important factor and states that even the best CMS can't protect an organization from so-called rogue employees (meaning employees willing to break the law). By reviewing different studies, the Committee concludes that in a large part of antitrust cases, management was involved. From this finding it is concluded that most organizations do not have an effective CMS. To address this problem the Committee suggests, *inter alia,* mandatory antitrust trainings for senior employees, whistleblowing hotlines and public naming and shaming of wrongdoers (OCDE, 2021, pp. 34 et seq.).

The Committee also stresses the importance of compliance incentives. It states that it should be possible for employees to reach their performance targets without committing illegal acts. If this is not the case, then according to the Committee, the CMS worthless. The remuneration of senior employees should also be focused on longer term interests, which could include compliance practices. The Committee recommends that authorities consider taking into account the impact of remuneration schemes when assessing cartels (OCDE, 2021, pp. 38 et seq.).

Under the title of auditing and monitoring of business processes, it is suggested to use data and algorithms for these purposes. Furthermore, competition authorities should encourage organizations to implement search mechanisms such as algorithms for the detection of illegal behavior (OCDE, 2021, pp. 39 et seq.).

Additionally, it is recommended to encourage third parties such as business partners to implement effective CMS (OCDE, 2021, pp. 41 et seq.).

Following these suggestions does not lead to certification. Because of that, a closer look at the ISO 37301 should be considered.

3. ISO 37301

ISO 37301, which is in effect since 2021, replaced ISO 19600 from 2014. Compliance is defined therein as "the outcome of meeting all the organization's compliance obligations"[6]. As the standard aims to be applicable internationally, it is designed for every type and size of organization (Steenkamp & Pyrcek, 2021). It follows the "Plan-Do-Check-Act" cycle which many ISO standards are based on (Würz, 2021). Compliance is defined therein as "the outcome of meeting all the organization's compliance obligations"[7]. In Figure 1 of the standard, a CMS is depicted. It can be derived from this Figure that an organization needs to establish compliance obligations, conduct a risk analysis, implement a compliance policy, hold trainings and communicate (internally) about their compliance efforts and evaluate their CMS regularly.[8] Those steps shall be discussed in more detail.

(a) The beginning of each CMS implementation should be a stakeholder analysis. This serves to identify all stakeholders, which have to be considered for the CMS as they are

6 ISO 37301. (2020). Compliance management systems – Requirements with guidance for use, 3.27. https://www.iso.org/obp/ui/#iso:std:iso:37301:dis:ed-1:v1:en.

7 ISO 37301. (2020). Compliance management systems – Requirements with guidance for use, 3.27. https://www.iso.org/obp/ui/#iso:std:iso:37301:dis:ed-1:v1:en.

8 Ibid, Figure 1.

either directly affected by it (e.g., employees) or will indirectly evaluate its legitimacy (for example competition authorities or regulatory authorities). Furthermore, the support of the top management has to be secured. These employees should commit themselves to all compliance policies and standards, as they have to lead by example (Homann, 2021; Tüv Media, 2021, p. 8).

(b) Employees have to be aware of the compliance measurements. One employee has to be appointed as Compliance Officer and will be responsible for all tasks related to compliance, such as administration, monitoring and evaluation (Tüv Media, 2021, p. 8).

(c) In a next step the scope of an organization has to be defined, from which compliance obligations and potential risks can be derived. For this purpose, the environment of the organization has to be evaluated (Homann, 2021; Tüv Media, 2021, p. 8).

(d) The new ISO 37301 focuses even more than ISO 19600 on the implementation of whistleblowing-systems. This system has to be accessible to and visible by every single employee. It should guarantee anonymity and confidentiality. The incoming hints have to be investigated in a neutral fashion. The whole process requires diligent, written documentation, and the lessons for the further improvement of the organization's CMS should be considered when evaluating the CMS (Homann, 2021).

(e) Control mechanisms to evaluate the CMS periodically are to be established and monitoring has to be conducted in a consequential and periodical fashion (Homann, 2021). ISO 37301 requires internal compliance audits, measures to recognize violations of the policies and antitrust law, and the supervision of external auditors. This analysis should help to improve the CMS.

As these Guidelines vary in their recommendation, a comparison shall provide more clarity about the requirements of an effective CMS.

4. Comparison of Guidelines

The guidelines vary greatly in their length. The ICC provides in its Toolkit a much more detailed approach to the explanation about the implementation and revision of CMS, and therefore provides the time-pressed reader with quick summaries. The Committee choses to produce a concise guide on effective antitrust CMS. This guide is, however, part of a larger document about competition compliance efforts and compares many different sources. It has to be noted that it is the newest document, having been drawn up in 2021, and the only one which takes into account the behavior and views of competition authorities on this issue. ISO 37301 has an appropriate length and focuses on practical implementation. It has to be kept in mind that this serves as a certification standard.

The institutions also deviate in their view of responsibility for compliance: Whilst the ICC sees it as a task for the Head of Finance for SMEs and for the legal department in larger organizations to raise compliance issues (ICC, 2013, p. 5), the OECD Competition Committee and ISO 37301 however, do not specify who is to be appointed as the Compliance Officer or given the compliance responsibilities (OECD, 2021, p. 18; Birker, 2021).

All guidelines see it as impartial that the management of an organization commits itself to compliance and lawful behavior (ICC, 2013, p. 5; OECD, 2021, p. 34; Tüv Media, 2021). In order for effective compliance measurements to be implemented and show effects, this commitment is essential. However, the ICC goes a step further by suggesting different measures in order to attain this commitment (ICC, 2013, pp. 6 et seq.).

As for the risk analysis, the ICC Toolkit and ISO 37301 are rather detailed. The ICC even recommends certain risk-evaluation tools. The OECD Competition Committee does mention a risk analysis, but without going into further detail about its execution (OECD, 2021, p. 7).

The rising importance of whistleblowing can also be seen in the guidelines. Anonymity and confidentiality serve as the corner stones of each whistleblowing system and/or hotline. Documentation of all the subsequent steps is another requirement. However, the "OECD Competition Compliance Programmes" document does not really specify the requirements of an effective whistleblowing hotline (OECD, 2021, p. 31). In order to comply with ISO 37301 diligent, written documentation is required (Homann, 2021). The ICC Toolkit also considers compliance with data protection law and the possibility of the interviewer reaching the whistleblower as being essential (ICC, 2013, pp. 34 et seq.). The Toolkit is certainly the most helpful for setting-up a whistleblower hotline as it provides the aforementioned questions, which can be used as a checklist (ICC, 2013, p. 36).

Monitoring is another important aspect of an effective CMS mentioned by all three guidelines. According to the OECD Competition Committee, in order to be most effective, monitoring uses data (OECD, 2021, p. 40). ISO 37301 requires internal compliance audits and the supervision of external auditors (Homann, 2011). The ICC Toolkit is the only guideline which suggests a time frame (every three to five years) for the monitoring to take place (ICC, 2013, p. 66).

In general, the ICC considers more aspects, is more detailed and provides the reader with examples and quick summaries; it is therefore a recommended read. As ISO 37301 is an internationally recognized CMS standard and can be certified, it is recommended in high-risk industries and for organizations in concentrated markets. In order to find some examples of CMS in other companies, it is recommended to read through the "OECD Competition Compliance Programmes".

However, all guidelines show the importance of the commitment of the management to antitrust compliance, trainings and a thorough risk analysis. In most jurisdictions, considering these aspects will mitigate the risk of antitrust violations. The ICC also includes all aforementioned best practices for compliance and provides further practical advice.

Even though the OECD's Competition Committee discussion paper aims to provide advice for authorities, the aspects highlighted by it are to a great extent the same as the ones discussed in guidelines such as the ICC Toolkit and ISO 37301. This leads to the conclusion that certain elements have to be considered regardless of the perspective, in order to establish an effective CMS. These elements include commitment of the senior management to, and sufficient monitoring of, the CMS. Especially is the company culture discussed in detail in each guideline and paper. It is therefore recommended for each organization to establish a company culture that respects antitrust law, and which acts in accordance with it.

IV. "COMPLIANCE DEFENSE" AND THE ASSESSMENT OF FINES

In the recent past, few topics have generated more discussions in the area of corporate compliance than the question as to whether CMSs, a so called *"Compliance Defense",* should be taken into consideration in the assessment of fines in cases where antitrust infringements occur (Eufinger, 2016, p. 209).

One of the main arguments brought up in this context is that the simple fact that a violation of antitrust law has occurred, already indicates that the CMS currently installed could obviously not have been functional - or only insufficiently functional. Otherwise, it would have prevented the violation (The German Federal Cartel Office, 2020, p. 14). Also, the mere introduction of a competition compliance program alone, would not constitute a guarantee that the rules will be complied with on a permanent basis in the future (Eufinger, 2016, p. 210). The fact that this argument falls far short of the mark

is evident when one considers that there is, of course, no such thing as a perfect CMS that can be guaranteed to detect all legal violations with absolute certainty. Nevertheless, the implementation of a corporate compliance program itself already signals the law-abiding position of a company towards the public, the government and towards regulatory authorities. Evidently, the liability of a company that has made honest efforts to avoid antitrust violations should be considered as being less than the liability of a company that has not taken any action at all. This applies at the very least if the violation does not originate from the top management of the company (Kersting, 2017). Held against this is the fact that in the overwhelming majority of cases in practice, such misconduct would typically be committed by the top management of a company. An installed CMS which addresses all levels of employees of the company, would therefore be redundant. Moreover, a grant of immunity or reduced sanctions for whistleblowers would already constitute a comprehensive reward for successful compliance (The German Federal Cartel Office, 2020, p. 14). But especially in this case, the implementation of a CMS, which in itself already carries an inherent deterrent effect, can at least build up the appropriate pressure on the company's top management to behave in a compliant manner, and can thereby proactively and preventively avoid violations of the law (Eufinger, 2016, p. 210). Moreover, even a partial prevention of unlawful conduct at lower levels of an organization can be considered as being positive - at least from the perspective of lawfulness. Additionally, when it comes to determining the assessment of a fine, all factually relevant aspects should be taken into consideration in the discretionary decision of an authority as a matter of principle. This also applies in particular to measures intended to prevent legal violations in companies, i.e., compliance measures (Roxin, 2018, p. 348).

Critics of the "Compliance defense" further bring up that in cases of antitrust misconduct, settlement negotiations between the respective company and authorities are generally only conducted after the conclusion of the proceedings to fine the company. In this case, an installed CMS could be taken into account in the event of a subsequent claim for damages, but not during the proceedings to impose the fines themselves. While this may still be the rule in practice at present, this could change in the future as more compliance efforts are rewarded when fines are assessed (Stammwitz, 2021).

It is further criticized that, although there are objectively internationally agreed standards (see II.), the assessment of a CMS is subject to the subjective perception of the respective authority or court. Whether from their point of view the "*Compliance Defense*" is eventually classified as efficiently functional or not, would therefore be a question of individual evaluation, which is accompanied by uncertainties on the part of the company (Reimers & Hainz, 2016, p. 190). Also this argument is inconclusive. First of all, more and more national jurisdictions and competition authorities are increasingly issuing detailed national guidelines, which distinguish a compliance system. Secondly, companies - as well as private individuals - are frequently "at the mercy" of judicial discretion. In this context, one must trust in the accuracy of the rule of law.

Finally, the introduction of a CMS could also raise a resource question for companies (Reimers & Hainz, 2016, p. 190). Internal courses, continuous training programs, audits, external specialists, supervisions, etc. represent a cost factor which should not be underestimated. This particularly pertains to SMEs, which do not have the same financial flexibility as large corporations. There would be a risk that large companies that could afford a better and more efficient CMS would be privileged, which could lead to distortions of competition, which is precisely what should be prevented (Wessing, 2018). However, this risk could already be mitigated before a CMS is installed. For example, SMEs could be provided with subsidies that are in line with competition. Additionally, the authorities might set a lighter CMS standard for SMEs than for large companies. Factors such as the nature, size and structure of a company, as well as the risk of an antitrust violation, could be considered. Nonetheless, a CMS would need to be sufficiently adequate and impactful, and would have to tend to reduce the risk of misconduct (Ritcher, 2021). But even if SMEs in particular also have to bear considerable costs due to the implementation of a "*Code of Conduct*", the measures often turn out to be economically advantageous for companies in the end. An international study has indicated that the costs associated

with compliance violations are more than twice as high as the investments that are made by companies to comply with compliance measures (Becka, 2018, p. 2). This fact alone indicates how high the cost-benefit factor of CMSs should be considered to represent.

V. PRE–EXISTING OR SUBSEQUENT "COMPLIANCE DEFENSE"?

After doctrine and research have been demanding for quite some time that compliance efforts should be taken into consideration in a fine-reducing context, practice now seems to increasingly evaluate this topic in the same way (Eufinger, 2016, p. 209). However, especially in the practical context, it is still partially argued that a fine-reducing effect should be taken into account exclusively in respect of post-offense behavior. The biggest proponent of this view is probably the European Commission, which relies on the argument of the non-functioning CMS which failed to prevent the misconduct (The German Federal Cartel Office, 2020, p. 14). In addition, it is added, that a corporate compliance program which has already been installed would likewise not guarantee long-term compliance (Eufinger, 2016, p. 210). Admittedly, this is to be agreed to the extent that there is precisely no guarantee that misconduct will be prevented. However, if this idea is taken further, even a CMS which is subsequently installed is no guarantee of flawless behavior in the future. The European Court of Justice goes even further in part, and attributes adverse effect to previously installed and unsuccessful codes of conduct. On the one hand, a non-functioning code of conduct of a subsidiary within a group entity can also be held against the parent company.[9] On the other hand, this is due to the fact that a CMS could even make it more difficult to uncover the infringements at issue:[10] Employees could use the know-how they have acquired in internal compliance training courses to circumvent the CMS in the best possible way.

However, this view fails to take into account that the assessment of fines under antitrust law also pursues specific preventive purposes. Consequently, pre-existing codes of conduct would also have to be considered in terms of fine assessments (Eufinger, 2016, p. 210). If solely CMSs that were installed after a law violation were to be taken into account, this would also result in unequal treatment of companies. Not only would an effort to show law-abiding behavior not be honored, but it would also actually be competitively detrimental to the company. This would unfairly impede free competition and thus run contrary to the very objective which competition law is intended to protect.

VI. "*COMPLIANCE DEFENSE*" IN OTHER COUNTRIES

An international comparison of countries shows that more and more states are rewarding efficient compliance measures in cases where misconduct occurs in companies (Roxin, 2018, p. 348). Examples include the Canadian Competition Bureau and their Bulletin – *"Corporate Compliance Programs"* (2010, updated 2015), the French Competition Authority (Autorité de la concurrence) and their framework document *"Document-cadre du 10 février 2012 sur les programmes de conformité aux règles de concurrence"* (2012) or the Brazilian Authority (Conselho Administrativo de Defesa Econômica) and their *"Guidelines for Compliance Programs"* (2016). Additionally, the USA, Germany and Spain are discussed in more detail in the following section.

1. USA

As early as 1991 the United States Sentencing Commission implemented a fine reduction in case of effective compliance programs with their *"Federal Sentencing Guidelines for Organizations"*. A reduction could amount up to 95 percent if (i) no top-level employee was involved in the illegal action the fine was set for and (ii) the conduct in question was reported in a timely manner. Furthermore,

9 Schindler Holding Ltd / European Commission (2013) Case no. C-501/11 P. European Court Reports, pp. 113 et seq.

10 Ibid, p. 142.

seven criteria for effective compliance programs were established. These included diligence in delegation of discretionary authority, supervision of the implementation and application of the program by executives, implementation of specified systems referred to *inter alia* nowadays as being whistleblowing-systems which were then described as being "systems for monitoring, auditing and reporting suspected wrongdoing without fear of reprisal" (Desio, n.d.), and measures to avert further incidences such as the one being penalized from happening in the future, as well as reactions should the incidence occur again (Desio, n.d.). The guidelines applied to both already existing CMSs and those installed subsequently (Eufinger, 2016, p. 211). These guidelines were tightened in 2004 as a reaction to scandals in the United States (Hopson & Koehler, 2008, p. 208). In antitrust practice, however, this option was not used for a long time (Eufinger, 2016, p. 211).

This changed significantly with the antitrust proceedings of the US Department of Justice ("**DOJ**") against the automotive parts supplier Kaya Industry Co. Ltd. ("**KYB**") and its subsidiaries in the U.S. (The United States Department of Justice, 2015) In the period between 1990 and 2012, collusive agreements between parent and subsidiary companies resulted primarily in price fixing, bid-rigging and market allocations - forms of classic hardcore restrictions. The monetary penalty was expected to range between USD 103 million and USD 207 million. However, as KYB had already agreed to introduce an internal compliance program immediately after the proceedings were initiated, the fine was set by the DOJ at "only" USD 62 million (Eufinger, 2016, p. 211).

This change in practice with respect to rewarding corporate compliance efforts has been further endorsed by the DOJ in the recent past (Ritz & Weber, 2021, p. 21). Thus, with the "Evaluation of Corporate Compliance Programs" the prosecutors were given a manual at hand in which once again the importance of compliance efforts for prosecutors is emphasized, both in the pre-crime as well as in the post-crime context:

> This document is meant to assist prosecutors in making informed decisions as to whether, and to what extent, the corporation's compliance program was effective at the time of the offense, and is effective at the time of a charging decision or resolution, for purposes of determining the appropriate (1) form of any resolution or prosecution; (2) monetary penalty, if any; and (3) compliance obligations contained in any corporate criminal resolution (e.g., monitorship or reporting obligations). (U.S. Department of Justice Criminal Division, 2020, p. 1)

It can be assumed that the DOJ thereby explicitly wants to signal that CMSs should be honored and taken into account to a greater extent in the future.

2. Germany

a. Compliance Guidelines

In 2016 the German Institute for Compliance published a guideline "Antifraud Compliance – Key Aspects of Effective Compliance Programs (Part 1)" (in short referred to as DICO-Guidelines as DICO is the German abbreviation for the Deutsches Institut für Compliance). The guidelines were established with the support of the German Association for Materials Management, Purchasing and Logistics. The aim of the guideline is to minimize uncertainties regarding the content and extent of compliance programs and support the members of the Institute as well as third parties in the introduction, improvement and assessment of their own CMS and control of the effectiveness of their suppliers' CMS. Interestingly the Institute's goal was to influence the discussion about fine reduction because of appropriate compliance programs under antitrust law (DICO, 2016, p. 4).

As for the field of application, the guidelines also aim to be applicable for small and medium enterprises (SME) without creating unproportionate costs (DICO, 2016, p. 6). Nevertheless, the size of an organization should be taken into account when implementing a CMS. The size is, however, not the

only determining factor. The risk aversion and risk situation should also be taken into account when a CMS is introduced and/or revised (DICO, 2016, p. 6).

It has to be noted that the guideline was not revolutionary in the sense that it only contains new ideas and suggestions. The guideline used certain already published standards and guidelines, including the International Commerce Chambers Toolkit and the Guideline ISO 19600 as a form of inspiration (Reimers & Hainz, 2016, p. 191).

However, the guideline does include interesting aspects of Compliance Management Systems. It is mainly composed of five key aspects: management culture, responsibility and organization, risk analysis, internal policies and internal training courses. To the authors of the guidelines, it is irrelevant if the antifraud compliance program is part of an overall compliance program of a company or not. Rather from the authors viewpoint, it is significant that the five key aspects exist (Deutsches Institut für Compliance [DICO], 2016, p. 6).

In the key aspect of management culture, it is suggested to have a declaration concerning absolute adherence to the law and especially to refraining from forming what is in the referred to in the guidelines as "hard-core" (DICO, 2016, p. 6) cartels. The guidelines propose a clear communication of the adherence to the law, but do not recommend a specific form for this communication. The statement could for example be presented in the organizations intranet and/or in their own guidelines and/or policies and be repeated and/or revised at regular intervals (DICO, 2016, p. 6)[11]. This statement should be distributed in the whole organization in an appropriate manner and be adhered to in daily business endeavors. In order for the CMS to be effective, the management of an organization has to regularly update their legal knowledge, especially its knowledge of antitrust law. This aim can be achieved by the regular attendance of internal (or external) trainings. Furthermore, an organization should provide enough resources, especially in personnel and monetary form, and be willing to terminate contracts with non-compliant personnel (DICO, 2016, p. 7).

In the second key aspect named, responsibility and organization, it is suggested that the legal department of an organization is responsible for compliance and subsequent measurements. If an organization does not have a legal department, the organizations management is best suited to carry out compliance tasks. In any case, a contact person for antitrust measures should be provided in order to enable the employees to seek guidance in antitrust-related business proceedings. The contact can be internal or external (for example an external lawyer). It is of importance that all employees are aware of the contact and given the possibility to seek advice from it at any time. For larger corporations the implementation of a whistleblowing-hotline is (strongly) recommended. This facilitates the report of (possible) antitrust violations and ensures the CMS' effectiveness (DICO, 2016, p. 7).

The third key aspect is risk analysis. The guidelines recommend regular risk analysis, which should be conducted in the whole corporation. The analysis should consist of an analysis of business activities and their regulatory and economy environment. The results of the analysis have to function as a basis for the CMS and further measurements such as trainings (DICO, 2016, p. 8). Interestingly enough the guidelines don't go into depth about the execution of a risk analysis. Furthermore, this key aspect is only covered in half a page in a rather superficial manner, whilst all other key aspects are discussed in a page or more, in a more detailed fashion. Considering that the risk analysis should function as a guideline and basis for the CMS, this seems astonishing. Especially for SMEs, information and tips about the execution of a risk analysis would be helpful and would assist them immensely in the set-up of their CMS.

The fourth key aspect containing tips about internal policies and/or rule books suggests implementing short and clear explanations about antitrust law. The forbidden behavior as well as the accompanying

11 The Guidelines recommend an update every two years.

sanctions, are to be included in the policy or rule book. It is suggested to include 'Do's and Don'ts' - as they allow employees to gather the most relevant actions derived from antitrust law in a timely manner. The policies and/or rule book should be written and include a declaration from the management to comply with antitrust law. It should also be taken into consideration to provide the rule book and/or policies in a language understandable for all employees, such as English. If possible, the document(s) should also be translated into the national language of each subsidy of the corporation. For new employees, the rule book and/or policies should be included in the documents received when entering the organization (often also referred to as a 'starter-package'). The fourth key aspect is concluded by referring to the rule book of DICO and suggesting to the reader a download of it (DICO, 2016, p. 8).

Most extensively covered in the DICO-Guidelines are the training sessions provided, as the fifth and last key aspect. The trainings should act as a tool for sensitization for employees and provide them with the opportunity to ask questions and gain insights into lawful conduct in daily business endeavors. Almost all other key aspects could be communicated in this format. The guidelines recommend that at least everybody who has a connection to antitrust law, as well as the management of the company, should participate in the trainings. However, this recommendation is relativized in the subsequent paragraph, in which the guidelines state that it is possible for SMEs for only one person (belonging to the management) to take part in the trainings and afterwards spread his newly gained knowledge within the company. The trainings should be held by antitrust experts, whereas the DICO plans to hold its own meetings for its members and interested third parties. As for the frequency, it is recommended to hold the trainings at least every two to three years. Especially important seems to be the notion that the trainings need to focus on the specific business areas of the organization, as it is only possible to fulfill the aim of the trainings if the lessons are directly applicable into the daily business endeavors of the organization. Specifically, instructions about exchange of information as well as sales restrictions should be addressed, as these topics gain in importance especially in relation to the amount and height of fines that have lately been handed out. The final remark of the guidelines that interactive elements encourage the learnings from the trainings, is an especially significant one, as it assists the participants in learning more effectively (DICO, 2016, pp. 9 et seq.).

The guideline ends by reminding its readers to apply the key aspects in relation to the individualistic characteristics of their organizations (DICO, 2016, p. 10).

Having only 12 pages, the guidelines are kept short and quite applicable to daily business. They seem to achieve their purpose by functioning as guiding principles for the establishment of a CMS. As for the revision or adjustment of CMSs, further information could prove useful for the DICO members and interested third parties, especially for SMEs. However, the second part of those guidelines which were already announced, could fulfill that second aspect (DICO, 2016, p. 10).

b. Judicial Assessment

For a long time, the German Federal Cartel Office (Bundeskartellamt, the **"BKartA"**) held the view that a company's compliance efforts could not and should not be taken into account at all, regarding appropriate fines (Eufinger, 2016, p. 210). The EU Commission serves as a model for this. The arguments are largely simplistic and monotonously repeated, that the primarily installed CMS was apparently not sufficient to prevent a violation of antitrust law. Moreover, that the granting of immunity to whistleblowers is to be regarded as a sufficient privilege. Accordingly, there is no room for a reduction of fines for the entire company. The BKartA now deviates from this position - at least for subsequently installed CMSs (The German Federal Cartel Office, 2020, p. 14). The German Federal Court of Justice (Bundesgerichtshof, the **"BGH"**) has brought movement into the discussion of a reduction of fines based on compliance efforts of a company. Since its decision on the guarantor obligations of a compliance officer in companies in 2009[12], the BGH has not made any further

12 The German Federal Court of Justice. 5 StR 394/08. (2009). http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=48874&pos=0&anz=1.

pronouncements on compliance issues. In 2017, parallel to the DOJ v. KYB case in the USA, a new leading decision was issued by the highest German civil court (Hastenrath, 2017, p. 325). The case concerned bribery and tax evasion in connection with exports by a German arms manufacturer to the Greek government. In its *obiter dictum*, the BGH stated that both an already existing and a subsequently installed CMS should be taken into account when assessing the fine (Kersting, 2017). Even if this decision was based on tax law, it can be assumed that the principles of the ruling can also be applied to antitrust law (Kersting, 2017). In line with this, the German legislator has also for the first time standardized *"Compliance Defense"* in antitrust fine proceedings with the 10th amendment to the Act against Restraints of Competition (**"GWB"**), which came into force at the beginning of 2021. In this context, Art. 81 Para. 1 Sentence 2 No. 4, No. 5 GWB states that compliance efforts must be taken into consideration both before and after a misconduct has occurred (Reimers & Hainz, 2016, p. 20).

3. Austria

Compliance has experienced a steady increase in significance in Austria in recent years. The Austrian legal system does not provide for a general obligation to establish a compliance organization within companies. However, the Austrian Corporate Law Amendment Act 2008 (**"URÄG"**) legally established the responsibility for reviewing the effectiveness of the risk management system, internal control systems and auditing systems, for listed companies. In addition, the Austrian Corporate Governance Code was expanded to include further compliance rules (Kofler-Senoner, 2016). When it comes to the question of whether the establishment of compliance management systems has the effect of exempting companies from liability, the case law of the European courts is cautious. The European Commission is not obliged to take CMS into account as a mitigating factor when assessing fines.[13] In Austria, on the other hand, the Federal Competition Authority (**"BWB"**) has shown itself willing to consider CMS as a reason for mitigation in the so-called "settlement proceedings", especially if it was introduced in connection with the voluntary cessation of the conduct in violation of antitrust law even before the preliminary investigation.[14] The latest antitrust case in the Austrian construction industry also demonstrates the BWB's inclination to honor the implementation of a CMS when imposing fines. The Austrian construction group Strabag implemented a certified CMS in conjunction with a novel monitoring system as part of the antitrust investigation into the "construction cartel" in order to prevent future violations of the ban on cartels. This behavior on the part of Strabag had a positive impact on the amount of the fine requested by the BWB (Bundeswettbewerbsbehörde, 2021). The Austrian Association Responsibility Act (**"VbVG"**) also provides for a managerial responsibility of the management board to implement appropriate compliance structures. According to this law, companies can be held responsible if their decision-makers commit criminal acts. Pursuant to Section 5 (3) no. 1 VbVG, the penalty is mitigated if the association has taken precautions within the company to prevent such acts prior to the act or has instructed employees to behave in a law-abiding manner. In addition, the provision provides for a further reason for mitigating the penalty in the context of compliance. If the association makes a significant contribution to establishing the truth after the act, for example by assisting in the investigation, the fine is to be reduced (Section 5 (3) no. 3 VbVG) (Roxin, 2018, 349).

4. Spain

a. Compliance Guidelines

In June 2020 the Spanish competition authority ("CNMC") published a "Guide on Regulatory Compliance Programmes in Relation to Competition Law" ("The Compliance Guide") (Prado, 2020). The Compliance Guide names the following criteria:

13 Dansk Rørindustri A/S ua/Kommission (2005) Case no. 189/02 P. European Court Reports, I, 05425; BASF and UCB/Kommission (2007) Case no. T-101/05 and T-111/05. European Court Reports, II-4949; Schindler Holding Ltd ua/Kommission (2011) Case no. T-138/07. European Court Reports, II-04819.

14 Samsung Electronics Austria GmbH, RIS 24 Kt 35/15 (2015); Vöslauer Mineralwasser AG, RIS 25 Kt 76/14 (2015).

The first criterion is the involvement of the company's governing bodies and/or senior management. This is fulfilled when there is an incentive policy which rewards compliance (e.g. bonusses) and punishes non-compliance (e.g. salary cuts). In addition, top managers must clearly state that competition law is not only a legal obligation but a fundamental element of the company's culture (Comisión Nacional de los Mercados y la Competencia [CNMC], 2020, pp. 8-9).

Effective Training is a second criterion, which is fulfilled when the company has a training program, ensuring that the employees receive training about competition law. The training must be adapted for each employee to their scope of activity and functions. Also expected is the scheduling of ad hoc training sessions when circumstances change (CNMC, 2020, p. 9).

To the Spanish authorities, independence and autonomy of the Compliance Officer is an important aspect of an effective CMS. This criterion includes granting the Compliance Officer the power to report conduct directly to the governing body. The Compliance Officer should also have the necessary human and financial resources depending on the size and characteristics of the company or organization (CNMC, 2020, p. 10).

Like many other authorities, the Spanish one likewise requires a risk identification and design of control mechanisms. The company must have a risk map identifying the business areas and employees that are at the highest risk of infringing competition law. The company must also name the likelihood and impact of such infringement. In addition, there must be a plan considering the procedures the company will follow in cases of an infringement (CNMC, 2020, p. 11).

The fifth criterion is the design of the internal procedures for lodging complaints and/or doubts. There must be an internal reporting channel to report potential infringements of competition law or doubts regarding the lawfulness of certain conduct. The channel must allow the adequate and prompt analysis of the risks and the protection of complainants (e.g. ensuring anonymity of the complainant) (CNMC, 2020, p. 10).

Lastly a clear and effective disciplinary system has to be designed.

The guidelines name the positive legal consequences which the observance of the Compliance Guide provides. A complete remission of the fine or at least a reduction in the level of fine that the company might face, is possible. It is also possible to avoid a ban from participating in future public tenders in the case of a bid-rigging infringement. The above-mentioned criteria will be assessed by the "CNMC" in order to obtain the positive legal consequences (CNMC, 2020, p. 8).

b) Judicial Assessment

In 2010, Spain introduced criminal liability for legal entities for the first time with Art. 31bis Código Penal. At the same time, the provision also stipulated that criminal authorities had to take into account compliance efforts by companies in order to mitigate criminal punishment. However, this only applied to those efforts undertaken after the commission of an offense (Roxin, 2018, p. 348). This opinion was also held by the Spanish Attorney General's Office. In doctrine, however, there was an increase in the number of voices that also wanted to honor preventive compliance measures. Accordingly, Art. 31bis of the Código Penal was revised in 2015. As a result, preventive systems are now also included in the assessment of penalties and fines (Tauschwitz & Tornero, 2016, pp. 18 et seq.). Far more astonishing, however, is the fact that if all of the newly stipulated statutory requirements of a CMS are met, it is even possible to enjoy the privilege of impunity (Pelz, 2021). After all, if certain requirements are met, a mitigation of the penalty is foreseen (Roxin, 2018, p. 348). Thus, Spain goes one step further than most other countries and allows companies to generate a penalty exclusion by installing an efficient CMS.

5. Switzerland

The Swiss Cartel Act (**"CartA"**) was significantly reformed in 2004. In addition to the introduction of direct sanctions for companies under Art. 49a para. 1 CartA, Art. 49a para. 2 CartA represented one of the most significant innovations.[15] According to this bonus provision, if the respective company "[…] assists in the discovery and elimination of the restraint of competition, a charge may be waived in whole or in part"[16]. Although the wording clearly indicates that "compliance defense" by companies in antitrust violations should be rewarded accordingly, however, Swiss antitrust practice often paints a different picture. Neither the Swiss Competition Commission (**"WEKO"**), nor the Swiss Federal Supreme Court, nor the Swiss Federal Administrative Court have so far taken compliance programs of companies into account in their investigations and decisions in order to reduce fines. It can be deduced from the above that very high requirements are placed on a CMS in Switzerland (Denoth & Kaufmann, 2021, pp. 375 et seq.). Not only are CMSs installed *ex post* not taken into account by the WEKO. Rather, their installation after a violation of antitrust law is taken for granted by the competition authorities.[17] But even in the case of *ex ante* installed CMSs, high hurdles are imposed on companies: In a leading decision regarding territorial protection agreements in connection with oral and dental care products between Gaba International AG and its Austrian licensee, Gebro Pharma GmbH, both the Federal Administrative Court and the WEKO initially recognized the compliance system already installed *ex ante* by the fined Gaba International AG. Nevertheless, this was not taken into account to reduce the sanction. This was mainly justified by the fact that a functioning CMS should have detected a violation of the law at an early stage and remedied it accordingly. However, this had not happened in the present case.[18]

The WEKO requires, for the consideration of pre-existing CMSs in the case of legal violations, that companies have first issued corresponding internal directives. At the same time, their compliance must be rigorously monitored. In the event of violations, the perpetrators should be effectively sanctioned.[19] It is also not sufficient for a "Code of Conduct" to be communicated exclusively verbally and for employees to be trusted to adhere to it accordingly. The CMS can only be effective if it is set out in writing and if guidelines are laid down in advance as to how to proceed in the event of suspected breaches of the law.[20] Finally, it is up to the respective party that refers to its CMS to prove that this CMS was suitable to prevent antitrust violations.[21]

Unfortunately, the WEKO does not define which criteria a CMS has to meet specifically so that it can actually be taken into account in order to reduce the fine (Denoth & Kaufmann, 2021, p. 374). For the sake of legal certainty and transparency, it would be desirable for the WEKO to draw up corresponding guidelines which could then be used as a basis for practice.

6. Brazil

In Brazil, Decree 8.420/2015 regulates CMSs. It is part of the Brazilian government's anti-corruption legislation, regulating the 2014 Clean Companies Act. The decree contains provisions on the

15 Tangmann C. & Zirlick B. BSK KG, Art. 49a, p. 1.

16 Article 49a para. 2 CartA.

17 WEKO. (2013). Verfügung vom 10. Dezember 2012 in Sachen Abrede im Speditionsbereich. RPW 2013/2, p. 204, 319.

18 Gaba International AG/WEKO. B-506/2010. (2013). https://entscheide.weblaw.ch/cache.php?link=19-12-2013-b-506-2010&sel_lang=de

19 WEKO. (2013). Wettbewerbsabreden im Strassen- und Tiefbau im Kanton Zürich. RPW 2013/4, p. 628, N. 986.

20 WEKO. (2012). Verfügung vom 16. Dezember 2011 in Sachen Wettbewerbsabreden im Strassen- und Tiefbau im Kanton Aargau. RPW 2012/2, p. 403, N. 1077.

21 WEKO. (2010). Verfügung vom 02. November 2009 in Sachen Hors Liste Medikamente. RPW 2010/4, p. 698, N. 379.

implementation of compliance measures in companies. In particular, it establishes criteria under which the establishment of a CMS is a mitigating factor in imposing sanctions on offending companies. The decree also stipulates that compliance programs must be risk-based. The evaluation of such programs takes into account factors such as the size, industry and structure of the company, as well as its interaction with the authorities. According to the decree, the most important factors contributing to an effective compliance program include that the upper management should communicate a clear policy against corruption to employees by setting standards and codes of ethics and conduct. In addition, employees should receive regular training and channels for reporting irregularities should be established. Due diligence must be conducted for corporate and M&A transactions. Establishing internal controls and ensuring that books are accurate and complete are also parameters for evaluating the effectiveness of the compliance program.

Brazil published its own guidelines in Portuguese and English entitled "Guidelines – Competition Compliance Programs". These guidelines also include a general perspective on compliance explaining what the term means and what its benefits are. Similar to other guidelines the Brazilian Guidelines state that the commitment of the organization is essential for an effective CMS. Especially the management has to ensure that the CMS is more than just words on paper by clear and emphatic communication about the CMS and its importance, by provision of sufficient resources, by monitoring and by establishing clear goals for its control. Furthermore, employees should not just be measured by financial standards, but also by their lawful conduct (Administrative Council for Economic Defense [CADE], 2016, pp. 16 et seq.).

As for the oversight of the CMS, a person with a management role should be assigned. This person has to have a certain autonomy and independence in their decision-making process in order for the CMS to be effective, as only then can the responsible person take sufficient measures even if the management does not agree with them (CADE, 2016, pp. 18 et seq.).

Before establishing a CMS, the Brazilian Administrative Council for Economic Defense recommends conducting a risk analysis, which has to take into account the specific risk an organization is faced with. This guideline refers to the ICC for the definition of a risk analysis. However, the guideline points out that external assistance might in certain cases be beneficial, especially if an organization is conducting business in a high-risk environment. The conduct of daily business of the organization should be taken into account when assessing the risks it is currently and possibly facing. The Brazilian authority suggests interviewing employees, visiting factories, reviewing strategies and risks and conducting open communication, in order to assess the risk in the best possible manner (CADE, 2016, pp. 19 et seq.).

After assessing the risk, certain steps should be taken to mitigate it. These can include trainings, monitoring and documentation (CADE, 2016, pp. 21 et seq.). It is recommended that trainings are carried out by compliance experts and that employees are subject to an evaluation following the training, in order to establish its effectiveness. Although the Brazilian authority sees the advantages of both online and offline trainings, in the end it suggests offline trainings as they offer the possibility of interaction with the professional holding the classes. Furthermore, compliance policies should be communicated frequently, and all internal communication needs to be adapted to daily business endeavors. As for the monitoring, the Administrative Council for Economic Defense views certification as a tool to ensure that many employees have undergone compliance training. Monitoring should also involve evaluating the effectiveness and efficiency of a CMS by an auditor or market research. The establishment of a reporting hotline is the last monitoring task mentioned. The hotline could also allow for information by third parties. In any case, anonymity has to be secured and the information gathered through the hotline has to be clear. Sufficient resources need to be provided for the hotline so that all incoming complaints should be handled. Lastly, all compliance efforts as well as daily business endeavors have to be well-documented, to enable the organization to provide information at any time (CADE, 2016, pp. 21 et seq.).

Finally, the Brazilian authorities advise organizations to establish incentives and punishments for following or violating compliance policies. It is stressed that all employees must be subject to penalization. As for the evaluation of the right penalization factors, things such as the motives of the wrongdoer, his cooperation, his involvement in the antitrust violation and his participation in trainings, have to be taken into account (CADE, 2016, 27).

It is suggested that the CMS regularly be reviewed as changes in the economic and legal environment might occur. However, the Brazilian authority does not recommend a specific period after which a revision has to occur. Rather it is suggested to stay up to date on changes in regulations (CADE, 2016, 27).

VII. QUO VADIS "COMPLIANCE DEFENSE"?

In the future, various further changes in compliance defense practice are to be expected, since the risks to be prevented by effective compliance are also in a state of flux: First of all, there are new challenges in connection with the legal tech industry (Görtz, 2018, p. 92). In particular, the fast pace and complexity of this sector will present companies with challenges of effective implementation of CMS systems, and courts and authorities with their correct assessment.

In addition, the inconsistent evaluation of the compliance term in different industries can be problematic. For example, is tax compliance to be evaluated differently than product compliance? (Hager, 2020) If so, why and to what extent?

Also, more and more SMEs will start to implement CMSs in the future (Görtz, 2018, p. 92). This will significantly change the CMS landscape in terms of number, quantity and quality.

Furthermore, criminals will also adapt to already known prevention measures and find new ways and means to circumvent them (Görtz, 2018, p. 92).

Finally, the country-specific corruption risk must also be taken into account. Although companies in the respective country may currently still be relatively immune to criminal acts under competition or antitrust law, this can change within a very short period of time due to national or international uprisings and unrest, changes in political power or changes in the economic strength of a nation (Görtz, 2018, p. 92). Accordingly, higher demands would also have to be placed on efficient CMSs.

VIII. CONCLUSION

Whether *"Compliance Defense"* should be taken into account in reducing fines in the case of antitrust violations in companies or not, has been controversial for some time - and ultimately still is. Doctrine and research have long been in favor of doing so; practice is only gradually opening up to this possibility. Nevertheless, overall, a paradigm shift is clearly visible internationally: The DOJ in the U.S., for example, has clearly spoken out in favor of the fine-reducing character of CMSs after the proceedings against KYB. Similarly, in Germany, the BGH and now the BKartA too, also did so. Under Spanish law, a *"Compliance Defense"* for corporate offenses can - under certain circumstances - even constitute grounds for exclusion from punishment. The trend towards the acceptance of effective CMSs seems to be becoming more and more *"en vogue"* (Ritz & Weber, 2021, p. 21).

Only the European Commission and the European Court of Justice seem to see this differently - at least for the present.

Although there are valid arguments against the remuneration of CMSs in the reduction of fines in the context of antitrust violations, in the opinion of the authors, the more conclusive arguments indicate

that they should be taken into account - regardless of whether the CMS was installed in the company only after an offense or beforehand.

In order to be able to determine whether and when compliance measures are to be regarded as being 'effective', the guidelines of the Anglo-American world have largely prevailed internationally. However, recently many other jurisdictions such as Brazil, Spain and Germany have published their own guidelines on effective CMS. International organizations *inter alia* the ICC and the OECD Competition Committee provide suggestions for CMS as well. The common denominator of these guidelines is the responsibility held by the highest-ranking employees in an organization, a risk analysis and effective monitoring. Trainings are another frequent suggestion.

Constantly changing industries such as legal tech, as well as the change of CMSs in terms of number, quantity and quality, will pose new challenges to both authorities and companies. It remains to be seen where the journey will lead.

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