

Competition Compliance programs

The experience of Latin America



United
Nations

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NOTE

Considering the important role of research and policy analysis in the development of appropriate policies and legislation in the areas of competition and consumer protection, UNCTAD created the Research Partnership Platform (RPP) in 2010. The UNCTAD RPP is an initiative that aims at contributing to the development of policies and best practices to promote effective law enforcement for competitive markets and inclusive development.

The RPP brings together scholars, research institutions, universities and Competition and Consumer protection experts and civil society representatives and provides a platform for joint research and exchange of ideas on the issues and challenges in the area of competition and consumer protection faced particularly by developing countries.

The role of UNCTAD is to facilitate and provide guidance on the research and analysis to be undertaken by members of the RPP. UNCTAD and its member States benefit from the research findings in responding to the challenges faced by developing countries through its technical assistance and capacity-building activities.

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EXECUTIVE SUMMARY

In Latin America, the development of public policies aimed at increasing economic growth through trade liberalization, the promotion of innovation, the modernization of its industrial fabric and the adoption of measures to facilitate digitalization and improve respect for the environment are bearing fruit. However, due to the COVID -19 pandemic and the cascading crises that followed economic growth in Latin America has slowed down since 2020.

To achieve better results, these policies must be combined with effective competition policies. Competition policy plays an essential role in the pursuit of all other public policies and allows the benefits of economic development and market liberalization to reach all consumers. Regional cooperation and intra-regional trade must also be seriously enhanced to accelerate economic development.

Competition compliance programs which encourage companies to implement measures to prevent and detect competition infringements are likely to prevent anticompetitive conduct and reduce the overall burden of investigations on competition authorities.

A survey of Latin American competition authorities shows that most of the authorities surveyed already have some kind of program to promote competition compliance in place, and approximately half of the competition authorities surveyed take the extent of any efforts by a company to ensure competition compliance into account when setting sanctions for infringements of competition law. Most of the surveyed authorities intend to engage in further activities to promote competition compliance, with the most common measure being the introduction of compliance systems into companies' operations. The survey also identifies common collaboration partners for competition authorities in their activities to promote compliance.

Informed by the survey of Latin American competition authorities and a study of best practices on competition compliance from international organizations and competition authorities around the world, this report sets out some recommendations for Latin American competition authorities to consider as they introduce or take their compliance programs forward. They identify key elements of an effective compliance program for a competition authority, the important aspects to be taken into account in the design and implementation of compliance guidelines and identify factors for competition authorities to consider about the role of compliance measures when setting sanctions for infringements of competition law. The report also includes a recommendation to companies about the design of their own competition compliance systems.

The recommendations aim to contribute to improve Latin American competition authorities' compliance programs and to facilitate their adoption in a regionally consistent manner, as this could promote convergence, facilitating cooperation between national competition authorities and with courts and increasing awareness raising by companies and their competition compliance. This can improve the predictability and legal certainty of business environments within a region with significant cross-border trade and investment and where market integration is important.

I. INTRODUCTION

In recent years, compliance with business laws, including competition laws, has become increasingly important. Compliance with business laws is inextricably linked to modern corporate governance. In addition, with the implementation of national and international legislation, standards and norms increase the complexity of systems and – in the case of structured misconduct – increase the potential liability of corporate bodies. Furthermore, competition compliance specifically plays an important role for the long-term success not only of a company, but also for the stability of national economies.

Compliance with competition laws can be improved through the introduction of company-specific systems, processes and controls that work to promote adherence to laws, standards and internal rules of conduct by preventing, detecting and reacting to infringements. The bundle of measures taken to control and ensure that ethical behavior and legal requirements are met correspond to a compliance management system (referred to in this report as a compliance system for simplicity).^{1,2}

A compliance program that encourages companies to implement effective compliance system can be a useful tool to encourage the prevention and detection of infringements at the company level, contributing to the overall effectiveness of a competition regime and enhancing consumer welfare. An effective compliance system ensures that all employees at all levels of a company know and understand what is and is not permitted by competition law, can identify when conduct may violate competition law, know how to report a potential violation of competition law, and understand the consequences of a violation. An effective compliance system must promote a culture of compliance with competition law as opposed to avoidance and ensure that those who report potential violations can be confident that their claims will be taken seriously and will not result in reprisals.

Just like private sector companies, competition authorities have limited human and financial resources. Well-functioning compliance programs which promote compliance measures that are “adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees”³ can prevent cartel infringements and/or lead to prompt and timely self-reporting and thorough cooperation by the companies involved in an infringement. This can reduce the overall burden of investigations on competition authorities.

Competition authorities can also use compliance programs as a tool to support and increase the effectiveness of leniency programs. A company with a well-functioning compliance system is more likely to be able to detect potential cartel infringements at an early stage. This can put a company involved in a cartel in a better position to be able to come forward to report and provide evidence of the conduct under the competition authority’s leniency program.

Violations of competition law provisions can result in serious sanctions for a company. An efficiently functioning compliance system is one of the best tools available to a company to avoid these outcomes. In the event of a legal violation, the compliance measures taken are examined by the enforcing authorities in many jurisdictions, even if there is no legal obligation to implement such measures.

Latin America (which includes South and Central America) is a region that has experienced uneven economic growth over the last two decades. However, due to the COVID -19 pandemic and the war in Ukraine, growth has slowed down since 2020. The United Nations Economic Commission for Latin America and the Caribbean (ECLAC) expects the deceleration of economic growth to deepen in 2023, reaching a rate of 1.2 per cent. Specifically, South America is expected to grow by 0.6 per cent in 2023 (3.8 per cent in 2022) and Central America and Mexico by 2.0 per cent (compared to 3.5 per cent in 2022)⁴.

The participation of Latin America in world trade is close to 5 per cent. Therefore, regional cooperation

¹ Wieland, Josef / Steinmeyer, Roland / Grüniger, Stephan: Handbuch Compliance-Management, 3. Aufl., Berlin 2020, S. 931 ff.

² In this report, unless the context otherwise requires, the terms “compliance system”, “compliance efforts” and “compliance measures” refer to actions by or measures within companies, and the term “compliance program” refers a to Competition authority’s strategy or actions to encourage companies to adopt their own compliance measures.

³ U.S. Department of Justice Antitrust Division, Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations, 2019, p. 3.

⁴ https://www.cepal.org/sites/default/files/pr/files/tabla_proyecciones_cepal_abril-2023_es.pdf

and intra-regional trade must be seriously enhanced to accelerate economic development. The Inter-American Development Bank's Trade and Integration Monitor, 2022⁵ highlighted that intra-regional trade in Latin America was more dynamic than extra-regional trade. However, the share of intra-regional trade did not exceed the 15 per cent experienced since the mid-1990s⁶.

The development of public policies aimed at increasing its economic growth through trade liberalization, the promotion of innovation, the modernization of its industrial fabric and the adoption of measures to facilitate digitalization and improve respect for the environment are bearing fruit. However, to achieve better results, these policies must be combined with effective competition policies. Competition policy plays an essential role in the pursuit of all other public policies and allows the benefits of economic development and market liberalization to reach all consumers. Competition compliance programmes are likely to improve the enforcement of rules prohibiting anticompetitive conduct.

In this regard, it is worth mentioning the creation of the Central American Competition Committee,⁷ whose main function is to promote competition in the region in a coordinated manner through the national competition authorities of the sub-region. Other economic integration systems in the region also cover competition issues such as MERCOSUR, through the Competition Protocol⁸ from 1996 and the Andean Community with its Decision 608⁹ from 2005.

It is therefore desirable to promote the application of these programmes in a regionally consistent manner, facilitating their understanding by enterprises and contributing to their integration and implementation within enterprises.

For more than 15 years, through the COMPAL Programme,¹⁰ UNCTAD has been supporting Latin American countries in promoting sustainable competition and consumer protection systems by strengthening relevant institutions and fostering a better understanding of the benefits of competition. It has provided concrete support to many Latin American countries in developing legislation, establishing authorities, training their technical staff and facilitating intra-regional cooperation between competition authorities and other relevant stakeholders, such as the judiciary. Within the COMPAL Programme, UNCTAD assisted Colombia and Peru in the drafting of Competition Compliance guidelines for the private sector in 2017.

UNCTAD considers it important to examine and analyze the implementation of compliance programmes in the region and to make a comparative analysis of best practices worldwide. In 2016, the UNCTAD secretariat prepared a background note for the fifteenth session of the Intergovernmental Group of Experts on Competition Law and Policy entitled "Strengthening private sector capacities for competition compliance".¹¹ This paper analyzed best practices at the international level and made recommendations to facilitate their implementation for both competition authorities and economic operators.

As active partners of the UNCTAD Research Partnership Platform¹² and within the framework of long-standing bilateral cooperation¹³, the Zurich University of Applied Sciences (henceforth "ZHAW") in general and the Center for Competition Law and Compliance (henceforth "CCC") in particular, proposed to the RRP to analyze how Competition authorities and courts in South and Central America assess competition compliance.

⁵ The Inter-American Development Bank's Trade and Integration Trade Monitor 2022 highlighted that intra-regional trade in Latin America was more dynamic than extra-regional trade. As a result, the share of intra-regional trade reached 15% in 2022.

⁶ https://scioteca.caf.com/bitstream/handle/123456789/1907/Pathways%20to%20integration_trade%20facilitation%2c%20infrastructure%2c%20and%20global%20value%20chains.pdf?sequence=1&isAllowed=y

⁷ https://www.sc.gob.sv/index.php/sala_multimedia/entra-en-vigor-primer-reglamento-centroamericano-de-competencia-comunicado-oficial/

⁸ <http://www.sice.oas.org/trade/mrcsrs/decisions/dec-1896sText.asp>

⁹ <https://www.comunidadandina.org/StaticFiles/DocOf/DEC608.pdf>

¹⁰ https://unctad.org/system/files/official-document/dit-clp20043_en.pdf, https://unctad.org/system/files/official-document/CCPB_COMPALIII_Brochure_en.pdf and <https://link.springer.com/article/10.1007/s10603-022-09502-x>.

¹¹ https://unctad.org/system/files/official-document/ciclpd39_en.pdf

¹² Previous work completed by ZHAW as a partner of the UNCTAD Research Partnership Platform includes, for example, research on Competition and Consumer Protection Policies for Inclusive Development in the Digital Era (see <https://unctad.org/publication/competition-and-consumer-protection-policies-inclusive-development-digital-era>).

¹³ The MoU was signed on 18 January 2018.

II. AIM, STRUCTURE AND METHODOLOGY

Part one of the report aims to establish whether Competition authorities and courts in South and Central America have compliance programs, including whether they take a company's compliance efforts into account when assessing sanctions in cases of legal infringements, and if so, to what extent.

The first part of the report was conducted with the use of an empirical analysis of survey results, applying quantitative research methodology.¹⁴

In order to obtain corresponding usable findings, a structured questionnaire was created and sent to the study participants.

The questionnaire was structured in such a way that the responses would be accessible for statistical evaluation. The questionnaire was divided into three sections:

- (i) Section 1: *status quo*,
- (ii) Section 2: intended future developments and
- (iii) Section 3: collaboration with other organizations to support compliance efforts.

Each of these sections included several sub-questions containing multiple choice answers and fields for additional comments.¹⁵

A total of 17 competition authorities¹⁶ were sent the questionnaire. The questionnaire was initially sent to competition authorities in late 2020. By early 2021, 5 authorities had responded, and the questionnaire was re-sent to the authorities that had not yet submitted

a response. By April 2021, 15 out of 17 authorities had submitted responses and participated in the study, corresponding to a total response rate of **88,23%**,¹⁷ as follows:

- (i) Argentina
- (ii) Brazil,
- (iii) Chile,
- (iv) Colombia,
- (v) Costa Rica,
- (vi) Ecuador,
- (vii) Guatemala,
- (viii) Honduras,
- (ix) Mexico,
- (x) Nicaragua.
- (xi) Panama,
- (xii) Paraguay,
- (xiii) Peru,
- (xiv) The Dominican Republic, and
- (xv) Uruguay.

A large number of the Competition authorities confirmed in their responses that they were already working intensively on the topic of compliance. However, at that point they were in the process of evaluating and finding out whether compliance measures should be promoted, assessed, or taken into account, and if so, in what way and to what extent. More concrete answers were expected in the near future.

¹⁴ Empirical analysis is an evidence-based approach that is based on the interpretation of information and data. In contrast to non-empirical research, the empirical approach uses real-world data, metrics and results instead of theories and concepts. A quantitative research methodology is a data collection procedure of empirical social research. Generally speaking, the collected data can then be processed statistically to test hypotheses or gain new insights.

¹⁵ The English version of the questionnaire can be found in the appendix.

¹⁶ The questionnaire was sent to the competition authorities of the following countries: (i) Argentina, (ii) Bolivia (Plurinational State of), (iii) Brazil, (iv) Chile, (v) Colombia, (vi) Costa Rica, (vii) Ecuador, (viii) El Salvador, (ix) Guatemala, (x) Honduras, (xi) Mexico, (xii) Nicaragua, (xiii) Panama, (xiv) Paraguay, (xv) Peru, (xvi) The Dominican Republic and (xvii) Uruguay.

¹⁷ The competition authorities of the Plurinational State of Bolivia and of El Salvador did not participate in the initial surveys (in 2021 and 2022). El Salvador and the Plurinational State of Bolivia indicated that the questionnaire was not applicable to them in this form (yet). Although efforts and future developments regarding compliance programs are intended in these countries and updates received from El Salvador in 2023 are reflected in footnotes throughout this report, they were not counted as active participants in the survey in order not to distort the results.

For this reason, UNCTAD and the CCC decided to resend the initial questionnaire approximately one year later to all competition authorities so that they would have an opportunity to update their responses. Most of them chose to do so. The descriptions of the activities of each competition authority that responded to the questionnaire are therefore up to date as of March 2022.

Based on the responses, initial conclusions could be drawn about the extent to which Competition Authorities in South and Central America have compliance

programs and consider compliance measures in the context of sanctions, what developments can be expected in the future and what conditions are necessary to achieve these future developments, as well as potential future collaborations.

Part two identifies international best practices from different countries, institutions and jurisdictions.

Part three drafts practical recommendations for action based upon the initial assessment as well as on the international best practices, as voluntary guidance and aid for the respective authorities.

III. PART ONE: REPORT FINDINGS

A. Questionnaire – Part 1: *status quo*

Jurisdictions with compliance programs

The report shows that 87% of the competition authorities which participated in the survey support or promote the implementation of compliance systems. Authorities that assist in the implementation of compliance measures are namely the authorities of (i) Argentina (ii) Brazil, (iii) Chile, (iv) Colombia, (v) Costa Rica, (vi) Ecuador, (vii) Honduras, (viii) Mexico, (ix) Nicaragua, (x) Panama, (xi) Paraguay, (xii) Peru and (xiii) The Dominican Republic.

Competition authorities supporting the implementation of compliance measures

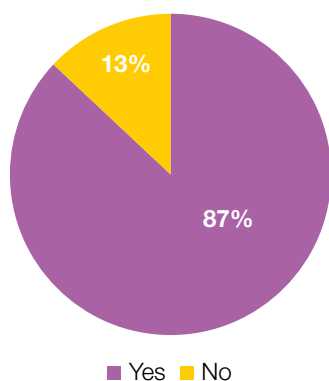


Figure 1

At the time of response, the competition authority of El Salvador was in the process of assessing ideas for non-binding compliance guidelines and considering whether incentives could be generated to make compliance attractive to companies.¹⁸ Costa Rica had recently reformed its competition law, and the new law incorporated the concept of “voluntary compliance programmes”. At the time of response, Costa Rica’s Coprocom was formulating guidelines for voluntary

¹⁸ The Superintendence of Competition of El Salvador confirmed in August 2023 that since responding to the initial surveys they had issued guidelines for companies to formulate competition compliance systems. It reported that compliance systems might be considered for the reduction of sanctions based on a case-by-case assessment.

compliance measures and was planning on working with companies to develop them in the future.¹⁹

The Colombian Superintendency of Industry and Commerce reported having created a unit called the Compliance Directorate with the functions of promoting and monitoring compliance systems, with a team of around 25 people. This unit has published a document entitled “Guidance on the Implementation of Competition Law Compliance Programmes”.

The survey shows that 53 per cent of the participating competition authorities use a combination of two or more methods mentioned to support companies in their compliance efforts (see Figure 2).

Competition authorities using a mixture of different tools to support compliance efforts by companies

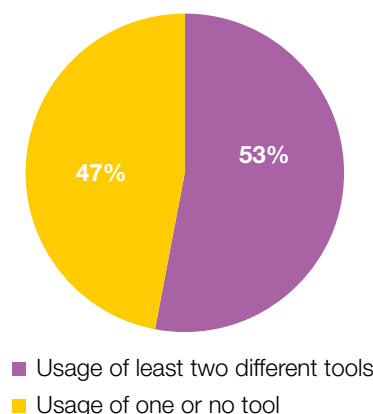


Figure 2

¹⁹ In 2016, the Government presented the Bill of Law 19.996 on the Creation of the Administrative Competition Tribunal, which sought to reform Law 7472 and Law 8642 and address the main weaknesses of Costa Rica’s competition regime identified by the Competition Committee. Faced with difficulties in passing this bill, the Government prepared a new draft bill which, despite being more ambitious, was thought to have better prospects of success. This bill was submitted for public consultation in December 2018. In March 2019, the Government consequently presented Bill of Law 21.303 ‘For the Strengthening of the Competition Authorities in Costa Rica’ to the Legislative Assembly. This bill, which was adopted on 29 August 2019 as Law 9736 (the ‘Competition Reform Act’), significantly reformed the competition law regime in Costa Rica. The bill entered into force in November 2019.

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The most common form of assistance provided by Competition Authorities (with over 50% doing so) consists of *the issuance of guidelines on the implementation of compliance programs* (see Table 1). The fact that Competition Authorities play a leading role in the drafting of these guidelines generates considerable value. Competition Authorities can draw on their experience from their years of investigative activities to provide guidance on how companies can identify their antitrust hotspots.

Providing guidance of this type offers benefits to Competition authorities as well as the companies the guidance is aimed at. High-quality compliance

systems can complement and support competition law enforcement, especially for Competition authorities with fewer financial and human resources.

Some authorities are exploring further methods to assist companies' compliance efforts in addition to the issuing of guidelines (see Table 2). The additional methods include (ii) *advising companies on compliance issues*, (iii) *providing companies with other compliance documents*, (iv) *conducting compliance training for companies* and (v) *promoting compliance with other measures* (see Table 1). The authorities of Argentina, Brazil, Chile, Colombia, Ecuador, Mexico, Nicaragua, Panama, Peru and the Dominican Republic use a combination of these different tools.

	Guidelines	Advising	Providing other compliance documents	Compliance training	Other measures
Argentina	x				x
Brazil	x		x		x
Chile	x				x
Colombia		x	x	x	x
Costa Rica ²⁰					
Ecuador	x			x	
El Salvador ²¹					
Guatemala ²²					
Honduras					x
Mexico	x		x	x	x
Nicaragua	x	x	x	x	
Panama	x	x	x	x	
Paraguay ²³					x
Peru	x				x
The Dom. Rep. ²⁴	x		x		
Uruguay					

Table 1 Overview of the combinations used to provide assistance in the implementation of compliance measures

²⁰ At the time of the response, Costa Rica was in the process of formulating the voluntary compliance programme guidelines and future work with companies was planned. In 2023, Coprocom reported that it has issued guidelines and is applying them.

²¹ In 2023, the Competition Superintendency reported that it has issued guidelines and is applying them.

²² At the time of the project, Guatemala had not enacted a competition law.

²³ In 2023, Comco reported that it has issued guidelines and is applying them.

²⁴ In 2023, PRO-COMPETENCIA reported a case in which the Compliance Plan submitted by the Cervecería Nacional Dominicana (CND) was duly evaluated according to the guidelines established by the Board of Directors of PRO-COMPETENCIA through Resolution 013-2017. The recommendations for improvement were presented to the economic agent so that the compliance programme could be corrected and/or completed in its content, and subsequently submitted to a new review by the authority. The updated compliance plan was never re-submitted to PRO-COMPETENCIA.

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	Other methods used by authorities to promote competition compliance in companies
Argentina	Training and monitoring of associations are pending, so that they can incorporate good practices that will allow them to mitigate possible infractions of the antitrust law.
Chile	Promotion or advocacy activities on compliance measures, such as seminars, lectures, etc.
Colombia	Technical Standard NTC 6378:2020 provides the requirements for the establishment, in companies, of good practices for competition in the markets and the promotion of the competition culture.
Honduras	Although the Honduran CDPC has not implemented compliance programmes, other measures have been issued to monitor the behavior and/or conduct of economic operators in economic concentration procedures, especially in those operations whose approval has been conditionally granted. Regarding investigation cases where anticompetitive practices have been detected, measures have been adopted within the framework of Advocacy actions aimed at correcting these behaviors, or at least attenuating this behavior.
Mexico	(1) Organization of forums on compliance measures (2) Generating advocacy documents with recommendations for efficient compliance measures (3) Developing social media campaigns on specific compliance-related topics
Nicaragua	Promoting compliance in companies with e.g., compliance audits
Paraguay	Organization of compliance seminars
Peru	A promotional video: (358) Guía de Programas de Cumplimiento de las Normas de Libre Competencia - YouTube

Table 2 Summary of additional measures to promote and support compliance

Mexico, for example, makes use of available social networks such as Facebook, Twitter and LinkedIn to develop and communicate the benefits of compliance or on specific compliance-related topics, e.g., on the benefits and obligations of the sanctions reduction or immunity program developed by the Mexican Competition Authority (henceforth “COFECE”). Furthermore, COFECE regularly organizes events such as seminars, conferences and trainings. These events are aimed at the business community to promote compliance.

Together with the Colombian Institute of Technical Standards and Certification (Icontec), the Colombian Authority has developed and established the Colombian Technical Standard NTC 6378:2020.²⁵

This standard created requirements and good practice for developing “free economic competition” and promoting a culture of free competition.

Compliance efforts and sanction mitigation

As can be seen in the table below (Table 3), in 2022 approximately half of the authorities surveyed recognize compliance efforts by companies when considering the imposition of sanctions. This was an increase from the start of the project, when only the competition authorities of Brazil, Chile and Peru took compliance programs into account. Nevertheless, the existence of a compliance system does not exempt a company from sanctions for cartel conduct in any of the surveyed jurisdictions.

²⁵ <https://tienda.icontec.org/gp-requisitos-para-el-establecimiento-de-buenas-practicas-de-proteccion-para-la-libre-competencia-ntc6378-2020.html>, (Retrieved 2021, October 19).

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Does the presence of a compliance system reduce fines?	Mitigating the penalty	Penalty exclusion	No impact
Argentina	x		
Brazil	x		
Chile	x		
Colombia	x		
Costa Rica	x		
Ecuador ²⁶			x
Honduras			x
Guatemala			x
Mexico ²⁷			x
Nicaragua	x		
Panama			x
Paraguay			x
Peru	x		
The Dominican Republic			x
Uruguay			x

Table 3 How compliance is treated by the countries surveyed

In order for compliance efforts to be recognized as a mitigating factor in the imposition of sanctions, the competition authorities of Argentina, Chile, Costa Rica, Nicaragua and Peru require that the measures were already in place before proceedings were initiated. In Colombia, compliance measures implemented during and after an antitrust investigation are taken into account (but not measures that were in place before the violation and failed to prevent it). Brazil and (in practice)²⁸ Mexico goes one step further and when determining a sanction consider a company's

compliance measures no matter when they were introduced, including commitments to improve its compliance efforts in the future. In the case of Brazil, whether a sanction reduction is available for future improvements to compliance measures can be contingent on the actual implementation of those improvements.

Costa Rica recently reformed its competition regulations and enacted the “Law for the Strengthening of Competition Authorities”, Law No. 9736. Article 26 incorporates the factor of “voluntary compliance programs in competition matters”. At the time of response, the Costa Rican Competition Authority (henceforth, “COPOCROM”) was in the process of developing relevant regulations and expected that it would issue specific guidelines on the subject.

In 2023, the competition authorities of Costa Rica, El Salvador and Paraguay reported that they had issued and started applying compliance guidelines since completing the questionnaire.

²⁶ Ecuador reported in August 2023 that it has introduced guidelines for compliance systems and may consider compliance systems as a mitigating factor in the sanctions context based on a case-by-case assessment.

²⁷ Although the Mexican Competition Law does not explicitly consider compliance systems as a mitigating factor for sanctions, there were specific cases in which compliance actions implemented by companies were considered when issuing a resolution. See example in the section *Specific court rulings on the role of compliance efforts in determining sanctions*.

²⁸ As reflected in resolutions by COFECE and, previously, CFC, as discussed further below.

Specific court rulings on the role of compliance efforts in determining sanctions

The surveyed competition authorities were asked if there are any (national) court rulings in which compliance measures were taken into account to mitigate or exclude sanctions.

Three competition authorities provided examples of rulings where sanction mitigation had occurred, which are outlined below. Two of the cases described can be characterized as requiring the introduction of compliance systems as part of a sanction, as opposed to the presence of a compliance system being treated as a mitigating factor.

Brazil

In its response, Brazil referred to various judgments in which compliance measures were mitigating factors in administrative proceedings when determining a fine. As an example, the case “Requerimento nº 08700.004341/2016-44 and 08700.004341/2016-89 (SEI/CADE - 0549581 - Termo de Compromisso de Cessação (TCC))” and “Requerimento nº 08700.003450/2019-97, 008083/2017-56, 08700.007272/2018-92, 08700.001276/2020-81, 08700.008158/2016-18, 08700.006653/2020-79, 08700.004463/2017-11, 08700.004159/2017-74 e 08700.001449/2021-4” (part of Operation Lava Jato) can be considered in more detail.

(i) Case facts: Operation Lava Jato

Four contractors, namely Andrade Gutierrez Engenharia S.A., Construtora OAS S.A., Carioca Christiani-Nielsen Engenharia S.A., and Construtora Norberto Odebrecht S.A. (henceforth “Odebrecht,” collectively, “the contractors”) carried out various public works projects between 2000 and 2015.

The projects were investigated by the Brazilian Attorney General's Office as part of Operation Lava Jato. As one of the outcomes of this investigation, the contractors were found to have engaged in cartel conduct (as well as other crimes and offenses such as fraud in public tenders, money laundering and corruption), with Odebrecht assuming a leading role.

In relation to a group of six infrastructure projects affected by the conduct,²⁹ the Brazilian competition

²⁹ Addressed in Requerimento nº 08700.004341/2016-44 and 08700.004341/2016-89 (SEI/CADE - 0549581 - Termo de Compromisso de Cessação (TCC)).

authority, CADE (*Conselho Administrativo de Defesa Econômica*, henceforth, “CADE”) reached settlements with 16 companies, with fines for anticompetitive conduct totaling BRL 817 million (equivalent to approximately US\$ 157 million).

Over the course of 2022, CADE engaged in a series of negotiations with the contractors on cease-and-desist agreements for twelve cartel investigations in relation to the further affected roading project in Rio de Janeiro.³⁰ The terms of the cease- and- desist agreements included the contribution of BRL \$460.7 million over several years by the contractors towards the Fund for the Defense of Diffuse Rights as pecuniary penalties. This cease-and-desist agreements provided for the possibility of a 15% reduction in the contributions if the contractors could provide proof of reparation of damages caused by the conduct, and some of the agreements also provided for further reductions for the implementation and maintenance of “antitrust integrity programs”.

(ii) The treatment of compliance efforts

In relation to the initial group of six projects, Odebrecht, as the leading company of the anticompetitive practices, was granted sanction relief of approximately BRL 13 million (equivalent to approximately US\$ 2.5 million) for a range of mitigating circumstances. Those circumstances included its commitment to implement a compliance system in accordance with the “Guidelines for Competition Compliance Programs”³¹ published by CADE in 2016.

Odebrecht was required to implement a compliance system that included the following:

- the commitment of top management;
- the adoption of a code of conduct that provides specific guidelines for integrity in competition;
- an autonomous and independent compliance team.

³⁰ <https://www.gov.br/cade/pt-br/assuntos/noticias/cade-celebra-19-acordos-em-investigacoes-no-mercado-de-infraestrutura>; Requerimento nº 08700.003450/2019-97, 008083/2017-56, 08700.007272/2018-92, 08700.001276/2020-81, 08700.008158/2016-18, 08700.006653/2020-79, 08700.004463/2017-11, 08700.004159/2017-74 e 08700.001449/2021-4.

³¹ <https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-cade/compliance-guidelines-final-version.pdf>

In doing so, Odebrecht's compliance team was required to:

- establish criteria, methods and identify persons responsible for analyzing competitive risks;
- carry out activities and install internal communication and whistleblowing channels that are publicized among employees, suppliers and service providers and guarantee anonymity to those who file complaints and
- conduct regular courses and training.

In relation to the Rio de Janeiro roading project, CADE advised that the maximum potential value of any reductions for implementing compliance measures was 4% of the BRL \$460.7 million of contributions they were required to pay. In order to qualify for the reductions, the compliance measures must meet the requirements of CADE's compliance program. The program requires companies to identify, reduce and mitigate the risk of potential violations in all of their transactions, including affiliated or subsidiary companies. The companies were also required to submit an annual report, approved by an independent expert, regarding the measures implemented.

The approach in relation to the Rio de Janeiro roading project could either be characterized as treating the introduction of compliance measures as a mitigating factor, or instead as requiring the introduction of compliance measures as part of the sanction with an increase to be applied if that did not occur.

Chile

In its response, Chile referred to the judgment Sentencia N° 167/2019³² (relating to fresh chicken meat) as an example of compliance efforts acting a mitigating factor in the imposition of a sanction.

In response to a separate UNCTAD project, "Evaluation of the Impact of the Performance of the National Competition Authorities Participating in the COMPAL programme within their Respective Markets", Chile provided information about the judgment Sentencia N° 160/2017 (relating to tissue paper products),³³ which is also relevant.

³² See [Sentencia_167_2019.pdf \(tdlc.cl\)](#), (Retrieved 2021, October 19).

³³ https://unctad.org/system/files/official-document/ditcclp2019d1_en.pdf at 33-34 and <https://www.fne.gob.cl/tdlc-condena-a-cmpc-y-sca-por-colusion-en-el-mercado-del-papel-tissue/>.

(i) Case facts: Sentencia N° 167/2019 (fresh chicken meat)

In February 2019, the TDLC upheld an injunction filed by the FNE against Cencosud, SMU and Walmart for having executed an agreement or concerted practice in the fresh chicken meat market, fining them a total of more than \$8 billion pesos, in addition to ordering the implementation of an antitrust compliance system. In its ruling, the TDLC imposed a fine of 5,766 UTAs on Cencosud, 3,438 UTAs on SMU, and 4,743 UTAs on Walmart. The Court found that Walmart had a reasonable internal compliance and ethics program and accordingly reduced its sanction by 15 per cent.³⁴

(ii) The treatment of compliance efforts in Sentencia N° 167/2019 (fresh chicken meat)

This decision treated compliance efforts as a mitigating factor in the imposition of sanctions. In its judgment, the Court applied a 15% reduction to the fine imposed on Walmart after considering that the "*The firm ... has designed a reasonable ethics and compliance programme, which is implemented by the company and enforced as circumstances require, so that, in its view, it should be regarded as a serious, credible and effective programme.*" and it "*should certainly be recognized*".³⁵

(iii) Case facts: Sentencia N° 160/2017 (tissue paper products)

In February 2015, the FNC imposed an injunction against CMPC Tissue S.A. (CMPC) and SCA Chile S.A (SCA) for cartel conduct involving market allocation and price fixing for tissue paper products from 2000 until at least December 2011, affecting the national wholesale distribution market for tissue paper within the mass consumption channel. The TDLC upheld the injunction in a judgment dated December 2017 and imposed a fine for tax purposes on SCA of 20,000 annual taxable units. CMPC was exempted from a fine under Chile's compensated leniency program.

³⁴ See [Sentencia_167_2019.pdf \(tdlc.cl\)](#), (Retrieved 2021, October 19).

³⁵ See [Sentencia_167_2019.pdf \(tdlc.cl\)](#) (Retrieved 2021, October 19).

Separately from the judgment, the National Consumers Service also reached an extrajudicial compensation agreement with the CMPC to repay a total of the equivalent of US\$15 million to consumers.

(iv) The treatment of compliance efforts in Sentencia N° 160/2017 (tissue paper products)

In addition to the fine imposed on SCA in the judgment, the TDLC required both SCA and CMPC to adopt competition compliance systems for a five-year period, in accordance with FNE directives and guidelines. The TDLC further specified that the compliance system for each company should include, at a minimum:

- The appointment of a compliance committee, including at least one independent director, within 30 business days of the judgment being issued. The compliance committee's responsibilities were to include proposing the appointment of a compliance officer to the board of directors and ensuring the proper fulfillment of the compliance officer's duties.
- The appointment of a compliance officer within 30 business days of the establishment of the compliance committee. The compliance officer must be a person external to the company and their responsibilities were to include ensuring respect for competition law in each company and was to report directly to the board. The company was required to report to the FNE on the appointment.
- Delivering a copy of the judgment to any person involved in the cartel conduct and any directors, managers, assistant managers, executives or high-level employees involved in commercial matters (including sales, the definition of pricing policies, and quoting and bidding processes). Each of those individuals was also required to sign an affidavit stating that they had read and understood the judgment and were not aware of any further violations of competition laws. This process was to be repeated annually over the five-year period.
- Annual compliance training over the five-year period for the same groups of individuals as identified above, as well as any other person the compliance officer deems appropriate. This

training was required to be carried out by an external lawyer, economist or competition expert, and include an account of the judgment.

- The completion of at least two competition audits over the five-year period. Each audit was required to, at a minimum, review the email inboxes and call records of the groups of individuals identified above, their contractual incentives, the company's participation in bidding or listing processes, the company's participation in trade associations, and the company's internal competition policy.
- The maintenance of an anonymous complaints or whistleblowing line that would allow any employee to report potential competition violations directly to the compliance officer.
- Annual reports to the FNE over the five-year period providing an account of the execution of the compliance system.

The compliance systems in this case did not produce a mitigation of sanctions. Rather, the implementation of compliance systems can be considered a part of the sanctions themselves.

Mexico

In response, the competition authority of Mexico, COFECE, explained that Mexico's Federal Economic Competition Law does not expressly identify compliance measures as a mitigating factor in the setting of sanctions, but provided references to three cases where either it or the now disestablished Comisión Federal de Competencia (CFC) did take compliance measures into account when issuing resolutions. Those cases were AMPI Mazatlán, Expediente IO-001-2008 (decided by the CFC in 2010),³⁶ Hospitales, Expediente IO-001-2011 (decided by the CFC in 2013)³⁷ and Transportes de Chiapas, Expediente IO-004-2012 (decided by COFECE in 2015).³⁸

³⁶ <https://resoluciones.cofece.mx/CFCResoluciones/docs/Asuntos%20Juridicos/V22/48/1219070.pdf#search=%20AMPI%20Mazatl%C3%A1n>.

³⁷ <https://resoluciones.cofece.mx/CFCResoluciones/docs/Asuntos%20Juridicos/V76/9/1767628.pdf>

³⁸ <https://www.cofece.mx/sanciona-cofece-a-empresas-de-transporte-de-pasajeros-del-estado-de-chiapas-por-incurrir-en-practicas-monopolicas-absolutas/>

COFECE's consideration of compliance measures in Transportes de Chiapas, Expediente IO-004-2012, is outlined further below.³⁹

(i) Case facts: Expediente IO-004-2012

COFECE found that seven passenger transport companies in the state of Chiapas had entered into cartel agreements involving bid rigging and output restrictions in the period from 2010 to 2014. The investigation involved eight agreements, seven of which were found to be collusive, between different combinations of the companies and over different periods, affecting the Tuxtla-Comitán and Tuxtla-Tapachula routes.

COFECE ordered the seven companies to immediately cease the conduct and imposed fines totaling 26.6 million pesos (MXN) or USD \$1.69 million, consisting of a fine of 114,211 MXN for Teopisca, 76,364 MXN for Zuriel, 2,160,000 MXN for Balun Canan, 178,905 MXN for OTEZ, 178,905 MXN for OCC, 4,606,997 MXN for Aexa, and 88,090 MXN for AVC. This compared with estimated damages to users caused by the conduct of at least 43.8 million MXN for users of the Tuxtla-Comitán routes, and price increases of between 5% and 8% for passengers on the Tuxtla-Tapachula routes. The differences between the estimated damages to users and the fines imposed were in large part due to the fines being set according to the financial means of each company.

(ii) The treatment of compliance efforts

However, in the case of Aexa, the lower sanction compared with the damages caused by the conduct was also due to commitments it had made to adopt some specific compliance measures. These were to distribute a handbook, prepared by Aexa itself, on best practices for economic competition to its employers and managers, and to provide COFECE with evidence of this action.

Reasons for compliance efforts

The authorities surveyed were given a total of nine reasons as to why, *in their opinion*, companies implement compliance measures. They were asked to select all the reasons that they considered to be applicable. The following were available for selection: (i) to prevent violations of the law; (ii) to comply with industry standards; (iii) to promote/adhere to company ethical standards; (iv) to protect individual employees from sanctions; (v) to protect the company from reputational damage; (vi) to be able to take on contracts from private individuals; (vii) to be able to take on public contracts; (viii) that in the event of a violation, compliance measures are taken into account to mitigate or exclude punishment; and (ix) other.

According to the experience of the authorities surveyed, the most common reasons for companies to implement compliance measures are the following: (i) preventing violations of the law and (ii) protecting the company from a reputational damage, followed by (iii) promoting the companies' ethical standards and (iv) the mitigation and exclusion of penalties in the case of law infringement.

³⁹ See https://www.cofece.mx/cofece/ingles/images/Comunicados/Comunicados_ingles/COFECE-020-2015.pdf for the official English version of COFECE's media release on the resolution.

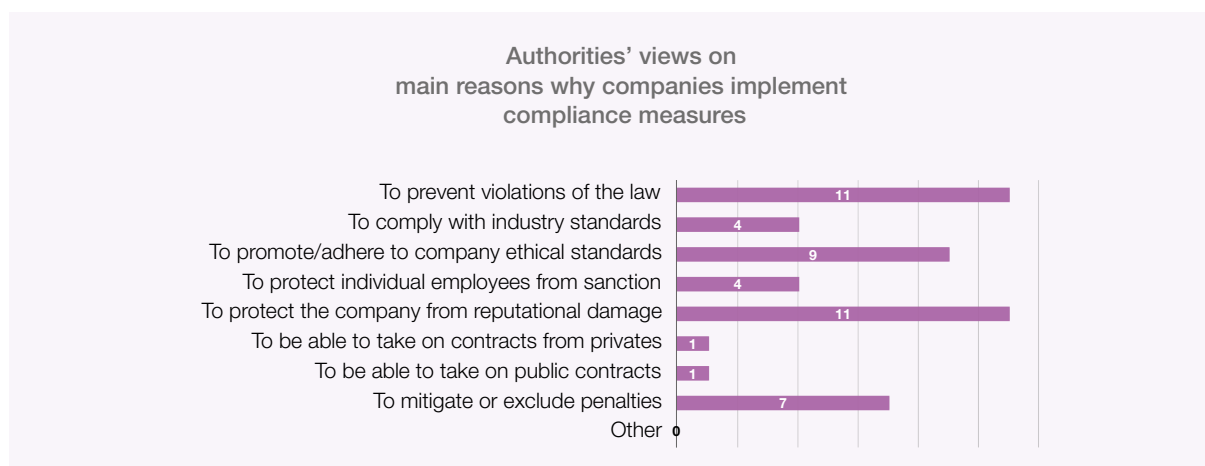


Figure 3

B. Questionnaire – Part 2: intended future developments

The second part of the questionnaire dealt with the question of whether changes (i) *at the level of the authorities*, (ii) *at the level of legislation* as well as (iii) *in*

the private sector, are being considered to influence companies to strengthen their compliance efforts in the future.

Future developments to promote strengthened compliance efforts:	at authority level	at a political / legislative level	in the private sector
Argentina			x
Brazil ⁴⁰	x	x	x
Chile			x
Colombia	x		x
Costa Rica	x		x
Ecuador			
Guatemala	x	x	
Honduras	x		x
Mexico	x	x	x
Nicaragua	x		x
Panama	x		
Paraguay	x		
Peru	x		x
The Dominican Republic	x		
Uruguay	x		

⁴⁰ In 2023, CADE reported that it proposes capacity building activities for companies on competition.

Table 4 Intended future developments to promote strengthened compliance efforts"

The table shows that future developments to promote compliance efforts are primarily planned at the national competition authority level and in the private sector.

In Guatemala, forums are held on competition and there were ongoing discussions on the implementation of a competition law.

Mexico was considering a draft regulation to revise the Federal Law on Economic Competition.⁴¹ The regulation proposed to establish that pre-established compliance measures will be considered when fines are imposed on economic agents for having engaged in absolute or relative monopolistic practices, abuse of market power and unlawful concentration.

The report shows that the most common new measure in the private sector to promote compliance is the *introduction of compliance programs by companies* (see Figure 4).

5 out of 15 of the authorities interviewed responded that there were no specific measures being taken to further promote compliance efforts in the private sector (separately from the development of compliance guidelines or changes at the political or legislative levels). This could indicate that those authorities are still in the early stages of developing compliance programs, or that there is not yet clarity as to which measures the private sector should be encouraged to adopt to improve compliance.

The Chilean-, Colombian-, Costa Rican- and Mexican Authorities made use of the “other” field to indicate the following additional measures: promoting lectures or seminars on compliance, the issuing of technical standards and certification norms, the development of a voluntary compliance system guide and the organization of events on compliance systems and actions by bar associations.



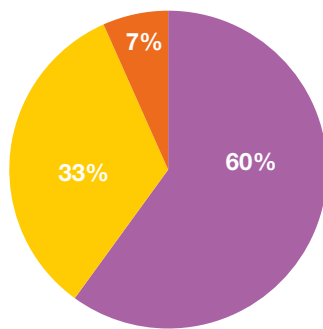
Figure 4

⁴¹ https://infosen.senado.gob.mx/sgsp/gaceta/64/3/2020-12-15-1/assets/documentos/Inic_PAN_Sen_Minerva_art_130bis_lfcea_programa_de_cumplimiento_normativo.pdf

C. Questionnaire – Part 3: collaboration on compliance efforts

One way for competition authorities to encourage companies to strengthen their compliance efforts can be to cooperate with research or institutional organizations. As the evaluation shows, about 2/3 of the authorities surveyed (64%) indicate they have the know-how and resources required to create guidelines and checklists and promote compliance measures in general (see Figure 5). Nicaragua mentioned being in the process of developing such know-how.

Percentage of competition authorities having the know-how and enough resources re promotion of compliance measures



■ Yes ■ No ■ In the process

Figure 5

The importance of cooperation for the further development of compliance is reflected in the fact that 13⁴² out of 15 of the competition authorities surveyed already have cooperation partnerships. These cooperation partners mainly consist of associations and international organizations.⁴³ Other cooperation partners included public and private companies and universities.

Colombia additionally named the National Standardization Organization as “other” cooperation partner (see Figure 6). Chile responded more broadly, indicating that the FNE, as part of its work, generally promotes compliance with competition law, and therefore also encourages the adoption of compliance systems, inter alia through talks, seminars, etc.

⁴² All the surveyed countries except from Costa Rica and Uruguay. Costa Rica explained that since the regulation was recent, it was still working on the guidelines and directives, and will then start providing training for economic agents.

⁴³ Countries mentioned cooperation with the International Competition Network – ICN, OECD and UNCTAD, as well as the Latin American Anti-Corruption Platform.

Existing partnerships of the competition authorities surveyed

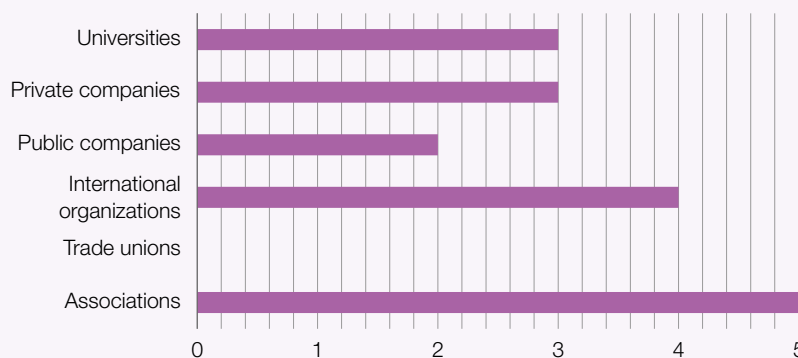


Figure 6

Practice: Engaging with stakeholders in the development of measures to promote compliance is helpful to share best practice and encourage “buy-in” from companies.

D. Summary of the key findings

Key Finding 1: Most authorities surveyed (87%) have compliance programs. To achieve this goal, the authorities surveyed use a mix of different tools, such as advising companies on compliance issues, providing companies with guidelines and other compliance documents, conducting compliance trainings for companies and promoting compliance with other measures.

Key Finding 2: Approximately half of the authorities surveyed take compliance measures into account when calculating fines. It should be emphasized that the prerequisite for the recognition of compliance measures in Argentina, Chile, Costa Rica, Nicaragua and Peru is that these were already in place before the proceedings were initiated. Colombia considers compliance efforts implemented during and after an antitrust investigation when assessing sanctions, but not measures that were already in place before a violation. When determining sanctions, Brazil and Mexico also consider commitments to improve compliance efforts in future. Some sanctions imposed in Brazil and Chile can be characterized as requiring the introduction of compliance systems as part of the sanction.

Key Finding 3: Most countries surveyed are aiming to further promote compliance efforts especially at the authority level and in the private sector. The most common measure being adopted to promote compliance is the introduction of compliance systems by companies. For some competition authorities, there is no clarity yet on what measures they will take or implement to achieve compliance goals.

Key Finding 4: 60% of the authorities surveyed state that they have sufficient resources and know-how to promote compliance measures. Furthermore, 93 % of the interviewed competition authorities surveyed already have cooperation partnerships with other stakeholders. Finally, all participants have indicated an interest in collaborating with other partners in this regard.

IV. PART TWO: INTERNATIONAL “BEST PRACTICES”

The second part of this report takes an in-depth look at several international “Best Practices” of some of the advanced authorities, international organizations, and business associations with regard to compliance mechanisms. In particular, the focus is on the structure and design of efficient compliance systems and how they are assessed by national competition authorities and courts.

E. National Best Practices

National competition authorities are increasingly issuing detailed guidelines in connection with compliance systems. The requirements of preselected countries are presented below. The countries were selected due to their advanced and representative experience in the enforcement of competition law and their promotion of competition compliance measures, providing a diverse range of best practices.

United States of America

The U.S. Federal Sentencing Guidelines for Organizational Crime from 1991 issued by the U.S. Federal Sentencing Commission set the framework for the sentencing of organizations and are the major driver for the development of modern corporate compliance. They provide strong incentives for efficient corporate compliance systems by identifying them as mitigating factors for sentences.⁴⁴ The Commission intends that a potential fine could be reduced by up to 95% if an organization can prove that an effective compliance system is in place, no high-level employee was involved in the infringing behaviour and the practices in question were reported rapidly to the authorities. The Federal Sentencing Guidelines apply equally to already existing compliance management systems as well as retroactively installed ones⁴⁵.

The Federal Sentencing Guidelines also contain seven criteria that are essential for an effective compliance system, including reasonable actions to achieve

compliance, consistent enforcement of disciplinary actions, and due diligence in delegating discretionary authority.⁴⁶

Furthermore, the Federal Trade Commission (henceforth, “FTC”) and the U.S. Department of Justice’s Antitrust Division offer guidance and policies specifically related to compliance with competition law.⁴⁷ This tailored guidance is the focus of the discussion that follows.

Best Practices

Several national and international guidelines approved by governmental bodies or organizations identify distinct factors that companies need to be aware of when implementing a compliance system to detect and prevent competition law infringements (“best practices”) and foster remedial efforts within companies. These factors primarily ensure the effectiveness, proper application, and practicability of the system in question. Criteria such as risk assessment, policies, and procedures in addition to disciplinary measures are among the factors to consider.

The main sources of these best practices in the United States are the “Federal Sentencing Guidelines for Organizations” by the U.S. Sentencing Commission, the “Principles of Federal Prosecution of Business Organization” in the Justice Manual by the U.S. Department of Justice and the evaluation guidelines issued by the Criminal⁴⁸ and Antitrust⁴⁹ Divisions of the U.S. Department of Justice. In particular, the DOJ Criminal Division has published guidelines called “Evaluation of Corporate Compliance Programs” and “Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations” for prosecutors’ detail how the principles of Federal Prosecution of business organisations apply to the prosecution of business organisations for competition offenses.

⁴⁴ Biegelman, Compliance Program, p. 51; Biegelman, Fraud Prevention, p. 50.

⁴⁵ Eufinger, 2016, p. 211

⁴⁶ Desio (n.d.)

⁴⁷ FTC, Competition Guidance | Federal Trade Commission ([ftc.gov](https://www.ftc.gov)); U.S. DOJ, Public Documents ([justice.gov](https://www.justice.gov)).

⁴⁸ Evaluation of Corporate Compliance Programs

⁴⁹ Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations

The requirements necessary for compliance systems to be considered as mitigating factors for competition infringements are:

- (i) Risk assessment and risk management process.
- (ii) Policies to comprehensively address the mitigation of identified risks, which are well integrated into the organization⁵⁰.
- (iii) Periodic training for and communications with relevant employees, directors, officers, and business partners based on the risk they are exposed to⁵¹.
- (iv) Reporting and investigation procedures that allow employees or other involved parties to anonymously or confidentially report misconduct without the fear of reprisal or other negative consequences, and a process that facilitates the monitoring, investigation and measures taken based on the reported action by qualified professionals⁵².
- (v) Commitment by senior and middle management and a compliance culture.⁵³
- (vi) The use of incentives and disciplinary measures to promote compliant behaviour within an organization, with regular enforcement.⁵⁴
- (vii) Regular reviews of the compliance management system with a view to making improvements.⁵⁵

⁵⁰ U.S. Department of Justice Criminal Division, Evaluation of Compliance Programs, p. 4; Eufinger, 2016, p. 212; U.S. Department of Justice Antitrust Division, Evaluation of Compliance Programs in Criminal Antitrust Investigations, p. 4-5.

⁵¹ U.S. Department of Justice Criminal Division, Evaluation of Compliance Programs, p. 5-6; U.S. Department of Justice Antitrust Division, Evaluation of Compliance Programs in Criminal Antitrust Investigations, p. 8-9.

⁵² U.S. Department of Justice Criminal Division, Evaluation of Compliance Programs, p. 6-7; Desio (n.d.); Eufinger, 2016, p. 212; U.S. Department of Justice Antitrust Division, Evaluation of Compliance Programs in Criminal Antitrust Investigations, p. 10-11.

⁵³ U.S. Department of Justice Criminal Division, Evaluation of Compliance Programs, p. 10; Desio (n.d.); Eufinger, 2016, p. 211; U.S. Department of Justice Antitrust Division, Evaluation of Compliance Programs in Criminal Antitrust Investigations, p. 5-6.

⁵⁴ U.S. Department of Justice Criminal Division, Evaluation of Compliance Programs, p. 13; Desio (n.d.); U.S. Department of Justice Antitrust Division, Evaluation of Compliance Programs in Criminal Antitrust Investigations, p. 711-12.

⁵⁵ U.S. Department of Justice Criminal Division, Evaluation of Compliance Programs, p. 15-16; Desio (n.d.); U.S. Department of Justice Antitrust Division, Evaluation of Compliance Programs in Criminal Antitrust Investigations, p. 10.

Consideration of compliance measures by authorities and courts

The Justice Manual (henceforth, *the Manual*), which was known as the United States Attorney's Manual prior to 2018, is issued by the US Department of Justice (DOJ) and contains guidance for prosecutors who participate in the investigation of Federal Law violations.

The "Principles of Federal Prosecution of Business Organizations" listed in the criminal division (ninth title) of the Manual⁵⁶ state that the existence of a compliance system is not sufficient, in and of itself, to justify not charging a corporation for criminal misconduct, but its adequacy (in conjunction with other factors) can be one relevant factor to a decision on whether to charge the corporation. The existence and adequacy of a compliance program can also impact the terms of any resolution with the DOJ and whether there is a need for an independent compliance monitor. The DOJ will consider both pre-existing and retrospectively installed compliance systems.

The Principles of Federal Prosecution of Business Organizations contain a specific set of criteria that prosecutors should account for when deciding on whether to press charges against a corporation or start an investigation. They include the following questions:

1. "Is the corporation's compliance program well designed?"
2. "Is the program being applied earnestly and in good faith? "
3. "Does the corporation's compliance program work?"⁵⁷

The following sub-criteria are particularly noteworthy: "adequacy and effectiveness of the corporation's compliance program at the time of the offense, as well as at the time of a charging decision" and "efforts to implement an adequate and effective corporate compliance program or to improve an existing one."⁵⁸

⁵⁶ U.S. Department of Justice, Archives (USAM 1997), Section 1-1.000.

⁵⁷ U.S. Department of Justice Criminal Division, Evaluation of Compliance Programs, p. 1-2

⁵⁸ U.S. Department of Justice, Justice Manual, Section 9-28.300.

European Union and its Member States

To facilitate and promote compliance with competition laws within the European Union, the European Commission makes use of the following types of instruments:

- (i) compliance advocacy tools which are used to create awareness of the laws and their application and how to develop an effective compliance management system, such as “European Commission, Compliance Matters” guidelines,
- (ii) guidance on the material competition laws which include fining policies like the “Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a),”⁵⁹ and
- (iii) promoting other tools to assist with compliance developed by business organizations and other international organizations, such as the International Chamber of Commerce (henceforth, “ICC”), by publishing links to those tools on its website.⁶⁰

Best Practices

Compliance with EU competition law requires that companies take a proactive approach and develop a system for their specific circumstances, size, industry, and environment. This will facilitate compliance with EU competition rules and avoid misconduct within all levels of the organization. The European Commission⁶¹ expects that a company’s competition compliance system should include the following features:

- (i) A clear compliance strategy that identifies the risks they are exposed to and where EU competition law infringements might most likely occur, using appropriate corporate language and a form which will be understood by everyone throughout the company.⁶²

- (ii) Commitment to the strategy by senior management.⁶³
- (iii) Measures to safeguard the employee’s adherence as well as commitment to the implemented system (e.g., a written acknowledgment by the staff after the distribution of EU competition law information and internal guidelines prior to a training session), consequences (such as a penalty) for non-compliance, and potentially also positive incentives to increase an employee’s awareness of⁶⁴ and motivation to comply with internal and external rules.⁶⁵
- (iv) Internal reporting mechanisms which encourage employees and management to speak up when they are aware of the process that facilitates the communication, ensures their safety, and sets out the necessary information and procedure to do so⁶⁶. The EU Directive 2019/1937 on the protection of whistleblowers also aims to increase protections for whistleblowers so that they won’t have to fear negative consequences such as reprisals, discrimination, or intimidation after a report of misconduct and obliges companies within the EU that have a certain size to offer secure and anonymous internal reporting channels for whistleblowers.⁶⁷
- (v) Regular training.⁶⁸
- (vi) Regular monitoring, auditing, and updates of the system.⁶⁹

Consideration of compliance measures by authorities and courts

The European Commission previously treated compliance measures, including those introduced after a violation, as mitigating factor within the stage of sanctions imposition in the early eighties and nineties.⁷⁰

⁵⁹ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, published in OJ C 210/2 of 1.9.2006.

⁶⁰ OECD, Competition Compliance Programmes – Note by the European Union, p. 1-4; EU commissions compliance website https://competition-policy.ec.europa.eu/antitrust/compliance_en

⁶¹ European Commission, Compliance matters, p. 9; OECD, Competition Compliance Programmes – Note by the European Union, p. 1-4.

⁶² European Commission, Compliance matters, p. 16-17

⁶³ European Commission, Compliance matters, p. 17

⁶⁴

⁶⁵ European Commission, Compliance matters, p. 17

⁶⁶ European Commission, Compliance matters, p. 18

⁶⁷ DIRECTIVE (EU) 2019/1937 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 23 October 2019 on the protection of persons who report breaches of Union law; Press release - Entry into force of the directive on whistleblower protection.

⁶⁸ European Commission, Compliance matters, p. 18

⁶⁹ European Commission, Compliance matters, p. 18-19

⁷⁰ E.g., Commission Decision of 7.12.1982, National Panasonic, JO L 354, p.28; Commission decision of 5.6.1991,Viho/Toshiba, JO L 287, p.39

But the European Commission changed its practice in the mid-nineties, and no longer considers the existence of a compliance system as a mitigating factor for fines. Although the European Commission welcomes and acknowledges the importance of compliance measures, it argues that it is a company's duty to respect the law and failing to do so has its consequences.⁷¹ It furthermore states that the objective of a compliance system is to prevent any competition law violation and if an existing program failed to achieve compliance it is ineffective. The latter is nevertheless not considered as an aggravating circumstance resulting in a higher fine.⁷²

Some legal commentators⁷³ criticize this approach because they regard compliance systems as the only organizational means to prevent violations of antitrust law. They also argue that this can at least reduce organizational culpability on the part of the company.⁷⁴ The European Commission has nevertheless made clear statements maintaining its stance against the recognition of compliance systems as a factor relevant to penalty⁷⁵, most recently in its "Compliance Matters" guideline from 2013.⁷⁶

The European General Court also disregards compliance systems implemented after a violation. Regarding pre-existing compliance systems, it has also followed the European Commission and does not consider them as mitigating factors.⁷⁷ The Court of Justice of the European Union (ECJ) had so far not commented on the consideration of compliance

measures and had not objected to the practice of the European Commission or the General Court.⁷⁸

At Member State level, most Competition Authorities have established compliance programmes, with Spain and France having established new programmes.

In May 2022, France's *Autorité de la Concurrence* issued an update to its framework document on competition compliance systems, which was originally published in 2012 but had been withdrawn following the introduction of the settlement procedure.⁷⁹

The text includes an introduction recalling the powers of the Authority in its mission to supervise markets, as well as three parts dedicated to the benefits of compliance systems, the conditions and criteria that must be met in order to guarantee their effectiveness and the role of the various compliance stakeholders in ensuring the overall success of compliance systems.

These guiding principles are complemented by a broader set of resources that the Authority makes available to companies and business associations to support their compliance efforts.⁸⁰

Spain's *Comisión Nacional de los Mercados y la Competencia* (CNMC) adopted its Antitrust Compliance Programmes Guidelines in June 2020.⁸¹ The definitive impetus of regulatory compliance policies comes from two important legislative developments: the prohibition of public administrations contracting businessmen sanctioned for serious infringements of Law 15/2007, of 3 July, on the 15/2007, of 3 July 2007, on the Defence of Competition (LDC), provided for in Article 71.1.b) of the Article 71.1.b) of Law 9/2017 on Public Sector Contracts³ (LCSP), and the recent adoption of Directive 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the of 23 October 2019 on the protection of persons who report breaches of public procurement law (LCSP, also known as the "Whistleblowing Directive".

⁷¹ European Commission, Compliance matters, p. 20-21; Denoth/Kaufmann, p. 374

⁷² European Commission, Compliance matters, p. 19.

⁷³ G. Dannecker/J. Biermann, in: T. Körber/H. Schweitzer/D. Zimmer (Hg.), Wettbewerbsrecht Band 1. EU, Kommentar zum Europäischen Kartellrecht, 6th edition, Munich 2019, VO 1/2003 23 N 217; K. Hofstetter/M. Ludescher, Der Konzern als Adressat von Bussen im EU-Kartellrecht, in: P. V. Kunz/D. Herren/T. Cottier/R. Matteotti, Wirtschaftsrecht in Theorie und Praxis, Festschrift für Roland von Büren, Basel 2009, 496 f.

⁷⁴ Denoth/Kaufmann, p. 374.

⁷⁵ <http://ec.europa.eu/competition/speeches/>; See Speeches of Vice-president Almunia in the context of the joint competition conference Business Europe/US Chamber of Commerce in October 2010.

⁷⁶ Compliance matters - Publications Office of the EU (europa.eu)

⁷⁷ EuG vom 14. Mai 1998, T-327/94, SCA Holding Ltd gegen Europäische Kommission, II-1379 ff., Rz. 115 f.; EuG vom 24. März 2011, T-384/06, IBP Ltd und International Building Products France SA gegen Europäische Kommission, Rz. 83 und 105

⁷⁸ D. Lengauer/L. Ruckstuhl, Compliance, Recht für die Praxis, Zürich 2017, 126.

⁷⁹ See document of the settlement procedure in https://www.autoritedelaconcurrence.fr/sites/default/files/communique19oct17_transaction_conformite.pdf

⁸⁰ https://www.autoritedelaconcurrence.fr/sites/default/files/2022-05/Conformite_nouveau%20doc-cadre%20ADLC.pdf

⁸¹ https://www.cnmc.es/sites/default/files/editor_contenidos/Competencia/Normativas_guias/202006_Guia_Compliance_FINAL_eng.pdf

The CNMC has commented on compliance systems, both those implemented prior to the detection of the infringement (*ex-ante* compliance systems) and those implemented or modified for improvement once the company has already been investigated (*ex post* compliance systems).

The criteria that the CNMC takes into account when assessing compliance systems are as follows:

- Involvement of management bodies and/or senior management of the company management of the company
- Effective training
- Existence of a complaints channel
- Independence and autonomy of the person responsible for the design and control of compliance policies
- Identification of risks and design of protocols or control mechanisms
- Design of the internal procedure for handling complaints and managing the detection of infringements.
- Designing a transparent and effective disciplinary system

The CNMC considers that the mere implementation of a compliance system, whether *ex ante* or *ex post* upon detection of an infringement, does not in and of itself justify a mitigation of the company's liability or sanction. Nevertheless, the CNMC will assess whether a compliance system (regardless of whether it was already in place before or improved or implemented after the competition authority's investigation) can be considered a moderating element of the sanction or as a mitigating element of its liability on a case-by-case basis. The CNMC will normally take a more positive view of an effective *ex ante* compliance system than of a system that has not been implemented or improved.

Whether compliance measures result in any mitigation of liability will depend on the type of conduct (cartel or other) and its gravity (serious or very serious) as well as the criteria set out in the guide.

United Kingdom

The Office of Fair Trading (henceforth, "OFT") was for many years the United Kingdom's primary competition and consumer authority. Since 2014 its responsibilities regarding competition and compliance have been conferred to the Competition and Markets Authority (henceforth, "CMA"), whereby the OFT's documents were largely adopted by the CMA in the process.⁸²

The OFT has approved in 2011 a number of compliance guidance documents, such as guidelines named "Company Directors and Competition Law,"⁸³ "Quick Guide to Competition Law Compliance"⁸⁴ and "How Your Business Can Achieve Compliance With Competition Law"⁸⁵ and a 15 minutes short movie with the title "Understanding Competition Law."⁸⁶ This "Compliance-Package" intended to sensitize companies to antitrust violations and the necessity of appropriate compliance, to familiarize companies with the subject of antitrust law measures and to identify concrete options for action.⁸⁷

Best Practices

The CMA follows a two-pronged approach: the core requirement is that a company must commit to compliance. The top management, especially the board, must set the "tone from the top down" and unequivocally affirm its commitment to compliance. Additionally, enterprises are required to establish an intelligent and risk-based approach which is tailored to the singular specifications of the organization. Therefore, it is important to:

- (i) identify the specific risks of the company, taking into account the size and nature of each business;
- (ii) analyze and evaluate the risks, including for low risk, medium risk and high risk employees;
- (iii) manage the risks, including by implementing suitable training measures, strategies and procedures, with high-risk employees receiving

⁸² CMA, Quick Guide to Complying with Competition Law, p. 1, p. 14.

⁸³ OFT1340.

⁸⁴ CMA, Quick Guide to Competition Law Compliance.

⁸⁵ OFT 1341.

⁸⁶ <https://www.youtube.com/watch?v=ACA9vdlNqek>, visited 02.11.2022.

⁸⁷ Soyez, S. 189 ff.

correspondingly more intensive and detailed training; and

- (iv) monitor and review the compliance system at regular intervals, as well as out of cycle in particular circumstances.⁸⁸

Within the framework of “from the top down”, the CMA expects that directors are assigned a special role. In its own guide “Company directors and competition law”, it suggests that directors ask themselves the following questions concerning competition law compliance:⁸⁹

- What are our current compliance risks?
- Which are the low, medium and high risks?
- What measures should be taken by us to mitigate these risks?
- When should we next review the risks to check they have not changed?
- When should we next review the effectiveness of our risk mitigation activities?

Consideration of compliance measures by authorities and courts

The fines imposed by the CMA in the event of a violation of competition law can be reduced by up to 10% if the company takes or has taken appropriate compliance measures before or shortly after such a violation. These can be based on the four-step principle described hereinabove or other equivalent measures, but must in any case be suitable to ensure compliance under Chapters I and II of the Competition Act 1998 (the CA98) and Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).⁹⁰ In one of its 2014 decisions in the pharmaceutical sector, the OFT at the time explicitly states that compliance efforts should be considered as a mitigating factor.⁹¹

The CMA emphasizes that there is no “one-fits-all” compliance system and that each case must always be assessed individually. There is no provision for an automatic reduction of fines. Companies have the burden of proof to demonstrate that they have

taken appropriate measures according to the size of the company and the specific antitrust risk of the company.

Finally, compliance measures are not usually considered by the CMA to increase penalties. Exceptionally, however, this may be the case if they serve to conceal or facilitate the infringement or to mislead the CMA about the existence of a violation.⁹²

Austria

The Austrian Federal Competition Authority (henceforth, “FCA”) provides various guidelines and viewpoints regarding compliance with competition law on its website. One of the central documents is the brochure “Antitrust Law and Compliance - For a Professional Handling of Antitrust Law Rules at the Operational Level”⁹³ which was created together with the Austrian Economic Chamber.

Best Practices

The FCA recommends that companies should first use the International Chamber of Commerce’s toolkit (henceforth, “ICC Toolkit”)⁹⁴ to create a compliance system. The FCA also outlines five –steps to create a compliance system :⁹⁵

- (i) Companies must analyze the relevant, industry-specific antitrust risks.
- (ii) A compliance culture should be exemplified from the top management level.
- (iii) Companies should ensure that every employee as well as the management level is committed to compliance values. This should also be anchored in employment law.
- (iv) The selected compliance measures should be continuously monitored, evaluated and, if necessary, renewed.
- (v) Finally, there is no universal patent formula for successful compliance. Instead, companies

⁸⁸ <https://www.gov.uk/government/publications/competition-law-risk-a-short-guide/competition-law-risk-a-short-guide>

⁸⁹ OFT 1240, p. 21.

⁹⁰ How your business can achieve compliance with competition law, p. 31 f.

⁹¹ Case CE/9627/12 from 20 March 2014, S. 73 oder Rz. 7.29 ff.

⁹² How your business can achieve compliance with competition law, p. 31 f.

⁹³ https://www.bwb.gv.at/fileadmin/user_upload/Downloads/standpunkte/Brosch%3Fre%20-%20Kartellrecht%20und%20Compliance.pdf

⁹⁴ <https://iccwbo.org/content/uploads/sites/3/2014/10/ICC-Antitrust-Compliance-Toolkit-GERMAN.pdf>

⁹⁵ BWB, KARTELLRECHT UND COMPLIANCE, p. 16 f.

must take individual measures that are suitable for them.

These broadly formulated principles are further substantiated by the FCA using a more specific twelve-point program:⁹⁶

- (i) Tone from the top: The measures must be supported by senior management.
- (ii) This must be taken seriously within the company and also distributed to all relevant levels.
- (iii) The measures selected must be effective. They must withstand internal and external stress tests, such as mock dawn raids.
- (iv) In addition, the measures must be of a certain quality and not merely aimed at meeting minimum standards.
- (v) (In-person) training and education must be provided for the relevant positions within the company.
- (vi) Measures taken within the company must be consistently documented and traceable so that they can contribute to increasing compliance.
- (vii) The measures must also be regularly reviewed and updated.
- (viii) If an infringement occurs, comprehensive cooperation with the authorities is necessary.
- (ix) The cooperation must continue until the conclusion of the antitrust proceedings.
- (x) The disclosure of evidence and, if necessary, the provision as a leniency is very much welcomed by the FCA.
- (xi) The measures must be suitable to prevent a new infringement.
- (xii) No “one-fits-all”-solution: The compliance system must be tailored to the individual needs of each company.

Consideration of compliance measures by authorities and courts

In 2013, the FCA held that the existence of a compliance system in a company did not generally justify refraining from imposing a fine in the case of an antitrust violation. This Austrian Supreme Court

⁹⁶ Thanner, *Becka_Anerkennung_von_compliance_die_digitale_herausforderung im Kartellrecht*, S. 31.

(“OHG”) did not object to this position.⁹⁷ However, if a company follows the twelve-point program outlined, a mitigation of sanctions may be available, up to a maximum of 5% of the total fine.⁹⁸

Australia

The Australian Competition and Consumer Commission (henceforth “ACCC”) is a statutory authority enforcing the Australian Competition and Consumer Act 2010⁹⁹ (henceforth “CCA”) as well as other laws that are related to the promotion and regulation of competition. The ACCC’s first set of recommendations regarding legally accepted compliance systems in companies were published in the early 2000s and they contain four different program templates that businesses can use and adjust when developing a competition compliance system. The requirements in the templates differ depending on the size of the company in question, ranging from micro-businesses to large businesses.¹⁰⁰

In addition, there are also compliance guidelines published by the country’s leading and independent non-profit and non-governmental standards organisation called Standards Australia¹⁰¹. The first Australian Standard on Compliance Program AS 3806-1998 was set in 1998 and is considered as the benchmark for compliance systems by the ACCC and other Australian regulators. Moreover, its latest revised version AS 3806-2006 served as the basis for the Compliance Management Systems – Guidelines ISO 19600:2014 issued by the International Organization for Standardization in 2014 that were adopted by more than 160 countries including Australia.¹⁰²

Aside from the above-mentioned sources for compliance systems, Australian authorities also follow international compliance guidelines by the OECD and ISO (of which they have been members of for decades), such as the OECD Compliance Programmes and the ISO 37301:2021 Compliance management systems - Requirements with guidance for use.¹⁰³

⁹⁷ *Entscheid 16Ok2/13*.

⁹⁸ *Vortrag Thanner*, p. 15.

⁹⁹ Former name: Trade Practices Act 1974

¹⁰⁰ ACCC, *Implementing compliance program*, [Implementing a business compliance program | ACCC](#)

¹⁰¹ originally called the Australian Commonwealth Engineering Standards Association

¹⁰² Homann, 2021; Gasiorowski-Denis, 2014

¹⁰³ Australia and the OECD; ISO SA Australia Membership.

Best Practices

The ACCC¹⁰⁴ encourages businesses to implement a compliance system that helps them to monitor and safeguard their abidance by the laws set in the Competition and Consumer Act 2010 as part of good corporate governance, and such efforts have been recognised by the Federal Court.¹⁰⁵ In case of a breach that has already occurred, the compliance system should help to resolve that issue that and prevent further breaches¹⁰⁶. The ACCC reinforces the encouragement by providing resources like templates as guidance for legally eligible compliance systems and reviews of already established systems if they are subject to a court-enforceable undertaking.¹⁰⁷ The following series of criteria for a good system are derived on the one hand from the ACCC's template for large businesses¹⁰⁸ and on the other hand from Standards Australia's compliance guidelines. Additionally, international compliance standards are also taken into account.

- (i) A commitment from top management towards compliant behaviour.¹⁰⁹
- (ii) Appropriate resources and appointments of appropriately senior and qualified persons (such as a director or senior manager with appropriate qualifications, and a compliance advisor with expertise in competition and consumer law) to specific roles for the establishment, implementation, and review of the system.¹¹⁰
- (iii) Risk assessment: identify the areas of risk and assess of likelihood of the occurrence of the risks. If a procedure for risk management is already in place, the risk assessment should identify gaps it might have based on the analysed

risks. Finally, the person in charge such as the compliance advisor provides recommendations to accommodate the detected risks.¹¹¹

- (iv) Compliance policy and implementation of the system: A written compliance that shows the company's commitment to comply with the CCA and outlines principles, rules, and processes for everything related to compliance. This should include the requirements and steps for reporting misconduct, including a guarantee that whistleblowers will be protected through confidentiality measures and the measures that the company plans to take once they have noticed an infringement of the CCA or internal compliance rules must also be described in the policy. The company should design a complaint handling system that is in accordance with the *Guidelines for Complaint Management in Organization AS 10002:2022* set by Standards Australia.¹¹²
- (v) Staff training for all a company's directors, employees, officers, agents, and representatives who might be a threat to the compliance with the relevant provisions of the CCA. The training must be conducted by a qualified legal practitioner or qualified compliance professional accompanied by documentations and tutorials in plain language that everyone can understand and tailored where possible.¹¹³
- (vi) Compliance performance review and reports: Independent experts should regularly review the compliance management system, and properly document what deficits were found and how they should be improved upon.¹¹⁴

¹⁰⁴ <https://www.accc.gov.au/business/compliance-and-enforcement/implementing-a-business-compliance-program>

¹⁰⁵ See, for example, *ACCC v Bupa Aged Care Australia Pty Ltd* [2020] FCA 602 and *Rural Press Limited v ACCC* (2003) 216 CLR 53.

¹⁰⁶ <https://www.accc.gov.au/business/compliance-and-enforcement/implementing-a-business-compliance-program#toc-compliance-programs-as-part-of-an-undertaking-or-enforcement>

¹⁰⁷ <https://www.accc.gov.au/business/compliance-and-enforcement/implementing-a-business-compliance-program>

¹⁰⁸ The other 3 templates for micro to medium-sized businesses were not analysed because the requirements for large businesses have the highest requirements that also include the ones for smaller enterprises.

¹⁰⁹ AS 3806-2006, p. 8-10; Homann, 2021

¹¹⁰ AS 3806-2006, p. 9-17; Homann, 2021; ACCC compliance program level 4, p. 1

Consideration of compliance measures by authorities & courts

A range of institutions play a role in the enforcement of competition law in Australia. This report focuses on the positions taken by the most important courts and the Australian Competition and Consumer Commission

¹¹¹ ACCC compliance program level 4, p. 1-2; AS 3806-2006, p. 10-14

¹¹² AS 3806-2006, p. 8-9; Homann, 2021; ACCC compliance program level 4, p. 2-3

¹¹³ AS 3806-2006, p. 15-16; Homann, 2021; ACCC compliance program level 4, p. 2-3

¹¹⁴ ACCC compliance program level 4, p. 6; AS 3806-2006, p. 17-20; Homann, 2021

(ACCC), which is the regulator responsible for enforcing competition law in Australia.

The ACCC has taken compliance systems into account when seeking injunctions or negotiating penalties for companies that were in breach of the Competition and Consumer Act. In its proceedings against Bupa Aged Care Australia Pty Ltd (Bupa) e.g., the Federal Court of Australia agreed to impose the ACCC's proposal for a reduction in penalty to 6 million AUD to account for the defendant's transparency, cooperation, and willingness to implement compliance measures.¹¹⁵

The Federal Court of Australia is the court with primary jurisdiction in all competition law matters. It decides, amongst other things, competition cases brought by the ACCC. Its recognition of compliance measures and culture as a mitigating factor in the setting of penalties can be traced back to the 1991 proceedings of *Trade Practices Commission v CSR Ltd*¹¹⁶ and in 2001 in *ACCC v Rural Press Ltd* (2001). In *ACCC v Rural Press*, the Federal Court of Australia reduced Rural Press's penalty taking into account its proactiveness in implementing competition compliance measures after the misconduct. In particular, Rural Press had involved and consulted experts to develop a tailored compliance system and establish a compliance culture.¹¹⁷ The Federal Court does not consider the cost of implementing a compliance system to be an excuse for not having a system in place.¹¹⁸

Japan

The Japan Fair Trade Commission (hereinafter JFTC) was established in 1947 as the third-oldest competition authority in the world and has more than 70 years of history in the enforcement of Japanese competition law. The JFTC has been proactively committing to the implementation of competition policy, the elimination of anticompetitive practices through strict and accurate law enforcement, and advocacy activities for businesses and other

stakeholders to raise competition awareness and improve compliance.

Best Practices

The JFTC conducted multiple sector specific (e.g. targeting construction sector, business associations, cooperative associations) and general surveys on competition compliance from 2006 to 2020.¹¹⁹ The JFTC also carried out research on Japanese companies' compliance with foreign competition laws (e.g. of the US, EU, China and South Korea), and of foreign-owned companies with Japanese competition law. The survey reports presented the benefits to companies of competition compliance measures, case studies of successes and failures, and examples of effective and efficient competition compliance programmes.

The survey reports showed that larger companies were more likely to have competition compliance programmes, independent departments, or staff in charge of competition compliance and competition compliance manuals, than smaller companies. For example, all the construction companies with a capital of 5 billion JPY (36 million USD) or more had independent departments or staff overseeing compliance and 91% of companies with a capital of 500 million to 5 billion JPY (3.6 to 36 million USD) did, whereas only 39% of companies with a capital of less than that did.¹²⁰ Also, almost 70% of the companies listed in the Tokyo Stock Exchange had competition compliance manuals.¹²¹

The JFTC has stated that important elements for effective and efficient competition compliance systems are the following:

- Initiatives and involvement of top management
- Department/staff overseeing competition compliance
- Concrete and practical compliance manuals
- Internal training for management executives as well as for employees

¹¹⁵ Kerrigan/McMahon/Lemmon, 2020; ACCC court order, 2020

¹¹⁶ The Trade Practices Commission was the agency responsible for the enforcement of competition law in Australia before the ACCC was established.

¹¹⁷ Rural Press Ltd, australiancompetitionlaw.org; ACCC press release Rural Press Ltd, Stern, 2003.

¹¹⁸ See e.g., Cartels: What you need to know, p. 21; ACCC vs. MNB Variety Imports Pty Ltd (1998).

¹¹⁹ See e.g., "Survey on Corporate Compliance Efforts with the Antimonopoly Act (Summary)", available at: https://www.jftc.go.jp/en/pressreleases/yearly-2012/nov/121128AMA_Compliance_files/121128AMA_Compliance.pdf.

¹²⁰ As of 2009.

¹²¹ As of 2012.

- Active involvement of a parent company in group companies' compliance
- In-house rules for contact with competitors
- Proper and prompt in-house investigations in response to information on violations of competition law.

Consideration of compliance measures by authorities & courts

Under Japanese competition law, the JFTC can issue a cease-and-desist order or monetary fines, or both, by way of administrative sanctions for violations (only serious cartel cases can be referred to the public prosecutors for criminal penalties). Monetary fines are calculated by a rigid formula which is stipulated in Japanese competition law and neither the JFTC nor Japan's courts take compliance measures into account as a factor for the mitigation of sanctions.

Republic of Korea

The Korea Fair Trade Commission (hereinafter KFTC) is the competition authority of Korea established in 1981, which enforces Monopoly Regulation and Fair-Trade Act, the Korean competition law. The KFTC has been operating its compliance program since 2001 based on the rule of "Regulation on the operation of Compliance Program for Fair Trade and the Granting of Incentives". In 2006, the KFTC introduced a rating evaluation system to provide more incentives to companies to ensure they have effective compliance management systems. Through an authorized agency, the KFTC annually evaluates companies' compliance management systems, giving them a grading on a six-point scale from AAA-D. The KFTC offers incentives to companies with a grade of A or higher.

The KFTC holds a Compliance Program Forum every year to listen to businesses' opinions about the way their compliance management systems operate and are evaluated, as well as sharing exemplary cases to seek improvement. In 2022, 13 companies which performed well were awarded certificates of evaluation at the annual Compliance Program Forum. The KFTC and other ministries and agencies in charge have been discussing various incentives for businesses with well-performing compliance management systems such as giving them priority in public procurement and awarding them bonus points in evaluations of their ESG performance.

Best Practices

The KFTC focuses on the following factors in evaluating a company's compliance management system:

- (i) Preparation and implementation of compliance standards and procedures, so that the affiliated executives and employees can clearly recognize and implement the matters to comply with the fair trade-related laws and regulations related to their duties.
- (ii) The CEO's willingness to comply with competition law and support for compliance.
- (iii) Appointment of a manager in charge of the compliance management system's operation by the highest decision-making body, such as the board of directors.
- (iv) Production and utilization of handbooks of the compliance program, which all executives and employees can easily access and use.
- (v) Continuous and systematic education on the compliance management system.
- (vi) Establishment of an internal monitoring system to prevent or detect illegal acts early. Surveillance and audit results should be reported periodically (at least twice a year) to the highest decision-making body, including the board of directors.
- (vii) Sanctions against executives and employees who violate competition law.
- (viii) To ensure that self-compliance continues to operate effectively, the compliance management program's standards, procedures, operations, etc. shall be regularly inspected and evaluated, and improvement measures shall be taken accordingly.

Consideration of compliance measures by authorities & courts

The KFTC provides some incentives to companies with highly rated compliance management systems, such as (i) exemptions from the requirement to publish if they are the subject of a KFTC corrective order (ii) exemptions from ex officio investigations (unless the suspicion is substantial), and (iii) government commendations. Before 2014, fines could be reduced up to 10-20% for companies with highly graded compliance management systems, but the incentive of mitigation of financial sanctions is no longer available. In 2022, 13 companies received a grade of A or higher.

Hong Kong-China

The Hong Kong Competition Commission (hereinafter the HKCC) is an independent statutory body and was established in 2012. The HKCC is tasked with, among other things, investigation of anti-competitive practices, advocacy for raising competition culture and awareness, and assurance of businesses' compliance with competition law. The competition law regime in Hong Kong adopts a judicial enforcement model, where anti-competitive cases are investigated by the HKCC and brought to the Competition Tribunal, which has an authority to impose sanctions and remedies.

Best Practices

The HKCC has emphasised the importance of advocacy as a necessary element for creating a culture of competition law compliance within the business community. In 2015, HKCC published a compliance toolkit titled "How to comply with the Competition Ordinance,"¹²² which is designed to assist businesses, especially small and medium enterprises (SMEs), to review their business practices and develop a competition compliance strategy. It explains "Four Don'ts"¹²³ in simple and clear-cut language and states that compliance is an ongoing process but can be ensured by three key steps; identify risks, mitigate risks and regular review. It also states that there is no one-size-fits all solution to formulating a compliance strategy, and a strategy should be suitable to the size and risk profile of a business.

The toolkit includes a checklist to help SMEs identify their risks and suggests that each risk that applies is classified as high, medium, or low.

It also includes a list of suggestions for potential measures to mitigate the risks, including eliminating cartel risk, modifying any business practices that do not involve cartel risk but may otherwise harm competition, appointing a compliance officer, developing a competition compliance policy, providing training to staff (with extra training for high risk staff), circulating guidance materials prepared by the HKCC and potentially the company itself to all staff,

¹²² https://www.compcomm.hk/en/media/reports_publications/files/CC_SME_Compliance_Toolkit_Eng.pdf.

¹²³ These are don't fix prices, don't restrict output, don't share markets and don't rig bids.

developing appropriate protections for whistleblowers, developing sanctions for staff engaged in competition law violations, and seeking extra help or advice when required.

Consideration of compliance measures by authorities & courts

Under the competition law in Hong Kong, there is a possibility that a company's competition compliance management system will be taken into account as a mitigating factor when the HKCC considers the penalty to recommend to the Competition Tribunal. The HKCC's Recommended Pecuniary Penalties¹²⁴ sets out how to calculate recommended penalties. It states that the HKCC can make adjustments to the base amount of the penalties for aggravating, mitigating and other factors, which include competition compliance management systems. To be more precise, it states that competition compliance activities by businesses can be taken into account as a mitigation factor only when "the undertaking demonstrates a clear and unambiguous commitment to competition law compliance throughout the organization and that steps were taken, appropriate to the size of the business, to achieve this." However, this mitigating factor has yet to be applied to a specific case.

India

India enacted its Competition Act to promote and sustain competition in the market and is enforced by the Competition Commission of India (hereinafter the CCI) in 2002. The provisions relating to prohibition of anti-competitive agreements and abuse of dominance came into effect from 2009, and the merger regulation has been enforced with effect from 2011. The CCI established and distributed its Competition Compliance Program to prevent companies from knowingly or unknowingly violating the Competition Act law. The Competition Compliance Program has three main objects of (i) preventing violations of competition law, (ii) promoting a culture of compliance, and (iii) encouraging good corporate citizenship.¹²⁵

¹²⁴ https://www.compcomm.hk/en/legislation_guidance/policy_doc/files/Policy_on_Recommended_Pecuniary_Penalties_Eng.pdf

¹²⁵ Competition Commission of India, Compliance Manual for Enterprises, https://www.cci.gov.in/images/publications_compliance_manual/en/compliance-manual1652179683.pdf

Best Practices

The CCI has stated that the essential features of a competition compliance management system are the following:¹²⁶

- Explicit statement of the commitment of senior management to the compliance management system;
- availability of an enterprise’s compliance policy;
- training and education of employees;
- The existence of a compliance manual;
- the main principles of the compliance policy should be set out in simple and plain language that is easily understandable;
- an effective compliance policy may include seeking a written undertaking from employees to conduct their business dealings within the compliance framework and taking disciplinary action against employees whose actions result in an infringement of the law;
- the relevant procedures should enable the employees to seek advice on whether a particular transaction complies with competition law and report activities that they suspect infringe the law. These practices should be included in the “best practices” norms of every enterprise.

Consideration of compliance measures by authorities & courts

Although not specified in its Competition Compliance Program manual, the CCI seems to treat the existence of an appropriate compliance management system as a mitigating factor when calculating fines. The CCI considered the implementation of a compliance management system as a mitigating factor in a case relating to resale price maintenance of automobiles in 2017.¹²⁷

¹²⁶ Id.

¹²⁷ OECD, Competition Compliance Programmes (2021), <https://www.oecd.org/daf/competition/competition-compliance-programmes-2021.pdf>.

F. Best Practices of International Organizations

UNCTAD (United Nations Conference on Trade and Development)

UNCTAD has held discussions on the best practices for compliance programs, including in a roundtable session on “Strengthening private sector capacities for competition compliance” at the fifteenth session of the Intergovernmental Group of Experts on Competition Law and Policy in 2016.¹²⁸ In the background note for that session,¹²⁹ UNCTAD outlined the different ways in which compliance can be strengthened in the private sector and in regulatory authorities with reference to the drivers of compliance and on compliance with competition law, and common tools used to encourage or promote an organization’s compliance with the law.

The UNCTAD background note on “Strengthening private sector capacities for competition compliance” discusses the essential elements for an effective compliance management system, as identified by the OECD (whose approach is discussed further below). These are risk assessment, prioritization and abatement or mitigation of those risks; commitment from the company’s board and chief executive officer, screening and monitoring of compliance, documentation of compliance efforts; and continuous improvement of the compliance management system.¹³⁰ A strategy to mitigate identified risks could include periodically reviewing the risks and updating policies, procedures and existing compliance management system, seeking expert legal advice, and setting up reward and punishment incentives for personnel.¹³¹

UNCTAD suggests that it is important that a compliance management system focuses on establishing a culture of compliance rather than focusing on rules, as “emphasizing rules can lead employees to look for loopholes to exploit rather than looking for ways to act ethically”.¹³² To achieve this, clear expectations need to be set as to what role everyone in an a

¹²⁸ https://unctad.org/system/files/official-document/ciclp2016progRT4_en.pdf

¹²⁹ https://unctad.org/system/files/official-document/ciclpd39_en.pdf

¹³⁰ https://unctad.org/system/files/official-document/ciclpd39_en.pdf at 15-16.

¹³¹ https://unctad.org/system/files/official-document/ciclpd39_en.pdf at 17.

¹³² https://unctad.org/system/files/official-document/ciclpd39_en.pdf at 15-16.

business has to play in ensuring adherence to the business's code of conduct, the culture should be effectively communicated to all staff, and there should be a system of measuring and reporting on business compliance activities against planned objectives.¹³³

UNCTAD further recommends that all staff should be offered regular training.¹³⁴ It refers to five requirements for staff training programs to be effective, as identified by a 2014 study by the United Kingdom Competition and Markets Authority: targeting the right people, addressing the right issues, communicating the consequences of breaching competition laws, updating old and new employees on changes to the law and stressing the importance of ongoing compliance on a regular basis, and prioritizing compliance with resources available.¹³⁵

In addition, UNCTAD developed “Guidelines on Corporate Programs for Compliance with Competition Rules” in conjunction with the Bulgarian Commission on Protection of Competition for the Sofia Competition Forum in 2013.¹³⁶ The Sofia Competition Forum aims to foster cooperation among the competition authorities of the Balkan region, including by providing capacity building assistance and policy advice. The Guidelines aim to help business better understand the benefits of corporate compliance management systems for competition laws and encourage their development and uptake.

The Guidelines provide an overview of the main provisions of the applicable competition law in the Republic of Bulgaria, and guidance on the main practical steps that companies can take to develop their own programs for compliance with competition rules. This includes a list of factors that increase a specific business undertaking's risk of violating Bulgaria's competition laws.

OECD (Organisation for Economic Co-operation and Development)

The OECD has also been actively discussing competition compliance since at least 2011.¹³⁷

¹³³ https://unctad.org/system/files/official-document/ciclpd39_en.pdf at 16.

¹³⁴ https://unctad.org/system/files/official-document/ciclpd39_en.pdf at 17.

¹³⁵ https://unctad.org/system/files/official-document/ciclpd39_en.pdf at 13.

¹³⁶ https://unctad.org/system/files/non-official-document/ccpb_SCF_CorporateCompliance_en.pdf

¹³⁷ <https://www.oecd.org/daf/competition/competition-compliance-programmes-2021.pdf> at 7.

Recently, the Competition Committee held a roundtable on Competition compliance management systems in 2021, where member States discussed the main characteristics for effective compliance management systems developed in case practice and guidance by competition authorities. The Report by the OECD¹³⁸ presented common elements which characterize a well-designed compliance management system; regular risk assessment, prioritization of operations, units and personnel most at risk; strong leadership and management commitment; transparency, communications and documentation e.g. guidelines and public statements by management; regular auditing, monitoring and evaluation of compliance management systems; mandatory compliance trainings for staff; an internal reporting system where staff can report competition infringements confidentially and without the threat of retaliation; and ex-post review of the system after infringements have occurred.

The Report also referred to the activities by competition authorities to incentivize compliance management systems. Regarding rewards for compliance management systems, OECD member States showed significant differences in their approaches; some competition authorities do not consider fine reductions or other benefits for compliance management systems, and others do have different conditions, or adopt different policies with regard to pre-existing systems, or systems newly introduced or amended following an offence. According to the Report, there seems to be no discernible differentiation between regions nor between advanced and younger competition authorities in the trend to consider compliance measures or not.

ICN (International Competition Network)

ICN, a global and informal network of competition authorities, advocates for the adoption of superior standards and procedures in competition policy around the world, formulates proposals for procedural and substantive convergence, and seeks to facilitate effective international cooperation between competition authorities. Under this mission, the ICN member authorities discuss a wide range of theoretical and practical issues related to competition law, policy and enforcement, and produce work products based on consensus in project orientated working groups.

¹³⁸ <https://www.oecd.org/daf/competition/competition-compliance-programmes-2021.pdf>

Competition compliance is one of the issues discussed in different working groups in the context of advocacy and raising awareness of competition.

Their work includes the “Report on Competition Compliance”¹³⁹ compiled in the Advocacy Working Group. The Report highlights the critical elements of an effective compliance management system pointed out by competition authorities and non-governmental advisors (NGAs); many of them acknowledged that “Detection, reporting, audits and monitoring”, “Oversight and tone at the top”, “Education and training”, “Risk assessment and enhancement”, and “Program evaluation” have high significance in an effective compliance management system.

The Report also introduces initiatives by competition authorities to help businesses implement competition compliance management systems. One of the most commonly adopted approaches is increasing businesses’ awareness of competition law in general, which includes the use of mass media and social media to raise general awareness of competition law, and statements and open letters targeting specific industries. This is relevant to the previous work done by the ICN, “Explaining the Benefits of Competition to Businesses,”¹⁴⁰ which discusses communication strategies of competition authorities when delivering messages regarding compliance.

Another initiative is providing compliance guidance to businesses, i.e., providing guidance materials to businesses on the need for, and key features of, an effective compliance management system, providing templates for compliance management systems (particularly for SMEs), and holding seminars for businesses and trade associations to explain key features of competition law and how to comply. Many of the responding competition authorities also provide formal or informal opinions on a particular practice at the request of a business.

Among other initiatives, half of the responding competition authorities (14 out of 28)¹⁴¹ provide incentives to establish compliance management systems by giving credit for compliance management

systems in the process of making decisions on charges and penalties in one way or another, while the other half do not.

ICC (International Chamber of Commerce)

The ICC was founded in 1919. Representing over 45 million companies in more than 100 countries, it is the biggest business organization in the world. Its members consist of business associations, local chambers of commerce, small and medium-sized enterprises and world leading companies. The organisation’s main goal is to foster international trade, investment, and responsible business conduct to name a few. It makes use of means such as policy advocacy, training courses, resolution of commercial disputes and the development of guidelines and rules to achieve the aforementioned objectives.¹⁴²

The last few years have shown a noticeable increase in legal and compliance expectations of companies around the world along with the increment of ethical expectations that society has towards businesses. The ICC published its Antitrust Compliance Toolkit in 2013 as its contribution to help businesses to be more compliant with legal provisions and decrease future antitrust law infringements by providing practical advice and guidance. The ICC Toolkit includes a “Starter Kit”, which groups the different elements of a compliance management system into two categories: “foundation elements” which need to be considered when establishing a system for the first time, and “reinforcement elements” that are primarily looked at once a program is established.

The foundation elements include embedding an antitrust compliance culture along with a policy, compliance organization and resources, risk identification and assessment as well as antitrust compliance know-how.

The reinforcement elements are comprised of an antitrust concern-handling system, internal investigations and disciplinary action, antitrust incentives, or certification and lastly the monitoring and continuous improvement of the system.¹⁴³

The ICC goes on to provide more detailed guidance on how to achieve each element.

¹³⁹ <http://internationalcompetitionnetwork.org/wp-content/uploads/2022/04/AWG-Report-on-Competition-Compliance.pdf>.

¹⁴⁰ https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AWG_ExplainingBenefitstoBuisnesses.pdf.

¹⁴¹ Brazil, Canada, Hong Kong, Hungary, Israel, Italy, Kenya, Mexico, Malaysia, Norway, Russia, Spain, Taiwan, UK, and USDOJ.

¹⁴² ICC, about us.

¹⁴³ ICC Compliance Toolkit, p. 1-3

V. PART THREE: PRACTICAL RECOMMENDATIONS FOR ACTION

The adoption of compliance programs in Latin America has been growing in recent years. Practically 90% of competition authorities are in favor of promoting competition by providing companies with guidance aimed at preventing the commission of competition law infringements. It is expected that in the coming years all competition authorities in the region will have such programs.

In this report we have described the application of compliance programs in the region through a survey that gathered information from most of the competition authorities in Latin America. An analysis of the application of these programs in more advanced jurisdictions that have extensive practical experience in their application across the world was also included.

This overview provides a wide picture of the relevance and impact of compliance programs. This allows for some practical recommendations to be made that may provide competition authorities in the region with relevant information to improve their application of compliance programs and to facilitate their adoption.

These recommendations may also contribute to promote convergence, facilitating cooperation between national Competition Authorities and courts, and improving the predictability and legal certainty of business environments within a region where market integration is important and cross-border trade and investment is significant. For instance, the Central American Competition Regulation establishes the coordination of advocacy activities in the region as one of its fundamental objectives¹⁴⁴, highlighting the importance of this topic.

G. Promoting compliance

Competition compliance is encouraged by Competition Authorities within their broader competition advocacy efforts directed at the private sector, aiming to raise the business community's awareness of the benefits of competition for consumer welfare, economic

growth, and sustainable development, as well as to disseminate a competition culture¹⁴⁵.

The promotion of competition compliance encompasses the following set of activities:

- (i) Information and education: it is highly likely that the degree of compliant behaviour is influenced by the availability and accessibility of information explaining competition law. It is therefore important that businesses are well informed about the obligations, rights, procedures, and sanctions related to competition law. This can be achieved through various communications channels, annual reports and briefs on the latest competition developments, guidelines disseminated through media, websites, mailing lists, newsletters, or educational and training campaigns depending on the capacities of the relevant competition authority and target audience.
- (ii) Advocacy for compliance systems: education and information about competition law can have a significant impact on a company's conduct if there is an internal culture and commitment to compliant behaviour. It should be noted that the benefits of a compliance system generally outweigh its costs.¹⁴⁶ Advocacy, assistance, trainings, guidance, and provision of documents on compliance programs will encourage voluntary behaviour and commitment.
- (iii) Raising of public awareness: the public also should be made aware of the importance of compliance, since it is more likely that compliant behaviour will be adopted in an organization if its social environment condemns unlawful behaviour. Furthermore, involvement in legal proceedings

¹⁴⁴ <http://infotrade.minec.gob.sv/ca/wp-content/uploads/sites/7/2021/02/Reglamento-Centroamericano-sobre-Competencia.pdf>

¹⁴⁵ See UNCTAD secretariat note on „Competition advocacy during and in the aftermath of the COVID-19 crisis“ (TD/B/C.I/CLP/58, 28 April 2021) - https://unctad.org/system/files/official-document/ciclpd58_en.pdf.

¹⁴⁶ An international study has shown that the costs caused by compliance violations are more than twice as high as the investments companies have made in setting up a corresponding program. Ponemon Institute, “A True Cost of Compliance – A Benchmark Study of Multinational Organizations” (2011), 2ff.

can be damaging to an organization's reputation which does also have an economic impact on the company's performance. Sharing information and the possibility to participate in the fight against non-compliant behaviour through direct communication with Competition Authorities via hotlines and mailboxes for complaints provides a social motivation for companies to increase their compliance efforts.

- (iv) Dialogue with stakeholders and business representatives: it is important to facilitate the communication between stakeholders and the authorities, through different channels such as questionnaires, trainings with Q&A sessions or hotlines. Furthermore, it is also recommended that authorities disseminate best practices and recommendations to business associations to prevent further infringements. Cooperation with research centres and other competition authorities can facilitate gathering the latest relevant practice.

Recommendation: To promote compliance in practice, competition authorities can explore the following four areas:

1. Information and education: Using a range of methods, including trainings, guidelines, updates on developments in competition law, and educational campaigns, and a range of methods such as newsletters and mailings, websites and media, businesses should be educated about competition law.
2. Promotion of compliance systems: Actively promoting the implementation of compliance systems within businesses and making resources available to help businesses ensure their systems programs are effective (such as through trainings, guidance, and documents) will help encourage businesses to develop a culture of and commitment to compliant behaviour.
3. Raising Public Awareness: Creating public awareness of the importance of compliance increases social pressures on companies to adopt compliance-driven behaviors.
4. Dialogues with stakeholders and business representatives: Facilitating communication with stakeholders and business representatives, disseminating best practices to business associations and cooperating with research organizations and other competition authorities to facilitate the sharing of best practice.

H. Design of compliance guidelines

The publication of compliance guidelines by competition authorities incentivizes and enables companies to implement an effective compliance system.

Competition authorities' compliance guidelines should address the following factors:

- (i) The «why»: in day-to-day business, companies are often overwhelmed with information, laws and regulatory measures to be complied with. To inform them about the importance of compliance in general and to sensitize them to it, it is important for authorities to explain why this is relevant so that companies fully adhere.
- (ii) Scope and content: compliance guidelines should be applicable to the widest possible range of companies and economic activities. At the same time, guidance should be drawn as concretely and effectively as possible so that companies get clear orientation in practice. This should include clearly setting out the key features a competition authority expects to see in an effective compliance system, including the presentation of concrete examples of their application. Based on the practices of the competition authorities studied, compliance guidelines (and any other educative measures) should set out its expectations on the following key features:
 - Compliance commitment, culture and policies
 - Risk assessments, strategy and goals
 - Processes
 - Structure and organization
 - Communication and training
 - Continuous monitoring and improvement
 - Incentives and sanctions.
- (iii) These are also the factors a competition authority may wish to examine in the context of sanction mitigation if the presence or implementation of an effective competition compliance system is considered a mitigating factor in the event of a violation. Proportionality: since “no one size fits all”, guidance should also recognize that the complexity of the compliance measures a company should be expected to implement may

differ depending on the company. In particular, SMEs may not have the same risk profiles or resources to direct towards compliance systems as larger companies. Other factors that may be relevant to a competition authority's particular expectations for an individual company's compliance system include the complexity of the company, the company's ownership structure and the risk environment (including industry risk and market structure).

Some competition authorities in South and Central America have already published guidelines of this type, including Argentina, Brazil, Chile, Ecuador, Nicaragua, Panama and The Dominican Republic.

Recommendation: The adoption and the design of compliance guidelines can have a significant influence on the implementation of these measures by companies. In this context

- Companies should be informed about why it is important to observe and implement compliance measures relating to competition.
- The guidelines should be widely applicable yet still provide clear and concrete guidance, namely through examples.
- The guidelines should consider the principle of proportionality.
- The guidance should set out a competition authority's expectations on the following key features of an effective compliance system:
 - Compliance commitment, culture and policies
 - Risk assessments, strategy and goals
 - Processes
 - Structure and organization
 - Communication and training
 - Continuous monitoring and improvement
 - Incentives and sanctions.

I. The role of compliance measures in the setting of sanctions

The consideration of compliance efforts by companies by Competition Authorities and courts when determining the sanctions applicable in case of anticompetitive practices is subject to debate, and has been a controversial topic in discussions about corporate compliance in the recent past.¹⁴⁷ Relevant issues include whether the existence of a compliance system should be considered a mitigating factor in the setting of sanctions, and, if so, whether the timing of the compliance efforts relative to the infringement is relevant.

One factor against the recognition of compliance systems as a mitigating factor in the imposition of sanctions is that if a violation of the law occurs, the compliance system in question was not sufficiently functional. Otherwise, it would have prevented such misconduct.¹⁴⁸ Moreover, the mere introduction of a compliance system does not guarantee that further legal violations could not and would not occur in the future.¹⁴⁹

However, it is unrealistic to expect that a compliance system could prevent all law infringements. The implementation of a compliance system could demonstrate a company's intention to promote awareness of and abide by the law. This may provide a basis to treat a company that has made an honest effort to achieve such compliance more leniently than that of a company that has made no such effort at all. This can only be the case if the misconduct does not emanate from the top management level, in accordance with the "tone from the top" line of thinking.¹⁵⁰

¹⁴⁷ Eufinger, Berücksichtigung von Compliance-Programmen bei der Bußgeldbemessung – Vorbild USA? 2016, p. 209.

¹⁴⁸ (2020). Stellungnahme des Bundeskartellamts zum Regierungsentwurf zur 10. GWB-Novelle, 14. https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Stellungnahmen/Stellungnahme-Regierungsentwurf_GWB10.pdf?__blob=publicationFile&v=2.

¹⁴⁹ EUFINGER, A. (2016). Berücksichtigung von Compliance-Programmen bei der Bußgeldbemessung – Vorbild USA? CCZ, 210.

¹⁵⁰ KERSTING, C. (2017, August 29). Compliancesysteme als mildernder Umstand? Neues vom BGH. D'KART. <https://www.d-kart.de/blog/2017/08/29/compliancesysteme-als-mildernder-umstand-neues-vom-bgh/>.

A related issue to consider is how to assess whether a compliance system can be characterized as efficient and functional in a context where a violation has occurred despite its existence. This is a source of legal uncertainty, with such assessments being subject to the evaluation of authorities and courts based on the circumstances of each case.¹⁵¹ However, many competition authorities and courts have issued comprehensive and detailed guidelines to provide greater clarity on this issue. It is appropriate and common that competition authorities and courts retain some discretion in assessing the appropriate impact of a compliance system on a sanction, since competition law enforcement requires economic and legal assessments to be made taking into account the specific conduct and circumstances of a particular case.

Competition authorities may also wish to consider whether their legal framework includes scope to require the introduction or improvement of compliance systems as part of an overall package of sanctions, as has occurred in Brazil and Chile. Doing so could help reduce the risk of repeat violations by a company.

Relevance of the timing of compliance efforts relative to the violation:

If compliance measures are considered relevant in the setting of sanctions, a further question to consider is whether the sanction should take into account efforts and measures that were already in place before the infringement (ex-ante compliance efforts), that were introduced after the law infringement (ex post compliance efforts), or both ex post and ex ante compliance efforts.

In support for only considering *ex ante* compliance efforts, there is a risk that companies that only set up a compliance system after a legal infringement has occurred and investigations have been launched by competition authorities are only seeking to secure a reduced sanction.¹⁵² In addition, they may be acting for purely corporate selfish motives, such as image and reputation concerns. Even if it is assumed that companies have at least partially self-interested goals, this is not necessarily reprehensible. The key concern should primarily be whether the efforts will

genuinely promote legally compliant and ethical corporate behavior. The driving force to achieve these consequences should be of secondary relevance to the question of whether a company's compliance system is designed to be effective.

On the other hand, taking *ex post* compliance efforts into account could strengthen companies' incentives to take corrective and preventative action immediately following the discovery of an infringement. It would also be consistent with the principles of "active remorse" and rehabilitation.

Recommendation: Compliance measures could be considered by Competition Authorities as possible mitigating circumstances when determining sanctions for law infringements on the basis that they signal a company's efforts to act in accordance with the law. There are possible justifications for Competition Authorities to consider both *ex ante* and *ex post* compliance efforts when setting sanctions for a competition infringement, as long as the compliance measures are designed to be effective.

Competition authorities may also wish to consider whether their legal framework includes scope to require the introduction or improvement of compliance systems as part of an overall package of sanctions, to reduce the risk of repeat violations by a company.

J. Requirements of compliance systems

The evaluation and configuration of compliance systems can vary depending on the jurisdiction or organization, but there is no one-size-fits-all solution. Rather, a compliance system is influenced in each case by specific factors of the respective company itself, the industry risks and the business environment.

Companies should consider the following issues and establish the necessary mechanisms when drafting and implementing a compliance system. It is important that companies recognize that any guidance issued by a competition authority cannot go so far as designing a compliance system suitable for each and every company but can only provide high level principles and guidance. Companies are responsible for the effectiveness of their own compliance systems and should carefully consider for themselves what an effective compliance system looks like for their own circumstances.

¹⁵¹ Reimers & Hainz, Die neue DICO-Leitlinie „Kartellrechtliche Compliance“ – zugleich ein Diskussionsbeitrag zur vergaberechtlichen Selbstreinigung und kartellrechtlichen Bußgeldbemessung 2016, p. 190.

¹⁵² Tagmann/Zirlick S.5/19 Aufsatz: Berücksichtigung von Compl. Massnahmen bei Kartellsanktionen.

Compliance commitment, culture and policies:

The primary success factor of a compliance management system is an organization's attitude towards morals, principles, ethics, and general compliant behaviour to be reflected in a company's actions at all levels. The attitude must therefore be shared by all employees as well as top management, especially since they should lead by exemplary behaviour. This requires clear and proper communication of the commitment to compliance from the top, clear and proper communication and documentation of the compliance program and policies.

A commitment to compliance "from the top" is important, as many infringements derive from the company's top management¹⁵³ or the incentives they set, and a clear and visible commitment at that level reduces the risk of non-compliance at lower levels. But it is important for a CMS to target all levels of employees who may be at risk of engaging in a competition violation. This is because competition violations can occur at lower levels without the knowledge of top management, and a strong compliance program at lower levels of a company could help expose any violations by individuals at the top.

Risk assessments, strategy and goals

As well as demonstrating and understanding knowledge of what is and is not permitted by competition law in a general sense, a compliance system should demonstrate knowledge and understanding of a company's risk landscape and be tailored to a company's particular circumstances to be considered by enforcement authorities. A compliance system can only operate efficiently and effectively if it directly targets existing compliance risks. This should be achieved by means of an extensive risk assessment which considers, on the one hand, the specific situation of the company (e.g., market position, industry, size and stakeholders) and, on the other hand, general risks to which all companies are exposed, regardless of their size or other criteria.

¹⁵³ The German Federal Cartel Office. (2020). Stellungnahme des Bundeskartellamts zum Regierungsentwurf zur 10. GWB-Novelle, 14. https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Stellungnahmen/Stellungnahme-Regierungsentwurf_GWB10.pdf?__blob=publicationFile&v=2.

After identifying the risks, they should then be evaluated according to their likelihood and appropriate mitigation measures identified. This can be described as a "compliance strategy."

A comprehensive system should also contain goals that are to be achieved with the compliance system and ways to measure progress against those goals.

Processes

A well-designed compliance system should have processes in place that ensure the regular collection, assessment, and review of relevant information to proactively minimize the risk of a violation.¹⁵⁴ It should also include strong processes to deal with potential violations when they have been identified, including means for employees to confidentially report potential violations without fear of reprisal (for example, the setup of a whistleblowing system or the ability to confidentially report potential violations to an independent third party, external from the company) and a proactive, systematic approach to investigating reported violations.

All processes should be documented. This is to ensure the effectiveness of the compliance program itself and, if compliance programs are taken into account in the setting of sanctions, to ensure evidence is available to the competition authority and court of its existence, operation and effectiveness.

Structure and organization

The responsibility for the compliance system should be assigned to at least one designated person. This person must have appropriate qualifications, seniority and resources and be able to perform their role independently and free of conflicts of interest. A company's top management body should be regularly informed about compliance concerns and developments.

Communication and training

Organizations need to set up a system for appropriate communication, including the dissemination of information regarding different responsibilities, dedicated process and communication channels on

¹⁵⁴ For example, processes to consider any new competition risk that might arise from a new business risk, or approval processes for high-risk activities.

compliance. This should include regular training and assessments to check the level of understanding within a company of competition law, the company's risk areas and applicable risk mitigations.

Continuous monitoring & improvement

A CMS should be continuously and systematically reviewed for its effectiveness to identify any elements that are “missing” or unclear, so that the necessary improvement measures can be taken.

Incentives and sanctions

A CMS should be supported by the internal sanctioning of compliance violations and the setting of the right incentives for adherence to the rules.

Recommendation: Companies should consider the following issues and establish the necessary mechanisms when drafting and implementing a compliance management system:

- Compliance commitment, culture and policies
- Risk assessments, strategy and goals
- Processes
- Structure and organization
- Communication and training
- Continuous monitoring and Improvement
- Incentives and sanctions

VII. CONCLUSION

Competition authorities in Latin America have increasingly been working to promote voluntary efforts by businesses to improve their compliance with competition laws. This is occurring within the context of Latin America's growing international trade, both within the region and with the rest of the world and growing regional cooperation in the field of competition namely in Central American (SIECA) and MERCOSUR.

Many Latin American competition authorities have been adopting measures consistent with international best practices in this area. But there is room for improvement, and this provides an opportunity for Latin America to strength and further develop regionally aligned competition compliance programs which also draw on their own experiences. Doing so will facilitate the implementation of voluntary and effective measures to increase competition compliance in Latin American and contribute to economic growth in the region.

APPENDIX

Compliance in the practice of competition authorities and courts in South and Central America

In an empirical analysis, the United Nations Conference on Trade and Development (UNCTAD) is looking into the consideration of compliance programs by competition authorities and courts in South and Central America. As part of a long-standing international cooperation, UNCTAD has therefore commissioned the Zurich University of Applied Sciences (ZHAW) to investigate, as a first step, as to how compliance is developing in the practice of competition authorities and courts in South and Central America. The following questionnaire consists of three parts (Part 1: Status quo; Part 2: Development and Part 3: Cooperation) and is intended to shed light on this question with your support.

Part 1: Status Quo

1. Does the [name of competition authority] promote or support companies in the implementation and realization of compliance programs?

Yes No

2. If yes, how does the [name of competition authority] promote or support companies in the implementation and enforcement of compliance programs?

- The [name of the competition authority] advises companies on compliance issue matters.
- The [name of competition authority] provides companies with compliance documents for companies
- The [name of competition authority] has issued guidelines on the implementation of compliance programs.
- The [name of competition authority] conducts compliance training for companies.
- The [name of competition authority] promotes compliance in companies with other measures, e.g.: _____

3. Are compliance measures taken by the company taken into account in mitigation or exclusion of punishment when sanctioning the company in question, or by excluding punishment (“Compliance Defense”)?

Yes, mitigating Yes, excluding punishment No

4. If yes, when must the compliance measures have been introduced by the respective company?

- Before the proceedings
- During the proceedings
- After the proceedings

5. Are there any court rulings in which compliance measures were taken into account to mitigate or exclude punishment?

- Yes No

5.1. If yes, please list these judgements (reference on the internet with corresponding URL).

5.2. If not, what are the reasons or possible reasons why there are no judgments on this?

- No company has yet invoked Compliance Defense
- Compliance Defense is not taken into account in proceedings
- Compliance has not (yet) been an issue at [name of competition authority].

6. In the opinion of the [name of competition authority], what are the main reasons why companies take compliance measures?

- To prevent laws from being broken
- To comply with industry standards
- To promote/adhere to company ethical standards
- To protect individual employees from sanctions
- To protect the company from reputational damage
- To be able to take on contracts from private individuals
- To be able to take on public contracts
- In the event of a violation, compliance measures are taken into account to mitigate or exclude punishment in the event of a violation
- Others: _____

Part 2: Development

7. Does the [name of competition authority] plan to support companies in the development of compliance guidelines?

- Yes No

8. Are there any current (political) discussions on changes to the law in the area of compliance (e.g., compliance promotion measures)?

- Yes No

9. If yes, what are these aspirations/changes?

10. Are there efforts/changes in the private sector to promote compliance?

Yes No

11. If yes, what are these aspirations/changes?

Introduction of industry standards (e.g., development of checklists and guidelines)

Introduction of compliance programs in companies

Targeted communication between companies and various stakeholder groups regarding compliance activities

Strengthening the role model function of managers (“tone from the top”)

Others: _____

Part 3: Collaboration

12. Does the [name of competition authority] itself have the know-how and resources (staff, departments, etc.) to develop compliance promotion measures (checklists, guidelines) for companies?

Yes No

13. Does the [name of competition authority] cooperate with any of the following organizations in the area of compliance promotion measures?

Universities: _____

Private companies: _____

Public companies: _____

International organizations: _____

Associations: _____

Trade unions: _____

Others: _____

14. Would the [name of competition authority] be interested in working with (further) cooperation partners?

- Yes No

15. If yes, what criteria would the cooperation partner have to fulfil?

- National organization based in the country
- International organization based in South America
- International organization based in Europe/North America
- Organization that has years of experience in the field of compliance
- It must be a higher education institution
- It must be a law firm
- Organization that presents the most appropriate compliance measures
- Others: _____

16. Remarks

Comments and suggestions on the topic of compliance and the study:

Thank you for your participation!

