



European Union Network for
the Implementation and Enforcement
of Environmental Law

Guidance CMS Supervision

December 2014

Introduction

Traditional supervision has several shortcomings. Although certain regulatees need a deterrent approach, most regulatees are willing to comply to public regulations. Some of them, especially the bigger regulated organizations, are responsive to new forms of regulation. For these companies, a traditional command and control approach is not very effective because it does not recognise the company's own capabilities and may undermine the intrinsic motivation.

For competent and motivated companies therefore it is more effective to assess the way they organise compliance rather than just measure compliance. We call the part of a company management system that aims at assuring compliance, the compliance management system of a company.

This guidance is applicable for the assessment of a compliance management system. It can be used to assess the compliance management system of any regulated company.

This guidance provides a short description of the basic principles, advantages and a flow chart to use applying CMS supervision. Annexes provide further explanation for use like a glossary, a CMS supervision tool, competences for CMS supervisors and practical tips for agencies and inspectors.

For detailed explanation of the considerations we refer to the IMPEL reports Compliance assurance through company compliance management systems.¹

Objective of the guidance

The objective of this guidance is to serve as a practical tool to

- a. Decide in what situations CMS supervision is feasible
- b. Develop a CMS supervision policy and strategy using best practices

The flow chart in this guidance leads you through the questions needed to (a) and (b)

How to use this guidance

This guidance is developed to serve as a practical tool to make a policy and strategy for CMS supervision.

Inspectors may use the guidance to help them assess the level of compliance assurance of regulated companies. Flow chart part 2 may help them through the assessment using the explanation box beneath the flow chart and the annexes with glossary, checklist and practical tips.

Policymakers may be assisted in designing a policy or strategy for CMS supervision using the flow chart part 1 and 2. These give them practical suggestions for building blocks of the policy and

¹ IMPEL (2011). Compliance assurance through company compliance management systems 2011/04 and IMPEL (2014). Report Guidance CMS Supervision 2013/15 – 2014/16

strategy. Annexes may provide them with detailed suggestions to be included in the policy or strategy. In the early stages of implementation, it should well be considered what scope is aimed. For example, is the CMS supervision approach only used for environmental regulations or also for safety, security etc. If applicable, several inspectorates may co-operate using this guidance.

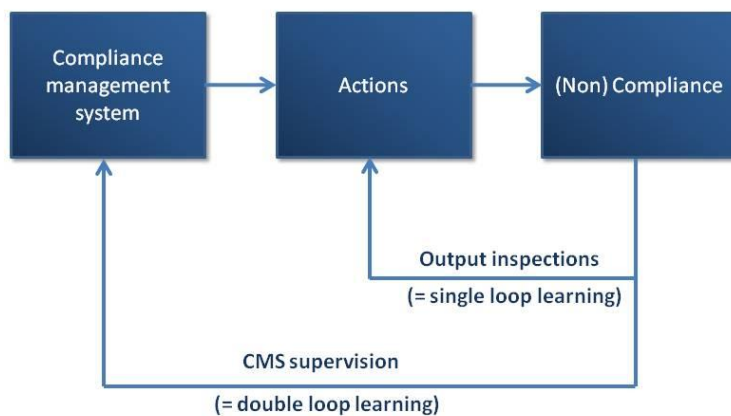
Managers of inspectorates may find flowchart part 1 of the guidance helpful to assist them in deciding whether CMS Supervision is feasible in a particular industry or setting (if CMS may be applied). Once it is decided that CMS should be applied, flowchart part 2 of the guidance may help them to set the main conditions and operating mechanisms of CMS Supervision.

Inspectors, policymakers and managers may all use from the report accompanying this guidance to acquire considerations and background information about considerations, theoretical considerations and general recommendations.

Basic principles of CMS supervision

- a. CMS supervision is designed to stimulate companies to improve their internal processes in such a way that they assure compliance. This means that companies should organise to assure compliance, check their compliance, identify and correct violations themselves and learn from it. By applying CMS supervision the focus of the public supervisors shifts from compliance to compliance assurance.
- b. CMS supervision is aimed at those part of the management system of a regulated company that is meant to assure compliance. This part of the management system we call the compliance management system (CMS) of the company. This is not exactly the same as an EMS. Standards of well known EMSs like EMAS and ISO 14001 overlap for a great percentage with requirements for a CMS, but not 100% as you may observe looking at the checklist in ANNEX 2. A individual management system (MS) of a company may cover the requirements for a EMS and CMS and even more than that.
- c. In CMS supervision the CMS is assessed, traditional compliance inspections are limited and penalties are only given if the company fails to correct violations and learn from it (to prevent reoccurring). In CMS supervision control of risks for public interests like the environment is more important than formal compliance with the letter of the law.
- d. By assessing the CMS as a public supervisor we can
 - i. find out to what degree the company is assuring compliance and
 - ii. stimulate the company to improve its performance through compliance assurance and improve the understanding between government and companies
- e. CMS supervision is not effective for every company. Only those companies which are willing and able to implement an effective CMS should be given access to CMS supervision.

The main operating mechanism of CMS Supervision is to evoke double loop learning. CMS Supervision is meant to structurally improve compliance by improving compliance assurance by the regulated company using a compliance management system (see figure next page).



Advantages of CMS supervision

If applied well in suitable situations CMS supervision can bring the following advantages:

For inspectors:

- a. It stimulates companies compliance assurance, including self-monitoring and self-correction
- b. It allows to allocate time and capacity to those companies who really need it
- c. It brings a better understanding of a company and industry
- d. It results in prevention in stead of cure

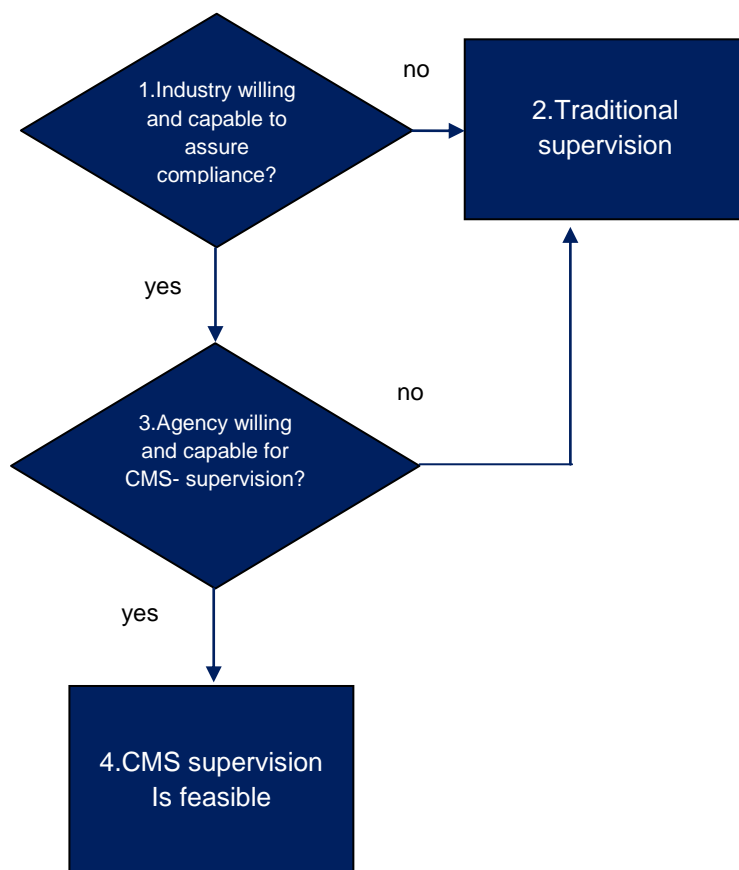
For companies:

- a. It supports being in control
- b. Recognition by the public authorities of their management system
- c. It builds upon standards already familiar (ISO 14001, EMAS)
- d. It reduces chances of unexpected non-compliance and penalties

Flow Chart

This flow chart consist of two parts. Part 1 helps you to find out whether CMS supervision is feasible in the given situation. If CMS supervision is feasible following part 1 of the flow chart, part 2 helps you to implement CMS supervision.

Part 1: Is CMS Supervision feasible?



Explanation helping to answer the questions on the left

1. Indicators that industry is willing and competent are:

- company size (+)
- management systems covering regulated domains and risk control (+)
- front runners as role models (+)
- Influence third parties on compliance (+)
- commitment for CMS (+)
- can demonstrate a history of being compliant (+)
- many free riders (-)
- high level of violations (-)

2. There is no ground for CMS supervision because either the industry or the agency are not willing or capable.

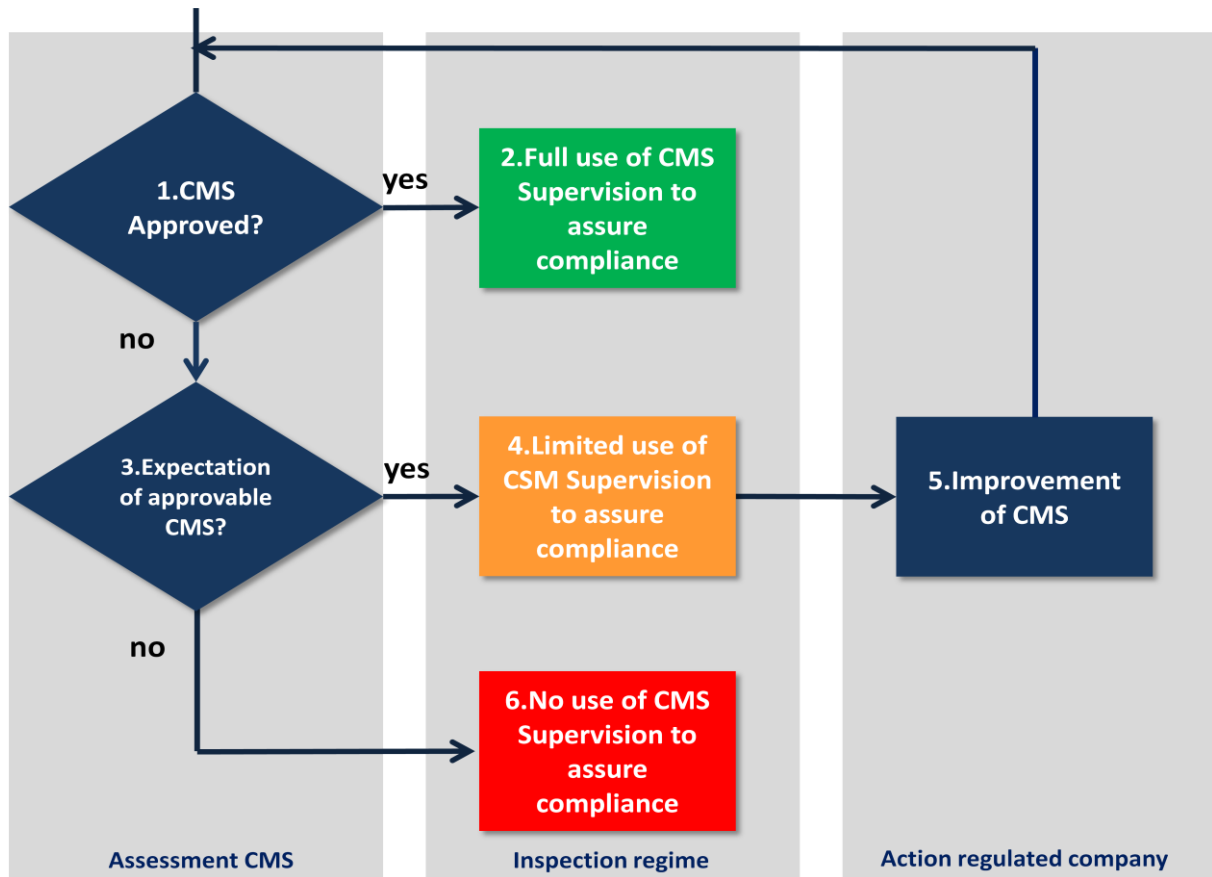
3. Indicators that the agency is willing and capable are:

- political will(+)
- support in society(+)
- support within own agency/inspectorate(+)
- competencies agency/inspectorate and inspectors(+)
- capacity agency/inspectorate(+)
- transparency in industry(+)
- confidence in industry(+)
- legislation allows CMS supervision(+)
- no unacceptable reduction of competition(+)

4. Conclusion is that CMS Supervision is feasible. It is recommended to develop a CMS

Part 2: Develop a CMS Supervision policy / strategy

If the flow chart part 1 has resulted in a positive conclusion, part 2 of the flow chart can be used to help develop a policy for CMS Supervision. This part 2 flow chart reflects the steps needed to assess the CMS of an individual regulated company and provides suggestions for the consequent inspection regimes depending on the level of the assessed CMS.



Explanation helping to answer the questions

1. The CMS should be assessed for approval to determine whether the CMS is effectively assuring regulatory compliance. It is recommended to use the standard in Annex 2 as a tool for CMS assessment. Practical tips for use are given in ANNEX 3.

2. If the CMS is approved, public supervision should consist of

- periodic assessment of the CMS,
- limited regular inspections (if the law allows that)
- traditional interventions and sanctions if the company does not pro-actively detect, solve and learn from violations

We recommend that no penalties are applied if the company pro-actively detects, solves and learns from violations with exclusion of interventions following criminal law

3. There is a reasonable chance that the company might develop an approvable CMS within a limited time span if the company has a management system meeting ISO 14001 or EMAS standards or equivalent (not necessarily certified or registered).

4. In this regime the public supervisor should:

- Check on compliance output
- Make arrangements to make the company improve its CMS
- Apply traditional interventions and sanctions in case of violations

5. Following the arrangement, the company should improve its CMS

6. In case there is non effective CMS nor a potential to develop an effective CMS public supervision should consist of traditional supervision and enforcement:

- Checks on compliant output
- Apply traditional interventions and sanctions in case of violations

NB: This approach was designed for a voluntary participation of regulated companies in a CMS Supervision policy / strategy. In case the requirements for the CMS are mandatory, basically the same steps are valid.

Certification

The confirmation of certain characteristics of an object, person, or organization

CMS Supervision

The assessment by the public competent supervisor of the effectiveness of compliance management systems and the public supervision and enforcement regime customised to this assessment

Compliance

Conforming to legislative requirements

Compliance management system (CMS)

The part of a management system that is aimed at assuring that an organisation can fulfil all tasks required to achieve compliance

Enforcement

Insuring obedience to legislative requirements

Environmental management system

A management system to assure that an organisation can fulfil all tasks required to achieve its objectives with regard to the environment

Inspection

The periodic and targeted scrutiny of specific objects and entities, to check whether they are meeting legislative requirements

Management system

A framework of processes and procedures to ensure that an organisation can fulfil all tasks required to achieve its objectives

Management system standard

A set of specifications for a management system

Public supervision

Collect information and use that information to determine whether the legislative requirements are met

Regulation

A process of the promulgation, monitoring, and enforcement of legislative requirements

Verification

The act of reviewing, inspecting or testing, in order to establish and document that a product, service or system meets regulatory or technical standards

ANNEX 2 Checklist and standard for CMS Assessment

This tool can be used to assess the part of the company's management system aimed at assuring compliance (referred to as the CMS). Typically the tool can be used to do an audit like assessment of the CMS.

Important points to notice:

- a. The primary concern of the CMS supervisor should be to understand the CMS of the assessed company. This checklist is not meant to just tick the boxes, but to remind the CMS supervisor of the items to discuss and assess. Also, the checklist can serve as a structure for registration and reporting the findings of the audit to the assessed company.
- b. Questions in the checklist may overlap with requirements of existing standards like EMAS and ISO 14001. That is no point of concern, for the CMS supervisors is supposed to assess the implementation of these items with extra attention.
- c. If Question 3.1 is answered positively, then there is a reasonable chance that the company might develop a approvable CMS within a limited time (step 3 in flowchart part 2).
- d. It is recommended that the duration of the audit is about 1 – 2 days depending on the size of the company, consisting of interviews with key staff of the company.
- e. Public inspectors may carry out the assessment, but also other independent parties may be used to assess the CMS.

Checklist

1. System regulatory requirements

Requirement	Verification item	Suitable	Documented	Implemented
1.1 Does the company maintain a system in which all relevant legal requirements are registered?*	Registration of regulation in database or register	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
1.2 Is the management of this system assured?*	Written responsibility	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
1.3 Does the company assure that the system is actual, complete and correct?*	active screening changes of regulations	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Periodical adjustment of database or register	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
1.4 Does the company analyses whether regulatory requirements are clear, compliable and effective?		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
1.5 Does the company have a procedure for risk analyses and risk management which contains control measures for risk reduction?*	Written procedure risk analysis	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
1.6 Is the risk analysis used to differentiate the level of assurance of regulatory compliance?*		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
1.7 Does this system contains an explicit link between risk management, legal requirements and parts of the compliance management system?*	Cross reference table	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

2. Vision and behaviour

Requirement	Verification	Suitable	Documented	Implemented
2.1 Has the private body a written, supported vision on legal compliance?*	Content of the vision	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2.2 Is this vision known by employees?*	Distribution of the vision	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2.3 Is the vision in writing?*	Written vision	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2.4 Does the management actively support the compliance management system?*	Agenda management	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2.5 Does the company have a written code of conduct which is accepted by employees and management which clarifies how the private body expresses the vision on legal compliance in the behavior of employees and management?*	Content code of conduct	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Review code of conduct every 3 years	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2.6 Is the code of conduct known by employees?*	Distribution code of conduct	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2.7 Does the code of conduct explicitly stipulate what is expected from employees with regard to openness, education, pro-activity and self reflection concerning legal compliance?*	Content code of conduct	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

3. Quality thinking, education, self reflection and continuous improvement

Requirement	Verification	Suitable	Documented	Implemented
3.1 Does the private body meet the standard of a management system as has been agreed by the parties involved. Normally, this means that the private body should meet the requirements of EMAS or ISO 14001 ² ?	Operational management system	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3.2 Is the management system meant in 3.1 systematically applied for the assurance of regulatory compliance?*	Procedures aimed at legal compliance	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3.3 Does the private body set objective quantified objectives for legal compliance?*	Maximum number deviations	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Objectives measurable and realistic	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3.4 Does the company issue annual plans with intended actions regarding legal compliance?*	Is it clear who executes the actions	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Is it clear when the action should be finished	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Procedure measuring compliance performance	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3.5 Has the company determined how compliance performance is measured?*	Measuring objective and reproducible	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Report of measurement	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3.6 Is the compliance performance measured regularly?*	Periodical registration	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3.7 Does the private body systematically register deviations and near-deviations regarding legal compliance?*	Registration examinations	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
3.8 Does the private body systematically examine the cause of these deviations and near-deviations?*	Assignment of actions (who, when)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Monitoring execution actions	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

² In specific cases a different standard than EMAS or ISO 14001 may be agreed.

performance?*" 3.10 Does the company have a instruction plan showing how and when employees are informed about the legal requirements and what is expected from them regarding these legal requirements?	Instruction plan Content of the plan	<input type="checkbox"/> <input type="checkbox"/>	<input type="checkbox"/> <input type="checkbox"/>	<input type="checkbox"/> <input type="checkbox"/>
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4. Compliance officer and pro-activity

Requirement	Verification	Suitable	Documented	Implemented
4.1 Does the private body employ an officer (further called compliance officer) or department (further called compliance department) who governs the compliance with legal requirements by that company?	Clear department or job description	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4.2 Are the tasks, authorisations and responsibilities of the compliance officer and the compliance department determined?	Clear and unambiguous definition of tasks, power and responsibilities	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4.3 Is there a replacement procedure in case the compliance officer is absent?	Dedicated person who is responsible	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4.4 Does the compliance officer or compliance department communicate with public authorities with regard to the meaning of legal requirements affecting the company?	Periodically at least twice a year	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4.5 Can you show this through reports, minutes etc.?	Minutes of meetings with authorities	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Content of meetings	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4.6 Does the compliance officer or compliance department report directly to the highest management level and independent from those who are responsible for regulatory compliance?	Participation of compliance officer in highest management level	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4.7 Is the compliance officer or compliance department authorized to communicate in name of the company?		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4.8 Is this power assured in writing?	Power laid down in writing (who, what)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
4.8 Does the compliance officer or compliance department have adequate experience, education and training?	Training compliance officer HRM file	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

5. Open attitude and reporting

Requirement	Verification	Suitable	Documented	Implemented
5.1 Does the private body communicate openly with stakeholders about its own level of Legal compliance?	Communication	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5.2 Does the private body communicate openly with stakeholders about the design, working and results of its compliance management system?	Communication	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5.3 Does the private body publicize an annual report about its own level of legal compliance?	Annual report	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5.4 Does the company communicate in this annual report the performance in relation to all relevant regulatory requirements?	Compliance data in annual report	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5.5 Is this report transparent and clear?	Content annual report	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
5.6 Is this annual report available for stakeholders?	List of stakeholders	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

6. Pre-screening employees and disciplinary measures

Requirement	Verification	Suitable	Documented	Implemented
6.1 Has the private body made clear to employees and directors what action the private body takes in relation to persons who knowingly violate regulatory requirements?	Internal arrangements	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6.2 Has the private body made clear to employees and directors that no penalties are taken towards those reporting unintentionally committed violations?	Internal arrangements	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6.3 Does the company have a list of jobs vulnerable with regard to fraud?	List with jobs Criteria for jobs vulnerable with regard to fraud	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6.4 Does the company use criteria to determine whether or not a job is vulnerable with regard to fraud?	Criteria	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6.5 Does the company apply a screening procedure to assure that jobs vulnerable with regard to fraud are executed by suitable employees?	Screening procedure	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6.6 Has the company taken measures to assure that jobs vulnerable with regard to fraud are done by employees who act ethically?	Written measures in case of unethical acting	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6.7 Does the company have a system or procedure check that tasks vulnerable with regard to fraud are carried out ethically?	Due to internal audit at least twice a year	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Results internal audits reported in writing	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6.8 Does the company take direct measures when violations are noticed?	Internal arrangements	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

6.9 Has the company made clear to the employees that notification of violations is compulsory?	Internal arrangements	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6.10 Does the company have a system or procedure to stimulate the notification of violations?	Prompt feedback from the management	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Simple procedure	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
	Possible consequences are known to the notifier	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

* Essential question

Standard

CMS is to be approved if:

(a) All 22 essential questions are met (questions marked with asterisk)

AND

(b) at least 50% of the 26 other questions are met

NB 'met' means that the assessed system part is fit for purpose, documented and implemented.

ANNEX 3 Competences for CMS supervisors

The public supervisor responsible to assess the Compliance Management System

Supervision fits the following indicative profile:

1. Has education on at least BSc level
2. Is familiar with, trained in and experienced in audit principles, audit procedures and audit techniques; lead auditor level
3. Knowledge of applicable legislation which the CMS is supposed to cover
4. Knowledge of corporate management processes, including issues like corporate culture, governance en compliance
5. Knowledge of management systems and standards like EMAS, ISO 14001 and OHSAS 18001
6. Knowledge of CMS Supervision approach and operating mechanisms
7. Basic familiarity with applicable relevant technical aspects

NB: The responsible supervisor may add specific competences to his team in specific settings if required for an adequate CMS assessment (such as additional technical, legal or organizational knowledge).

ANNEX 4 Practical tips for agencies and inspectors regarding assessment of CMS

1. Inspectors should be aware of the advantages of CMS Supervision: More freedom for the company as long as it takes its responsibility to pro-actively assure regulatory compliance, free feedback on its management system, growing trust and legitimacy both ways. Use good examples of leading companies with CMSs as role models.
2. Individual non-compliances do not mean that the system is not effective. Even a very good system will not guarantee 100% compliance. More important is what the company has done to prevent the violation from occurring and how pro-actively the company reacts on non-compliances.
3. Put emphasis on understanding the system behind (non-)compliance. Why is this a non-compliance reoccurring? What is the root cause of this problem?
4. Limit the specifications of the CMS assessment framework to a minimum in order to leave enough freedom for the company to organise it the way it wants
5. Check especially whether the company really act according to its own system. Does it pro-actively measure its own compliance? Does it correct its non-compliances adequately and does it learn from the analysis of non-compliances to prevent reoccurring? Beware of window dressing, false promises and free riding.
6. Use compliance reality checks not only to measure the result in the real world, but also to reflect on the system: What action does the company take as a consequence of this non-compliance?
7. Systematic control of risks for the environment by the company is considered more important than compliance to the letter of the law.
8. Inspectors involved in CMS Supervision and doing the assessment should have suitable competences to assess the CMS
9. Communicate as much as possible about the interpretation of rules and risks with the company
10. Share information with other public agencies to get a better understanding of the company('s CMS).
11. Public inspectors may carry out the assessment, but also other independent parties may be used to assess the CMS and do not duplicate the conformity checks of the auditor without good reason.

12. If you rely on certificates like ISO 14001 or EMAS registration you should check whether the certification process adequately ensures suitable CMS assessment. If possible, make use of private audit reports.
13. If possible and applicable, try to limit details in the permit of the company concerning how to realise compliance.