CNMC
PROPOSAL FOR A GUIDE TO COMPLIANCE PROGRAMMES CONCERNING THE DEFENCE OF COMPETITION

Presentation

Compliance programmes have experienced a significant rise in Spain. Although initially they were used primarily in the sphere of criminal law, companies have recognised the value of these programmes to ensure compliance in areas other than criminal matters, particularly in the sphere of administrative infringements.

In the sphere of competition law, the definitive drive behind compliance policies comes from two important legislative developments: the exclusion of cartel members (and those found guilty of other serious infringements of the Spanish Competition Act – Ley 15/2007 de Defensa de la Competencia, hereinafter, LDC) from public tenders, established in Article 71.1.b) of the Spanish Public Procurement Act – Ley 9/2017 de Contratos del Sector Público, hereinafter, LCSP; and the recent adoption of Directive 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, also known as the 'Whistleblowing Directive'.

Concerning the exclusion from public tenders, the LCSP establishes the possibility of banning companies against which a final decision has been handed down fining them for a serious infringement of the LDC from public tenders. However, the same law, in Article 72.5, allows for the possibility of regaining access to public tenders when companies, in addition to paying, or committing to pay, the relevant fines or compensation, establish a compliance programme (self-cleaning provision).

As regards the Whistleblowing Directive, its future implementation will necessarily entail greater awareness regarding criminal and administrative offences, including those deriving from competition law, and, therefore, greater effort in the design and implementation of the compliance programmes envisaged in precisely this area of law.

On the other hand, the CNMC has been exploring compliance issues and policies for the past four years through conferences and workshops (previously referred to as 'compliance dialogues'), delving in particular into the complementary aspects of the deterrence tools in competition policy and preventive measures in the business environment.

In view of the preceding, it is considered appropriate at this time to firmly advocate regulatory compliance policies in relation to competition law. This guide aims to aid companies to this end, providing transparency on the basic criteria that the CNMC considers relevant for a specific compliance programme to be effective.

1. Introduction

The CNMC is the body responsible for promoting and defending competition in the Spanish business environment, in the interest of society in general. To this end, it has different functions and tools established in the LDC.

Among its tools, the following are notable for their significance and impact on detection of the most harmful practices: the leniency programme, whereby companies that provide relevant information leading to the detection and/or discovery of a cartel infringement can obtain immunity from fines or a reduction of the final amount (articles 65 and 66 of the LDC); the possibility of imposing fines on legal representatives and executives who have been involved in anti-competitive agreements (Article 63.2 of the LDC); the consequences that may arise from a final decision finding a serious antitrust infringement in the sphere of public procurement (Article 71.1.b of the LCSP); and damages claims following civil suits, especially after the transposition of the Damages Directive.

Likewise, for the purposes of this guide, the CNMC's advocacy functions and tools should be highlighted, including the promotion of a rigorous business commitment to complying with competition law.

The Spanish system for the defence of competition includes both the rules of the current LDC – with the amendments introduced by Act 3/2013, of June 4, creating the National Commission of Markets and Competition (LCNMC) – and the case law of EU bodies, jurisdictional bodies, the previous state-level competition authorities and the corresponding authorities in the autonomous communities.

Observance of and respect for the objectives of this regulatory system, which seeks to promote and defend effective competition between economic operators for the proper functioning of the market economy, must be taken into account in the decision-making and business culture of any economic operator.

Compliance programmes contribute to this task. They are tools that allow economic operators to prevent and detect their involvement in illicit behaviour which may result in criminal and administrative liability and affect their reputation. Such conduct includes practices that are contrary to competition law, infringement of which increasingly produces social rejection due to the damage it does to the welfare of society as a whole. Likewise, compliance programmes could encourage and strengthen the collaboration of companies with the CNMC within the framework of the leniency programme provided for in articles 65 and 66 of the LDC.

To be truly effective, compliance programmes must ensure, through a series of tools, mechanisms, and actions, the existence of a true commitment to compliance that is incorporated into the daily decision-making process of both natural persons who engage in trade activity for and on behalf of the company, whether de facto or de jure, and the company's workers as a whole, enabling them to detect or prevent practices restricting competition within the scope of their respective duties. Thus established, a compliance programme should be a manifestation of a work culture that is respectful of the rules of the legal entity,

translated into protocols, internal procedures, codes of ethics, internal and external reporting systems, etc., which, as a whole, reflect the firm intention of compliance in the way of working throughout the organization.

This guide sets out certain commonly accepted indicators for setting up effective compliance programmes and is intended for the group of economic operators that aspire to establish a true culture of compliance with rules in general and competition law in particular. Publication of this guide is an indication of the CNMC's commitment to promoting compliance programmes to disseminate a culture of competition in Spain for the public interest.

2. CNMC practice concerning compliance programmes

The CNMC Council has had the opportunity to rule concerning compliance programmes, both those implemented prior to the detection of the infringement (hereinafter, ex-ante compliance programmes) and those implemented or modified for improvement once the company has already been charged (hereinafter, ex-post compliance programmes).

With regard to ex-ante compliance programmes, these are generally only considered effective when they develop and apply internal controls that have detected internal anticompetitive conduct, facilitating the company’s use of the leniency programme (articles 65 and 66 of the LDC) in the case of cartels.

The mere establishment of a compliance programme cannot be considered any more than an extenuating circumstance. However, it may formally reflect the company's willingness to comply, which has been taken into account, in certain cases, as a moderating factor in reducing the penalty.

So far, none of the ex-ante compliance programmes presented to the CNMC Council has been considered sufficient to lessen responsibility within a given administrative disciplinary proceeding. In the light of the above considerations, the criteria and factors for case-by-case assessment of the effectiveness of a compliance programme are explained below in this guide.

3. Effective compliance programmes. Evaluation criteria

Below are the elements that the CNMC considers essential when designing and implementing an effective compliance programme with the aims outlined in this guide: firstly, to prevent infractions and, secondly, to establish the means of detecting and managing infractions that could not be avoided. The benefits of a compliance programme that is effective at all levels (especially, in terms of reputation and for the company’s merit-based competitiveness) are generally significantly higher than the costs incurred by companies in its implementation.

The criteria are particularly based on the *Practical Guide to Self-Diagnosis and Reporting on Regulatory Compliance, Corporate Governance and Corruption Prevention,* prepared by Transparency International Spain, a digitised version of which was created by the CNMC and the aforementioned international not-for-

profit organisation and is available to all operators as a self-diagnostic tool regarding regulatory compliance at the following link https://arguide.cnmc.es.

A. Involvement of the company's governing bodies and/or top executives

The culture of regulatory compliance must be promoted and encouraged by the company's top executives. For the purposes of this guide, top executives are those individuals who are authorised to make decisions on behalf of the legal entity or who have organisational and oversight authority within it. Said qualification would in any case include: (a) the legal representatives of the company; (b) those who are authorised to make decisions on behalf of the legal entity (generally, the *de facto* or *de jure* managers); and (c) those who have organisational and oversight authority, for example, those managers who make up the management committee or similar body.

In order for the compliance programme to be effective, the top executives must be fully involved, insofar as they reflect the companies' policies and work culture.

For this same reason, a case-by-case analysis notwithstanding, the fact that one of the company's top executives is involved in a violation of the LDC may, depending on the circumstances of each case, cause the compliance programme to be ineffective, given that it precludes a true commitment to observing competition law.

The culture of compliance must be an intrinsic part of the company's management policies. In this regard, an incentive policy that prioritises risky conduct would diminish the effectiveness of the program. In contrast, an incentive policy that rewards performance in accordance with the programme and punishes non-performance, including as grounds for termination of the employment relationship, would make the programme more effective.

In this context, the existence of a clear, firm and public statement by the top representatives of the company is particularly appropriate, emphasising that compliance with competition law is not only a legal obligation, but a central element of the company culture and its responsibility to its customers and suppliers and consumers in general.

B. Effective training

One of the basic pillars of any compliance programme is the training of all company employees, adapted in each case to their scope of activity and duties. For example, training for a sales manager may not be similar to that given to an operator, but both must receive training related to compliance with competition regulations to the extent that they may be exposed to risks arising from the same in their respective units. Similarly, the training strategy should be assessed in relation to close associates (partners, distributors, major suppliers, etc.).

The training strategy must be accessible, adaptable and measurable, in terms of impact and internalisation of the issues presented during training.

Similarly, ad hoc training sessions should be planned when there is a change in circumstances (change of shareholding or control, new supplier, new market, new procurement system, new marketing campaign, etc.).

Without proper training, the other elements of the compliance programme will not be fully effective: the governing bodies and top executives will not know how to demonstrate their connection to rules they are not familiar with, the reporting channel will not serve its purpose, risks cannot be properly identified, etc.

A standard training strategy that is limited to outlining the basics of competition law is not considered effective.

To be considered effective, the training strategy must include sessions adapted to each work unit according to the specific risks to which they are exposed. Similarly, training must provide workers with tools so that they can identify risks and make informed decisions. The training strategy and effort must be measurable.

C. Existence of an anonymous reporting channel

In international best practices, anonymous reporting channels have shown themselves to be an essential tool for the effective implementation and management of a compliance programme.

Firstly, the internal reporting channel makes it possible to quickly detect infringing behaviour, in that anyone (mid-level positions, support staff, etc.), having received the appropriate training, can detect the infraction and inform the person responsible for managing the channel (reporting channel officer) without fear of being known and, therefore, without fear of reprisals.

Secondly, it represents a deterrent measure for company workers and managers due to the ease of detecting the infraction and communicating it to the reporting channel officer.

The internal reporting channel is reinforced by an effective training strategy. Without training, the effectiveness of the reporting channel is diminished. Conversely, no matter how much training is provided, if there is no accessible reporting channel, the detected practices cannot be easily identified.

The future transposition of the Whistleblowing Directive will entail the obligation to establish an anonymous reporting channel at companies with more than 50 workers. Concerning the LDC, it is essential that the reporting channel also includes infringements of competition law and that the violations revealed through this tool find their way to the appropriate channel according to the criteria contained in this guide.

D. Independence of the person responsible for design and oversight of compliance policies

It is necessary to appoint a direct person responsible for design and execution of the programme. They must have a full guarantee and the resources to be able to perform their duties independently (hereinafter, the ‘compliance officer’).

In order to guarantee this independence, they must have the authority to report directly to the company’s senior representatives (governing bodies and top executives) on issues related to monitoring the compliance programme (for example, detection of violations and management of these), as well as to request measures for the proper design and implementation of the programme (strategic, labour – such as designing incentives – disciplinary, etc.) from the management body and top executives. Likewise, the compliance officer must have full independence to be able to advise on the decision-making process of the company's governing bodies.

In addition, the compliance officer must have the necessary human and financial resources based on the size and characteristics of the company or organisation.

However, the aim of the compliance programme must ultimately be to transfer the first line of defence against anti-competitive practices to the workers, so that each and every one of them will be responsible for compliance with regulations within the scope of their duties. The compliance programme should aim to provide each of the company's employees with criteria to assist them in both decision-making and identifying risks within the scope of their duties.

E. Risk identification and design of oversight protocols or mechanisms

Any compliance programme must specifically analyse, within each company and each unit making it up, the risks to which they are exposed. This is what is commonly known as a ‘risk map’.

The risk map should indicate the areas of the business and organisation most exposed to possible violations of competition rules, the probability that the infraction in question will appear and the impact that the infraction would have on the company and its personnel (fines against the company, fines on the executives, reputation, ban from contracting with public administrations, compensation for damages, legal costs, etc.).

From the perspective of competition law, the risks faced by, for example, a company in a regulated sector, a company in the agri-food sector, a manufacturing company or a company in the pharmaceutical sector, are different.

Once the risks have been detected, for the compliance programme to be effective, it is necessary to design protocols or mechanisms of action that minimise the appearance of the risk in the decision-making process where it has been identified.

These protocols or mechanisms must introduce measures that guarantee the oversight or monitoring of observance of the company's compliance policy by workers and managers. Likewise, they must also include tools to be able to evaluate this compliance in order to trigger the relevant positive or negative consequences.

Indeed, for the programme to be effective, continuous evaluation is essential, for example, by overseeing training actions and the internalisation of concepts by means of assessed simulations, monitoring the reports submitted and how they are resolved, promoting individual initiatives around compliance, etc.

The risk identification system and protocol design should allow for continuous updates, with special emphasis on the training area. In particular, any event that involves new risks for the company or organisation (for example, acquisition of a new company or business, a change in ownership or control, development of a new line of business or a new market, a change in case law, etc.) must entail an update of the risk identification map and the protocols associated with it for decision-making.

F. Design of the internal procedure for management of reports and of detecting infractions

To be considered effective, the compliance programme must provide for internal mechanisms to (a) request advice in relation to a practice about which there are doubts as to its legality, including urgently, and (b) warn of the existence of suspicions or verification of infractions. This mechanism must be agile and accessible to all employees of the company.

Likewise, the compliance programme must include a specific procedure for managing infractions or the suspicion of infractions, either through internal or external reports or through the oversight mechanisms of the compliance programme itself.

This procedure must be able to guarantee proper analysis of risk situations, as well as protection of whistleblowers or persons who have reported the conduct in question to the company’s regulatory compliance officer. It must therefore include a system that protects the whistleblower from possible reprisals, in line with the obligations stipulated in the Whistleblowing Directive.

Early detection of the infringement is only useful if adequate measures are actually taken to put an end to it and produce the appropriate consequences.

G. Design of a transparent and effective disciplinary system

The absence of consequences resulting from risky decisions or the absence of their visibility reduces the overall effectiveness of any compliance programme.

It is necessary for the programme to make provision for relevant disciplinary measures as a result of deviations from the programme or violation of the rules, and for said measures to be visible and identifiable for the other company

employees. Penalties can range from a reduction in income (deactivation of the worker's financial incentive plan) to limitation of possibilities for promotion and even dismissal. In the case of managers, great value is placed on utilising senior management contracts that include rescission clauses in the event that the competent authorities definitely confirm that infractions of the LDC have been committed.

4. Consequences derived from implementation of an effective regulatory compliance programme in cases brought by the CNMC

The existence of an effective and efficient compliance programme is useful because it prevents participation in infractions and makes it possible to detect infractions that could not be avoided, as well as managing the consequences of a specific infraction.

The CNMC reiterates that the mere implementation of a compliance programme, whether before or after detection of the infraction, does not justify *per se* lessening the responsibility of the company which must be considered for the purposes of determining the penalty.

However, the CNMC may assess, on a case-by-case basis, whether implementation of a compliance programme can be considered a moderating factor in reducing the penalty.

The criteria and conditions set out below may be taken into account by the CNMC to possibly reduce the penalty in the light of the compliance programme presented by the accused company:

1. In relation to ex-ante compliance programmes

These are situations in which the company had a compliance programme prior to the start of the administrative disciplinary proceeding by the CNMC. It is important to differentiate between two types of situations, depending on whether or not there is the possibility of going to the CNMC under the leniency programme.

• Very serious violation constituting a cartel

In the event that a cartel infraction is detected as a result of the mechanisms introduced in the compliance programme, the CNMC considers making the authority aware of said cartel through the leniency programme constitute evidence of the company’s commitment to comply with competition law. This may be taken into consideration for the purposes of lessening its responsibility, as established by the LDC.

Likewise, active and effective collaboration with the CNMC from the start of an investigation and prompt report of a possible cartel involvement, together with recognition of the facts confirmed by the CNMC, also constitute evidence of the company's commitment to comply with competition law, and may be considered for lessening its responsibility.

• Very serious or serious violation not constituting a cartel

In the event that a non-cartel violation is detected as a result of the mechanisms introduced in the compliance programme, the CNMC considers that making the competition authority aware of said infraction constitutes evidence of the company's commitment to compliance with competition law. This may be taken into consideration for the purpose of lessening its responsibility, as established by the LDC.

Likewise, in the event that the violation of competition rules has been detected by the CNMC, it also considers (a) acknowledgement of the facts detected, (b) immediate termination of the conduct, and (c) making decision that remedy the damage of the same to competition quickly and voluntarily from the beginning of the investigation and notification of this by the company (for example, changing business strategy or the clauses in dispute) to also constitute evidence of the company's commitment to compliance with competition law, and may be considered for the purposes of lessening its responsibility.

2. In relation to ex-post compliance programmes

Once the violation of competition rules has been detected and the administrative disciplinary proceeding has been initiated, the company may submit plans for designing a compliance programme or plans for improving a compliance programme that the company may have prior to the start of the administrative disciplinary proceeding.

The CNMC Council will assess whether the design of said compliance programme or its improvement meets the considerations set forth in this guide regarding the effectiveness of this type of programme for the purposes of possibly adjusting the penalty in the penalty proceedings in progress, particularly in those cases where the ban on contracting provided for in Article 71 of the LCSP may apply.

Once the new compliance programme or the improved earlier programme has been implemented, the company has a maximum of six months to submit a statement by its legal representatives certifying implementation of the compliance programme or the improvement whose design was presented to the CNMC.