

ANTITRUST COMPLIANCE PROGRAMMES GUIDELINES

10th June 2020

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ANTITRUST COMPLIANCE PROGRAMMES GUIDELINES

Preface

Regulatory compliance programmes (hereinafter referred to as 'compliance programmes') have experienced considerable growth in Spain.¹ Although initially they were focused primarily in the sphere of criminal law, companies have been recognising the value of these programmes in ensuring regulatory compliance in other areas,² most notably in relation to violations of administrative law.

In the sphere of competition law, the definitive drive behind regulatory compliance policies has been two major legislative developments: the prohibition to contract with public administrations in the case of business sanctioned for serious violations of Act 15/2007, of July 3, on the Defence of Competition (LDC), provided for in Article 71.1.b) of Act 9/2017 on Public Sector Contracts (LCSP),³ 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'.

As regards the prohibition to contract, the LCSP provides for the exclusion from public tenders of companies which have received a final sanction for a serious violation in the area of 'distortion of competition'.⁴ However, Article 72.5 of the same act allows for the possibility of circumventing this prohibition to contract with public administrations when the company, in addition to proceeding or undertaking to pay the relevant fines or compensation, has a compliance programme. In particular when: 'the person who incurred the prohibition certifies

1 The definitive impetus came with the entry into force of Article 31bis of the Criminal Code, introduced by Organic Law 1/2015, of 30 March, which allows legal persons to be exempted from criminal liability in cases where they have implemented an effective compliance programme. Prosecutor's Office Circular 1/2016, of 22 January, on the criminal liability of legal persons pursuant to the reform of the Penal Code carried out by Organic Law 1/2015, available at https://www.boe.es/buscar/abrir_fiscalia.php?id=FIS-C-2016-00001.pdf, provides criteria for the evaluation of these programmes for the purposes of the article 31bis of the Criminal Code.

2 See, for example, the following certifications: ISO 19600:2014 compliance management systems, ISO 19601:2017 criminal compliance management systems, ISO 37001:2016 anti-bribery, ISO 14001:2015 environmental management systems, and UNE 19602:2019 tax compliance.

3 Act 9/2017, of 8 November, on Public Sector Contracts, transposing into Spanish law directives of the European Parliament and of the Council 2014/23/EU and 2014/24/EU of 26 February 2014, BOE 2017 no. 272, p. 107714. The non-application of the prohibition to contract with the public administrations of Article 72.5 of the LCSP is a result of the transposition of Article 57.6 of Directive 2014/24/EU, which included this provision, and is known as 'self-cleaning' measures (Directive 2014/24/EU of the European Parliament and of the Council, of 26 February 2014, on public procurement and repealing Directive 2004/18/EC, OJE 2014 L 94, p. 65).

4 Article 71.1.b) of the LCSP.

that they have paid or agreed to pay the fines and compensation set by an administrative judgment or decision from which the prohibition to contract arises, provided that said persons have been declared responsible for payment of the same in said judgment or decision, and the adoption of appropriate technical, organisational and personnel measures to prevent future administrative violations, including entering the leniency programme for the falsification of competition'.

As far as the Whistleblowing Directive is concerned, its future transposition will necessarily involve greater awareness of criminal and administrative offences, including those arising from competition law and, therefore, greater effort in the design and implementation of compliance programmes in precisely this area of the law.

Furthermore, the CNMC has been exploring 'Compliance Spaces' (formerly 'Compliance Dialogues') and compliance policies for four years through open conferences on public-private partnership,⁵ deepening the complementary aspects of deterrents in competition policy and preventive measures in the business environment.

In view of the foregoing, it is considered appropriate at this time to advocate compliance policies in relation to competition law. This guide is being published with the aim of assisting companies in this exercise, making transparent the basic criteria that the CNMC considers important for a given compliance programme to be effective.

1. Introduction

The CNMC is the body responsible for promoting and advocating competition in the Spanish business environment in the interest of society in general. To this end, it has various functions and tools established in the LDC.⁶

Among its tools, the following are notable for their importance and impact on detection of the most harmful practices: the leniency programme, under which companies providing relevant information or documents for detection and proof of a cartel may receive immunity or a reduction of fines which would have otherwise been imposed (articles 65 and 66 of the LDC); the possibility of imposing fines on legal representatives and executives who were involved in anti-competitive agreements (Article 63.2 of the LDC); the consequences that may arise from a final sanction for violation of the LDC in the area of public procurement (Article 71.1.b of the LCSP), such as prohibitions to contract with public administrations; and, lastly, victims of violations of competition law bringing

⁵ See the CNMC 'Compliance Space' at this link: <https://www.cnmc.es/cnmc-espacio-compliance>.

⁶ This is all provided for information purposes on the agency's website (<https://www.cnmc.es/sobre-la-cnmc/que-es-la-cnmc>).

claims against infringers for damages caused; particularly after the transposition of what is referred to as the Damage Directive.⁷

Likewise, for the purposes of this guide, it is relevant to highlight among the CNMC's functions, advocacy, which also entails the promotion of a rigorous corporate commitment to compliance with competition law.

The Spanish system for ensuring fair competition comprises both the rules of the current LDC – with the amendments introduced by Act 3/2013, of 4 June, establishing the National Commission on Markets and Competition (LCNMC) – and the case law of the EU bodies, courts, previous competition authorities at State level, and the corresponding authorities in the Autonomous Communities.⁸

Observance of and respect for the objectives of this regulatory system, which seeks to promote and advocate for 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 enable economic operators to prevent, detect and react early to unlawful conduct, which can result in criminal and administrative liability and affect their reputation. Such conduct includes practices that contravene competition law, the infringement of which is generating growing social rejection because of the damage it does to the welfare of society as a whole. Additionally, compliance programmes may also incentivise and strengthen companies' collaboration with the CNMC within the framework of the leniency programme provided for in articles 65 and 66 of the LDC.

In order to be truly effective, compliance programmes must ensure, through the clear establishment of behavioural parameters and the implementation of organisational measures for their development, the existence of a true commitment to compliance that is transferred to the day-to-day decision-making process of both natural persons who are involved in commercial activity for and on behalf of the company, de facto or de jure, and all employees of the company, enabling them, within the scope of their respective duties, to detect or prevent practices restricting competition. Set up in this manner, a compliance programme should be a manifestation of a work culture that respects the regulation of legal persons, translated into ethical codes, policies and the resulting procedures, oversight to verify that they function properly, internal and external reporting

⁷ Directive 2014/104/EU of the European Parliament and of the Council, of 26 November 2014, on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L 349, p. 1, implemented in Spanish law by Royal Decree-Law 9/2017, of 26 May, which transposes European Union directives in the fields of finance, commerce and health, and on the movement of workers, BOE 2017 no. 126, p. 42820.

⁸ Act 1/2002, of 21 February, regarding Co-ordination of the State and Autonomous Communities' Competences, BOE 2002 no. 46, p. 7148.

channels, etc. that, on the whole, reflect the firm aim of compliance in the way the organisation operates overall.

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

2. CNMC practice in relation to compliance programmes

The CNMC Council has had occasion to state an opinion on compliance programmes, both those implemented prior to detection of the violation (hereinafter, *ex ante* compliance programmes) and those implemented or modified to improve them once the company has already been investigated (hereinafter, *ex post* compliance programmes).⁹

As regards *ex ante* compliance programmes, in general, in the case of cartels, they are considered effective when they develop and implement internal controls that detect anti-competitive behaviour within the company, facilitating the company's use of the leniency programme (articles 65 and 66 of the LDC) in the case of cartels.

So far, the *ex ante* compliance programmes which the CNMC Council has had the opportunity to analyse in the context of disciplinary proceedings, did not contain sufficient elements to mitigate the liability of the accused companies.

With regard to *ex post* compliance programmes, the CNMC Council has assessed them positively, as demonstrated in sanction decisions in recent years.¹⁰

Although, according to the CNMC, the mere implementation of a compliance programme (or making improvements to a previous one) cannot be considered as such a mitigating circumstance, it may formally reflect the company's willingness to comply, which has been considered, in certain cases, for adjusting the fine.¹¹

9 CNMC decisions of 23 July 2015, case S/0482/13, *Fabricantes de Automóviles*; of 17 September 2015, case SNC/0036/15, *Mediaset*; of 12 January 2016, case S/DC/0522/14, *Thyssenkrupp*; of 26 May 2016, case S/DC/0504/14, *AIO*; of 6 September 2016, case S/DC/0544/15, *Mudanzas Internacionales*; of 8 June 2017, case S/DC/0557/15, *Nokia*; of 26 July 2018, case S/DC/0565/15, *Licitaciones informáticas*; and of 1 October 2019, case S/DC/0612/17, *Montaje y Mantenimiento Industrial*.

10 CNMC decisions of 17 September 2015, case SNC/0036/15, *Mediaset*; of 12 January 2016, case S/DC/0522/14, *Thyssenkrupp*; and of 6 September 2016, case S/DC/0544/15, *Mudanzas Internacionales*; and of 1 October 2019, case S/DC/0612/17, *Montaje y Mantenimiento Industrial*.

11 See the CNMC decisions of July 23, 2015, case S/0482/13, *Fabricantes de Automóviles*; of 17 September 2015, case SNC/0036/15, *Mediaset*; of 12 January 2016, case S/DC/0522/14, *Thyssenkrupp*; of 26 May 2016, case S/DC/0504/14, *AIO*; of 6 September 2016, case

In the light of these considerations, the remainder of this guide lays out the criteria and elements for assessing the effectiveness of a compliance programme, both ex ante and ex post, on a case-by-case basis.

3. Effective compliance programmes. Evaluation criteria

The following are the criteria the CNMC considers generally appropriate for designing and implementing an effective compliance programme that meets the aims set out in this guide: firstly, preventing violations, and secondly, establishing the means to detect and react to violations that have not been prevented.¹²

The criteria are largely drawn from the Practical Guide to Self-Diagnosis and Reporting in Regulatory Compliance, Corporate Governance and Prevention of Corruption prepared by Transparency International Spain, whose digital version was produced by the CNMC and the aforementioned international non-profit organisation and is available to all operators as a self-diagnostic tool in the sphere of regulatory compliance at the following link: <https://arguide.cnmc.es>.¹³

In any case, assessment of the criteria set out below will be carried out by the CNMC on a case-by-case basis, with particular reference to the company's resources and its level of actual or potential exposure to the risks arising from infringement of competition law. It is in any event the company's responsibility to set out the criteria it considers relevant for assessing the effectiveness of its compliance programme, as well as its suitability for the appropriate consequences in each case, whether in the context of administrative sanction proceedings, in view of the corrective measures provided for in Article 72.5 of the LCSP, or in the framework of a commitment decision procedure.

In any event, the benefits of an effective compliance programme at all levels (especially reputational and merit-based corporate competitiveness) are generally considered to be significantly higher than the costs incurred by companies in implementing it.

A. Involvement of company management bodies and/or top executives

The culture of regulatory compliance should be promoted and incentivised by the company's top executives.¹⁴ For the purposes of this guide, top executives

S/DC/0544/15, *Mudanzas Internacionales*; of 8 June 2017, case S/DC/0557/15, *Nokia*; of 26 July 2018, case S/DC/0565/15, *Licitaciones informáticas*; and of 1 October 2019, case S/DC/0612/17, *Montaje y Mantenimiento Industrial*.

¹² In any case, small legal entities must adapt the commitment to regulatory compliance to their size and particular features, in a manner similar to the provisions of section 5.5 of Circular 1/2016, of 22 January, of the Office of the Director of Public Prosecutions on the criminal liability of legal entities under the reform of the Penal Code by Organic Law 1/2015.

¹³ See also: <http://integridad.org.es/wp-content/uploads/2017/07/TI-Guia-Pract-Autodiagnostico-DIGITAL-1.pdf>

¹⁴ The commitment of the company's top executives to the compliance programme is what is known as the 'tone from the top'. There is no unambiguous concept of 'executive' in the Spanish

are those who are authorised to make decisions on behalf of the legal entity or have organisational and oversight powers within the same. Said classification would in any event include: (a) legal representatives of the company, (b) those who are authorised to make decisions on behalf of the legal entity (generally, de facto and de jure administrators), and (c) those who have organisational and oversight powers, for example, those who make up the management committee or similar body.

In order for the compliance programme to be effective, top executives must be fully involved, as they reflect the company policy and working culture.

For the same reason, a case-by-case analysis notwithstanding, the fact that one of the company's top executives is directly involved in a very serious violation of the LDC could, depending on the circumstances of each case, determine the ineffectiveness of the compliance programme if it is concluded that their involvement in the violation precludes a genuine 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 gives priority to risky behaviour could undermine the effectiveness of the programme. By contrast, an incentive policy that rewards programme compliance and punishes non-compliance, including as grounds for termination of the employment relationship, could make the programme more effective.

In this context, it is particularly advisable to have a clear, firm, public statement by the company's top executives stressing that compliance with competition law is not only a legal obligation, but a central element of the company's 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 training for the company's employees, adapted in each case to their area of activity and duties. For example, the training given to a sales manager should not be the same as that of an operator, but both should receive training related to competition compliance in so far as they may be exposed to risks relating to this in their respective units. The training strategy should also be assessed in relation to close associates (partners, distributors, major suppliers, etc.).

The training strategy should be accessible, adaptable, measurable and verifiable, in terms of impact and internalisation of the topics covered during the training.

legal system. Labour legislation is usually the main reference in differentiating between those whose relationship to the company is governed by an employment contract or a senior management contract, but other areas of the law have their own definitions in their reference legislation. The LDC does not contain a definition of the concept of 'executive' as such, and the broad strokes of this for the purposes of application of Article 63.2 of the LDC were defined by the Supreme Court in, among others, its judgments no. 430/2019, 28 March 2019, app. no. 6360/2017, and 1287/2019 of 1 October 2019, app. no. 5244/2018.

Ad hoc training sessions should also be provided when there is a change in circumstances (a change of ownership or control, a new supplier, a new market, a new procurement system, a new marketing campaign, etc.).

Without proper training, it is doubtful whether the other elements of the compliance programme can be effective: management bodies and top executives would not know how to demonstrate their engagement with rules with which they are unfamiliar, the reporting channel would not serve its purpose, risks could not be properly identified, etc.

Generally speaking, a standard training strategy that merely outlines a few basic concepts of competition law is not considered effective.

C. Existence of a reporting channel

In international best practices, internal reporting channels have proven to be an essential tool for the effective implementation and management of compliance programmes.

Firstly, an internal reporting channel makes it possible to quickly detect infringing conduct, as anyone (mid-level positions, support staff, etc.), having received the appropriate training, can detect the violation and bring it to the attention of the person responsible for the channel.

Furthermore, it represents a deterrent for company employees and managers, given the ease of detecting the violation and communicating it to the head of the reporting channel.

The internal reporting channel is fed by an effective training strategy. Without training, the effectiveness of the reporting channel is diminished. Conversely, however much training is provided, in the absence of an accessible means of reporting, it will not be possible to easily detect the practices identified.

Likewise, management of the internal reporting channel must be able to protect the complainant from possible reprisals. The possibility of maintaining anonymity in the reporting procedure through the channel would normally increase the effectiveness of the compliance programme in so far as it mitigates the risk of retaliation measures.

The future transposition of the Whistleblowing Directive will entail the obligation to set up a reporting channel in companies with more than 50 workers. As far as LDC is concerned, it is essential that the reporting channel also covers violations of competition law and that violations revealed through this tool are routed to the appropriate channels in accordance with the criteria in this guide.

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

A direct head of compliance programme design and implementation (hereinafter referred to as the 'compliance officer')¹⁵ should be appointed, with every assurance and the resources to enable them to carry out their duties independently and autonomously.

The compliance officer's power to report directly to the management body on issues related to oversight of the compliance programme (for example, detection and management of violations) is generally significant evidence of their independence. Similarly, the compliance officer should be able to provide fully independent advice in the decision-making process of the company's governing bodies on matters relating to their duties.

The compliance officer should have the necessary human and financial resources, depending on the size and characteristics of the company or organisation.

However, the aim of the compliance programme should ultimately be to bring the first barrier for oversight of anticompetitive practices to the workers, so that each and every worker is responsible for compliance with the rules within the scope of their duties. The compliance programme should aim to provide each company employee with the criteria to assist them in both making decisions and identifying risks within the scope of their duties.

E. Identification of risks and design of protocols or oversight mechanisms

Any compliance programme should be able to assess, that is, to identify, analyse and evaluate, in a specific way, the risks to which each company and each unit making it up are exposed. This is commonly referred to as a 'risk map'.

The risk map should indicate at least: (1) the business areas, business processes and individuals within the organisation most exposed to potential violations of competition law; (2) the likelihood that the violation in question will occur; and (3) the impact that the violation would have on the company and its staff (sanctions on the company, sanctions on managers, reputation, prohibition to contract 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 industry, a manufacturing company or a pharmaceutical company are very different.

For the compliance programme to be effective, it is necessary to design what is known in the field of compliance as a 'control matrix', that is, protocols and

¹⁵ In comparative law, this person is known by the English name 'compliance officer'.

mechanisms for prevention, detection and early reaction to risks, minimising the emergence of the risk in the decision-making process where it has been identified.

It is advisable for the control matrix to include measures to ensure oversight and monitoring of observance of the company's compliance policy by workers and managers, and that these measures are measurable and verifiable.

The risk identification system and protocol design should provide for ongoing updates. As in the case of training, any event involving new risks to the company or organisation (for example, acquisition of a new company or business, a change of ownership or control, the development of a new line of business or a new market, a change in case law, etc.) makes it advisable to update the risk identification map and control matrix.

F. Design of the internal procedure for managing reports and managing detection of violations

In order to be considered effective, the compliance programme should include internal mechanisms for (a) seeking advice in relation to a practice about which there are doubts as to its legality, including when urgent, and (b) warning about suspicions or confirmation of violations. These mechanisms should be agile and accessible to all workers at the company.

Similarly, the compliance programme should include a specific, pre-established and known procedure for managing violations or suspected violations that have been detected, either through internal or external reports or through the mechanisms of the compliance programme itself included in its control matrix.

This specific procedure should ensure, one, suitable and expeditious analysis of risk situations (for example by entrusting leadership and management to persons with sufficient capacity in terms of independence and autonomy, allowing collaboration and coordination with other areas, etc.); and, two, protection for whistleblowers or persons who have reported the conduct or suspicion in question. In this regard, the system could include protective measures against possible retaliation measures similar to those contained in the Whistleblowing Directive.

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

G. Design of a transparent and effective disciplinary system

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

An effective compliance programme typically includes both disciplinary measures as a result of deviations from the programme or violation of rules, and possible incentives for compliance or even collaboration within the

programme. In any event, the measures envisaged should be predictable and transparent to all members of the organisation.

Sanctions could range from a reduction in the offender's income (deactivation of the worker's financial incentive scheme) to limiting promotion options and even dismissal. In the case of executives, where this is possible in accordance with labour regulations, the ending of senior management contracts that include termination clauses due to confirmation of LDC violations by the competent authorities is viewed favourably.

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

The existence of an effective compliance programme is useful because it prevents involvement in violations and makes it possible to detect those that have not been prevented, as well as reacting early to a particular violation.

The CNMC reiterates that the mere implementation of a compliance programme, whether ex ante or ex post in relation to detection of the violation, does not per se justify mitigating the company's liability for the purposes of determining the fine.

However, the CNMC may assess, on a case-by-case basis, whether the pre-existence of a compliance programme, its improvement or its subsequent implementation after the investigation is initiated by the competition authority, can be considered as a mitigating circumstance for the purposes of adjusting the amount of the fine.

In any case, in general, the CNMC will normally view an effective ex ante compliance programme more positively than the promise to implement or improve an ex post compliance programme.

The CNMC will be able to assess the effectiveness of a compliance programme and, in particular, of the reactive measures it may include in relation to active and effective collaboration with the authority once the violation has been detected, in particular in the context of administrative proceedings, with a view to the corrective measures provided for in Article 72.5 of the LCSP or in the framework of a commitments decision proceeding.

4.1. With regard to ex ante compliance programmes

This section covers situations in which the company had a compliance program before administrative proceedings were initiated by the CNMC. It is necessary to differentiate between two types of situations, depending on whether or not there is the possibility of recourse to the CNMC leniency programme.

4.1.1. Very serious violation constituting a cartel

A. Request for exemption or reduction of the fine pursuant to articles 65 and 66 of the LDC.

The CNMC considers that reporting the cartel to the authority or collaboration through the leniency programme in accordance with the provisions of articles 65 and 66 of the LDC constitutes evidence of the company's commitment to compliance with competition law and may be considered for the purpose of mitigating its liability, as stipulated in the LDC.

B. Other situations

In the event that the company has not made use of the leniency programme under articles 65 and 66 of the LDC, its active and effective collaboration with the CNMC from the start of an investigation, together with acknowledgement of the facts established by the CNMC, constitutes evidence of the company's commitment to compliance with competition law and may be considered for the purpose of mitigating its liability.

4.1.2. Very serious or serious violation not constituting a cartel

A. Collaboration in detection and investigation of the violation

The CNMC considers that bringing a violation that may have been discovered thanks to the compliance programme to the attention of the authority, whether or not an administrative proceeding has been initiated, and collaborating actively and effectively with the CNMC, constitutes evidence of the company's commitment to compliance with competition law and may be considered for the purpose of mitigating its liability, as established by the LDC, and even exempted from payment of the fine.¹⁶

B. Other situations

Similarly, in the event that the violation of competition law has been detected by the CNMC, it is considered that (a) acknowledgement of the facts detected; (b) immediate termination of the conduct; and (c) making decisions to remedy the harm caused by the same quickly and voluntarily from the start of the investigation (for example, by altering the business strategy or the contested clauses), also constitute evidence of the company's commitment to compliance with competition law; and may be considered for the purpose of mitigating its liability.¹⁷

4.2. With regard to ex post compliance programmes

Once the violation of competition law has been detected and an administrative disciplinary proceeding has been initiated, the company may submit a plan to design the compliance programme, or a plan to improve any compliance programme the company may have had before the start of the CNMC investigation.

The plan for the compliance programme or improvement of the ex ante compliance programme must be submitted to the Directorate of Competition of

¹⁶ See the CNMC Decision of 26 July 2018, in case S/DC/0596/16, Estibadores Vigo.

¹⁷ See the CNMC Decision of 29 October 2019, in case S/0629/18, Asistencia Técnica Vaillant.

the CNMC as soon as possible and in any event before notification of the proposal for a decision.

The CNMC will assess whether the design of said compliance programme or its improvement, as well as its active and effective cooperation during the proceedings, including acknowledgement of the facts, is in line with the considerations set out in this guide regarding the effectiveness of such programmes for the purpose of possibly adjusting the penalty in the disciplinary proceedings in progress, without prejudice to Article 72.5 of LCSP.

Once the new compliance programme or the improved earlier programme has been implemented, within six months of adoption of the decision concluding the case, or within the period provided for in the agreements adopted in a commitments decision proceeding, the company must submit a statement by its representatives certifying implementation of the compliance programme or the improvement whose design was submitted to the CNMC.

4.3. Results deriving from an effective compliance programme

In the cases discussed in the preceding paragraphs, the case-by-case assessment notwithstanding, the CNMC envisages the possibility of the following results arising from the pre-existence, implementation or improvement of effective compliance programmes in accordance with the criteria established in this guide:

- In the circumstances indicated in **paragraph 4.1.1.A**, companies, in addition to the benefits derived from the leniency programme provided for in articles 65 and 66 of the LDC (immunity or reduction of fines, as well as avoiding the prohibition to contract with public administrations provided for in Article 71.1 of the LCSP, in accordance with Article 72.5 of the same law), mitigation of their liability for the infringement will be reflected in the fining decision, for such purposes as may be appropriate. Said mitigation of liability may be reflected in the fine imposed on the company, regardless of the reduction in the fine provided for in Article 66 of the LDC.
- In the circumstances indicated in **paragraph 4.1.1.B**, adjustment of the fine which may pertain to the company will be assessed in accordance with the mitigation of its liability arising from the compliance programme.
- In the circumstances indicated in **paragraph 4.1.2.A**, companies will see mitigation of their liability for the infringement reflected in the fining decision, for such purposes as may be appropriate. Said mitigating circumstance may also result in an adjustment of the fine, without prejudice to the possibility that the decision may not provide for any fine.¹⁸ Likewise, the CNMC declaration of the effectiveness of the infringing company's compliance programme may be relevant in other administrative

¹⁸ See the CNMC Decision of 29 October 2019, in case S/0629/18, Asistencia Técnica Vaillant.

proceedings, in particular, proceedings before the Consultive Board on Procurement for the purposes of Article 72.5 of the LCSP.

- In the circumstances indicated in **paragraph 4.1.2.B**, adjustment of the fine which may pertain to the company will be assessed in accordance with the mitigation of its liability arising from the compliance programme.¹⁹ Likewise, the CNMC's declaration of the effectiveness of the infringing company's compliance programme may be relevant in other administrative proceedings, in particular, proceedings before the Consultive Board on Procurement for the purposes of Article 72.5 of the LCSP.
- In the circumstances indicated in **paragraph 4.2**, adjustment of the fine which may pertain to the company will be assessed in accordance with the mitigation of its liability arising from the compliance programme.

¹⁹ See the CNMC Decision of 26 July 2018, in case S/DC/0596/16, Estibadores Vigo.

APPENDIX

EXAMPLE OF COMMONLY ACCEPTED INDICATORS FOR REVIEWING THE EFFECTIVENESS OF A COMPLIANCE PROGRAM

For more examples, see <https://arguide.cnmc.es> and
<https://evaluacioncompliance.cnmc.es/>

A. Involvement of the company's management bodies and top executives

- Does your company have a specific, comprehensive and up-to-date competition law violation prevention programme approved by top executives?
- Is there a public statement by top executives of zero tolerance in relation to competition law?
- Does your company have an incentive system that promotes and fosters compliance with competition law and policies?
- Does your company include compliance with competition law and the provisions of the compliance programme to prevent non-compliance as an essential element of the business owner's instructions for disciplinary purposes and even possible dismissal?
- Does your company promote and develop a culture of regulatory compliance in the organisation in support of free competition?
- Is the compliance unit involved in strategic decisions, such as, for example, mergers and acquisitions, or the design of new business strategies?

B. Effective training

- Does your company have an annual training plan on the compliance programme in the remit of all members of the company: employees, senior management and members of the governing body?
- Is there traceability for the above-mentioned training?
- Does your company have corporate integrity and regulatory compliance training for third parties that interact with the company?

- Has your company launched awareness campaigns for its employees, governing body members and senior management regarding ensuring fair competition?
- Does your company update and revise your training plan in the area of competition law on a regular basis (at least annually) and adapt it to major regulatory and legal changes?
- Does your company publish training activities in the area of ensuring fair competition (number of hours and percentage of staff trained)?

C. Existence of an anonymous reporting channel

- Has your company set up a reporting channel (whistleblowing channel) for employees?
- Does your reporting channel guarantee the anonymity of the whistleblower?
- Does your company have a regulation or protocol on the operation, content and limits of your reporting channel?
- Does your company have a training programme to regularly inform workers about what types of violations can be reported and which cannot be reported and about the proper operation of the channel?
- Does your internal channel make it possible to report possible anti-competitive conduct?
- Do your employee contracts include a clause on the obligation to report any inappropriate conduct which they may witness through that channel?
- Does your company have any channels for inquiries other than reports (for example, information channel or for other incidents) and do they function properly?
- Does your company conduct regular surveys of workers to measure their level of knowledge and awareness of the reporting channel, as well as the effectiveness of the same?
- Does your company provide quantitative data on the number of reports received in your consolidated report or on your corporate website?
- Is your reporting channel also available to your supply chain and other stakeholders?

- Does the compliance unit or department coordinate management of reports received via the different reporting channels?

D. Independence of compliance policy design and oversight

- Does your company have a compliance person, department or unit (for example, a 'compliance officer')?
- Does the compliance officer have full autonomy and independence in performing their duties?
- Does your company have internal operating rules or regulations governing the duties, powers, and limits of the compliance officer?
- Is the compliance officer in direct communication with the governing body and top executives?
- Does the compliance officer have their own budget line?
- Does the compliance officer have sufficient financial, human, technological and material resources to carry out their duties?
- Does your company have protocols to properly manage potential conflicts of interest between the compliance officer and other units or departments, such as, for example, human resources, legal services or internal auditing?
- Does the compliance officer's contract contain a specific action and self-protection clause in the event of a decision not to act or not to investigate by management bodies or top executives against the judgment of the compliance officer?

E. Identification of risks and design of protocols or oversight mechanisms

- Does your company have a detailed analysis of potential real risks in the area of regulatory compliance?
- Does your company have a specific and specialised competition questionnaire to prepare a risk map for its employees?
- Does your company's compliance programme include a report on the main risks deriving from competition law and the measures taken to prevent them?
- Does your company anticipate revision of the risk map when significant changes occur, such as for example, changes in company structure,

changes in ownership or control, changes in legislation and relevant case law?

- Does your company adjust its oversight according to each risk?
- Does your company conduct a periodic (at least annual) review your risk map?
- Does your company produce specific compliance programme oversight reports specifically with regard to competition law?
- Has your company developed its own system of measurable indicators to assess the effectiveness and development of each element of the compliance programme, as well as the corporate culture of compliance, and is this in line with the risks of non-compliance that the company faces (by type, area or department, frequency, executors, etc.)?
- Does your company conduct a regular (at least annual) review, update and improvement of its specific compliance programme in the area of competition law?
- Does your company provide details of the powers of the governing body in overseeing the risks arising from violations of competition law?

F. Design of the internal procedure for managing reports and managing detection of violations

- Has your company established an internal compliance investigation procedure or protocol?
- Does this internal investigation procedure safeguard personal privacy and the protection of personal data?
- Does your company have a specific document or programme to train or inform workers about their rights during investigation proceedings in the event of a complaint?
- Does your company have rules, procedures and oversight of the investigation of events, reports or conduct at its subsidiaries or in other geographical areas where it operates?
- If there is an internal investigation into an event as a result of a report, does your company entrust an external company with managing this in cases where it is deemed appropriate?

- Does your company or the external company engaged in managing internal investigations have evidence securing techniques?
- Does your company have a system to protect and safeguard information in internal investigation processes?
- Does your company actively cooperate with the competition authority as soon as it becomes aware of a possible violation, acknowledging the facts detected, immediately terminating the conduct and taking measures to remedy the damage to competition in a prompt and voluntary manner?

G. Design of a transparent and effective disciplinary system

- Has your company established an internal disciplinary scheme?
- Is your disciplinary policy clear and transparent, compliant with labour legislation, and with proportionate, effective and sufficiently dissuasive measures?
- Has your company designed a system to set up a disciplinary committee or committees for particularly serious, complex or important cases?
- Has your company regularly and appropriately kept all employees informed about the existence and content of the internal penalty scheme?
- Do senior management contracts include termination clauses in the event of involvement in practices prohibited by competition law?