

## CNMC

# PROPOSED GUIDE FOR COMPLIANCE PROGRAMMES INVOLVING FAIR COMPETITION

### Presentation

Regulatory compliance programmes (hereinafter, "compliance programmes") have experienced a significant surge in Spain<sup>1</sup>. Although their utility was initially limited primarily to the area of criminal law, companies began to recognise the value of these programmes to ensure regulatory compliance in areas other than criminal law<sup>2</sup>, and specifically in the area of breaches of administrative law.

In the field of anti-trust regulation, the law is ultimately enforced through two important legislative tools: the prohibition imposed on businesses from contracting with government agencies when they have been fined for serious violations of Law 15/2007 of 3 July, the Anti-Trust Law (LDC), as provided for in Article 71.1.b) of Law 9/2017 on Public Sector Contracts<sup>3</sup> (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".

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<sup>1</sup> The final push came with the entry into force of Article 31a of the Criminal Code, introduced by Organic Law 1/2015 of 30 March, which allows for the possibility of exempting legal entities from criminal responsibility in those cases where an "effective" compliance programme has been implemented. Circular 1/2016 of 22 January of the State Prosecutor's Office, on the criminal liability of legal entities pursuant to the reformed Criminal Code resulting from Organic Law 1/2015, available at [https://www.boe.es/buscar/abrir\\_fiscalia.php?id=FIS-C-2016-00001.pdf](https://www.boe.es/buscar/abrir_fiscalia.php?id=FIS-C-2016-00001.pdf), provides criteria for evaluating these programmes for the purposes of article 31a of the Criminal Code.

<sup>2</sup> See, for example, the following standards: ISO 19600 Compliance Management Systems, ISO Criminal Compliance Management Systems, ISO 37001 Anti-bribery, ISO 14001 Environmental Management Systems, Future UNE 19602 Tax Compliance.

<sup>3</sup> Law 9/2017 of 8 November, on Public Sector Contracts, which transposes the European Parliament and Council Directives 2014/23/EU and 2014/24/EU of 26 February 2014, into the Spanish legal system, BOE 2017 no. 272, p. 107714. The waiver of the contracting prohibition in Article 72.5 of the LCSP is a consequence 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, OJEU 2014 L 94, p. 65).

With regard to the contracting prohibition, the LCSP allows excluding from public tenders those companies that have been issued a final sanction for a serious breach in the area of “distortion of competition”<sup>4</sup>. However, the same Law, in Article 72.5, provides for the possibility of waiving this contracting prohibition when the company, in addition to paying or committing to pay the relevant fines or compensation, has a compliance programme. Specifically, when: *“the person charged in the prohibition case pays or agrees to pay the fines and compensations imposed by an administrative ruling or resolution that also imposes the prohibition to contract, provided that the aforementioned person has been declared responsible for the payment thereof in said ruling or resolution, and that the appropriate technical, organisational and personnel measures have been adopted to avoid the commission of future administrative infractions, including opting into the leniency programme in matters of distortion of competition”*.

With regard to the Whistleblowing Directive, its future transposition will necessarily imply greater awareness regarding criminal and administrative offences, including those stemming from anti-trust rules, and therefore a greater effort in the design and implementation of compliance programmes in this area of law.

For four years, the CNMC has been using public workshops on public/private collaboration<sup>5</sup> - the “Compliance Spaces” (formerly the “Compliance Dialogues”) - to explore compliance policies and delve into the complementarity between the deterrent elements of the anti-trust policy and preventive measures in business environments.

In light of the above, it is appropriate at this time to promote regulatory enforcement policies in the area of anti-trust law. The publication of this guide is intended to assist companies in this endeavour by ensuring the transparency of the basic criteria that the CNMC deems relevant for a given compliance programme to be effective.

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<sup>4</sup> Article 71.1.b) of the LCSP.

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