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Competition Compliance Programmes – Note by Spain

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This document reproduces a written contribution from Spain submitted for Item 1 of the 133rd OECD Working Party 3 meeting on 8 June 2021.

More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/competition-compliance-programmes.htm>.

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1. This contribution by the Spain's National Commission for Markets and Competition¹ (CNMC) addresses the subject of the roundtable on the "Competition Compliance Programmes", to be held in the June 2021 meeting of the Working Party No.3 (WP3).
2. It is structured as follows. The first section deals with the relation between competition enforcement and compliance, assessing the role of compliance programmes and policies. The second section addresses the role of advocacy in promoting a culture of competition and compliance. The third section concludes with the main takeaways.

1. Compliance programmes and competition enforcement

1.1. The CNMC Compliance Guide

1.1.1. Introduction: the path to the 2020 Compliance Guidelines

3. The Spanish Competition Authority (Comisión Nacional de los Mercados y la Competencia – hereinafter CNMC) issued its [Compliance Guidelines](#) in June 2020, with the aim of promoting the observance of competition rules by economic agents as a tool to strengthen its own enforcement activity.

4. This is the first document designed by the CNMC concerning specifically compliance programmes (hereinafter CPs) related to the competition law infringements. Some analysis and references had been included in previous decisions, but there wasn't a methodological document with all the relevant criteria. Also, although initially CPs were used primarily in the sphere of criminal law², more and more companies started to recognise the value of Compliance Programmes to ensure compliance in areas other than criminal matters, particularly in the sphere of administrative infringements, including antitrust wrongs. Likewise, since 2016 the CNMC had been exploring into these matters through the well-known "Compliance Spaces", which consisted on periodical open house debates hosted by the CNMC on a wide set of compliance-related issues. Last, but not least, since 2018, following a legal amendment, companies may start facing debarments following antitrust infringements and these could be eluded with "self-cleaning" measures, as the ones included typically in a CP.

5. Indeed, a major drive behind compliance policies within the CNMC arose from the possible imposition of debarment measures in public tenders following serious infringements of competition law after the entry into force of [article 71.1.b\)](#) of the Public Procurement Act (Ley 9/2017 de Contratos del Sector Público or LCSP); and, the possibility to avoid such debarment following the self-cleaning measures envisaged in [article 72 paragraph 5 of LCSP](#). This article states that if "*the person involved in the cause*

¹ This contribution has been prepared by the staff of the CNMC and shall not be regarded as the official position of the CNMC unless it refers to CNMC approved documents.

² [Article 31 bis](#) of the Spanish Criminal Code (reformed in 2015) expressly recognizes an exemption of liability for legal persons if, among other conditions, "*the management body has effectively adopted and implemented, prior to the commission of the offense, organization and management models that include the appropriate monitoring and control measures to prevent crimes of the same nature or to significantly reduce the risk of its commission*" (paragraph 4).

of prohibition accredits the payment or commitment to pay the fines and indemnities established by a judgment or administrative decision from which the cause of prohibition to contract is derived, provided that the aforementioned persons have been declared responsible for the payment thereof in the aforementioned judgment or decision, and the adoption of appropriate technical, organizational and personnel measures to avoid the commission of future administrative infringements, among which will be included the application of the leniency program in matters of distortion of competition".

6. The first case in which the CNMC stated this debarment provision was in Decision of 14th March 2019 (Case S/DC/0598/16 *Electrificación y Electromecánica Ferroviarias*)³.

7. Taking all this background into account, in May 2019, the CNMC set up an internal multidisciplinary working group, led by the Competition Directorate to research, discuss and design some guidance regarding the “effectiveness” of the increasing number of CPs. The first draft was exposed in February 2020 to public consultation. Following the wide participation of relevant stakeholders (trade associations, corporations, antitrust and compliance experts, legal firms and regional competition authorities), the final text was published in June 2020.

1.1.2. CNMC experience with regard to Compliance Programmes prior to the 2020 Compliance Guidelines

8. Despite the fact that its Compliance Guidelines were only published in June 2020, some previous decisions considered the measures included in certain CPs as mitigating circumstances.

9. The legal basis for the consideration of the existence of a CP to modulate the amount of the fine to be imposed was [article 64 paragraph 3](#) of the Spanish Competition Act (Ley 15/2007, de Defensa de la Competencia, hereinafter, LDC):

“To set the amount of the penalty, the following mitigating circumstances, among others, shall be taken into account:

- a) The performance of actions that terminate the infringement.*
- b) The effective non-application of the prohibited conduct.*
- c) The performance of actions intended to repair the damage caused.*
- d) The **active and effective collaboration** with the National Competition Commission carried out outside the cases of exemption and of reduction of the amount of the fine regulated by Articles 65 and 66 of this Act.”*

10. The cases where companies pleaded for a reduction of the fine following the existence, or the commitment to adopt, a CP, were the following:

³ <https://www.cnmc.es/expedientes/sdc059816>

Table 1.

Decision	Date	Type of infringement	Type of alleged CP
S/0482/13 Fabricantes de automóviles ⁴	23.07.2015	Cartel	Ex ante
S/DC/0544/14 Mudanzas internacionales ⁵	06.09.2016	Cartel	Ex post
S/DC/0557/15 NOKIA ⁶	08.06.2017	Unilateral conduct	Ex ante
S/DC/0565/15 Licitaciones aplicaciones informáticas ⁷	26.07.2018	Cartel	Ex ante
S/DC/0612/17 Montaje y mantenimiento industrial ⁸	01.10.2019	Cartel	Ex post

11. In all these cases, the alleged CPs were considered not to be eligible as a mitigating circumstance since, in the CNMC's view, they did not fulfil the criteria established by Spanish legislation and case law for the appreciation of such circumstances.

12. The only case where the existence of a CP had some effect upon the amount of the fine was the cartel known as *Mudanzas internacionales*. In this case, the CNMC did not accept the promise to implement a CP following the infringement proceedings ("ex post CP") as a mitigating circumstance, but it nevertheless lowered the fine following such promise as an incentive to effectively do so.

13. In other cases, *Montaje y mantenimiento industrial*, the CNMC expressly recognised the possibility to avoid debarment from public procurement following an antitrust infringement if an effective CP was implemented.

14. It is relevant to point out that requests for benefits arising from CPs always came from infringing companies other than the leniency applicants. This might explain the high failure rate as regards the "efficacy" recognition of such CPs.

15. Very recently, on May 11 2021 (Case S/DC/0627/18, Consultoras), the CNMC applied for the first time its June 2020 Compliance Guidelines. Following the compliance commitment shown by the infringing company after the formal proceeding started, the CNMC granted a reduction of the fine and it excluded the company from debarment measures in public tenders.

1.1.3. The 2020 Compliance Guidelines

16. The CNMC Compliance Guidelines are structured in two parts. The first part lists a non-exhaustive list of criteria⁹ that the CNMC considers appropriate for designing and implementing an "effective" compliance programme (Sections 1 to 3). The second part

⁴ <https://www.cnmc.es/expedientes/s048213>

⁵ <https://www.cnmc.es/expedientes/sdc054414>

⁶ <https://www.cnmc.es/expedientes/sdc055715>

⁷ <https://www.cnmc.es/expedientes/sdc056515>

⁸ <https://www.cnmc.es/expedientes/sdc061217>

⁹ The Appendix to the Guide provides some examples of commonly accepted indicators for assessing the effectiveness of a compliance programme.

(Section 4) establishes the consequences within the framework of an infringement proceeding deriving from the existence or the future implementation of such “effective” compliance programme.

17. As regards the first part, the following criteria are described:

- **Tone from the top:** an effective CP must show the true commitment of the company’s management bodies and/or top executives in the promotion of compliance within the organization. The culture of compliance must be an intrinsic part of the company's management policies and ways to do business. To this extent, compliance should not only be envisaged as a legal obligation but also a central element of the company’s culture.
- **Compliance Officer:** normally effective CPs include the appointment of a fully independent compliance officer, who is responsible for the design and oversight of the compliance policies. The power to report directly to the management body on issues related to the CP is generally considered as a key feature of its independence.
- **Risk map and control matrix:** risks should be identified and protocols or control mechanisms designed to avoid and detect them: On one hand, each company should have its own “*risk map*” identifying business areas, tasks and individuals that are most exposed to competition law infringements. On the other hand, there should be a “*control matrix*” specifying mechanisms for prevention, detection and early reaction to these risks. Both should be constantly updated.
- **Training:** One of the basic pillars of any CP is the effective training of the company's employees (and even close partners in some cases), adapted in each case to their area of activity and duties and to changing circumstances. The training strategy should be accessible, adaptable, measurable and verifiable.
- **Internal reporting channel:** Likewise, the existence of an internal reporting channel so that employees can raise concerns or potentially unlawful conducts they have come across is essential. The reporting channel has two roles. On the one hand, it helps to swiftly communicate the conduct to the person responsible for taking the appropriate measures. On the other hand, it has a deterrent effect: employees and managers will be more likely to refrain from anticompetitive conducts if this reporting channel is effective. In order for this channel to be an effective tool, training is essential (if employees are adequately trained, they will be able to identify these concerns), together with some safeguards to protect the complainant/whistleblower from retaliation (e.g. anonymity of the reporting).
- **Predictable and transparent internal procedures:** It is also important to envisage an agile and accessible internal procedure for managing reports and detection of violations, allowing all employees to seek advice on doubts about specific conducts and to warn about suspicions or evidence. This procedure should include the internal and external measures considered for managing these suspicions or confirmed violations (as specified in the “control matrix”), with adequate safeguards for complainants/whistleblowers (e.g. anonymity).
- **Disciplinary Regime:** Last, an effective CP should normally include a transparent and effective disciplinary regime, including disciplinary measures in case of deviations from the programme or violation of the rules and potential rewards for compliance and collaboration. Ideally, these measures should be transparent and predictable, so they could be included in contractual clauses. Sanctions may range

from a reduction in the offender's income to limiting promotion opportunities and even the dismissal¹⁰.

18. The CNMC Compliance Guide stresses that these criteria will be assessed on a case-by-case basis, with particular reference to the company's resources and its level of actual or potential exposure to risks of infringing competition law

19. The second part of the CNMC Compliance Guidelines (Section 4) constitutes its major and most innovative feature to the extent it foresees the reactive measures expected following a given infringement and the incentives arising thereof. Indeed, section 4 includes an explicit recognition of the incentives deriving from compliance commitments which is uncommon among legal systems non-based on common law.

20. Incentives vary between *ex ante* CP (those in place before infringement proceedings are opened) and *ex post* CPs (those promised to be implemented thereafter). Also, a distinction is drawn between cartel cases and non-cartel cases to the extent that, in the latter case, companies cannot file for leniency.

21. Generally, larger benefits are inferred from *ex ante* CP than from *ex post* CP. Likewise, whenever there is self-reporting (leniency or other), true compliance commitment is assumed. Absent self-reporting, compliance culture and commitment deriving from an effective CP should normally entail full collaboration from the infringing company with the CNMC.

22. Incentives encompass the following: reduction of the fines, acknowledging the compliance efforts and willingness in the final decision (which may have, among others, positive reputational effects) and avoiding the eventual debarment from public tenders in eligible cases.

23. The Guide does not establish an automatic reduction of the fine, nor a specific percentage of reduction. Every case will be analysed individually. However, the Compliance Guide refers to previous decisions of the CNMC where self-reporting in a non-cartel case, together with full collaboration amounted to a non-fining decision (S/DC/0596, *Estibadores de Vigo*) and case where prompt full collaboration, acknowledgment of the facts voluntary and remediation prompted a significantly reduced fine (S/DC/0629/18, *Asistencia Técnica Vaillant*).

1.2. Experience in competition enforcement

24. Unfortunately, as said before, the Council of the CNMC has not adopted yet (15th May 2021) a Decision in which the criteria of the Compliance Guide are analysed and specific incentives deriving therefrom are applied. A Decision in this regard is however expected by the end of May.

¹⁰ It is important to stress that the Spanish Competition Authority is currently being informed of many dismissals, in particular in cartel cases (see for example CNMC Decision of 14th March 2019 (S/DC/0598/2016, “*Electrificación y Electromecánicas Ferroviarias*” (“*Railway Electrification and Electromechanics*”)); and in some cases, managers contracts are being modified to include infringements of the Spanish Competition Act (LDC) as a cause for dismissal.

2. Initiatives regarding compliance and competition advocacy

2.1. Communication

25. The CNMC has a communication department of 7 members that works in close coordination with the different units of the institution¹¹. One of the department's main goals is to raise awareness on CNMC's crucial role to protect consumers and boost competition in domestic markets. The CNMC uses a wide range of tools to communicate its daily activities, covering both traditional and digital strategies ([press releases](#) -on a daily basis-, interventions of experts on radio and TV programs -only in very relevant cases-, social media, ad-hoc campaigns, [seminars and sessions](#), briefings with journalists, etc.).

26. Regarding the use of social media, the CNMC Communication Department manages these tools:

- 3 **Twitter** accounts, each of them focusing on different audiences depending on the topic¹² (regulatory vs competition issues).
- Its LinkedIn profile¹³, as a powerful tool to engage with experts and more specific stakeholders, such as lawyers, members of the academia, students and other professionals who closely follow our activity.

27. Regarding the use of other communication tools, the CNMC Communication Department also uses:

- An institutional blog¹⁴, which is one of the most innovative in the Spanish Public Administration. It includes sections on [competition](#), [compliance](#), and [institutional issues](#). For media and experts, it is a trustworthy and primary source of information. The blog is aimed at engaging with new audiences and explaining the CNMC's relevant decisions in a factual and understandable way. It increases the institution's transparency and accountability, fosters the debate with stakeholders and raises awareness of our activity. It uses a plainspoken and direct writing style, avoids technicalities and complex concepts and "translates" the CNMC's most relevant decisions for companies and consumers¹⁵. There is also a special section for [guest authors](#) where independent experts can share their personal thoughts on a relevant topic.
- A [Youtube Channel](#) (more than 800 subscribers and almost 50,000 yearly visits) where different videos are loaded ([infographics](#) and [short videos](#) explaining CNMC's work or tools, [institutional videos](#), [past seminars](#)...). The CNMC is

¹¹ In some institutions, advocacy and communication are integrated in the same unit, but in CNMC they are independent. So the Communication team works in close coordination with the different units of the institution, including both the Directorate of enforcement and the Department of competition advocacy (actually, the CNMC is also a sectoral regulator, so there are other units responsible for energy, telecommunications and media and transport and postal services).

¹² [@CNMCcompetencia](#) is devoted to competition matters (with more than 9,000 followers) and [@CNMC_ES](#) (with more than 12,000 followers) to all issues with institutional relevance. There is a third profile related to telecoms and media ([@CNMCtelecos](#) -with almost 19,000 followers-), since CNMC is also a sectoral regulator.

¹³ With more than [16,000 followers](#).

¹⁴ With more than [31,000 monthly visits](#).

¹⁵ It also includes a [disclaimer](#) that information on the blog is not necessarily read as the CNMC's official position.

making important efforts to boost the production of audiovisual contents, particularly infographics and short videos.

- A separate [Youtube channel](#) where seminars and events are livestreamed.
- A series of podcasts called “CNMC tips”, uploaded on the [web](#) and easily accessible in main apps like [Spotify](#) or [Apple Podcasts](#). Each episode has around 500-2,500 downloads.

28. Through all these initiatives, CNMC’s work is communicated to different audiences (general vs specialized, consumers of traditional media vs users of social networks...). Apart from an exercise of transparency and accountability, the objective is to increase the culture of competition and compliance. Relevant competition cases (both [anticompetitive conducts](#) and [mergers](#)), available tools (e.g. [encrypted communication channels for whistleblowers](#) or the [leniency programme](#)) and [advocacy initiatives](#) can be explained in an accessible manner. This helps relevant stakeholders to understand the benefits of compliance with competition law (in contrast with the costs of non-compliance).

2.2. General dissemination through competition advocacy

29. Apart from general communication through the media and other innovative tools, compliance can be stimulated through a wider policy of advocacy, disseminating the culture of competition throughout the different stakeholders. In this subsection¹⁶ we focus on instruments targeting horizontally general consumers and firms.

30. Regarding consumers, the CNMC has just published a [Guide on the benefits of competition for consumers](#)¹⁷. This guide can contribute to a culture of competition compliance through different ways:

- On the one hand, better informed consumers are going to be warier of potential misbehaviour as firms. The guide includes not only a section on [the benefits of competition](#) but also a section on [how the CNMC can help](#) in relation to anticompetitive conducts. It is important to recall that consumers can be at the same time workers or entrepreneurs, so they may deal with firms in very different contexts where they could be victims of anticompetitive conducts. More collaboration from consumers implies more capacity to detect unlawful practices, which is a deterrent for firms (and hence an incentive to comply).
- On the other hand, the guide also includes an explanation of competition law (unlawful conducts, effects of competition infringements...) which [can be useful for firms](#) to better comply.

31. Actually, as far as firms are concerned, the Spanish Competition Authority has also developed in the past specific advocacy products¹⁸. It is the case of the Guide for business

¹⁶ In the next subsections we will analyse instruments addressing public Administrations (like regulatory reports or actions in the area of public procurement) or specific sectors (like market studies).

¹⁷ CNMC (2021): “[Los beneficios de la competencia para los consumidores](#)”. A communication campaign (including [videos](#), [infographics](#) and a [blog post](#)) was launched. The Guide was presented in an [event](#) and a [dedicated website](#) has been created.

¹⁸ The CNMC’s Compliance Guidelines can also be considered a product for helping firms to better comply with competition law but they have been analysed above (in section 1) because of their closer link to competition enforcement.

associations¹⁹, where main risks for competition were analysed (recommendations on pricing, market sharing, exchange of information, etc.) so that business associations could self-assess their behaviour and improve compliance.

2.3. Specific actions regarding public procurement

32. Public procurement is a very relevant area for competition for two reasons:

- There are risks of bid rigging in some contexts²⁰ (few participants, repeated interaction that can facilitate market sharing, tendering body suffering from information asymmetry...)
- The size of this sector is around 10%-20% of the GDP²¹.

33. And the relevance goes well beyond competition, since an optimal functioning of public procurement is key for a sound and transparent management of public finances.

34. That is why engaging policymakers and public procurement bodies in the culture of competition is a top priority for CNMC (as reflected in both its 2021-26 [Strategic plan](#)²² and its 2021-22 [Action Plan](#)²³, submitted to public consultation). Four initiatives can be emphasized regarding CNMC's work on the area of public procurement²⁴:

- The CNMC is updating the "[Guide on Public Procurement and Competition](#)"²⁵. This guide provides a reference to improve the design of public tenders following competition-friendly principles and to identify possible contexts of bid-rigging and collusion. It was originally published in 2011, so adapting it to reflect new economic and legal contexts²⁶ can be very useful for procurement bodies. This process is being carried out in phases which reproduce the cycle of public procurement. Therefore, planning has been the first phase. After celebrating a [public debate session gathering national and international experts](#)²⁷ and a [public consultation](#) (with [63 contributions](#)), the CNMC has recently published the

¹⁹ CNC (2009): "[Guide for Business Associations](#)".

Actually the above-mentioned guide for consumers also includes a short section on business associations(see [Section 2.6](#)).

²⁰ See the Communication from the European Commission COM/2017/0572 (2017) "[Making Public Procurement work in and for Europe](#)", that states that "collusion is a recurring feature in some public procurement markets (resulting in an impact of 20% extra costs over the price otherwise paid in competitive markets, according to several empirical estimates)".

See also the Communication from the European Commission C(2021) 1631 "[Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground](#)"

²¹ CNMC (2020): "[Public procurement planning as a tool to promote competition and efficiency](#)". G-2019-02

²² CNMC (2021): "[Plan Estratégico 2021-2026](#)". Submitted to public consultation (p. 7)

²³ CNMC (2021): "[Plan de Actuaciones CNMC 2021-2022](#)". Submitted to public consultation (p. 14, 21, 44, 49, 51, 52, 60)

²⁴ A [dedicated website](#) summarizes CNMC's efforts in the area of public procurement.

²⁵ CNC (2011): "[Guide on Public Procurement and Competition](#)".

²⁶ In Spain, the legal framework of public procurement has changed substantially with the transposition of EU Directives [2014/23/EU](#) and [2014/24/EU](#) in the [Law 9/2017](#).

²⁷ A summary of the event can be found in [CNMC's blog](#).

document “[Phase 1: planning public procurement](#)”²⁸. For the next phases (preparation²⁹, tender³⁰, award³¹, execution³² and ex post evaluation³³) the process will be similar (public consultations, events, workshops, requests for information...that will result in a document with the conclusions to improve each phase).

- In order to complement the above-mentioned guidance, the CNMC has developed a training program for public officials in charge of public procurement at all levels of public administration in Spain. Under this program, it has provided training to more than 40 institutions and around 2,500 officials since 2014³⁴. The program seeks to improve public officials’ capacity to detect bid-rigging practices and use best practices in the design of the procurement process. These training sessions have proved to be a very effective way to directly engage those public entities with competition issues in their daily tasks. Thanks to these sessions, the CNMC has gained a sizeable number of formal and informal contacts from contracting bodies in the recent years.
- The CNMC releases [general reports and research on public procurement](#)³⁵, e.g. emphasizing the areas for improvement in public procurement³⁶ or the savings associated to more competition (including an econometric estimation³⁷ that points out that more competitive procedures generates on average savings of 9.9% and that an inclusion of an extra firm implies savings of 2.1%).
- The CNMC issues [regulatory reports to improve the legal framework](#)³⁸. The CNMC was especially active when the EU Directives on public procurement ([2014/23/EU](#) and [2014/24/EU](#)) were transposed in the Spanish ([Law 9/2017](#)). The CNMC issued [reports](#) on the draft Law proposals and some of its recommendations were included in the final version:
 - Firstly, the laws have enshrined the free competition principle (see [Article 132](#) of Law 9/2017) and have established a duty for the public procurement body to collaborate with the CNMC and regional competition agencies in order to

²⁸ CNMC (2021): “[G-2019-02 Guide to public procurement and competition. Phase 1: planning public procurement](#)”. The document emphasizes the relevance of appropriate planning when managing public purchases and the benefits in terms of efficiency and competition. In particular, planning promotes transparency and facilitates the access of operators (namely SMEs) to tenders. It also favours the use of open and competitive award procedures that incentivise competition.

²⁹ Assessment of the procurement alternatives relying on a market analysis.

³⁰ Design of the key elements of the process: type of procedure, lots, criteria, etc.

³¹ Process that ensures that the most economically advantageous bid is chosen through formulas, weighting of variables, handling of abnormally low bids...

³² Analysis of modified terms, complementary services, special execution and subcontracting conditions, etc.

³³ Identifying, where appropriate, aspects that could be improved.

³⁴ Despite the abnormal situation in 2020, 6 trainings were organized with around 300 officials.

³⁵ In its power to carry out studies, research and reports (see [Article 5.1.h of Law 3/2013](#)).

³⁶ CNMC (2015): “[Analysis of Public Procurement in Spain: Opportunities for improvement from the perspective of Competition](#)”

³⁷ CNMC (2019): “[Overview of public procurement procedures in Spain](#)”

³⁸ As a consultative body (see [Article 5.2.a of Law 3/2013](#)).

prevent collusion, as well as mechanisms to instrument such collaboration (e.g. see Articles [69.2](#), [132.3](#), [150.1](#), [332.6](#) of Law 9/2017).

- Secondly, the laws have established a mechanism of debarment based on breach of competition law (e.g. see [Article 71.1.b of Law 9/2017](#)) which can be lifted if the undertaking has adopted a compliance policy (e.g. see [Article 72.5 of Law 9/2017](#))
- Finally, the laws have introduced institutional forms of collaboration³⁹ between the CNMC and the Consultative Board on Public Procurement (see [Article 328.2](#) of Law 9/2017), with the [Independent Regulatory and Supervisory Office of Public Procurement](#) (see [Article 332.7](#), [334.1](#) and [334.6](#) of Law 9/2017) and with the Ministry of Finance (see [Article 346.8](#) of Law 9/2017)
- The CNMC assesses specific tender procedures as a competition consultative body⁴⁰. It has issued over [30 reports on competition-related aspects](#) on draft tender procedures at the request of procurement bodies at all level of government (national, regional and local). Most of these CNMC's opinions refer to tender documentation for centralized purchasing of a wide variety of goods and supplies (office supplies, vehicles, furniture, audiovisual devices and computers, among others). The reports are prepared before the procurement process has started, with the aim to promote competition ex ante⁴¹. These reports have built a closer relationship with civil servants in charge of high-volume contracts and have set a wide range of recommendations on different issues (market analysis; capacity criteria; awarding criteria...).

35. All these efforts are important not only from the point of view of advocacy (to foster competition and market access in an important sector, of around 10%-20%) but also from the point of view of enforcement (in order to identify more easily potentially collusive practices). Therefore, they can incentivize firms' compliance in these ways:

- Higher awareness of contracting authorities can result in more detection of potentially unlawful of conducts. Furthermore, if these contracting bodies collaborate swiftly with the competition authority⁴², this will lead to more vigorous enforcement. These mechanisms (general advocacy messages on public procurement, specific training, formal and informal channels of communication) are working in practice and in the last years contracting authorities have actually reported on suspicious behaviour to the CNMC (2 cases in 2018, 4 in 2019 and 6 in 2020). This generates a deterrent effect on firms and incentivize compliance.
- The mechanism of debarment based on breach of competition law⁴³ generates an additional deterrent effect, further incentivizing compliance. In addition, the fact

³⁹ See also the relevance of these aspects in the Communication from the European Commission C(2021) 1631 "[Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground](#)".

⁴⁰ See [Article 5.2. of Law 3/2013](#)).

⁴¹ It is important to recall that the CNMC has the capacity to challenge administrative acts in courts (see [Article 5.4 of Law 3/2013](#)), so it could use that power to challenge tenders or other acts related to public procurement which unduly restrict competition. It has used this power in the area of public procurement recently but [it has done so in the past](#).

⁴² See above the mechanisms considered in the Spanish framework (Articles [69.2](#), [132.3](#), [150.1](#), [332.6](#) of Law 9/2017).

⁴³ See above the mechanism considered in the Spanish framework ([Article 71.1.b of Law 9/2017](#))

that debarment can be lifted if the undertaking has adopted a genuine compliance policy⁴⁴ can also incentivize good practices.

2.4. Targeted advocacy efforts through market studies

36. Market studies can be a relevant tool to promote compliance with competition law. Typically, CNMC's Department of Advocacy tends to be proactive when carrying out a market study⁴⁵, so priority can be given to sectors where competition concerns may arise. And, even if most CNMC's studies in recent years have concluded with recommendations directed towards the government (to adopt "good regulation" principles in specific activities, following a procompetitive approach), some reports do include ideas and advice for undertakings (in order for them to reduce risks of anticompetitive conducts), increasing the culture of compliance.

37. Examples of the latter type of reports in the last years include:

- Reports on the railway sector. When an activity has just started the liberalization process, competition issues may arise given the strong position of the former monopolist (very often a State-Owned Enterprise). There have been two reports in the last years:
 - A recent report on the "[liberalization of railway passenger transport services](#)⁴⁶", warning about potential competition concerns that could arise in the advent of liberalization (which started in 2020). For instance, regarding potential issues of access to spaces in passenger stations, to rolling stock, to maintenance facilities, to the market of recruitment and training of engine drivers. In addition, the combination of subsidized public service obligations (PSO) with commercial services can also affect competition in the latter. Some of these problems may be addressed by an appropriate regulation, but competition law might play a role should an anticompetitive behaviour be found. Therefore, flagging these concerns may also incentivize compliance by the incumbent, in order to reduce risks of potential consequences of an unlawful conduct.
 - A "[Report on competition in railway freight transport in Spain](#)⁴⁷" (released several years ago, since the liberalization process had started earlier for freight), where similar concerns were raised: the access to rolling stock (and its repair and maintenance), to ancillary services, to drivers training, etc. Actually, years after the publication of the study the incumbent (RENFE) was sanctioned by the CNMC⁴⁸ because (apart from agreements with other company, Deutsche Bahn) it applied discriminatory commercial conditions to other companies (vis-à-vis Deutsche Bahn) in the markets for rail freight services and rail traction. This indicates that the efforts of advocacy have to be even more intense in sectors prone to competition problems, in order to generate a culture of

See also the Communication from the European Commission C(2021) 1631 "[Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground](#)".

⁴⁴ See above the mechanism considered in the Spanish framework ([Article 72.5 of Law 9/2017](#)).

⁴⁵ See [Article 5.1.h of Law 3/2013](#).

⁴⁶ CNMC (2019): "[Market study on the "liberalisation of railway passenger transport services"](#)".

⁴⁷ CNC (2013): "[Report on competition in railway freight transport in Spain](#)".

⁴⁸ See case [S/DC/0511/14: RENFE OPERADORA](#)

compliance and competition (especially at the beginning of the liberalization process).

- A market study on “[Air traffic services in Spain](#)”⁴⁹. Some air traffic services (e.g., aerodrome services) and training of air traffic controllers were liberalized in 2010. This market study analysed the market some years later (in 2018). When addressing potential problems of competition, two aspects of the report can be emphasized in this contribution:
 - A protocol between air traffic services providers that included some “coordination measures” regarding the hiring of air traffic controllers. Even if the agreement had already been rendered void at the time of publication of the study (and that, according to the participants, some clauses had never been applied), an assessment of this kind of protocols can help undertakings to understand their risks. This can increase awareness and compliance with competition law.
 - The idea that vertical integration between the air traffic services provider (ENAIRES) and the airport manager (Aena) can lead to competition concerns⁵⁰.
- A study on the [wholesale automotive fuel market](#)⁵¹, finding that operators with refining capacity (Repsol, Cepsa and BP) might be able to influence the company (CLH) owning the pipeline network and the majority of storage facilities (assets which are essential for the distribution of automotive fuels). Furthermore, these vertically integrated operators enjoyed market power in wholesale and retail markets. Therefore, the market study proposed:
 - Limiting the influence of these companies on CLH (below 5% of capital and without presence in the Board of Directors). After the approval of the study, the three companies actually decided to sell their stakes in CLH. This proves that advocacy products can have a deterrent effect when flagging potential conducts or situations that may imply risks of anticompetitive concerns in the future.
 - In order to access CLH’s facilities and services, setting tariffs based on costs and according to an objective, transparent and non-discriminatory methodology. In this case, no changes followed the approval of the study.
 - Limiting the influence of the abovementioned operators in the government of the company managing strategic reserves (CORES). CORES’ tariffs should also be set according to an objective, transparent and non-discriminatory methodology. And the scope of the information exchange should be reduced to minimize the risk of coordination. In this case, no changes followed the approval of the study.
 - Reducing vertical integration between wholesale and retail activities (operational and accounting separation) and between wholesale and refining activities (personnel separation). In this case, no changes followed the approval of the study.

⁴⁹ CNMC (2018): “[Market Study on Air Traffic Services in Spain](#)”. E/CNMC/002/2018

⁵⁰ ENAIRES holds 51% of AENA.

⁵¹ CNMC (2015): “[Study on the wholesale automotive fuel market in Spain](#)” E/CNMC/002/15

- Studies on [Professional Bodies](#)⁵² (or Colleges, *Colegios Profesionales*), which regulate certain services with some powers conferred by law in Spain. Some of the recommendations of these studies include actions to minimize risks of violations of competition law, e.g. through coordination of supply (with indicative fees, information exchanges, restrictions on advertising...) or through disproportionate or discriminatory conditions imposed on their members (excessive enrolment charges, discrimination regarding the inclusion on lists of expert witnesses or receivers in insolvency proceedings, obligation to contract some services with the Body...). The issue of Professional Bodies is very complex in Spain, since the Supreme Court⁵³ considers that the Law on the Defence of Competition ([Law 15/2007](#)) can only apply when Professional Bodies are not acting strictly within the competences conferred by law. When Professional Bodies act within the competences conferred by law, the only option for the Competition Authority is to challenge those acts before competent courts (using [Article 5.4 of Law 3/2013](#)). Professional Bodies have also been analysed in many regulatory reports, as we shall see below.

38. To sum up, we have seen that competition advocacy through market studies can be useful to increase the culture of compliance with competition law. Flagging some competition concerns in conclusions or recommendations can lead some undertakings to change their course of action in order to minimize risk. This exercise can be done not just through market studies but also through regulatory reports.

2.5. Targeted advocacy efforts through regulatory reports

39. The CNMC can be both reactive⁵⁴ or proactive⁵⁵ when preparing reports on draft regulation or other acts. As happens with market studies, reports can include recommendations to the public sector (to adopt “good regulation” principles in a piece of legislation, following a procompetitive approach) but they can also warn about competition issues that undertakings can consider in order to better comply with competition law

40. Examples of the latter type of reports in last years include:

- Reports on Professional Bodies or Colleges. Apart from analysing specific reform proposals of the whole legal framework⁵⁶ (conveying similar messages to the ones mentioned above regarding the market study), the CNMC analyses the statutes⁵⁷ of many Professional Bodies where it provides, among others, recommendations to maximize compliance with principles of competition law:

⁵² CNC (2012): “[Report on professional colleges after the transposition of the Services Directive](#)” E-2011-04

⁵³ See the [Ruling STS 3131/2017 of July 27th](#)

⁵⁴ When being submitted draft law proposals as a consultative body (see [Article 5.2.a of Law 3/2013](#)).

⁵⁵ Preparing a regulatory report *ex officio* (see [Article 5.1.h of Law 3/2013](#)).

⁵⁶ See [IPN 110/13](#) for the last reform proposal which was not actually approved. The Law of Professional Bodies dates to 1974 (and has not been reformed substantially apart from the adaptation to the [EU Services Directive 2006/123/EC](#))

⁵⁷ See the last examples on Mining Engineers ([IPN/CNMC/003/21](#)), Forest Engineers ([IPN/CNMC/049/20](#)), Social Educators ([IPN/CNMC/048/20](#)), Opticians ([IPN/CNMC/016/20](#)) and Odontologists ([IPN/CNMC/010/20](#)). More examples can be found [here](#).

- Eliminating any suggestion on how prices and other conditions of supply should be set.
- Not including some functions that could imply a convergence in supply conditions (quality control, fight against unfair competition...)
- Not imposing disproportionate conditions on members.
- Not discriminating agents through their exclusion from expert witnesses lists⁵⁸.
- Reports on the collective bargaining between dock workers and dock firms. In the last year the CNMC has had the opportunity to assess some framework agreement in this sector from the point of view of the promotion of competition and good regulation⁵⁹. In its reports, the CNMC points out that collective bargaining is not necessarily out of the scope of competition law and that undertakings must self-assess their conducts compatibility with competition law. With those caveats in mind, the CNMC issues several recommendations to ensure the maximum respect of competition principles:
 - Ensuring that the parity commission (where dock firms and unions are represented) does not facilitate the exchange of sensitive information (if the commission has to be informed about new hiring or other changes in staff policies).
 - Safeguarding the freedom of firms to hire dock workers following the liberalization of the sector.
- Reports on the agriculture sector⁶⁰, with recommendations to ensure that associations of producers (and their organizations) and the codes of good practices are compatible with competition law.
- A report on the determination audit fees⁶¹, with recommendations to ensure the respect of competition law and the free will of parties.

2.6. Other actions

41. The CNMC is preparing a guide on the estimation of damages associated with competition law violations⁶². The objective is to assist Spanish judges and courts, although parties⁶³ (and their expert witnesses) will also take advantage of the higher degree of clarity.

42. The guide will include all the consolidated empirical methods for this quantification relying on case-law and the literature review. It will assess the relative merits of each

⁵⁸ The risk of using unfair or discriminatory criteria in list of expert witnesses has been thoroughly analysed in other reports, such as [INF/CNMC/005/15](#) and [PRO/001/13](#).

⁵⁹ See [INF/CNMC/094/20](#), [INF/CNMC/059/20](#) and [INF/CNMC/035/20](#).

⁶⁰ See [IPN/CNMC/016/19](#) and [INF/CNMC/003/15](#).

⁶¹ See [INF/CNMC/173/18](#).

⁶² The CNMC is a consultative body for judges on the criteria used for quantifying compensations for victims of competition law infringements (see [Article 5.2.b of Law 3/2013](#)). The 2021-22 [Action Plan](#) (see page 34) include the commitment to develop the criteria for those reports as a consultative body.

⁶³ It is important to recall that in this case the CNMC is *amicus curiae* (not a party), assisting the Court.

methodology so that judges can take an informed decision of which is the most suitable methodology in each case.

43. CNMC plans to have a first version of the guide after the summer, in order to submit it to public consultation. The final version could be published at the end of this year.

3. Conclusions

44. CNMC's policy regarding the promotion of a culture of compliance with competition law is multidimensional. Efforts within the different streams of work have to be coherent with the principle that the best competition policy is the one that is successful in preventing and deterring anticompetitive conduct. Given the complexity of this challenge, a wide array of tools is needed. These include vigorous competition enforcement, guidance on compliance programmes, and effective communication and competition advocacy.