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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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**LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM - Session I: Compliance
Programmes in Antitrust Enforcement**

– Contribution from Spain –

20-22 September 2021

The attached document from Spain is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session I at its forthcoming meeting to be held on 20-22 September 2021, via a virtual Zoom meeting.

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Session I: Compliance Programmes in Antitrust Enforcement

– Contribution from Spain (CNMC)¹ –

1. This contribution addresses the subject of “Compliance Programmes in Antitrust Enforcement”, the topic of Session 1 of the Latin American and Caribbean Competition Forum to be held in September 2021.

2. It is structured as follows. The first section deals with the Spanish Competition Authority (*Comisión Española de los Mercados y la Competencia*, hereinafter CNMC) position on competition compliance programmes. The second section addresses specifically the criteria used to assess the effectiveness of compliance programmes. The third section refers to advocacy efforts.

1. CNMC’s position on competition compliance programmes

1.1. Antitrust enforcement and Compliance Programmes prior to the adoption of the CNMC 2020 Compliance Guidelines

3. Prior to the adoption of a set of Compliance Guidelines in 2020 by the CNMC the evaluation of compliance programmes (hereinafter, CPs) has been present since 2015 in a handful of its enforcement decisions.

4. Indeed, following the pleas submitted by investigated companies in infringement procedures, the CNMC started to assess the adoption of CPs following article 64 paragraph 3 of the Spanish Competition Act (*Ley 15/2007, de Defensa de la Competencia*, hereinafter, LDC) related to mitigating circumstances (mainly, termination of the infringement, repairment of damage, non-application of the illegal conduct; active and effective collaboration).

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

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

¹ CNMC: Comisión Nacional de los Mercados y la Competencia (National Commission on Markets and Competition). This contribution has been prepared in August 2021 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. A wider contribution on this matter was prepared by the CNMC ([https://one.oecd.org/document/DAF/COMP/WP3/WD\(2021\)15/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/WD(2021)15/en/pdf)) for the [OECD roundtable on Competition compliance programs](#).

6. 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 relevant criteria.

7. The only case where the existence of a CP had some effect on the amount of the fine was the cartel known as *Mudanzas internacionales* (CNMC Decision of 6th September 2016). 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.

8. 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.

9. In 2018, the entry into force of articles 71.1.b) and 72 of the Public Procurement Act (*Ley 9/2017 de Contratos del Sector Público* or LCSP) was a major drive behind the shift of compliance policies within the CNMC. Indeed, while article 71.1.b) foresees the imposition of debarment measures in public tenders following serious infringements of competition law, article 72 allows for the possibility to avoid such debarment measures following so called "self-cleaning measures": (a) payment or commitment to pay the fines and damages; and (b) the adoption of the "*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*".

10. In case S/DC/0598/16, *Electrificación y Electromecánica Ferroviarias* the CNMC stated this debarment provision for the first time; and in case S/DC/0612/17, *Montaje y mantenimiento industrial*, the CNMC expressly recognized, also for the first time, the possibility to avoid debarment from public procurement following self-cleaning measures.

1.2. Adoption of the CNMC 2020 Compliance Guidelines

11. These previous decisions, together with the thorough internal and external debate around compliance issues led by the CNMC², were principal to establish the CNMC public methodology and criteria to assess the investigated companies' compliance efforts.

12. Therefore, and following the CNMC's 2019 Action Plan, a working group led by the Competition Directorate was created. A first draft was exposed in February 2020 to public consultation in which a wide range of stakeholders were involved (trade associations, corporations, antitrust and compliance experts, legal firms and regional competition authorities). The Guidelines were formally approved and published in June 2020³.

² Since 2016, the CNMC organized nearly bimonthly the so-called "Compliance Spaces": 17 open house debates, hosted by the CNMC, in which a diverse set of compliance-related issues were debated by public and private agents from a multidisciplinary point of view.

³ Available at:

https://www.cnmc.es/sites/default/files/editor_contenidos/Competencia/Normativas_guias/202006_Guia_Compliance_FINAL_eng.pdf

1.3. Application of the CNMC 2020 Compliance Guidelines

13. The CNMC had the opportunity to apply its Compliance Guidelines for the first time in its decision of 11th May 2021 (case S/DC/0627/18 CONSULTORAS)⁴. In this case, up to three of the fined companies pleaded for the consideration of their CPs, as an eventual mitigating circumstance in the light of the CNMC guidelines.

14. The CNMC concluded that two of them were ineligible since their *ex ante* compliance programmes had been manifestly ineffective in order to prevent the investigated anticompetitive behaviour and they had not provided for the adequate reactive measures following the detection of the infringement. Besides, both of them were too vague and did not include any mention to the observance of competition rules. In addition, the CNMC considered that *ex post* commitments offered by the companies did not guarantee future observance of competition rules.

15. However, the third company's CP was credited to be effective. Indeed, the CNMC found that it contained the appropriate competition-related commitments and internal procedures and that the company had adopted the appropriate reactive measures. These included the collaboration with the CNMC and the dismissal of two of the managers involved. The company was granted a 10% reduction of the fine and, more significantly, a protection against eventual debarment from public procurement measures.

2. Assessing the effectiveness of compliance programmes

2.1. 2020 Compliance Guidelines main assessment criteria for “effective” CP

16. The Guidelines are structured in two parts. The first part lists a non-exhaustive list of criteria that the CNMC considers appropriate for designing and implementing an “effective” CP (Sections 1 to 3). The second part (Section 4) establishes the consequences within the framework of an infringement proceeding deriving from the existence or the future implementation of such “effective” CP.

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

⁴ <https://www.cnmc.es/expedientes/sdc062718>.

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. This channel should envisage safeguards to protect the complainant/whistleblower from retaliation (e.g., anonymity of the reporting).
- **Predictable and transparent internal procedures:** internal procedures for managing reports and detection of violations or mere doubts as regards a particular course of action should be agile and accessible.
- **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 dismissal.

18. The CNMC Compliance Guidelines stress 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 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 Guidelines do not establish an automatic reduction of the fine, nor a specific percentage of reduction. Every case is to 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 non-fining decision (S/DC/0596, *Estibadores de Vigo*)⁵ 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*)⁶.

3. Advocacy efforts to promote competition compliance

24. Apart from actions on the enforcement side, compliance is also promoted through communication and advocacy efforts that increase the culture of competition and compliance. The CNMC has separate communication and advocacy departments.

25. The communication department works in close coordination with the different units of the institution. 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. These can be done through traditional means ([press releases](#), interventions on radio and TV programs in very relevant cases, [seminars](#), briefings with journalists, etc.) and digital and innovative tools (social media⁷, a [blog](#), [videos](#), [livestreamed](#) events, podcasts⁸, etc.). All these initiatives allow communicating to different audiences (general vs specialized, consumers of traditional media vs social network users...) in a targeted way.

26. Competition advocacy is also crucial to increase the awareness and culture of compliance. The CNMC leverages different tools to achieve that goal.

- General dissemination efforts to reach different stakeholders: firms, consumers, public Administrations. This is mostly done through [guides](#), like a "[Guide for Business Associations](#)" 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. Another recent example is a [Guide on the benefits of competition for consumers](#) which, apart from increasing consumer and general awareness (through a [dedicated website](#), [infographics](#) and [videos](#)) also includes an explanation of competition law (unlawful conducts, effects of competition infringements...) which [can be useful for firms](#) to better comply.
- Specific actions in public procurement, very relevant for competition because of its size (10-20% of GDP) and the risks of bid-rigging. Different actions are being carried out:
 - Updating the "[Guide on Public Procurement and Competition](#)", in order to improve the design of public tenders following competition-friendly principles and to identify possible contexts of bid-rigging and collusion⁹.

⁵ <https://www.cnmc.es/expedientes/sdc059616>.

⁶ <https://www.cnmc.es/expedientes/s062918>.

⁷ 3 Twitter accounts (@CNMCcompetencia, @CNMC_ES and @CNMCtelecos) and one LinkedIn profile.

⁸ They can be found on the web and easily accessible in main apps like Spotify or Apple Podcasts.

⁹ The updating process includes several phases. The first two ("planning public procurement" and "considering the alternatives to public procurement") have already been launched and the following

- Training public officials in charge of public procurement at all levels of public administration in Spain (more than 40 institutions and around 2,500 officials since 2014) to improve public officials' capacity to detect bid-rigging practices and use best practices in the design of the procurement process. This is also useful to strengthen formal and informal contacts between procurement entities and the CNMC.
 - General [reports and research on public procurement](#), [regulatory reports to improve the legal framework](#) and [assessment of specific tenders](#).
 - Targeted advocacy efforts (through [market studies](#) or [regulatory reports](#)) in specific sectors or activities which can give rise to competition concerns, such as [Professional Bodies](#), [passenger](#) and [freight](#) railway transport, [air traffic services](#) or [fuel](#).
 - Other actions, which can increase competition, such as a guide on the estimation of damages associated with competition law violations (which can assist Spanish judges and courts and provide parties (and their expert witnesses) with a higher degree of clarity. The [guide has been submitted to public consultation](#), and a final version could be published at the end of 2021.
27. To sum up, the promotion of compliance involves wide-ranging efforts by Competition Agencies in the areas of enforcement and advocacy and communication.

will focus on tenders, awards, execution and ex post evaluation. The different phases encompass public debates, events, workshops, requests of information and public consultations that usually receive various contributions. All these actions will result in a final document with the relevant useful recommendations. A summary of the first phase be found in the CNMC's blog.