

COMPETITION COMPLIANCE: THE PATH TRAVELLED AND THE WAY TO GO...THE CNMC'S EXPERIENCE



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Competition Compliance: The Path Travelled and the Way to Go...The CNMC's Experience

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Compliance is every effort an authority does to increase awareness on the importance of competition law, its benefits, and the consequences of infringements. The main goal remains to be the consolidation of a true culture of competition that reflects in the way in which companies do business. In line with this, the CNMC's efforts to promote a culture of competition compliance are multifaceted: we need vigorous competition enforcement, guidance on compliance programmes, effective communication policy and competition advocacy initiatives to increase awareness and true understanding of competition policy benefits for society as a whole.

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I. INTRODUCTION

The CNMC² seeks to promote and advocate for effective competition between economic operators for the proper functioning of markets, but these objectives cannot be reached through enforcement alone. Ultimately, decision-making and business culture within companies should comprise antitrust compliance as an integral part. Consumers, companies, markets and society as a whole will benefit from a business environment where antitrust compliance is a must.

The CNMC has been developing several initiatives in this direction. One of them focuses on incentivizing the implementation of compliance programs. Indeed, good and effective compliance programs can contribute to the big objectives as they provide tools that enable companies not only to prevent, detect and react promptly to unlawful conduct, including anticompetitive practices, but also to raise overall awareness regarding antitrust laws, its objectives and benefits. In addition, compliance programs may also strengthen companies' collaboration with the CNMC within the framework of the leniency programme. Other initiatives are focused on advocacy tools (guides and studies, training public officials, etc.) and communication tools (social media, training videos, etc.) which aim to raise awareness among stakeholders and provide the adequate tools to help understand, follow and enforce competition laws. Some of these initiatives are put forward below.

II. COMPLIANCE PROGRAMS AND COMPETITION ENFORCEMENT

The 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 and overall awareness with competition laws and its benefits.³

This is the first document designed by the CNMC that specifically concerns compliance programs related to competition law infringements. Some analyses and references had been included in previous decisions, following some pleas made in this regard by the parties, but there was no methodological document with all the relevant criteria.⁴ 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 [LCSP]); and the possibility of avoiding any such debarment following the self-cleaning measures envisaged in [Article 72, paragraph 5, of the LCSP](#).⁵

In this context, 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 compliance programs exposed by the parties during infringement proceedings. The first draft was disclosed for public consultation in February 2020. Following extensive participation by the relevant stakeholders, the definitive text was published in June 2020.

The CNMC Compliance Guidelines are structured in two parts. The first part details a non-exhaustive list of criteria that the CNMC considers appropriate for designing and implementing an “effective” compliance program (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 an “effective” compliance program.

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

2 This contribution has been prepared in September 2021 by the staff of the CNMC and should not be regarded as the official position of the CNMC unless it refers to CNMC-approved documents.

3 Compliance Programs experimented a major boost in Spain primarily in the sphere of criminal law due the introduction of criminal liability of legal persons and its elusion through compliance programs in 2015. Companies started to recognise the value of compliance programs to ensure compliance in other areas, particularly in the sphere of administrative infringements, including antitrust wrongs. Similarly, since 2016 the CNMC has been exploring these matters through its “Compliance Spaces,” which consist of regular open-house debates hosted by the CNMC on a wide set of compliance-related issues.

4 See cases [S/0482/13 Fabricante de automóviles](#) ; [S/DC/0544/14 Mudanzas internacionales](#) ; [S/DC/0557/15 Nokia](#) ; [S/DC/0565/15 Licitaciones aplicaciones informáticas](#) ; [S/DC/0612/17 Montaje y mantenimiento industrial](#). In all these cases, the alleged compliance programs were not considered eligible as a mitigating circumstance. The only case where the compliance instrument had some effect on the amount of the fine was *Mudanzas internacionales*, where the fine was reduced following the promise to implement a certain compliance program. In another case (*Montaje y mantenimiento industrial*), the CNMC expressly recognised the possibility of avoiding debarment from public procurement following an antitrust infringement if an effective compliance program was implemented.

5 The first case in which the CNMC stated this debarment provision was in its Decision of 14 March 2019 (Case [S/DC/0598/16 Electrificación y Electromecánica Ferroviarias](#)) available at <https://www.cnmc.es/expedientes/sdc059816>.

- **Tone from the top:** an effective compliance program must show the true commitment of the company's management bodies and/or top executives to promote compliance within the organization.
- **Compliance Officer:** normally, effective compliance programs include the appointment of a fully independent compliance officer, who is responsible for the design and oversight of compliance policies.
- **Risk map and control matrix:** risks should be identified, and protocols or control mechanisms designed to avoid and detect them.
- **Training:** specific antitrust training is regarded as one of the basic pillars of an effective compliance program according to the CNMC's Guide. Effective training should be duly adapted to the area of activity and duties and to changing circumstances of employees.
- **Internal reporting channel:** its existence enables employees to raise concerns or report potentially unlawful conduct.
- **Predictable and transparent internal procedures:** It is important for there to be an agile and accessible internal procedure for managing reports and detecting violations.
- **Disciplinary Regime:** an effective compliance program should generally include a transparent and effective disciplinary regime, including disciplinary measures in cases of deviations from the program or violation of the rules, as well as potential rewards for compliance and collaboration.

The second part of the CNMC Compliance Guidelines (Section 4) constitutes its most innovative feature, since it envisages the reactive measures expected from committed compliance following a given infringement, and the incentives arising therefrom. It includes an explicit recognition of the incentives deriving from compliance commitments, which is unusual among legal systems that are not based on common law. Such incentives are based in [Article 64, paragraph 3](#), of the Spanish Competition Act (*Ley 15/2007, de Defensa de la Competencia*, hereinafter, LDC) concerning mitigating circumstances following active collaboration and termination of the infringement.

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

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

Incentives encompass a reduction of the fines, acknowledgement of the compliance efforts in the final decision, and avoiding the eventual debarment from public tenders in eligible cases.

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

III. EXPERIENCE IN COMPETITION ENFORCEMENT

The CNMC applied the Compliance Guidelines for the first time in its Decision of May 11, 2021 (case S/DC/0627/18 *CONSULTORAS*).⁶ In this case, three of the fined companies pleaded for the consideration of their compliance programs, in the light of the CNMC Guidelines, as an eventual mitigating circumstance.

The CNMC concluded that the (*ex ante*) compliance programs of two of the companies were ineligible as a mitigating circumstance since they had been manifestly ineffective in preventing the anticompetitive behavior. Indeed, they were too vague and did not include any mention about the observance of competition rules and *ex post* commitments did not guarantee future observance of competition rules.

⁶ <https://www.cnmec.es/expedientes/sdc062718>.

Only in the case of one company did the CNMC accept the compliance program as a reason to reduce the amount of the fine by 10 percent and protect the company from eventual debarment measures. The CNMC found that the pre-existing competition-related commitments and internal procedures had been appropriate. Most importantly, it valued the proactive attitude of the company following the initiation of the infringement proceedings, which measures included internal audits and the dismissal of the employees involved in the infringement who had been found to act against the company's instructions.

More recently, on the contrary, in case S/0013/19 *CONSERVACIÓN CARRETERAS*,⁷ the CNMC concluded that none of the alleged compliance programs fulfilled the criteria for an eventual reduction of the fine or the avoidance of debarment measures in public tenders.

IV. ADVOCACY TO PROMOTE A CULTURE OF COMPETITION AND COMPLIANCE

In addition to promoting the adoption of compliance programs through enforcement measures, there are other maybe more significant strategies lead by the CNMC to promote compliance and antitrust compliance culture in Spain.

A. Communication Strategy

On the one hand, communication. Effective communication is crucial to create a culture of compliance and competition throughout society. Communication increases agents' awareness and knowledge of competition law and conveys the vital role that competition authorities have in safeguarding social welfare.

Communication strategy usually relies on press releases which ensure impacts in the traditional media like newspapers (appearances on radio or TV programs are left to significant matters). However, more targeted strategies, such as flagship cases or reports, briefings with journalists or seminars, also play a crucial role.

Digitization calls for a greater innovative approach in communication. The CNMC is particularly active in social media (such as Twitter⁸ or LinkedIn⁹) and regularly uses other useful digital tools, such as the institutional blog.¹⁰ For example, this blog keeps a specific section on compliance¹¹ which provides a good platform to explain the CNMC's compliance guidelines and related work) and contributions from independent guest authors on topics relevant to competition and compliance. The CNMC's YouTube¹² channel also includes short explanatory videos and infographics about elements of competition law such as the leniency policy and the new tool for making encrypted complaints. Videos of past events (which are also livestreamed) and a series of podcasts¹³ (CNMC Tips) are also available.

The combination of traditional and innovative communication tools has two advantages. Firstly, it allows the agency to adapt the message to the audience (which varies substantially from LinkedIn or the specialist press to mass social media or YouTube). Secondly, it facilitates the deployment of a battery of instruments (press releases, campaigns in social media, infographics, short videos, etc.) to ensure that a flagship case/report/initiative is well-known by the relevant stakeholders (who tend to consume different media and thus have to be reached through different channels).

B. Advocacy Policy

Apart from communication, a culture of compliance benefits hugely from an ambitious policy of competition advocacy.

7 <https://www.cnmc.es/expedientes/s001319>.

8 See https://twitter.com/cnmc_es and <https://twitter.com/CNMCcompetencia>.

9 See <https://es.linkedin.com/company/cnmc-comision-nacional-de-los-mercados-y-la-competencia>.

10 See <https://blog.cnmc.es/>.

11 See <https://blog.cnmc.es/dialogos-compliance/>.

12 See <https://www.youtube.com/user/CNMCes>.

13 See https://open.spotify.com/show/331ft7P7LT90x9KPMKkNf?si=w_djo8DIQsKmlP9rSKSzDA or <https://podcasts.apple.com/es/podcast/cnmc-tips/id1336002563>.

Relying on the CNMC's experience, advocacy initiatives to promote compliance follow three streams: general dissemination of competition policy, efforts to target specific areas or conduct, and actions directed at certain sectors.

Regarding the first stream of work, competition advocacy can be critical to make sure that the different stakeholders understand the advantages of competition and the role of the authorities.

If the culture of competition is disseminated, authorities can benefit from an environment where more firms comply with competition law and agents generally cooperate more (reporting their awareness of unlawful conduct). This eases the work of Competition Agencies, which can devote fewer resources to investigating different types of misbehavior and can focus on priority areas or cases.

Authorities must convey the message that compliance with competition law is profitable for the firm. It is not just a matter of avoiding sanctions or reputational costs. A belief that anticompetitive conduct maximizes profits is short-sighted. Getting used to the "quiet life" of a monopolist/cartelist makes the firm less dynamic to adapt to changing circumstances. A market that seems stable today can be altered by a regulatory change or technological disruptions that turn potential competition into actual competition. Firms that have been used to competing on their merits will be better prepared to thrive in this dynamic environment than companies that have been "dozing" in situations of limited competition.

Therefore, an advocacy policy can do two things to ensure awareness of competition law and of its benefits (for competitive firms, consumers and the general welfare). On the one hand, guides targeting specific stakeholders such as consumers,¹⁴ firms,¹⁵ or other agents.¹⁶ On the other, a far-reaching advocacy policy to ensure that the public sector promotes good, pro-competitive regulation (whereby anti-competitive conduct does not pay off because business entry, growth and innovation increase market contestability) through market studies and regulatory reports (and challenging administrative acts in courts if needed¹⁷).

The second stream of work in advocacy deals with specific efforts targeting priority areas (because of their relevance or risks). One of these is public procurement, which is paramount to competition due to its size (around 10-20 percent of GDP¹⁸) and the potential for bid rigging.¹⁹ We have estimated that increasing competition in the tendering process can yield cost reductions of at least a 10 percent.²⁰ Therefore, it is evident how the whole society can benefit from a more competitive environment in the form of higher value for money in public procurement and better management and optimization of government budgets. However, progress in this area requires decisive steps in advocacy (setting aside the above-mentioned incentives introduced through enforcement: sanctions and the debarment provisions and the lift of that debarment if credit is given to a solid compliance program).

Training procurement officials and entities is of the utmost importance. The CNMC has a Guide on Public Procurement and Competition,²¹ which provides a reference to improve the design of public tenders following competition-friendly principles and to identify possible contexts of bid-rigging and collusion. However, it was originally published in 2011, so it needs to be updated to reflect new economic and legal

14 See CNMC (2021): G-2019-01 "Benefits of competition for consumers." This guide explains competition for consumers but also includes a specific section for firms. A communication campaign (including videos, infographics and a blog post) was launched. See <https://www.cnmc.es/expedientes/g-2019-01> and <https://www.cnmc.es/guia-competencia-para-consumidores>.

15 See CNC (2009): "Guide for Business Associations," G-2009-01 (analysed below) <https://www.cnmc.es/expedientes/g-2009-01>.

16 The CNMC is also preparing a guide for estimating the damages associated with competition law violations, whose objective is to assist judges and courts (and also expert witnesses and lawyers). To the extent that it can have a deterrent effect (through a better private application of competition law) it can incentivize compliance. <https://www.cnmc.es/ambitos-de-actuacion/promocion-de-la-competencia/mejora-regulatoria/consultas-publicas/consulta-cuantificacion-de-danos>.

17 The Law on the creation of the CNMC (in Article 5.4) endows it with the power to challenge anticompetitive administrative acts before Courts. See <https://www.cnmc.es/file/64267/download>.

18 CNMC (2020): "Public procurement planning as a tool to promote competition and efficiency," G-2019-02 <https://www.cnmc.es/expedientes/g-2019-02>.

19 CNMC (2015): "Analysis of Public Procurement in Spain: Opportunities for improvement from the perspective of Competition" PRO/CNMC/001/15 <https://www.cnmc.es/expedientes/procnmc00115>.

20 CNMC (2019): "Overview of public procurement procedures in Spain" E/CNMC/004/18 <https://www.cnmc.es/expedientes/ecnmc00418>.

21 CNMC (2011): "Guide on Public Procurement and Competition" G-2009-02 <https://www.cnmc.es/expedientes/g-2009-02>.

contexts.²² This process is being carried out in phases which reproduce the cycle of public procurement: planning,²³ evaluation of alternatives,²⁴ preparation, tender, award, execution and ex post evaluation. But this process cannot be carried out from an ivory tower: each of the phases is materializing in the form of a document of conclusions following a process of public consultations, organization of events, workshops, requests for information, etc.

Furthermore, the CNMC has developed a training program for public officials responsible for 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 2014.²⁵ The program seeks to improve public officials' capacity to detect bid-riggings and use best practices in the design of the tendering process.

The Compliance Guide of June 2020 should be encompassed in this same strategy. The company's training efforts specific on antitrust issues within their compliance program contribute effectively to this overall antitrust awareness in the business community.

All these initiatives have further advantages. Better understanding of contracting authorities and officials can result in the increased detection of potentially unlawful conduct and a more agile collaboration with the competition authority. And these fora (training sessions, workshops, etc.) lay the groundwork for opening, developing and strengthening formal and informal channels of communication between contracting entities and competition authorities.²⁶ This results in a deterrent effect on firms and incentivizes compliance.

All these efforts complement other advocacy initiatives in the area of public procurement,²⁷ such as the analysis of draft regulations or tender documents (challenging them before courts if needed²⁸).

Apart from public procurement, there are other actions taking place in this second stream of work consisting of advocacy products that target relevant or troublesome areas. Another example is the field of business associations, which can give rise to concerns in relation to enforcement. This is why the CNMC also issued a Guide for Business Associations,²⁹ which analyzed the main risks for competition (recommendations on pricing, market sharing, exchange of information, etc.) so that business associations could self-assess their behavior and improve compliance.

Finally, the last stream of work in advocacy consists of focusing on sectors which may lead to competition concerns. In addition to issuing recommendations, market studies and regulatory reports can analyze certain contexts or conduct in specific activities. Even if the conclusions and recommendations are not binding³⁰ and are without prejudice to any action on the enforcement front,³¹ these advocacy products can flag up certain conduct or dynamics giving rise to competition concerns. Companies can take these warnings into account and adapt their behavior to more competitive patterns. In some of the examples mentioned below, undertakings have actually modified their course of action, meaning that advocacy (despite not having binding implications) has been effective in promoting compliance with competition law and principles.

22 In Spain, the legal framework of public procurement has changed substantially with the transposition of EU Directives https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AJOL_2014_094_R_0001_01
<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32014L0024>.

23 Already finished. See CNMC (2020): "Public procurement planning as a tool to promote competition and efficiency," G-2019-02 <https://www.cnmc.es/expedientes/g-2019-02>.

24 In progress. See the public consultation and the event <https://www.cnmc.es/ambitos-de-actuacion/promocion-de-la-competencia/mejora-regulatoria/consultas-publicas/consulta-convenios-encargos-propios>
<https://www.youtube.com/watch?v=TVAratPjEwk>.

25 This process is not slowing down despite the pandemic (in 2020, six training events were organized with around 300 officials).

26 One example of how these channels are working in practice is the fact that, in the last three years, contracting authorities have actually reported 16 cases of suspicious behavior to the CNMC.

27 See <https://www.cnmc.es/en/ambitos-de-actuacion/promocion-de-la-competencia/contratacion-publica>.

28 As mentioned above, the Law on the creation of the CNMC (in Article 5.4) endows it with the power to challenge anticompetitive administrative acts before the Courts. Therefore, this includes the possibility of appealing a procurement process if it is not deemed sufficiently competitive. See <https://www.cnmc.es/file/64267/download>.

29 CNC (2009): "Guide for Business Associations," G-2009-01 <https://www.cnmc.es/expedientes/g-2009-01>.

30 As would be the case in a market investigation, which is not strictly an advocacy product as such but an *ex ante* competition tool which can include binding remedies.

31 They do not necessarily lead to any specific enforcement action or investigation.

Regulated industries are a frequent target of reports. The CNMC has recently analyzed railway services, both passenger³² and freight,³³ following their liberalization. The studies included the assessment of conduct by the incumbent company (RENFE) that might imply risks: restrictions on access to inputs, cross-subsidization of services, etc.³⁴

The CNMC has also studied air traffic services in Spain,³⁵ including an analysis of a protocol regarding the hiring of air traffic controllers. The protocol was rendered void at the time the study was published, but the fact that the CNMC was carrying out the study was perhaps relevant for agents to understand the risks of such a conduct.

As for the wholesale automotive fuel market,³⁶ the CNMC found in a study that operators with refining capacity (Repsol, Cepsa and British Petroleum) 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). Therefore, the study proposed limiting the influence of these companies on CLH. After the approval of the report, the companies actually decided to sell their stakes in CLH, proving again how advocacy products can have a certain effect, promoting a higher degree of compliance.

The CNMC has also issued many studies and reports³⁷ on Professional Bodies (or Associations) that are authorized by Spanish law to regulate certain services (similar to occupational licensing). Some of the recommendations of these studies include actions to minimize the risk of violating competition law, such as through coordination of supply (with indicative fees, information exchanges, restrictions on advertising, etc.) or through disproportionate or discriminatory conditions.

And, finally, apart from “traditional” industries, the CNMC has also analyzed sectors disrupted by the wave of digitization where competition issues may arise, such as Fintech³⁸ (especially in the area of payments) and online advertising.³⁹

V. CONCLUSION

CNMC's efforts to promote a culture of competition compliance are multifaceted but they are all consistent with the principle that the best competition policy is the one that is successful in preventing and deterring anticompetitive conduct.

In line with this, a wide range of tools is needed to tackle the complexity of this challenge. These tools include vigorous competition enforcement, guidance on compliance programs, and effective communication and competition advocacy.

These efforts are already having the sought impact in media and business strategies in Spain. Although much can be done and resources are limited, we trust to be on the right path.

32 CNMC (2019): “Market study on the liberalization of railway passenger transport services,” E/CNMC/004/19
<https://www.cnmc.es/expedientes/ecnmc00419-0>.

33 CNC (2013): “Report on competition in railway freight transport in Spain. E-2010-02
<https://www.cnmc.es/expedientes/e-2010-02>.

34 In fact, some years after the conclusion of the market study on freight services, an investigation was opened ending in fines for anticompetitive conduct to the incumbent and other company because of discriminatory treatment of other undertakings. See case S/DC/0511/14: RENFE OPERADORA
<https://www.cnmc.es/expedientes/sdc051114>.

35 CNMC (2018): “Market Study on Air Traffic Services in Spain,” E/CNMC/002/2018
<https://www.cnmc.es/expedientes/ecnmc00218>.

36 CNMC (2015): “Study on the wholesale automotive fuel market in Spain” E/CNMC/002/15
<https://www.cnmc.es/expedientes/ecnmc00215>.

37 CNC (2012): “Report on professional colleges after the transposition of the Services Directive” E-2011-04
<https://www.cnmc.es/expedientes/e-2011-04>.

38 CNMC (2018): “Fintech market study” E/CNMC/001/18
<https://www.cnmc.es/expedientes/ecnmc00118>.

39 CNMC (2021): “Study on the competition conditions in the online advertising sector in Spain” E/CNMC/002/19
<https://www.cnmc.es/expedientes/ecnmc00219>.



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