

Five years of the CNMC's Antitrust Compliance Guidelines

Practical aspects of the application of the CNMC's Antitrust Compliance Guidelines to date.

Spain | Legal Flash | June 2025

KEY ASPECTS

- The CNMC's Antitrust Compliance Guidelines have become the main standard to assess the effectiveness of antitrust compliance programmes.
- An effective antitrust compliance program can mitigate company liability in the event of infringement, notably with respect to fines or a ban on public procurement.
- Application of the Antitrust Compliance Guidelines by the CNMC and the regional competition authorities highlights that compliance programmes are in high demand to access such benefits.
- Investing in designing, implementing and updating an effective antitrust compliance program is becoming increasingly important for companies operating in Spain.





On June 10, 2020, the National Commission on Markets and Competition ("**CNMC**") published its "**Antitrust Compliance Programmes Guidelines**" (the "**Compliance Guidelines**"). We review the highlights of the Guidelines and their practical application in the fifth anniversary since they were published.

The Compliance Guidelines

The publication of the Compliance Guidelines was a significant development in the legal and compliance landscape since (i) it formally introduced, for the first time in Spain, a set of specific criteria to assess the effectiveness of an antitrust and competition law compliance program; and (ii) it established the legal consequences of having or implementing an effective program in the context of administrative sanctioning proceedings.

Assessment criteria

The Compliance Guidelines outline a set of plans for action and measures that, if effectively implemented within a company, help foster a solid culture of compliance and contribute to the prevention and early detection of infringements that might threaten competition. Specifically, the Guidelines identify the following indicators to measure the effectiveness of a compliance program:

- the involvement and commitment of the company's top management ("tone from the top");
- employee training on competition matters that is appropriate and tailored to the reality of the company, not merely general or standard training;
- the existence of whistleblowing channels to report irregular activities and ensure the protection of the whistleblower;
- the independence and autonomy of the body responsible for compliance policy;
- the development of a risk map that facilitates risk identification and management;
- the design and implementation of internal procedures to manage complaints and, where appropriate, identify infringements; and
- a credible and effectively enforced disciplinary system.

Benefits of an effective compliance program

The implementation of an effective compliance program strengthens the internal compliance culture, reduces the risk of conducts restrictive of competition (particularly cartels) and favors rapid detection and reaction to potential infringements.

In addition, the Compliance Guidelines establish the possibility of mitigating the administrative liability that would otherwise correspond to an infringement (exemption or reduction of the fine) and, especially, the ban on public procurement.

At this point, it is necessary to bring up CNMC **Communication 1/2023** on the ban on public procurement, which, in line with the above, highlights the importance of an effective compliance program when determining the scope and duration of such ban. That same Communication emphasizes that the sanctioning body may assess the effectiveness of the compliance program, whether it existed before the infringement (*ex ante*) or it has been introduced or amended after it (*ex post*), in order to mitigate the ban on public procurement.



Five years applying the Compliance Guidelines

Competition authorities

The CNMC had already had the opportunity to comment on the effects of compliance programmes in the context of sanctioning proceedings before publishing the Compliance Guidelines, considering most programmes did not meet the necessary elements to mitigate company liability.

Since the publication of the Compliance Guidelines, the CNMC and the regional competition authorities have examined a growing number of compliance programmes. The observable trend is that companies are increasingly submitting them to, on the one hand, prove their true willingness to cooperate and, on the other, mitigate sanctions or request the non-imposition (or lifting) of the ban on public procurement. In other cases, it is the authorities themselves that decide to impose on the company the obligation to have a compliance program in place to avoid incurring new infringements in the future.

A remarkable example of the benefits of having an effective compliance program is case [S/DC/0627/18 Consultoras](#), in which the CNMC applied a 10% reduction on the fine and excluded one of the companies under investigation from the ban on public procurement in view of its antitrust compliance program and the adoption of specific measures in the framework of the investigation.

However, practice has shown the difficulty in designing or implementing certain aspects of antitrust compliance programmes. In fact, in several cases, the CNMC and the regional authorities have dismissed the application of the above benefits because the compliance programmes lacked some key elements, such as the implementation of mechanisms for real risk detection (through a specific risk map), demonstrable staff training (tracking effectiveness), robust internal investigation procedures, or the adoption of an effective disciplinary system.

However, companies can strengthen their compliance program after an initial evaluation. For example, in case [S/0008/21 Licitaciones Material Militar](#), the CNMC positively assessed the compliance programmes of two of the companies investigated but concluded that the implementation was not complete at first, and it urged the companies to continue developing them according to the Compliance Guidelines. Later, for one of the companies, the CNMC later issued a favorable report after verifying that it had incorporated the necessary improvements and deeming that the program complied with the criteria of the Compliance Guidelines.

A very similar situation occurred in case [S/04/2023 Transporte escolar Málaga](#) before the Competition and Economic Regulation Agency of Andalusia.

These examples highlight the importance of investing in the continuous improvement of compliance programmes to benefit from the mitigation of the legal and economic consequences of an infringement.

EU and national courts

Since the publication of the Compliance Guidelines, courts have also had the opportunity to address and analyze the impact and consequences of compliance programmes on liability for infringements of competition law.

The judgment of the General Court of the European Union ("GCEU") of October 2, 2024 (case T-126/23, [VC/EU-OSHA](#)) is of particular relevance, as it endorses the high standards applied in the validation of compliance programmes. In line with what the Court of Justice had also previously indicated (case C-501/11 [Schindler Holding](#)), the GCEU stresses that it is not enough to submit good conduct templates or manuals. It is necessary to show, with specific documentation, the effective implementation of these measures within the organization. For example, the GCEU stresses the importance of continuous training, internal investigation and proof of actual results so that the program is not perceived as merely symbolic.



The experience of the Spanish courts in this area is scarce. The most interesting decision in this regard is the judgment of the High Court of Justice of Catalonia (*Tribunal Superior de Justicia de Cataluña*), of December 11, 2024, which upheld the decision of the Catalan Competition Authority ("ACCO") to consider insufficient the compliance program submitted by one of the investigated companies.

Relationship with other compliance regulations and standards

The Compliance Guidelines are not an isolated initiative or effort but must be seen in a more global context in which they are supplemented with other antitrust compliance instruments and standards.

At the national level, in addition to the CNMC's Compliance Guidelines, other regional authorities have also issued similar documents, such as the [Guidelines of the Basque Competition Authority](#) (which, in fact, predates the Compliance Guidelines; in Spanish) or the [criteria of the Galician Competition Commission](#) (in Spanish) on applications for review of the ban on public procurement imposed in its decisions, adopted in 2024.

On a separate note, the [Recommendation of the Public Procurement Advisory Board](#), of June 2021 (in Spanish), in relation to article 72.5 of Act 9/2017, of November 8, on Public Sector Contracts ("LCSP"), develops the possibility of not applying (or lifting) the ban on public procurement when the company has implemented sufficiently rigorous technical, organizational and staff measures to prevent future infringements. This document underscores, once again, the need to demonstrate the effective implementation of the program and not just its design.

Furthermore, it is necessary to mention the [UNE 19603:2023 standard](#), "Compliance management systems in the area of free competition," which establishes a certifiable standard for specific compliance management systems. This UNE standard sets out detailed requirements for planning, implementation, maintenance and continuous improvement of a compliance program adapted to the reality of each company. In addition, it matches key aspects of the Compliance Guidelines, such as the involvement of top management, resource allocation and regular monitoring of program effectiveness.

At an international level, the International Chamber of Commerce published in October 2024 the second edition of the [Antitrust Compliance Toolkit](#), in which it provides practical guidelines of great interest and lists specific tools and methods for assessing risks and establishing policies.

Conclusions

Five years of application of the Compliance Guidelines have consolidated the importance of having effective compliance programmes as a tool to prevent or detect competition infringements and, where appropriate, mitigate legal and economic consequences, and especially, the ban on public procurement.

The criteria, standards and guidelines of different public bodies and other entities, the courts applying them in the framework of sanctioning proceedings and their subsequent review—and validation—confirm a demanding approach in terms of the actual existence, consistency and credibility of antitrust compliance programmes.

The accumulated experience clearly shows that a formal or aesthetic program is not enough, but that evidence and actual results are required regarding, among others, adequate staff training, accessible complaint procedures, appropriate internal investigations with a catalog of consequences to make it effective and credible, and the continuous updating of the program.

Likewise, solutions that are too general are not considered valid, but each company must design, implement and reinforce its program in response to its particular risks and needs.



In short, antitrust authorities have shown their strong commitment to advocate for a greater and broader competition culture beyond their sanctioning activity. The Compliance Guidelines are a good example of this, and we can assume that their activity in this area will continue with equal or greater emphasis in the coming years.

The benefits associated with effective and specific antitrust compliance programmes make it advisable to adopt and review them periodically, for which, in view of the high standards required by authorities and courts, we suggest specific analysis and tangible measures tailored to the reality of each organization. Click on this [link](#) to learn more about the advantages of adopting an effective compliance program in competition matters, as well as its key components.



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