
Kluwer Competition Law Blog

A New Episode in the Assessment of Compliance Programmes by the Spanish Competition Authority: The CNMC's Decision in Suministro de Alimentos

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Introduction

Companies nowadays are subject to strict regulations in different areas of law. These regulations have obliged companies to implement compliance programmes to ensure that they comply with these rules to avoid severe consequences. Compliance programmes were originally focused on criminal matters. However, compliance programmes have now also expanded to other areas of law such as competition law.

Competition authorities have lately carried out a significant advocacy activity promoting competition law compliance programmes. In some cases, they have started to grant certain benefits to companies under investigation that implement effective compliance programmes.

The Spanish Competition Authority (CNMC) published on 10 June 2020 the [Antitrust Compliance Programmes Guidelines \(the Guidelines\)](#). The Guidelines establish the criteria that the CNMC will take into account when examining the compliance programmes submitted by companies under investigation.

What are the benefits for companies implementing an effective compliance programme in Spain?

In Spain, the implementation of an effective compliance programme allows the companies that breach competition law to benefit from a reduction of the fine and/or to avoid the exclusion from public procurement.

The [Spanish Competition Act](#) establishes the criteria to set a fine in Article 64. In particular, Article 64(3) of the Spanish Competition Act lays down the mitigating factors that the CNMC may take into account to determine the final amount of the fine. Compliance programmes are not expressly mentioned as a mitigating factor in Article 64(3) of the Spanish Competition Act. Nevertheless, the Guidelines expressly recognise that the submission of an effective compliance programme allows the CNMC to reduce the fine of a company under investigation.

The exclusion from public procurement is regulated in the [Spanish Public Procurement Act](#). Article 71(1)(b) of the Spanish Public Procurement Act establishes that companies which have been sanctioned for committing serious competition law infringements may result in their exclusion from public procurement. Nevertheless, Article 72(5) of the Spanish Procurement Act provides that the mentioned prohibition shall not apply when the company pays or commits to paying the fine or the corresponding compensations, and implements the appropriate technical, organisational and personnel measures in order not to commit the infringement again. The CNMC has considered that the appropriate technical, organisational and personnel measures refer to the implementation of a competition law compliance programme.

In June 2023, the CNMC approved [Notice 1/2023](#), which sets out the criteria to determine the scope and the duration of the exclusion from public procurement. Notice 1/2023 confirms the CNMC's approach to compliance programmes. This Notice entails a major change since it assigns the competence to the CNMC to set the scope and the duration of the exclusion from public procurement in all the infringement proceedings as of 1 July 2023.

The Antitrust Compliance Programme Guidelines

As already explained, the CNMC approved in June 2020 the Antitrust Compliance Programme Guidelines. According to the Guidelines, the mere implementation of a competition compliance programme does not lead the CNMC to automatically grant a reduction of the fine and/or the circumvention of the exclusion from public procurement to companies. The Guidelines specifically state that companies can only be granted the mentioned benefits when the compliance programme is effective.

The Guidelines point out to the existence of two different types of compliance programmes based on the timing of the implementation: *ex-ante* and *ex-post*.

The Guidelines define *ex-ante* compliance programmes as those which are implemented by companies before the opening of any infringement procedure. In order for the compliance programme to be considered effective, the companies must (a) collaborate actively and effectively with the CNMC from the beginning of the investigation; (b) acknowledge the proven facts and; (c) adopt quickly and voluntarily reactive measures to remedy the harm caused.

The Guidelines define *ex-post* compliance programmes as those which are submitted by companies after the opening of the infringement procedure or plans to enhance existing compliance programmes that companies may have implemented before the start of the investigation. The Guidelines also stress that *ex-post* compliance programmes and improvement plans must be submitted to the Directorate of Competition promptly and, in any case, before the notification of the Proposal of the Decision (*Propuesta de Resolución*).

The Guidelines also describe the criteria that the CNMC considers adequate for the design and implementation of an effective compliance programme, *i.e.*, a programme that prevents infringements and sets up the tools to detect and react in case an infringement takes place.

The criteria taken into account by the CNMC when examining compliance programmes are the following: (i) involvement of company management bodies and/or top executives; (ii) effective training; (iii) existence of a reporting channel; (iv) independence and autonomy of the compliance

officer; (v) identification of risks and design of protocols or oversight mechanisms; (vi) design of the internal procedure for managing reports and detection of infringements and; (vii) design of a transparent and effective disciplinary system.

The CNMC's Decision in S/0016/21 *Suministro de Alimentos*

Since the adoption of the Guidelines in 2020, the CNMC has granted benefits only on one occasion. This was the case of Indra in *Consultoras*, which obtained a 10% reduction of the fine and avoided the exclusion from public procurement. Moreover, in *Licitaciones Material Militar* adopted in 2023 the CNMC accepted that certain companies could avoid the exclusion from public procurement as long as they filed the information related to their compliance programmes within 6 months after the decision's adoption.

Suministro de Alimentos, adopted on 10 July 2024, is the first decision assessing compliance programmes issued by the CNMC in 2024. In the Decision, the CNMC declared that seven companies and five managers breached Articles 1 of the Spanish Competition Act and 101 TFEU. The infringement consisted of a bid-rigging practice related to supplying food to hospitals, homes for the elderly, prisons and army installations. Certain companies mentioned in their replies to the Statement of Objections that they intended to implement effective compliance programmes. However, they did not finally submit any information related to them to the competition authority.

Only one company out of them, Leonesa, submitted an *ex-post* compliance programme along with the allegations to the Proposal of Decision to the CNMC. In its assessment, the CNMC points out that, as stated in the Guidelines, the compliance programme must be submitted before the allegations to the Proposal of Decision. It also said that Leonesa's compliance programme was not assessed by the Directorate of Competition since Leonesa submitted it after this moment.

The CNMC took into account the fact that Leonesa wanted to adopt an effective compliance programme in line with the Guidelines. The CNMC, however, criticised that Leonesa did not explain how the compliance programme fulfilled the criteria established in the Guidelines. Leonesa only filed some documentary evidence related to the actions carried out to prove the implementation of the compliance programme.

The CNMC in this regard recalled that the company under investigation had to rigorously and thoroughly argue why the compliance programme should be considered effective. The CNMC also specified that it was not necessary to comply with all the criteria set out in the Guidelines, but in that case, the company under investigation should explain why the unfulfillment of certain criteria was justified.

The CNMC stated finally that the compliance programme did not comply with the criteria established in its Guidelines for the following reasons:

- Leonesa carried out an internal audit to prepare the Audit Report. This Report found that there was no evidence of any breach of competition law. The CNMC specified that the lawyer who prepared and signed the Audit Report was the same lawyer who acted on behalf of other companies under investigation in the file. As a result, the CNMC stated that the lawyer had a conflict of interest to the extent that he had no incentive to reach a conclusion which could be detrimental to his client.

- Leonesa submitted a risk map to the CNMC that was used in a presentation during a training session.
- The compliance programme did not even mention the existence of a reporting channel.
- Leonesa did not appoint a compliance officer.
- Leonesa did not adopt any measure related to the prevention of potential infringements of competition law in public tenders.
- Leonesa did not implement an effective disciplinary system.
- The CNMC indicated that the information submitted by Leonesa did not allow to ensure that the company will follow training sessions in competition law in the future.
- The CNMC also pointed out that Leonesa did not take into account how it could adopt its compliance programme to new business strategies in the future.

The CNMC, therefore, concluded that the compliance programme submitted by LEONESA could not be considered effective as it did not comply with the criteria established in the Guidelines.

Conclusion

This Decision is in line with previous assessments made by the CNMC. The main takeaways of the Decision are the following:

- Companies must follow the criteria mentioned in the Guidelines so that the compliance programme can be considered effective. However, the CNMC specifies that it is not necessary to fulfil all the criteria established in the Guidelines. In that case, the company under investigation shall explain adequately why some of the criteria are not met.
- It is necessary to carry out a thoughtful assessment of the activities of the company to develop a credible compliance programme. Companies must specifically adapt their competition law compliance programmes to their business activity.
- Companies must gather all the information related to the activities carried out within the scope of the compliance programme to demonstrate its implementation.
- Companies must include in their compliance programmes the strategies that they will follow to adapt their compliance programmes to possible changes in their business activity.
- Companies must submit the compliance programme during the initial stages of the proceeding or, in any case, before the Proposal of Decision to ensure that the Directorate of Competition will be able to assess it.

* During the initial stages of the proceedings the Directorate for Competition describes the facts that may constitute an infringement in the Statement of Objections (*Pliego de Concreción de Hechos*). Once the necessary investigative acts have been carried out, the Directorate of Competition issues the Proposal of the Decision (*Propuesta de Resolución*), which is notified to the interested parties, so that they can present the arguments they consider appropriate before the CNMC's Council. The Proposal of the Decision contains an assessment of the evidence, the legal qualification of the facts that are considered proven, and, if applicable, the possible fines to be imposed.

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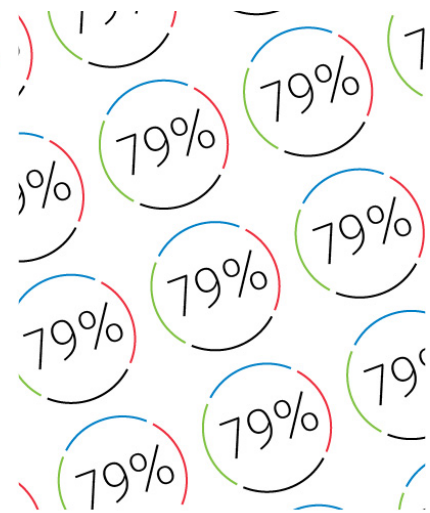
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