

# COMPETITION LAW COMPLIANCE PROGRAMS

JUNE, 2012

PROMOTION MATERIAL No. 3

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## Introduction

In late March 2012, the National Economic Prosecutor's Office ("FNE") shared the first version of the Guideline "**Competition Law Compliance Programs**". The Guideline was submitted to public consultation, which ended on May 6<sup>th</sup> of this year, aimed at gathering the opinions and suggestions of economic agents, academics and specialists in that field.

After a comprehensive process of collection, analysis and systematization of all the comments received during the consultation period, some of the valuable suggestions that were received have been included in the text of the Guideline.

The publication of the final promotion material is intended to provide incentives for economic agents to develop internal mechanisms that seek to prevent violations of competition law.

This document is a promotion material, therefore it does not have normative force, and does not bind the Competition Court ("TDLC") nor the Supreme Court.

Sincerely,

**Felipe Irarrázabal Ph.**  
National Economic Prosecutor



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## I. Introduction

Law Decree No 211 (DL 211) seeks to not only defend, but also to promote competition in the marketplace. A significant part of the promotion work of the FNE is directed to create a competition culture and foster compliance with the law. In this task, we seek for economic agents to be central actors, adopting the necessary steps to raise awareness of the law inside their organizations, and, incidentally, to fully comply with it.

In this context, the FNE has developed this Promotion Material, through which certain guidelines are provided as to what this service deems, in a general and abstract manner, should be contained in a **Competition Law Compliance Program**.

Compliance Programs are an **efficient and effective prevention mechanism of damage detection and control**, since they provide internal guidelines on the correct manner to react, favoring the lack of occurrence or reduction of negative effects of anti-competitive behaviors both for the company and society. Providing information and education to employees increases the possibilities of early identification of risk situations, likewise increasing the possibility of timely adopting the necessary measures to prevent or mitigate them.

Nevertheless, providing information to the members of an economic agent in order to educate them in competition matters is insufficient to prevent the risks that the Compliance Program seeks to reduce. In this sense, provision of information must necessarily be complemented with an active prevention program and with the adoption of business policies aligned with a competitive behavior.

Every Compliance Program should be developed in attention to the **particular needs and characteristics of a company**, according to its situation and performance in the market. For this reason, this Promotion Material should only be considered as a general guideline that sets the minimum requirements that, in the



opinion of the FNE, a Program should contain to ensure the benefits that its correct implementation brings.

Our objective is to provide basic orientation for economic agents, regardless of their size, to allow them to identify, by themselves, their own risks in order to prevent or mitigate them.

The FNE shall not verify Compliance Programs, thus the economic agent that implements them is exclusively responsible for their content.



## II. What is a Compliance Program?

A Compliance Program consists of the **policies, procedures, guidelines and mechanisms** adopted by an economic agent in order to comply with the existing competition law.

Any Program should always be tailored to each company, considering several factors, and in particular:

- **Size** of the economic agent
- **Characteristics and specific particularities** of the agent
- **Market** where it participates
- Degree of influence it exerts in the market where it participates (**Market Power**).

By identifying the abovementioned factors, the economic agent will be able to recognize their own weaknesses and strengths, in order to create and implement a Program according to their own characteristics and requirements. Any Compliance Program should comply with characteristics of seriousness, comprehensiveness, and be adequate to the reality of the economic agent. Compliance with such requirements should be achieved by observing sections III and IV of this document.



### **III. Essential Requirements of a Compliance Program**

In the opinion of the FNE, for a Compliance Program to be effective, it must comply with four requirements: (i) real commitment to comply with competition law; (ii) identification of possible risks that the economic agent faces; (iii) internal procedures and structures aligned with the compliance commitment undertaken; and, (iv) involvement of Managers and/or Directors in the Compliance Program. Each requirement is reviewed below:

#### **1. Real commitment to comply**

Commitment to comply is a basic and essential requirement of every Compliance Program. The mere existence of a Program, even one in appearance complete, does not serve any purpose when the economic agent does not undertake a real and effective commitment to comply with the existing law.

Such commitment is proved through the actions of each agent, being necessary that both internal and external policies are aligned with the existing law and with the intention to comply with it. This allows to communicate information to employees and external collaborators, creating a culture committed to competition.

#### **2. Identification of risks, both current and potential**

When identifying the areas susceptible of current or potential violations of competition, it is possible to determine the measures to be implemented by the economic agent in order to eliminate or mitigate such risks, as applicable.

Not all economic agents are exposed to the same risks, not even the areas or divisions of the same agent, making it necessary to identify and evaluate each one





of them in order to act in accordance with their individual requirements. The FNE recommends carrying out a detailed study of the risks that the economic agent is exposed to, hiring professionals that are experts in competition and regulation, which hold the necessary tools to identify such risks and propose measures.

The identified risks will determine the features of the Compliance Program that will be adopted and, moreover, the level of intervention in each area of the company. It is suggested to classify the level or degree of risks (for example, “low risk”, “medium risk”, and “high risk”), providing more support and monitoring to those areas labeled as medium and high risk.

Only through the identification and evaluation of risks is it possible to define what kind of Compliance Program is effective for a specific economic agent, being necessary, periodically or under a change of circumstances, to review the already identified risks and evaluate the potential emergence of new risks.

### **3. Internal structures and procedures of the economic agent aligned with competition law**

As previously mentioned, a basic requirement for any Compliance Program is the adoption of the commitment to comply with competition law, being the manifestation of such commitment the establishment and determination that both internal structures and procedures are in accordance with competition law.

For example, incentives, compensations, and other employee benefits, as well as the business goals on which such benefits depend, must be consistent with competition law in general and, in particular, with the prevention of the identified risks.

Likewise, it is advisable to establish adequate communication channels for employees to present to their respective leaderships those policies that may, in practice or through their application, adversely affect competition law.



#### **4. Involvement of Managers and/or Directors**

The Compliance Program should count with the involvement of senior executives and directors of the company, which cannot be limited to the decision to adopt a Compliance Program.

It is necessary for management positions and the board of directors of the economic agent (as applicable) to actively participate in the creation, implementation and development of the Compliance Program. Only through their involvement is it possible to communicate to the other employees the real and profound message of commitment to comply with and abide by competition law.

Finally, to the extent that the degree of market power justifies it and there are enough available resources, the person responsible for carrying out and overseeing the implementation of the Compliance Program should have full autonomy and independence inside the company (for example, reporting directly to the board of directors and having precisely defined causes for removal).



## **Essential requirements of a Compliance Program:**

### **↻ Compliance commitment**

- Real and effective commitment to comply with the existing law
- Internal and external policies of the economic agent in accordance with the existing law
- Compliance culture

### **↻ Identifying risks, both current and potential**

- Carrying out a detailed study of the risks and determining measures to eliminate or mitigate them, as applicable
- Risks should be classified according to their degree
- Periodically, or because of a change of circumstances, (merger, removal of a competitor, change of law, etc.) the identified risks and adopted measures should be reviewed, and potential emergence of new risks should be investigated

### **↻ Internal structures and procedures of the economic agent in accordance with competition law**

- Internal business policies, goals and incentives of the economic agent aligned with competition law and the commitment undertaken to comply with it
- Establishing adequate communication channels for employees to present possible theoretical or practical contradictions between business policies, goals or incentives and the adopted Compliance Program

### **↻ Involvement of Managers and/or Directors of the economic agent**

- Continued involvement of senior executives and directors of the economic agent in the development of the Compliance Program
- The person responsible for carrying out the Compliance Program should have autonomy and independence, and report to senior executives or, ideally, to the board of directors.

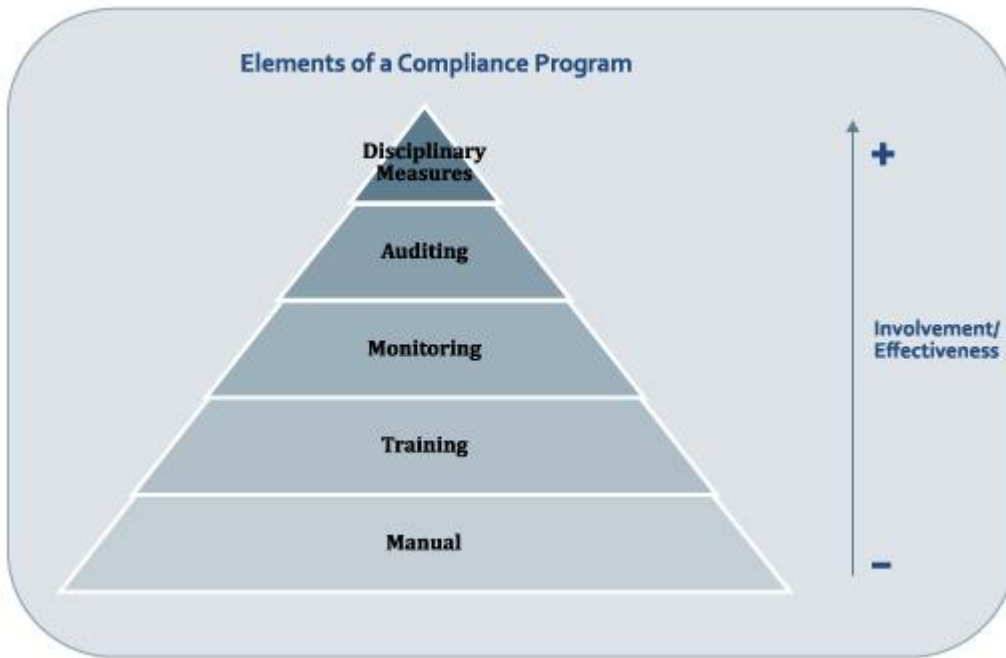


## IV. What elements can a Compliance Program include

A Compliance Program can include different elements, which may determine the degree of effectiveness of the Program. The risks identified by the economic agent will be decisive when deciding what components should be included in the Program. From the development of a competition manual to the implementation of disciplinary measures for employees that do not comply with the developed Program, may all be considered. The more components the Program includes, the easier it may be to achieve the objectives of teaching, preventing, detecting, correcting and sanctioning anti-competitive behavior that, currently or potentially, takes place inside the economic agent.

In general, the elements of a Compliance Program may be described in a “pyramidal” manner. When moving towards the top of the pyramid, the required costs and intervention level become higher, but, at the same time, the effectiveness potential of the Program as a whole will also be higher. Considering the variables, the economic agents will have to determine their own program, being it more likely that the higher the measure is in the pyramid, the lower the number of times it has to be implemented.





## 1. Manual

A Compliance Program should at least include a written manual that **contains in a clear and comprehensible manner the main aspects of the Program**. The manual should at least include:

- Description and explanation of competition law in a clear, simple and comprehensible manner (need of simplifying complex terms);
- Explanation of the identified risks and steps to follow in this regard;
- A list of those actions that should NOT be carried out and of those that may be carried out but with a high degree of care;
- Make available to employees adequate communication channels to convey questions or convey their concerns;
- Name of the person responsible for the Program; and,
- Establish expedite complaint channels, easily accessible for reporting a violation or potential violation.



The manual **should be made available to all the entity's employees**, in particular persons that are exposed to higher risks because of the work they perform in the company. The FNE recommends to make the manual available to employees in a continuous manner and readily accessible, for example, through the company's website or intranet.

Regarding the **complaint system, it should be clear, detailed, efficient and effective**, including at least two different procedures:

- One intended to regulate channels for employees to communicate the relevant complaint internally; and,
- Another intended to regulate the steps to be followed by leaderships upon receipt of a complaint.

For the correct operation of the complaint procedure, it is important that its treatment remains **confidential** and to assure the claimant that negative consequences will not follow, both from the economic agent and the rest of the employees, for the mere fact of submitting a complaint.

Additionally, every complaint procedure should clearly indicate the behaviors that should be reported, without prejudice of the existence of *open situations or behaviors* that allow reporting other suspicious circumstances, or the possibility of carrying out consultations before the person responsible for the Program. The listed behaviors should have a direct relation with the current or potential risks identified by the economic agent during the development of the Program. It is also suggested to expand the list of behaviors not only to direct violations of competition, but also to suspicious or unusual situations that indicate a competition violation.

Finally, any complaint procedure should indicate the steps to be followed in case a violation or potential violation is reported.

## 2. Training



**Training** allows to make available to employees the scope and purpose of the manual, therefore it should be included in any Compliance Program. The FNE suggests creating working groups composed of persons in similar positions and exposed to similar risks, to make available and teach in a practical manner the scope of the Program, the economic agent's competition policies and procedures.

It is desirable for training to be performed by an external professional of the economic agent, with expertise in competition matters. Alternatively, training may be implemented through online courses or workshops, seminars, among others.

The frequency of **trainings** will depend on the level of internalization by the employees, and other elements such as the degree of employee turnover, the extent of the risk associated with certain duties, or changes in competition conditions, among others.

### **3. Monitoring and auditing**

A possible feature of the Compliance Program is carrying out monitoring activities inside the economic agent to evaluate the effectiveness or performance of the implemented Program, thus identifying possible flaws and weaknesses, allowing to improve the scope and effects of the Program.

Audits seek to obtain a critical assessment of the economic agent and the implemented Program. Audits may be performed by external professionals or by the internal leadership, and can be carried out in different formats and times. The FNE suggests to perform always an audit when a claim is submitted regarding a violation or potential violation and to perform audits periodically as a preventive approach, without requiring the previous submission of a claim.

The frequency of monitoring and auditing will be in direct correlation with the level of risks identified when evaluating and developing the Compliance Program.

Both monitoring and auditing may also include techniques called "**screenings**",



consisting in the use of econometric tools that allow to detect the presence of potential anti-competitive practices. It is advisable, in principle, to hire specialized external personnel for their performance.

#### **4. Incentives and disciplinary measures**

Finally, the economic agent may evaluate the possibility of introducing preventive measures to the Program, this is, **expressly indicate the sanctions faced by offending employees**, in the case they engage in behavior against competition.

Likewise, it could be convenient to adopt incentives for employees that promote a more active involvement from them in identifying possible breaches of the Compliance Program.





## V. Benefits of a Compliance Program

A serious and comprehensive Compliance Program entails certain effects on the economic agent that implements it in good faith. Any agent that commits to compliance with competition law and effectively communicates such commitment might benefit.

In the opinion of the FNE, the main benefits of a Compliance Program are the following: (i) Prevention of violations, (ii) Damages detection and control.

With the correct implementation of a Compliance Program, the economic agent will be able to identify their own “weaknesses and strengths” and act accordingly. Thereby, the agent will correctly prevent and react according to their own competition challenges.

### 1. Violation prevention

The main benefit of a Compliance Program is **preventing** behaviors that may be qualified as a violation of competition law, that if sanctioned may cause a significant economic detriment to the infringing entity.

A serious and comprehensive Compliance Program allows to create and develop a “*competition compliance culture*”, so that each employee of the economic agent will know how to act and react upon different situations, in particular those considered of higher risk. Thereby, through the provision of as much relevant information as possible in this matter and by training employees, it will be possible to create **a network of control and support among employees** that will allow them to:

- Concretely understand competition law and conduct a self-exam of their behavior;
- Ensure that their coworkers do not engage in behaviors against competition;



and,

- Know where to go and what procedure to follow in the event of discovering a potential law violation.

In this way, monitoring is allocated to each member of the economic agent, and current and potential risks of behavior against competition law may be effectively internalized by employees and, in this way, personally avoided.

A Compliance Program will have preventive effects as long as the compliance culture is extended to all employees of the economic agency, making it necessary that the structure, regulation, internal organizational chart and business policies reflect and are aligned with the commitment adopted to comply with competition law.

## 2. Damages detection and control

In those cases where a good Compliance Program exists yet an employee or an economic agent violates competition, **the implemented mechanisms will enable the identification of infringements, allowing the company to adopt the relevant measures to adjust and ensure compliance with competition law**, thus controlling damages caused by the violation.

The FNE considers that, even if a violation exists, the implementation of the right Compliance Program provides three great benefits: (i) possible reduction of the applicable fine, in the context of a complaint before the Competition Court; (ii) timely use of leniency benefit, in case there is collusion or a cartel; and, (iii) possibility of reaching an out of court settlement agreement.



## a. Possible fine reduction

A potential benefit associated with the implementation of a Compliance Program is its consideration in case a complaint is presented before the TDLC, both in the determination of the fine<sup>1</sup>, and in any other requested sanction, in accordance with article 26 of DL 211<sup>2</sup>.

## b. Leniency

In case the detected violation is the one regulated in article 3 letter a) of DL 211, the economic agent will have more tools and opportunities to make use of the exemption or fine reduction benefit regulated in article 39 bis of DL 211<sup>3</sup>. The timely

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<sup>1</sup> DL 211, article 26 letter c) *“The imposition of fines for an amount equivalent to twenty thousand “unidades tributarias anuales” and when sanctioning harmful behavior set out in Article 3 literal a), up to an amount equivalent to thirty thousand “unidades tributarias mensuales”. Fines may be levied on the relevant legal person, its directors, administrators and all persons that intervened in the performance of the respective act. The fines levied on natural persons may not be paid by the legal entity for which he or she perform duties or by the shareholders or partners thereof. Moreover, they may not be paid by any other entity pertaining to the same business group under the terms stated in article 96 of Law on Stock Markets, nor by the shareholders or partners thereof. In the case of fines levied on legal persons, payment thereof will be jointly made by its directors, administrators and those persons that benefited from the respective act, as long as they participated in the performance of the same.”*

<sup>2</sup> DL 211, article 26, final paragraph: *“The following circumstances, among others, shall be taken into consideration for the purposes of determining the fines: the economic benefit obtained as a result of the infringement, the seriousness of the conduct, the recidivist character of the perpetrator, the collaboration that the latter has provided to the National Economic Prosecutor’s Office prior to or during the investigation”.*

<sup>3</sup> DL 211, article 39 bis: *“Whosoever engages in any of the conducts set out in article 3 paragraph a) may qualify for a fine reduction or exemption, if it submits to the National Economic Prosecutor’s Office proof of the conduct and information allowing to identify the responsible parties. In order to qualify to such benefits they must fulfill the following requirements: 1. Supply precise, truthful and verifiable information that constitutes an effective contribution for the establishment of sufficient evidentiary elements with which to justify the filing of a complaint before the Court; 2. Refrain from disclosing the application for these benefits until the Prosecutor’s Office has filed the complaint or ordered the complaint records to be sealed; 3. Cease any participation in the conduct in question immediately after the submission of the application for benefits. In order to be eligible for the exemption from dissolution or fine, as the case may be, in addition to the requirements indicated in the previous paragraph, the person engaging in the conduct must also be the first party to contribute the information to the Prosecutor’s Office, from amongst the group of parties responsible for the accused conduct. To qualify for a fine reduction, in addition to fulfilling the requirements detailed in paragraph two, the person engaging in the conduct must provide additional information to that submitted by whomsoever first supplied the information to the Prosecutor’s Office under this article. In any event, the reduction of the fine the Prosecutor proposes in the complaint shall only be applicable to the second party submitting information and cannot be higher than 50% of the fine that would have been proposed otherwise. In the complaint, the Prosecutor will identify each person engaging in the conduct that fulfilled the requirements to qualify for any of the benefits referred to in paragraph one. If the Court finds that the conduct has been proven, it cannot impose the dissolution or levy a fine upon any person identified as beneficiary of an exemption, nor a fine higher than that proposed by the Prosecutor in respect of whomsoever is individualized as the beneficiary of a fine reduction, except if, during the proceedings, it is proven that said beneficiary was the organizer of the illicit conduct, coercing the others to participate therein. Any party alleging the existence of the conduct foreseen in paragraph a) of article 3 with the purpose of damaging other economic agents by applying to the benefits of this article, knowingly based on false or fraudulent*



detection of the violation will provide the agent with the opportunity of being the first to make use of the benefit, being able to receive a fine exemption if the legal requirements are met<sup>4</sup>.

### **c. Out-of-court settlement agreement**

Additionally, the existence of a Compliance Program will provide the economic agent with more tools and opportunities to reach an out-of-court settlement agreement with the National Economic Prosecutor's Office in accordance with article 39 letter ñ) of DL 211<sup>5</sup>, when applicable. The timely detection of the violation will provide the economic agent with the opportunity to negotiate in a timely and adequate manner the terms of the agreement, reducing the risks and costs associated with a trial.

To receive the abovementioned benefits, the Compliance Program shall comply with the requirements set out in the previous sections (and others that could be relevant regarding specific economic agents and the market where they operate), and be implemented adequately and in good faith inside the economic agent.

Accordingly, the FNE will analyze the following:

- The existence of a Compliance Program;
- Compliance with requirements set out in the previous sections of this document, and other specific requirements that are necessary when taking into account the economic agent and the applicable market;
- The serious, comprehensive and in good faith implementation of the Program; and,

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*information, shall be penalized with minor imprisonment in its maximum degree in accordance with article 210 of the Criminal Code”.*

<sup>4</sup> See internal Guide on exemption benefit and fine reduction in cases of collusion, National Economic Prosecutor's Office, October 2009. Available in [https://www.fne.gob.cl/wp-content/uploads/2017/10/Guidelines\\_Leniency\\_Cartel\\_Cases.pdf](https://www.fne.gob.cl/wp-content/uploads/2017/10/Guidelines_Leniency_Cartel_Cases.pdf)

<sup>5</sup> DL 211, article 39 letter ñ) “*To execute out of court settlement agreements with the economic agents involved in its investigations, with the purpose of protecting competition in the markets.*”



- Effectiveness of the implemented Program, with an existing damage control system inside the economic agent and delimitation of detrimental effects associated to the violation.

The entity interested in invoking a benefit will be solely and exclusively responsible for presenting the necessary documents, and it will be an exclusive decision of the FNE, in relation to the documents presented, to consider or not the Program implemented by the economic agent when determining the requested sanctions. In those cases where the economic agent collaborates before or during the investigation, the FNE may present such circumstance to the TDLC.



## **Benefits of a Compliance Program:**

### **↻ Violation prevention**

- Main purpose of a Compliance Program
- A network of control and support among employees is created
- Commitment culture

### **↻ Damages detection and control**

#### **↻ Possible fine reduction**

- The Compliance Program should comply with the requirements set out in this document
- Serious, comprehensive and in good faith implementation of the Compliance Program
- Damage control opportunity inside the economic agent and delimitation of detrimental effects resulting from the violation
- Commitment to comply with competition law should be reflected when identifying and deciding steps to follow when learning about a violation

#### **↻ Leniency**

- The economic agent will have more tools and opportunities to be the first to use the leniency benefit, if it also complies with other legal requirements



## **VI. Who should implement a Compliance Program**

Any economic agent that can execute or conclude, individually or collectively, any event, act or agreement that impedes, restricts or hinder competition, or that produces such effects, should consider implementing a Compliance Program.

Nevertheless, considering that the implementation of a Compliance Program entails costs, the economic agents have to evaluate their own conditions and those of the market where they operate, before adopting a decision regarding the need of a Compliance Program, and the characteristics and depth of such program.

In this sense, in the case of smaller actors, the FNE suggests exploring the possibility of adopting alternative solutions that entail lower costs for the economic entity, thus obtaining the benefits of a Compliance Program without allocating major recourses.

As an example, the FNE suggests to smaller actors to use as models Programs developed by entities with similar characteristics, and to limit the number of persons responsible for the Compliance Program (which may perform such activity in a non-exclusive manner). Likewise, instead of audits and monitoring it is suggested to carry out self-evaluations, even through informal mechanisms, with the purpose of determining their degree of commitment with competition.

Nevertheless, the FNE considers that economic agents are more familiar with their own characteristics, internal structure, market performance, etc., and are more suited to determine the most efficient, practical and convenient procedures or mechanisms for themselves.



## VI. How to contact the FNE

Any economic agent may contact the FNE to report events or acts that, in their judgement, are or may be attempting against market competition. It is not necessary to have legal representation for this.

For more information in relation to any aspect of Compliance Programs, contact us:

### **National Economic Prosecutor's Office**

Huérfanos 670, 8th, 9th,  
and 10<sup>th</sup> floors

Santiago Metropolitan

Region

[www.fne.gob.cl](http://www.fne.gob.cl)

[contactenos@fne.gob.cl](mailto:contactenos@fne.gob.cl)

Telephone: (2) 753 5600 - 5631

Fax: (2) 753 5607 - 5608

