

Public Consultation

Update of the “Competition Law Compliance Programs” Guidelines

1. The “Competition Law Compliance Programs” Guidelines and the evolution of the issue since its publication

On June 2012, the National Economic Prosecutor’s Office (“FNE”), following a public consultation, published Promotion Material No. 3, “Competition Law Compliance Programs” Guidelines (“the Guidelines”). The Guidelines intended to introduce the main directives that a Competition Law Compliance Program had to include, according to the FNE. In this regard, the Guidelines detailed the benefits that, according to the authority, a serious and effective program could imply, the essential requirements to consider the program serious and effective, and the elements that it should include.

The Guidelines were an institutional landmark concerning competition law compliance in our country. In this regard, its positive reception by the competent courts and the development of the case law should be highlighted. The Competition Court (*Honorable Tribunal de Defensa de la Libre Competencia* or “H. TDLC”) has explicitly considered the Guidelines in all convicting judgments in cartel cases handed down since 2014. These decisions have imposed on the convicted undertakings the obligation to adopt compliance programs which at least include the requirements established by the Guidelines,¹ plus other requirements imposed by the H. TDLC. The Supreme Court, on the other hand, has confirmed these obligations, adopting them entirely or with minor modifications.

This is how a significant amount of case law on the characteristics or elements of the competition law compliance programs has emerged. This case law has specified, supplemented, or added requirements to the Guidelines. In this way, the H. TDLC and the Supreme Court have pointed out, for instance, the independence that a compliance officer must have, the need to establish adequate communication complaint channels and periodic auditing, and the obligation to create internal and independent compliance bodies, among others.

As it is natural, and considering that they were published more than ten years ago, the mentioned developments in the case law justify an evaluation and update of the Guidelines.

Moreover, several international developments during these years further justify such an evaluation and update. Indeed, since the publication of the Guidelines, the relevance given to competition compliance programs, as well as the public discussion about them, has increased progressively.²

For instance, in 2019, the Department of Justice of the United States published guidance on the Evaluation of Corporate Compliance Programs in the context of criminal violations of the

¹ These decisions by the H. TDLC are the next ones: N°145/2015 (3° resolution), N°148/2015 (147° consideration and 7° resolution), N°160/2017 (219° consideration and 5° resolution), N°165/2018 (156° consideration and 6° resolution), N°167/2019 (237° consideration and 7° resolution), N°171/2019 (236° consideration and 7° resolution), N°172/2020 (225° consideration and 5° resolution), and N°179/2022 (337° consideration and 5° resolution).

² See, e.g., American Bar Association y CeCo, *Antitrust Compliance in Latin America* (2022) p.4. <<https://centrocompetencia.com/aba-ceco-antitrust-compliance-latin-america/>> accessed: 09 August 2022.

Sherman Act.³ Moreover, the same institution has recently announced revisions to its corporate criminal enforcement policies, which include modifications to the evaluation of corporate compliance programs.⁴ On the other hand, in 2021, the Organisation for Economic Co-operation and Development (OECD) held a roundtable focused on the characteristics that a compliance program must have to be effective, the available empirical evidence, and the trends on the issue.⁵ On that occasion, the FNE presented the main principles of the Guidelines and the later developments of the case law, previously discussed.⁶

In Latin America, on the other hand, CADE (Brasil) in 2016,⁷ COFECE (México) in 2019,⁸ and INDECOPI (Perú) in 2020,⁹ have issued Guidelines on the issue. Moreover, also in 2020, the Colombian competition authority (*Superintendencia de Industria y Comercio*) promoted the issuance of a technical norm that seeks to contribute to the building of a culture of self-control on the economic agents' side.¹⁰

Likewise, the academic literature has extensively treated the topic.¹¹

³ U.S. Department of Justice Antitrust Division, *Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations* (2019). <<https://www.justice.gov/atr/page/file/1181891/download>> accessed 09 August 2022.

⁴ U.S. Department of Justice, Office of the Deputy Attorney General, Memorandum: Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group, de 15 de septiembre de 2022. Available at: <<https://www.justice.gov/opa/speech/file/1535301/download>> accessed: 27 September 2022. Also, see U.S. Department of Justice, "Deputy Attorney General Lisa O. Monaco Delivers Remarks on Corporate Criminal Enforcement". Available at: <<https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-delivers-remarks-corporate-criminal-enforcement>> accessed: 27 September 2022.

⁵ OECD, *Competition Compliance Programmes* (2021). <<http://oe.cd/ccp>> accessed: 09 August 2022.

⁶ See "Competition Compliance Programmes – Note by Chile" (2021) <[https://one.oecd.org/document/DAF/COMP/WP3/WD\(2021\)6/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/WD(2021)6/en/pdf)> accessed: 09 August 2022.

⁷ CADE, Guía: Programas de Compliance (2016). Original version available at: <<https://cdn.cade.gov.br/Portal/centrais-de-conteudo/publicacoes/guias-do-cade/guia-compliance-versao-oficial.pdf>>. English version available at: <<https://cdn.cade.gov.br/portal-ingles/topics/publications/guidelines/compliance-guidelines-final-version.pdf>> accessed: 09 August 2022.

⁸ COFECE, Recomendaciones para cumplir con la Ley Federal de Competencia Económica (2019). <https://www.cofece.mx/wp-content/uploads/2019/08/Recomendaciones_web.pdf> accessed: 09 August 2022.

⁹ INDECOPI, Guía de Programa de Cumplimiento de las Normas de Libre Competencia (2020). <<https://cdn.www.gob.pe/uploads/document/file/2131129/Gu%20de%20Programas%20de%20Cumplimiento%20de%20las%20Normas%20de%20Libre%20Competencia.pdf>> accessed: 09 August 2022.

¹⁰ ICONTEC, Norma Técnica Colombiana 6378:2020, Requisitos para el establecimiento de buenas prácticas de protección para la libre competencia.

¹¹ See, e.g., Wouter P. J. Wils, "Antitrust compliance programmes and optimal antitrust enforcement" (2013) 1 *Journal of Antitrust Enforcement*, 52-81; D. Daniel Sokol and Rosa Abrantes-Metz, "Antitrust Corporate Governance and Compliance", in Roger D. Blair y D. Daniel Sokol (eds.) *The Oxford Handbook of International Antitrust Economics, Volume 2* (Oxford University Press, 2014) 586-618; D. Daniel Sokol, Daniel Crane and Ariel Ezrachi (eds.), *Global Antitrust Compliance Handbook* (Oxford University Press, 2014); Keith N. Hylton, "Deterrence and Antitrust Punishment: Firms versus Agents" (2015) 100 *Iowa Law Review* 2069-83; Anne Riley and Daniel Sokol, "Rethinking compliance" (2015) 3 *Journal of Antitrust Enforcement* 31-57; Johannes Paha (ed.), *Competition Law Compliance Programmes: An Interdisciplinary Approach* (Springer, 2016); Cristián Reyes, "Consideraciones jurisprudenciales sobre la relevancia de los programas de cumplimiento en el sistema chileno de libre competencia" (2020), *Investigaciones CeCo*; Johannes Paha y Florence Thépot, "Antitrust Compliance: Collusion", in Benjamin van Rooij y D. Daniel Sokol (eds.), *The Cambridge Handbook of Compliance* (Cambridge University Press, 2021) 868-880; Justin Johnson and D. Daniel Sokol, "Understanding AI Collusion and Compliance", in Benjamin van Rooij y D. Daniel Sokol (eds.), *The Cambridge Handbook of Compliance* (Cambridge University Press, 2021) 881-894; Ignacio Oltra and Katherine González, "Programas de Cumplimiento como herramienta de prevención de conductas anticompetitivas: ¿un problema de incentivos?" (2022), *Investigaciones CeCo*. Moreover, the topic has been treated not only from most traditional perspectives

All these subsequent developments may constitute relevant inputs for its evaluation and update.

2. Scope of this public consultation

Considering the evolution discussed above, the FNE has decided to submit the current text of the “Competition Law Compliance Programs” Guidelines for public consultation so that stakeholders can submit their feedback regarding its content and the need to update, supplement or specify it.

Some topics that, in our opinion and only as a matter of example, can be the object of feedback, are:

- The creation of a real compliance culture and the role of the central management of the undertaking: procedures and successful methodologies to achieve such an objective;
- Generally, the need to update or supplement the Guidelines’ essential requirements of a compliance program, according to the developments in the national and international case law, and the evolution of both the international guidelines and the scholarship;
- The need to update or supplement the Guidelines’ elements of a compliance program, according to the developments in the national and international case law, and the evolution of standards and practices, both at a national and international level. For instance:
 - Integration of the competition compliance program into the general compliance framework of the undertaking;
 - Adaptation of the compliance program to the legal characteristics and economic reality of its business;
 - Role and relevance of screenings and similar methods to detect and prevent collusive behaviour;
 - Role that information technologies and data science may play in the implementation or execution of a compliance program;
 - Purpose of periodic audits and people responsible for them;
 - Use of disciplinary incentives (fines, termination of the employment relationship, etc.);
 - Best practices on defining the role and powers of the compliance officer;
 - Complaints channels or lines: practical elements to consider;
 - Compliance programs in smaller businesses: design, adaptation, and best practices;

of competition law. For instance, in behavioral ethics, see Todd Haugh, “Harmonizing Governance, Risk Management, and Compliance through the Paradigm of Behavioral Ethics Risk” (2019) 21 University of Pennsylvania 873-906; and, in psychology, see Paruzel et.al., “Psychological Contributions to Competition Law Compliance”, in Johannes Paha (ed.), *Competition Law Compliance Programmes: An Interdisciplinary Approach* (Springer, 2016), 215-241.

- Measures that promote competition law compliance by business partners, e.g., due diligence obligations, communication of information about the compliance program, or seeking reciprocal compliance duties.
- Best practices when detecting illegal behaviour:
 - Damage control;
 - Self-denouncing before the authority.

Lastly, it is necessary to state that the update of the Guidelines and this public consultation do not relate to the discussion held in the case C-304-2016, i.e., whether a compliance program may exempt parties from antitrust liability if they had implemented one when the violation was committed. The Supreme Court has settled this dispute establishing that a competition compliance program may not exempt parties from antitrust liability,¹² case law that the FNE considers adjusted to the law and also adequate in relation to the public policy incentives that competition law seeks to ensure, particularly in what regards to detection, prosecution, and punishing collusive practices. Moreover, it should be noted that this is not accepted in other jurisdictions either. In fact, in some cases, it is even discussed if it is appropriate to consider compliance programs for fine reductions.¹³

3. Deadline and contact information

The current version of the Guidelines will be kept on public consultation until October 28th 2022. Feedback can be submitted to consultacompliance@fne.gob.cl. The FNE will publish the final version of the Guidelines after the analysis process is finished.

¹² Supreme Court Decision N°9361-2019, 51° consideration.

¹³ See OECD, *Competition Compliance Programmes* (n 4) 12-16 and “Executive Summary of the roundtable on Competition Compliance Programmes” (2021), 2-3. <[https://one.oecd.org/document/DAF/COMP/WP3/M\(2021\)1/ANN2/FINAL/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/M(2021)1/ANN2/FINAL/en/pdf)> accessed: [última visita: 09 de agosto de 2022]. Furthermore, see the discussion between Wouter P. J. Wils, “Antitrust compliance programmes and optimal antitrust enforcement” (n 10) and Damien Geradin, “Antitrust compliance programmes and optimal antitrust enforcement: a reply to Wouter Wils” (2013) 1 *Journal of Antitrust Enforcement* 325-346.