Presentation

At the end of May 2012, the National Economic Prosecutor’s Office (FNE for its initials in Spanish) issued the first edition of the Guide “Competition Compliance Programs”. This Guide was previously presented for a public consultation that closed on May 6, 2012, for the purpose of receiving and gathering opinions and suggestions from economic agents, academics and specialists in the area of competition.

After an exhaustive process of compiling, analyzing and systematizing all of the comments received during the consultation process, a few of the valuable suggestions received have been included in the final text of this Guide.

By publishing the final promotional material, we aim to encourage various economic agents to develop internal mechanisms for the purpose of preventing violations of competition law.

This document is merely promotional material and, consequently, is unenforceable and does not bind the Tribunal for the Defense of Competition ("TDLC" for its initials in Spanish) or the Supreme Court of Justice.

Sincerely,

Felipe Irarrázabal Ph.
National Economic Prosecutor
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I. Introduction

The purpose and application of Law-Decree 211 is not to solely defend fair competition in the markets, but to also advocate it. A significant part of the promotional work conducted by the FNE is directed towards creating a culture of competition and fostering regulatory compliance. With this undertaking, we strive for economic agents to assume the role of central actors and decision makers, adopting necessary measures to make these regulations known within their organizations and, incidentally, fully comply with the same.

Within this context, the FNE has developed this Promotional Material to make known several central guidelines that it considers, in a general and abstract manner, a Competition Compliance Program should include.

The Programs are an efficient and effective mechanism for prevention, detection and damage control. They provide internal guidelines on the proper forms of action, impeding the occurrence of antitrust behavior or reducing its negative effects, for both the company and society. Providing information and education to employees increases the odds of early detection of risk situations, increasing the possibility of timely adopting the necessary measures to avoid or mitigate negative effects.

All in all, the dissemination of information to members of an economic agent for educational purposes in competition is not sufficient in itself to prevent the risks the Compliance Programs seeks to reduce. In this regard, the dissemination of information must necessarily be complemented with an active program of prevention and the adoption of business policies in line with competitive behavior.

Any Compliance Program must be created in response to the specific needs and characteristics of each business, based on its situation and market position. For this reason, the present Promotional Material must only be considered as a guideline for identifying, in a general manner, the minimum requirements a Program should include in order to, in the FNE’s point of view, obtain the benefits its proper implementation brings.
Our aim is to provide economic agents with basic guidance, regardless of their size, so that they themselves may identify their own risks, and prevent or mitigate the same.

The FNE will not certify Compliance Programs; therefore the creation and contents of each program are the exclusive responsibility of the economic agents.
II. What is a Compliance Program?

A Compliance Program encompasses those policies, procedures, guidelines and mechanisms adopted by an economic agent in order to comply with regulations in force concerning fair competition.

All Programs must always be tailored to the specific business, taking into account diverse factors and especially:

- The size of the economic agent
- The characteristics and peculiarities of the same
- The market in which it participates

Once the factors are identified, the economic agent will be able to recognize its own weaknesses and strengths in order to create and implement a Program in accordance with its own characteristics and needs. All Compliance Programs must meet the requirements of seriousness and comprehensiveness expected from a program, and must be tailored to the reality of the economic agent. Compliance with said requirements must be met by fulfilling that stated in sections III and IV of the present document.

III. Essential requirements of a Compliance Program

In the opinion of the FNE, for a Compliance Program to be effective, it must meet four overlapping requirements: (i) a real commitment to comply with competition regulations; (ii) the identification of current and potential risks faced by the economic agent; (iii) internal mechanisms and procedures in accordance with the commitment to comply; and, (iv) the participation of Managers and/or Directors in the Compliance Program. A review of each of these requirements is detailed below.
1. Commitment to comply

The commitment to comply with regulations is a basic and essential requirement of any Compliance Program. The existence of a Program, even seemingly complete in appearance, is meaningless when the economic agent does not make a real and effective commitment to comply with regulations.

This commitment is reflected by the actions of each economic agent: it is necessary for both internal and external policies to fall within the regulatory framework of competition law and for the agent to intend to comply with the same. In this manner, the intention of complying with competition regulations can be conveyed to employees and external collaborators, creating a culture of commitment to fair competition.

2. Identifying risks, both current and potential

By identifying those areas susceptible to current or potential infringements of competition law, we can determine the measures to be taken to eliminate or mitigate said risks, accordingly.

Not all economic agents are exposed to the same risks, or, for that matter, are their sub-areas or divisions; it is therefore necessary to identify and evaluate each one of these sub-areas or divisions in order to act in accordance with their needs. The FNE recommends carrying out a detailed risk assessment to which an economic agent is exposed, hiring professional experts in the field of regulation and competition who have advanced tools to identify said risks and can propose the measures to be taken.

The risks identified will determine the characteristics of the Compliance Program to be adopted, in addition to the level of intervention in each business area. It is suggested that the level or degree of risk be classified (for example, “low risk”, “medium risk”, and “high risk”), providing greater support and supervision to those areas classified as medium and high risk.
Only through risk identification and evaluation can the type of Compliance Program to be adopted be effective for a given economic agent. From time to time, or due to a change in circumstances, it will be necessary to review the previously identified risks and evaluate the possible appearance of new risks.

3. Internal structures and procedures for economic agents in line with competition law

As previously mentioned, adopting a commitment to comply with competition is a basic requirement of any Compliance Program—the commitment to establish and determine that both the economic agent’s internal structures and its internal procedures are in accordance with competition law.

For example, employees’ incentives, salaries and other benefits, including business targets on which said benefits rely, must be compatible with the regulatory framework of competition law in general, and in particular with preventing the risks identified.

Likewise, it is advisable that suitable communication channels be established so that employees can inform their senior officers of those policies that may, in practice or in their application, undermine competition.

4. Participation of Senior Executives and/or Directors

The Compliance Program must have the participation of the senior directors and managers of the company, participation that cannot be limited to merely deciding to adopt a Compliance Program.

It is imperative that the economic agent’s senior management and board of directors (within their respective competencies) actively participate in the creation, implementation and development of the Compliance Program. Only their participation makes it possible to relay to all employees the real and profound message of a commitment to compliance with competition law.
Finally, to the extent that the degree of market power justifies it and there are sufficient resources, the person responsible for enforcing the correct implementation of the Compliance Program must have full autonomy and independence within the company (for example, that person reports directly to the Board of Directors and can be removed only under specifically defined conditions).
Essential requirements of a Compliance Program:

**Commitment to comply**
- Real and effective commitment to comply with competition law
- Economic agent’s internal and external policies in line with competition regulations
- Culture of commitment

**Identify risks, both current and potential**
- Carry out a detailed risk assessment and determine measures to eliminate or mitigate the same, accordingly
- Risks should be classified according to their degree
- From time to time, or as a result of a change in circumstances (a merger, market exit of a competitor, change in legislation, etc.) the risks identified and measures adopted need to be reviewed, and the possible appearance of new risks should be investigated

**Economic agent’s Internal Structures and Procedures in accordance with competition law**
- Business policies, goals and internal incentives of the economic agent are in line with competition regulations and a commitment made to comply with them
- Establish suitable communication channels so that employees may indicate possible theoretical or practical contradictions between business policies, goals or incentives and the adopted Compliance Program

**Participation of the economic agent’s Managers and/or Directors**
- Continued involvement of the economic agent’s senior executives in the development of the Compliance Program
- The person responsible for enforcing the Compliance Program must have full autonomy and independence, and reports directly to the senior executives or, ideally, the Board of Directors.
IV. What elements can a Compliance Program include?

A Compliance Program can contain diverse elements which determine the Program’s degree of effectiveness. The risks identified by the economic agent will be vital when determining which components should be included in the Program. From the drafting of a handbook to the implementation of disciplinary measures for employees not complying with the Program, can all be considered. The more components the Program includes, the easier it will be to reach the goals of instructing, preventing, detecting, remediating and sanctioning conduct contrary to competition that, currently or potentially, occur within the economic agent.

In general, the elements of a Compliance Program may be described in a pyramidal manner. As one advances towards the top of the pyramid, the greater the costs and level of intervention required; but, at the same time, the greater the potential effectiveness of the Program as a whole. Considering these variables, economic agents must determine their own program. The higher up a measure is in this pyramidal scheme, the lower the number of times it must be implemented.
Elements that make up a Compliance Program

1. Manual

A Compliance Program should at least possess one written manual that includes the main aspects of the Program described in a clear and comprehensible manner. The manual should encompass at least:

- A description and explanation of competition regulations, in a clear, simple and comprehensible manner (this may require a simplification of complex terms);
- An explanation of the risks identified and steps to follow;
- A list of those actions that should NOT be carried out and of those that can, but with a high degree of caution;
- Make available to employees suitable communication channels to present their inquiries and make their concerns known;
- The name of the person in charge of the Program; and,
- Establish quick and easily accessible communication channels for presenting complaints or exposing any violations or possible violations.
The manual should be distributed to all personnel, especially to those persons that may be exposed to greater risks as a result of the work they perform within the company. The FNE recommends making the manual available to all employees on a permanent basis and easily accessible, uploading it, for example, on the company’s intranet or internet webpage.

With respect to the complaints system, it should be clear, detailed, efficient, and effective and should take into account at least two different procedures:

- One to regulate the channels through which employees internally make the corresponding complaint; and,
- Another intended to regulate the steps to be followed by senior management when receiving a complaint.

For the proper handling of a complaint, it is important for it to be treated as confidential and ensure the complainant that no negative consequences will arise therefrom, both from the economic agent and from other employees, solely for reporting the complaint.

Additionally, any complaint procedure should clearly indicate which conduct or actions should be reported, without prejudice to the existence of open situations or conduct that allow other suspicious acts to be reported, or the possibility of holding consultation with the person in charge of the Program. The conduct detailed here must be directly related to current or potential risks identified by the economic agent during the development stage of the Program. It is also suggested to extend the list of actions to take regarding conduct directly infringing competition, but also to include those suspicious or odd situations that may indicate any infringement to competition.

Finally, all complaint procedures must indicate the appropriate steps to be taken in case any actual or potential infringement is reported internally within the company.
2. Training

Training should always form part of any Compliance Program. It is a method to aid in disseminating the scope and significance of the program manual among employees. The FNE suggests training work groups of persons of similar rank and exposed to similar risks, in order to illustrate in a practical manner the scope of the Program, and the economic agent’s competition policies and procedures.

It is desirable that training be conducted by an unrelated, outside professional to the economic agent, with expertise in competition matters. Alternatively, training can be implemented through online courses or training sessions, seminars, among others.

3. Monitoring and audits

A possible component of the Compliance Program is conducting monitoring activities internally to evaluate the effectiveness and performance of the Program, identify its possible flaws and weaknesses, and later improve the scope and effect of the Program.

The process of auditing is to achieve a critical evaluation of the economic agent and the Program. Audits may be conducted by both unrelated, outside professionals and by internal department managers, allowing the audit to be conducted in different formats and at different times. The FNE suggests conducting an audit whenever a complaint has been submitted regarding a violation or potential violation, and arrange audits from time to time for preventive purposes, without the need of a prior complaint or report.

The frequency of monitoring and auditing is directly related to the level of risk identified at the time of evaluating and creating the Compliance Program.

Both monitoring and auditing can even incorporate techniques referred to as “screening”, which consist of the use of econometric tools that detect the existence of possible harmful practices that threaten competition. It is advisable, in principle, to hire specialized outside personnel for its implementation.

4. Disciplinary measures
Lastly, the economic operator may evaluate the possibility of introducing disciplinary measures in the Program, namely, **expressly indicating the sanctions that the economic agent will impose on the infringing employee(s)**, in the case of committing any action contrary to competition.

Furthermore, the introduction of incentives to employees would be a convenient manner to motivate a more active participation on their part in identifying eventual nonobservances to the Compliance Program.
V. Benefits of a Compliance Program

A serious and complete Compliance Program brings about diverse effects on the economic agent that implements it in good faith. Every economic agent able to commit to the act of complying with competition regulations, and that effectively relays the commitment it has made, may be benefited.

It is the FNE’s opinion that the main benefits of a Compliance Program are the following: (i) Prevention of violations, (ii) Damage detection and control.

By implementing a proper Compliance Program, the economic agent will be able to identify its own “weaknesses and strengths” and act accordingly. As such, the agent may correctly prevent and react in accordance with its challenges in matters of competition.

1. Prevention of violations

The main benefit of a Compliance Program is preventing conduct that may violate competition law, which, if sanctioned, could result in an important economic loss to the infringing entity.

A sound and comprehensive Compliance Program will allow the creation and fostering of a “competition compliance culture”; consequently, all of the economic agent’s employees will know how to act and react in the face of diverse situations, especially those considered as riskiest. Thus, by delivering the maximum relevant information possible on this matter and training of personnel, it is possible to create a control and support network among employees that will allow them to:

- Understand in concrete terms what constitutes competition regulations and be able to perform a self examination of their own conduct;
- Ensure that fellow employees do not perform conduct contrary to competition; and,
- Know whom to address and what procedure to follow in the event of discovering a potential violation of competition regulations.

In this manner, investigations can be focused in each member of the economic agent, and current and potential risks involving actions contrary to competition can be
effectively internalized by employees and, in this manner, personally prevented.

A Compliance Program will have preventive effects provided that the culture of compliance is extended to all employees of the economic agent. It is necessary that the structure, rules, internal organizational chart, and business policies reflect and are in line with the commitment of complying with competition regulations.

2. Damage detection and control

In those cases in which, in spite of the existence of a sound Compliance Program, an employee of the economic agent commits an infringement of competition regulations, the mechanisms implemented will be able to identify any infringements, allowing the company to adopt any pertinent measures to adjust and comply with competition regulations, controlling in this manner any damage caused by the infringement.

The FNE (National Economic Prosecutors’ Office) considers that, in spite of the existence of a violation, the implementation of a sound Compliance Program can render three great benefits: (i) the possible reduction of fines, within the context of a report submitted before the Tribunal for the Defense of Competition (TDLC); (ii) the timely use of the benefit of the Leniency Program, in the case of collusion or cartels; and, (iii) the possibility of reaching a settlement.

a. Possible reduction of fines

One of the benefits associated with the implementation of a Compliance Program is the consideration of the same in the event a complaint is filed before the TDLC, in relation to determining the fine,\(^1\) as well as any other sanction to be requested, in accordance with

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\(^1\) DL 211, article 26 letter c): “Order fines for fiscal benefit up to an amount equivalent to twenty thousand unidades tributarias anuales and, in the case of sanctioning a conduct provided in letter a) of article 3, up to an amount equivalent to thirty thousand unidades tributarias anuales. The fines can be levied on the corresponding legal person, its directors, administrators and all persons that intervened in the performance of the respective act. The fines levied on natural persons cannot be paid by the legal entity in which he or she conducts duties or by the shareholders or partners thereof. Moreover, they cannot be paid by any other entity pertaining to the same business group under the terms stated in article 96 of the Market Value Law, nor by 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.”
that established in article 26 of DL 211.²

b. Leniency Program

In the case where the detected infringement is regulated by article 3 letter a) of DL 211, the economic agent will have optimal tools and greater opportunities to use the benefit of exemption or reduction of fines regulated by article 39 bis of DL 211.³ The timely detection of the infringement will grant the economic agent the opportunity to be the first to make use of the benefit, gaining access to an exemption of the fine if the legal requirements are met.⁴

c. Settlement

² DL 211, article 26, final ¶: “To determine the fines, the following circumstances, among others, will be considered: the economic benefit obtained as a result of the violation, the severity of the conduct, the reoffending nature of the offender, and, for the purposes of lowering the fine, the collaboration the latter provided to the Fiscalía before or during the investigation.”

³ DL 211, article 39 bis: “The person that performs a conduct provided in letter a) of article 3 may obtain a reduction in or exemption of payment of the fine when the latter provides the Fiscalía Nacional Económica with information that conduces to proving said conduct and in determining the responsible parties. To obtain these benefits, the actor of the conduct must fulfill the following requirements: 1.- Provide precise, truthful and verifiable information that represents an effective contribution to constituting the elements of sufficient proof on which to base the complaint before the Tribunal; 2.- Abstain from disclosing the request of these benefits until the Fiscalía has formulated the complaint or has ordered the information of the request to be filed, and 3.- Place an end to their participation in the conduct immediately after submitting the request. To obtain a fine exemption, in addition to fulfilling the requirements detailed in the previous paragraph, the actor of the conduct must be the first in providing the information to the Fiscalía, within the group of parties responsible for the infringing conduct. To obtain a reduction in the fine, in addition to fulfilling the requirements detailed in the second paragraph, the actor of the conduct must provide additional information to that submitted by whoever first accompanied the information to the Fiscalía by virtue of this article. In any event, the reduction of the fine the Prosecutor requests in the complaint cannot be greater than 50% of the largest fine requested for the other actors of the conduct who cannot avail of the benefits of this article. In the complaint, the Prosecutor will individualize each actor of the conduct that fulfilled the requirements to obtain the benefit of fine exemption or reduction. If the Tribunal considered the conduct as proven, it cannot levy a fine to the person that was individualized as the receiver of an exemption, nor a fine larger to the one requested by the Prosecutor for whomever is individualized as the receiver of an exemption with the exception that during the proceedings, it can be proved that said actor was the organizer of the illicit conduct, coercing the others to participate therein. Whomever claims the existence of the conduct provided in a) of article 3, knowingly basing it on false or fraudulent information for the purpose of harming other economic agents by obtaining the benefits of this article, will be sanctioned in accordance with that established in article 210 of the Penal Code.”

Additionally, the existence of a Compliance Program will present the economic agent with optimal tools and greater opportunities to reach a Settlement with the FNE in accordance with that provided in article 39 letter ñ) of DL 211, where applicable. The opportune detection of the infringement will grant the agent the opportunity to timely and adequately negotiate the terms of the agreement, reducing the risks and costs associated with a lawsuit.

To access the previously referred to benefits, the Compliance Program must meet the requirements indicated in the preceding sections (and others that could be relevant with respect to certain economic agents and the market in which they operate), and be properly implemented in good faith internally.

To this effect, the FNE will analyze the following:

- the existence of a Compliance Program;
- compliance with the requirements indicated in the preceding sections of this document, and other specific ones necessary according to the economic agent and the involved market;
- The proper, serious, comprehensive and good faith implementation of the mentioned Program; and,
- the effectiveness of the implemented Program, which includes the existence of both internal damage control and a delimitation of adverse effects stemming from the infringement.

The presentation of necessary background to support the request are of the sole and exclusive responsibility of the entity that wishes to exercise its right to this benefit, and it will be an exclusive decision of the FNE, taking into account the background presented, to consider or not the Program implemented by the economic agent at the time of determining the sanctions requested in the complaint filed against the latter. In those cases in which the economic agent collaborated before or during the investigation, the FNE will make known these circumstances to the TDLC.

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5 DL 211, article 39 letter ñ): Enter into extrajudicial agreements with economic agents involved in its investigations, for the purpose of safeguarding fair competition in the markets.
Benefits of a Compliance Program:

- **Prevention of violations**
  - Main objective of a Compliance Program
  - The creation of a control and support network among the employees
  - A culture of commitment

- **Damage detection and control**

- **Possible reduction of fines**
  - A Compliance Program must comply with the requirements indicated in the present document
  - The serious, comprehensive implementation in good faith of the Compliance Program
  - The existence of internal damage control and the delimitation of adverse effects resulting from an infringement
  - The commitment to comply with competition regulations should be provided at the time of identifying and deciding on steps to be taken upon knowing of the existence of an infringement

- **Leniency Program**
  - The economic agent will have optimal tools and greater opportunities to be the first to benefit from the Leniency Program, if it meets the remaining legal requirements
VI. Who should implement a Compliance Program?

Any economic agent that may execute or enter into, individually or collectively, any act, conduct or convention that impedes, restricts or hinders competition, or which sets out to produce said effects, should consider implementing a Compliance Program.

All in all, given the costs associated with the implementation of a Compliance Program, economic agents must evaluate their own conditions and the markets in which they operate before adopting a decision with respect to the need of having a Compliance Program, and the characteristics and scope of this program.

In this context, in the case of smaller businesses, the FNE suggests exploring the possibility of adopting alternative solutions that have a lower cost for the economic entity, and obtain the benefits of a Compliance Program without incurring substantial expenses.

As an example, the FNE suggests for all small and medium businesses to use as models the Programs developed by other entities of similar characteristics, and limit the number of people in charge of the Compliance Program (who do not necessarily have exclusively to assume that role). Additionally, instead of conducting audits and monitoring, the entity could perform self-evaluations, even through informal mechanisms, to determine the degree of commitment to comply with competition regulations.

Notwithstanding, the FNE considers that the economic agents themselves must exert self-awareness of their characteristics, internal structure, performance in the market, etc., as they can best determine what ways or what mechanisms are most efficient, practical and suitable for the economic entity.
VI. How to contact FNE

Any economic agent may contact the FNE to report the occurrence of conducts or events that, in its judgment, are or may threaten competition in markets. To that end, legal representation by an attorney is not necessary.

For more information with respect to any aspect of the Compliance Programs, contact us at:

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