Guidelines on

COMPETITION COMPLIANCE PROGRAMS





GUIDELINES ON COMPETITION COMPLIANCE PROGRAMS

The following members of the Technical Secretariat of the Commission for the Defense of Free Competition contributed to this document:

Jesús Eloy Espinoza Lozada

Technical Secretary

María Luisa Egúsquiza Mori

Consultant

David Jesús Fernández Flores

Consultant

Sofía Guadalupe Rivera Alvarado

Legal Intern

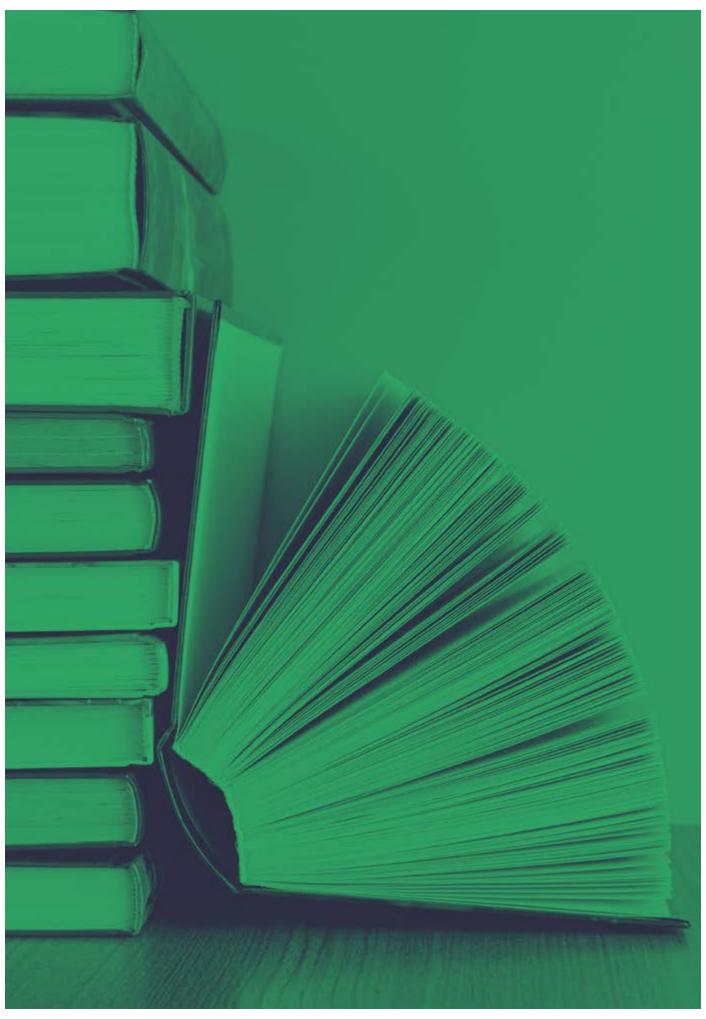
Indecopi

Calle de la Prosa 104, San Borja, Lima, Perú. Phone: (51-1) 2247800, annex 3101.

http://www.indecopi.gob.pe



DEFINITIONS	05
INTRODUCTION	08
1. What is a Compliance Program?	10
1.1 Compliance Programs	10
2.2 Competition Compliance Programs	13
2.Benefits of Compliance Programs to companies	14
3. Cost of non-compliance	16
4. Essential requirements of a Compliance Program	18
4.1. Real commitment to comply from the Senior Management ("tone at the top")	18
4.2. Identification and management of current and potential risks	20
4.3. Internal procedures and protocols	25
4.4. Training for employees	26
4.5. Constant update and monitoring of the Compliance Program	27
4.6. Audits on the Compliance Program	29
4.7. Procedures for consultations and complaints	29
· ·	31
4.8. Designation of a Compliance Officer or Compliance Committee	31
5. What elements does a Compliance Program include?	32
5.1. The Competition Manual	32
5.2. Incentives for employees	33
5.3. Disciplinary measures	35
6. Implementation of the Compliance Program according to the size of the company	36
7. Compliance Programs and infringement detection	37
7.1. Detection of infringements at an earlier stage	37
7.2. Timely collaboration with the authority or fine reduction benefits	37
7.3. Calculation of the fine	38
8. Compliance Programs as injunctions imposed by the Commission	39
9. Additional considerations made by the Commission when the offending company has already adopted a Compliance Program	42
10. Synthesis: Effective Compliance Program	43
11. How to contact the Authority	44
ANNEX A	40
Competition Manual Model	49
Competition and an local	
ANNEX B	61
Check-list for the analysis of the Compliance Program effectiveness (Large companies)	
ANNEX C	61
Check-list for the analysis of the Compliance Program effectiveness (SMEs)	01
ANNEX D	62
Check-list for the analysis of the implementation of a Compliance Program as a fine mitigation	
mechanism	
ANNEX E	63
Good practices related to the implementation of Compliance Programs	0.2





DEFINITIONS

- 1. Abuse of a dominant position: behavior whereby a company with a dominant position in the relevant market uses that position to restraint the competition in a wrongful way, obtaining benefits and damaging real or potential, direct or indirect competitors (this is known as "exclusionary effect) that would not had been possible to obtain without that position.
- **2. Cartels:** Infringement specified in Section 11.1 of the Competition Act and punishable under the per se rule according to Section 11.2 of the same act. These conducts are agreements by competing agents to limit competition among themselves over prices, clients, geographic zones, output or conditions of commercialization of their products or services in the markets where they compete, including restrictions on competition in public procurement processes (bid rigging). Decisions or recommendations issued by an association that have the same object or effect are also considered under this definition.
- **3. Commission:** The Commission for the Defense of Free Competition of Indecopi is the public body with technical and functional autonomy responsible for the enforcement and compliance with the Competition Act in the markets, except telecommunications market, which is supervised by Osiptel¹. Among its powers, it can determine the liability of the companies and their executives due to infringement of the Competition Act, as well as impose fines and dictate injunctions that it considers pertinent.
- **4. Companies:** Natural or legal persons, irregular associations, autonomous equity and other entities of public or private law, state-owned or not, with our without profit purposes, that participate in the production, distribution or commercialization of goods or services.
- **5. Competition Act:** The Act for the Repression of Anticompetitive Behavior approved by means of Legislative Decree 1034 (2008). The codified version of the Act was approved by means of Supreme Decree 030-2019-PCM.
- **6. Compliance:** Acting or development of the company's activity in accordance with legal obligations regarding competition matters.
- **7. Compliance Program:** Program aimed at assuring the compliance of the competition rules within the company.
- **8. Injunctions:** Additional measures to the imposition of administrative sanctions aimed at reestablishing the competitive process or prevent the commission of anticompetitive conducts². The injunctions can also have the purpose to revert the direct or indirect harmful effects of the illegal conduct. These measures do not have a criminal nature.
- **9. Employee:** Natural person that professionally or not performs a remunerated work or activity for the company, acting on its behalf under a subordinated relationship, regardless of its job position, hierarchy or labor relationship (board member, CEO, functionary, executive, operator, etc.).
- 10. Horizontal agreements: The agreements, decisions, recommendations or concerted practices carried out by competing companies with the purpose or effect to restrain, prevent or distort the competition, such as direct or indirect fixing agreements over prices or other commercial conditions; market sharing over clients, suppliers or geographic zones; coordination or agreements offers, bids, proposals or abstention in the public or private procurement procedures or other forms of public contracting or acquiring process established in the pertinent legislation, as well as public tenders or auctions, among others³.

¹ In the telecommunications public utility sector, the Supervisory Body of Private Investment in Telecom (OSIPTEL, in Spanish) is the competition authority.

² See Section 49 of the Competition Act.

³ See Section 11 of the Competition Act.



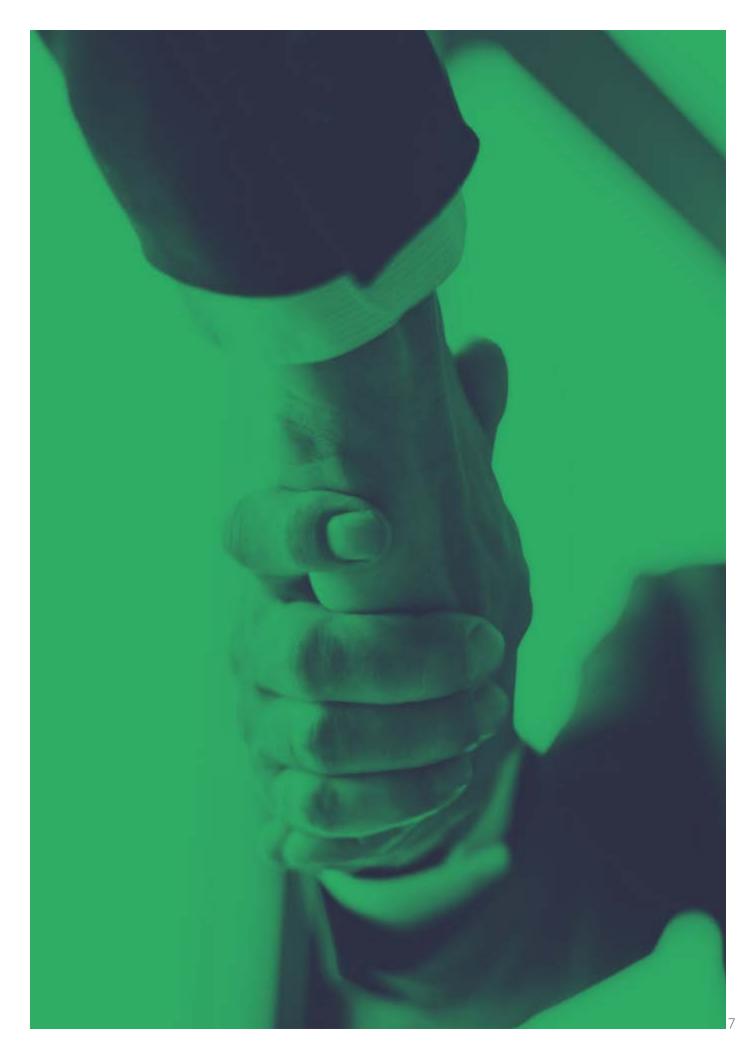
- **11. Indecopi:** National Institute for the Defense of the Competition and the Protection of the Intellectual Property. It's the Peruvian Competition Agency.
- 12. Policies: Intentions and directions formally expressed by the senior management of a company⁴.
- **13. Procedure:** Specific manner of carrying out an activity or process, taking into account the need for controlling the identified risks within a company⁵.
- **14. Risk:** The probability that any conduct contrary to the competition statutes will materialize, regarding the characteristics of the company and its different lines of business.
- **15. Senior management:** An individual or group of individuals that lead and control an organization at the highest level⁶. This category mainly includes the General Management and the Board of the company. Overall, the General Management represents and leads the ordinary activities of the company and is held accountable for its actions and decisions before the Board. Instead, the Board defines the general policies of the company and is held accountable for its decisions before the shareholders. Therefore, it is its duty to adopt the policies and risk management strategies within the company.
- **16. Technical Secretariat:** Technical Secretariat of the Commission for the Defense of Free Competition of Indecopi, body with technical autonomy that performs the investigation and prosecution of alleged anticompetitive conducts; and that issues an opinion on the existence of such offending conducts.
- 17. Trade Associations: any organization that associates a group of companies because of the sector to which they belong or the economic activity they carry out, and that is used as a platform to discuss and channel legitimate sectoral and commercial interests of their associates, and in specific cases to provide services
- **18. Tribunal:** The Specialized Competition Chamber of the Tribunal of Indecopi, administrative second instance court on competition matters.
- 19. UIT: Tax Units. For 2020, the value of a Tax Unit is equivalent to S/ 4300.
- **20. Vertical agreements:** The agreements, decisions, recommendations, or concerted practices carried out by economic agents that operate in different levels of the production and distribution chain with the purpose or effect of restraining, preventing or distorting competition⁷.

⁴ NATIONAL INSTITUTE OF QUALITY (INACAL, in Spanish). Technical Peruvian Regulation NTP ISO 196000:2017. Compliance management systems. Guidelines, p.3.

⁵ INACAL, Op. Cit., p. 4.

⁶ INACAL, Op. Cit., p. 2.

⁷ See Section 12 of the Competition Act.





INTRODUCTION

Among other duties, the Technical Secretariat and the Commission are responsible for enforcing the Competition Act against anticompetitive conducts (abuse of dominant position, horizontal and vertical agreements) with the purpose of promoting the economic efficiency in the markets for the benefit of consumers.

The Technical Secretariat is empowered by the Competition Act to start *ex officio* investigations and indict companies, which will be subject to administrative proceedings that may conclude with an imposition of fines above 1000 UIT⁸. In the last years, the prosecution activities of the Technical Secretariat have intensified. As a result, there has been a significant increase of cases decided and fines imposed by the Commission.

 $\label{eq:Graphic N° 1:} \textbf{Fines imposed by the Commission between 2010 and 2019}$



^{*} Some administrative fines have been modified by the Tribunal of Indecopi or are currently appealed. These fines include collaboration discounts under early termination processes. They do not include discounts for collaboration under the Leniency Program.

Source: Technical Secretariat.

Elaborated by the Technical Secretariat

The regulatory framework grants the Technical Secretariat different mechanisms that facilitate the detection of anticompetitive conducts, including the collaboration of offenders or third parties that may have relevant information about the infringement. Thus, the Competition Act foresees the possibility to exonerate or reduce the sanctions in return for offering evidence before the beginning of the sanctioning procedure⁹ and economic rewards for those who provide key information to deteczt infringements¹⁰.

These mechanisms are reactive by their own nature; this means that they are the consequence of the detection of an anticompetitive conduct. Because of that, it is strategically pertinent to join the prosecution duties of the Technical Secretariat to actions that, regarding the private sector, help to prevent the commission of anticompetitive conduct, in order to avoid the social cost of their occurrence.

According to Behavioral Economy, there are factors that influence the decision making processes of people that infringe the law, which might be cognitive distortions (for example, mental shortcuts that value higher the *status quo* or *over-optimistic behavior*, which implies a sub-estimation of the probability of being detected by the authority), or organizational culture, among others¹¹.

^{*} This graphic has been updated until March 24th of 2020.

⁸ The fine up to 1000 UIT can be imposed in case the infringement is qualified as severe. Nevertheless, the fine can't exceed the 12% of the gross income of the offender or its economic group, related to all of its economic activities, corresponding to the year preceding the Commission's decision (letter c) Section 46.1 of the Competition Act.

⁹ See Section 26 of the Competition Act.

¹⁰ See Section 28 of the Competition Act.

¹¹ Richard H. McAdams y Thomas S. Ulen. "Behavioural criminal law and economics". In: "John M. Olin Program in Law and Economics Working Paper N. 440-2008", p. 17.



Thus, imposing fines as the main mechanism to deter anticompetitive conducts may result inefficient, as it does not address the morality of the regulated behavior and only imposes a cost for noncompliance. In that sense, it is necessary to count with additional measures before (ex ante) the occurrence of the infringement¹².

These prevention efforts are also addressed in several competition regulations such as those of the United States, Canada, France, United Kingdom, Chile, Brazil and the European Union, which have issued guidelines on compliance programs, with the purpose to encourage companies to implement programs aimed at avoiding the commission of anticompetitive conducts¹³.

Competition compliance programs are self-regulation tools with the purpose of creating an organizational culture of competition compliance and reduce the risks of committing competition infringements.

The Commission and the Technical Secretariat stand for the implementation of effective compliance programs adaptable to every type of organization and whose implementation is not perceived as a cost by the companies, but instead as an investment and a way of strengthening a corporative culture of compliance with the Law.

In order to guarantee its sustainability, it is recommended that competition compliance programs should be incorporated into a major program, which addresses the management of non-compliance risks in the different areas of Law, simultaneously. Likewise, it is promoted that such program should be inserted in the dynamic of organizations' economic activity.

In that context, the objective of the Guidelines on Competition Compliance Programs is to generate more incentives for the companies, by their own initiative, to adopt a competition compliance culture, that should be internalized and disseminated through every employee. The aim is to create a change in the culture of the organizations and the attitude of its employees through the implementation of compliance programs that are comprehensive and adaptable to each company's particular circumstances.

Companies, when defining their bylaws, have the power to define the extent of their Compliance Programs' components, as well as the procedures or methodologies of the design, implementation and evaluation of the Program, according to their own necessities and characteristics. Regardless, these Guidelines develop the essential and complementary components that a Compliance Program should have.

It is worth noting that these guidelines are not for mandatory compliance, so it is not compulsory for companies to introduce a Compliance Program, although this is highly recommended.

Moreover, the purpose of this document is to provide guidance to the Commission regarding its faculty to impose the implementation of Compliance Programs as injunction measures, according to the Section 49.1 (e) of the Competition Act¹⁴.

Finally, it should be mentioned that the issuance of these Guidelines aligns with the Sections 14.2 (d) and 49.4 of the Competition Act¹⁵ regarding the issuance of Guidelines aimed at improving the enforcement of the Law and Guidelines on injunctions ordered by the Commission, respectively.

14 Section 49.- Injunctions

49.1. In addition to the sanctions that shall be imposed for an infringement of the Act, the Commission may order corrective measures in order to reestablish the competitive process or prevent the commission of anticompetitive conducts, which may consist of:
(...)

15 Section 14.- The Commission

14.2. - The Commission is entitled to:

 $\ d) \ Is sue \ Guidelines \ that \ lead \ economic \ agents \ regarding \ the \ right \ interpretation \ of \ the \ Competition \ Act.$

Section 49.- Injunctions

 $49.4. The Commission \, may issue \, Guidelines \, precising \, the \, scope \, of \, the \, current \, Section \, to \, improve \, its \, application.$

¹² Wouter P.J. Wils, "Is criminalization of EU competition law the answer?" In: World Competition: Law and Economics Review. Volume 28, No 2, 2005, p. 117.

¹³ OECD. "Policy Roundtables. Promoting Compliance with Competition Law 2011", p. 12. Available at: http://www.oecd.org/daf/competition/Promoting-compliancewithcompetitionlaw2011.pdf

 $^{\ \, \}text{(e) The implementation of training programs and elimination of noncompliance risks of the antitrust statutes}.$



1. WHAT IS A COMPLIANCE PROGRAM?

1.1 Compliance Programs

Compliance programs, overall, constitute self-regulation mechanisms that have the purpose to guarantee that organizations (companies and public institutions) comply with their legal obligations and voluntary commitments in a sustainable manner¹⁶. To do so, integrity and effective compliance are expected to be part of the culture of the organizations and the attitude of the people working there¹⁷.

These programs can be defined as the group of internal measures (policies, procedures, guidelines and mechanisms) adopted by a company to prevent and mitigate the risks of infringing the law and its own voluntary commitments, as a consequence of its own activities and the ones of their associates and employees.

Therefore, when a compliance program is in place, companies should seek for a change in the culture of the organization, since this will induce their employees to comply with the law and the voluntary commitments of the company, and to report the risk of an infringement even when they find themselves under pressure or eventually receive orders to infringe the law¹⁸. Employees will know that the organization has an expectation and certain standards regarding their behavior.

Compliance programs are applicable to several areas of Law, including money-laundering, corruption, tax, environment, labor and antitrust law, among others¹⁹. Within an organization, it is recommendable that every compliance program should be part of a major program that addresses the different areas simultaneously²⁰.

It is necessary to stress that there is no unique model of compliance program applicable to every company. These programs must be developed and executed based on the needs, characteristics and circumstances of each company²¹.

Compliance Programs will be successful as long they are effective and inserted into the commercial dynamic. Although its implementation does not guarantee the complete elimination of the risk of noncompliance of the Law, it will allow to identify those risks and put in place measures to deal with them and significantly decrease them²².

Finally, it is important to mention that Peru has recognized within its regulatory framework the implementation of Compliance Programs in criminal law, consumer and publicity law, corporative governance, financial system and security markets for the prevention of risks of laundering of money and financing of terrorism.

The following table presents the main characteristics of the regulation framework regarding Compliance Programs in the aforementioned areas of law:

 $[\]textbf{16} \quad \text{Which can include guidelines on good corporate governance, self-organizational standards, good practices adopted by the organizations, among others.}$

¹⁷ INACAL. Op. Cit., p. xii.

¹⁸ International Chamber of Commerce. "The ICC Antitrust Compliance Toolkit", 2013, p. 4. Available at: https://cdn.iccwbo.org/content/uploads/sites/3/2013/04/ICC-Antitrust-Compliance-Toolkit-ENGLISH.pdf

¹⁹ In this regard, see Law 30424, Legislative Decree 1352, Supreme Decree 044-2018-PCM and Law 30737.

²⁰ The scope of application of Compliance Program is currently growing, regarding the areas they address as well as the extent of their components. This way, a company should not use all of its resources for the implementation of a Compliance Program concerning just one area, nor divide the programs for each addressed area; instead, it should gather every area of its interest into a one major program. To do so, it should be considered that, even though each area of interest has its own regulation, the essential components of an effective Compliance Program are cross-cutting. In this regard, see OECD. Op. Cit., p. 12 and 13.

²¹ *lbídem*, p. 13

In this regard, the Antitrust Division of the Department of Justice of the Unites States of America establishes that the objective of a Compliance Program is to prevent and detect infringements. However, no Compliance Program can guarantee the prevention of any kind of infringement, that's why one of the main factors for its implementation is a suitable design that assures its best effectiveness. See: Departement of Justice – Antitrust Division of United States of America. "Evaluation of Corporate Compliance Programs in Criminal Antitrsut Investigation", July 2019, p. 3. Available at: https://www.justice.gov/atr/page/file/1182001/download



Table N° 1: Compliance Programs regulated in Peru

Matter	Legal framework	Subjective Scope	Authority in charge ²³	Main components of the Program
Prevention System against money laundering and financing of terrorism applicable to financial institutions	Resolution SBS N° 2660- 2015, Regulation on risk management regarding money laundering and financing of terrorism and its amendments	Financial institutions ²⁴	The Authority of Banking, Insurance and Private Pension Fund Administrators (SBS in Spanish)	 (i) Commitment from the Board and the General Management of implementing a prevention system. (ii) Policies and procedures for the identification and risk management of money laundering and financing of terrorism²⁵. (iii) Code of conduct. (iv) Compliance Officer. (v) Training sessions. (vi) Information systems for the company's risks management. (vii) Record operations and contracts. (viii) Detection and report of suspicious operations. (ix) Assessing the prevention system through internal and external audits.
Prevention System against money laundering and financing of terrorism applicable to the bound institutions.	Resolution Conasev N° 033-2011-EF-94.01.1, Regulation on money laundering and financing of terrorism and its amendments.	Obligated subjects ²⁶	Authority of Markets Security (SMV in Spanish)	 (i) Commitment from the Board and the General Management of implementing the prevention systems. (ii) Proceedings and controls for the identification, evaluation, control, mitigation and monitoring of the risks related to money laundering and financing of terrorism. (iii) Compliance Officer. (iv) Internal and external audits. (v) Code of conduct. (vi) Training sessions. (vii) Record operations. (viii) Communication of suspicious operations. (x) Code for the prevention of money laundering and/or financing of terrorism.
Compliance on financial Law	Resolution SBS N° 272-2017, Regulation on Corporative Governance and Risk Management System and its amendments	Financial Institutions ²⁷	The Authority of Banking, Insurance and Private Pension Fund Administrators (SBS in Spanish)	(i) Risk Management System (ii) Centralized Unit or specialized units in the managemen of specific risks (iii) Training Plan (iv) Compliance Officer

The authority in charge refers to the entity responsible of assessing the application for the mitigation factor or the exoneration of administrative and criminal liability as a result of the implementation of a Compliance Program, when applicable. Furthermore, it refers to those entities that supervise the implementation of Compliance Programs when it is mandatory to do so.

²⁴ Specifically, the Resolution SBS N° 2660-2015 and its amendments establish that the aforementioned regulation is applicable to the companies listed in sections 16 and 17 of the Act N° 26702, that organizes the Banking, Insurance and Private Pension Fund Administrators System of the SBS, the Agropecuarian Bank, the Private Pension Fund Administrators (AFP in Spanish), the Peruvian Bank, the Agricultural Bank, the Development Finance Corporation (COFIDE in Spanish), the public financial institution for social housing Fondo MiVivienda (FMV in Spanish), Contributions and Benefits Bank under the control of the SBS, the Peruvian Federation of Municipal Saving and Credit Banks (FEPCMAC in Spanish) and the Fund of Municipal Saving and Credit Banks (FOCMAC in Spanish).

²⁵ Among others, this component includes the policies and procedures established in the regulation of the sector, the measures to guarantee the indefinite duty of confidentiality of information and the procedures for the timely detection and report of suspicious operations.

²⁶ Specifically, the Resolution CONASEV N° 033-2011-EF-94.01.1 and its amendments established that the prevention system against money laundering and financing of terrorism set in that regulation is applicable to the following obligated subjects: (i) stockbrokers agents, (ii) intermediary securities agents, (iii) administrators of mutual funds in securities' investment, (iv) administrators of investment funds, (v) securitization companies, (vi) stock exchanges, (vii) institutions of compensation and securities settlements, (viii) administrators of collective funds; as well as any other institution authorization from the SMV to function, established in statutory law or incorporated in the UIF-Peru, by means of SBS's Resolution.

²⁷ Specifically, the Resolution SBS N° 2660-2015 and its amendments establish that the mentioned Regulation is applicable to the companies listed in sections 16 and 17 of Act 26702, that organizes the Banking, Insurance and Private Pension Fund Administrators System of the SBS, Agropecuarian Bank, the Private Pension Fund Administrators (AFP in Spanish), the Peruvian Bank, the Agricultural Bank, the Development Finance Corporation (COFIDE in Spanish), the public financial institution for social housing Fondo MiVivienda (FMV in Spanish), Contributions and Benefits Bank under the contro of thel SBS, the Peruvian Federation of Municipal Saving and Credit Banks (FEPCMAC in Spanish) and the Fund of Municipal Saving and Credit Banks (FOCMAC in Spanish).



Matter	Legal framework	Subjective Scope	Authority in charge ²³	Main components of the Program
Administrative liability of legal persons under criminal law ²⁸	Act 30424, Act that rules the administrative liability of legal persons. Supreme Decree N° 002-2019-JUS, Regulation on the Act 30424	Legal persons	Public Prosecutor with technical opinion of the Authority of Markets Security (SMV in Spanish)	 (i) A person in charge of prevention duties, designated by the management of the company, or the correspondent body. (ii) Identification, evaluation and deterrence of risks for the prevention of the crimes regulated in the Law. (iii) Implementation of reporting procedures. (iv) Diffusion and periodical training of the prevention program. (v) Continuous evaluation and monitoring of the prevention program.
Consumer and commercial advertising Law	Supreme Decree N° 185-2019-PCM, Regulation that promotes and rules the voluntary implementation of compliance programs on consumer and commercial advertising Law.	Companies	Indecopi	 (i) Involvement and support from the top directors of the company concerning the implementation of the program. (ii) Policies and procedures aimed at compliance with the Law. (iii) Internal mechanisms to train and educate employees on compliance with the Law. (iv) Monitoring, auditing and reporting mechanisms of eventual infringements to the Law. (v) Internal mechanisms to discipline eventual infringements to the Law.

2.2 Competition Compliance Programs

The competition rules in Peru are mainly provided by the Competition Act, which aims at prohibiting and sanction the anticompetitive conducts with the purpose of promoting the efficiency of the economy in the markets for the consumer welfare.

The Competition Act defines the conducts that harm free competition and are thus prohibited, which are the following:

Punishable conducts by the Competition Act

• **Horizontal Agreements:** agreements, decisions, recommendations or concerted practices carried out by two or more competitors regarding any competition variable in the market ²⁹.



- **Vertical Agreements:** agreements, decisions, recommendations or concerted practices carried out by economic agents that operate in different levels of the production and distribution chain with the objective or effect to restraint, prevent or distort the competition³⁰.
- **Abuse of dominant position:** unilateral behaviors carried out by an economic agent with a dominant position in a specific relevant market that uses such position to harm its competitors due to any reason different from economic efficiency³¹.



²⁸ The regulation of the prevention system in criminal matters is tailored for the crimes of bribery, influence peddling, money laundering and financing of terrorism, The judge is allowed to sanction those companies that have promoted or tolerated those crimes with fines, debarment, cancellation of licenses and even with the dissolution of the company.

²⁹ See Section 11.1 of the Competition Act.

³⁰ See Section 12.1 of the Competition Act.

³¹ See Section 10 of the Competition Act.



It is worth noting that, under the Competition Act, the offending company and its representatives are subject to the following administrative sanctions as a consequence of the commission of anticompetitive conducts:

Punishable individuals by the Competition Act



Companies

Fines up to 12% of the profits or gross income of the offender or its economic group related to all its economic activities from the year preceding the Commission's decision³².



Executives

Fines up to 100 Tax Units (around 125,000 USD³³) are applicable to the legal representatives of the offending company or the persons that are part of its management bodies, according to their level of accountability for the unlawful acts committed³⁴.

Considering the severity of the infringement and the expected fines, competition compliance programs must have mechanisms that allow companies to prevent, detect and act timely before the existence of these anticompetitive practices.

In different jurisdictions, the competition agencies (such as United States, Canada, France, United Kingdom, Chile and the European Union) have issued guidelines so that companies are aware of the main characteristics that a competition compliance program must have in order to comply with its preventive purpose and to receive the benefits derived from implementing an effective compliance program.

It is commonly known by the competition agencies that, although they can provide companies with orientation and information about certain recommendation to develop compliance programs, it is not the duty of the competition authorities to "approve" individual programs that each company may have implemented³⁵.

Finally, as it has been mentioned, there is no unique model for competition compliance programs. Thus, it is recommendable that economic agents consider their own needs, characteristics, circumstances and costs when assessing the complexity and extension of their compliance programs³⁶.

In that sense, smaller companies, such as medium and small enterprises, may choose to implement less expensive and complex compliance programs, without affecting their effectiveness.

³² See Section 46.1 of the Competition Act.

⁵³ For 2020, the value of a Tax Unit is equivalent to 4300 Peruvian soles (around 1,263 USD). The exchange rate is approximately 1 USD = 3.357 PEN.

³⁴ See Section 46.3 of the Competition Act.

¹⁵ In this regard, refer to: European Commission. "The importance of compliance", 2012, p. 18. Available at: <a href="https://publications.europa.eu/es/publications.europa.europ

³⁶ It is important to mention that Compliance Programs are also applicable to trade associations, which should adequate the implementation of their programs according to their own characteristics and functions.

It is worth noting that the Commission has issued the "Guidelines on Trade Associations and Competition", which is available in the following link: $\frac{\text{https://}}{\text{www.indecopi.gob.pe/documents/1902049/3761587/Guidelines+on+Trade+Associations+and+Competition.pdf/682f9c46-6950-7301-cc62-20d2a8600dad$



2. BENEFITS OF COMPLIANCE PROGRAMS TO COMPANIES

A company that has a serious, comprehensive (under its particularities) and effective compliance program could achieve the following benefits³⁷:

Benefits of a Compliance Program



Prevention of infringements and the costs they generate



Reduction of compliance costs for employees' activities



Reduction of employees' exposure to liability



Damage detection and control



Reputational improvement



Detection of anticompetitive conducts committed by other companies in the market

- **Prevention of infringements and the costs they generate.-** This is the main benefit of compliance programs. Companies will reduce the risk of assuming the costs of fines, injunction measures and civil liability (damages) and even the costs of having to defend themselves in administrative or judicial procedures, arising from violations of the competition statutes.
- Reduction of compliance costs by clearly establishing boundaries for the activities of the employees.- The information and training provided to employees will enable them to have greater knowledge on competition matters.

This way, employees will know how to act and react to potentially risky situations, therefore, they will be more confident about the legality or illegality of their actions. By having a Compliance Program, employees will know the procedure to follow in order to solve their own doubts regarding noncompliance of the Law when facing a likely or actual infringement in their own actions or from other employees.

• **Reduction of employees' exposure to liability.** • An effective compliance program will help employees who exercise the direction, management or representation of companies to reduce their risks of getting involved in a sanctioning procedure against anticompetitive practices and, therefore, of being susceptible to sanctions for their participation in the planning or implementation of those infringements³⁸.

On the one hand, these benefits are mainly in line with those detailed in the Guidelines of Canada ("Corporate Compliance Programs"). Chile ("Programas de Cumplimiento de la Normativa de Libre Competencia") and Brazil ("Guidelines Competition Compliance Programs"). These documents can be accessed through the following links, respectively: http://www.fne.gob.cl/wp-content/uploads/2012/06/Programas-de-Cumplimiento.pdf and <a href="https://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/compliance-guidelines-final-version.pdf. On the other hand, is important to mention that there are surveys that show the effectiveness of Compliance Programs. In this regard, it is worth noting the survey elaborated by the Society of Corporate Compliance and Ethics in 2016. The survey interviewed different compliance officers and the results were the following: (i) 83% of them informed that their compliance program had avoided one or more incidents in the last two years: (ii) 46% reported that approximately 5 incidents were prevented; (iii) 82% informed that the training sessions increased the reports of the whistleblowing lines; and, (iv) 76% informed that such reports allowed to prevent or stop an infringement. In this regard, see Society of Corporate Compliance and Ethics y Health Care Compliance Association, "Compliance Effectiveness Survey 2016". Available at: https://assets.corporatecompliance.org/Portals/1/PDF/Resources/Surveys/2016-compliance-effectiveness-survey-report.pdf?ver=2016-09-26-073541-920.

³⁸ See Section 2 of the Competition Act.



• Damage detection and control. - The implementation of a compliance program does not completely eliminate the probability that companies will engage in anticompetitive behavior. However, in a scenario of an infringement to the Competition Act, it may be detected in a timely manner due to the internal protocols implemented for this purpose.

In this scenario and before the occurrence of a cartel case, companies may apply to the Leniency Program, which provides benefit of full or partial reduction of the expected fines, depending on the time in which the application is $\mathsf{made}^{\mathsf{39}}$.

Finally, in case a company is involved in an administrative sanctioning proceeding initiated by the Technical Secretariat, to prove that it has an effective compliance program could be considered as a mitigating factor of the expected fine (See section 7.3 of the present Guidelines).

• **Reputational improvement.** - Having a compliance program could be useful for companies to demonstrate the seriousness and responsibility of their performance in the market. Specially, considering that a violation to the competition statutes has detrimental effects on consumers.

Moreover, this image projected by companies could generate confidence in investors, business partners, customers, suppliers and consumers who also value ethical and lawful commercial operations.

Finally, having a compliance program can also improve the ability of the companies to hire and retain talented employees concerned about their image, reputation and respect for the Law.

• **Detection of anticompetitive conducts committed by other companies in the market.** – The knowledge and training of employees make them able to identify possible evidence that other companies, such as competitors, suppliers, distributors or customers may be acting against the competition rules.

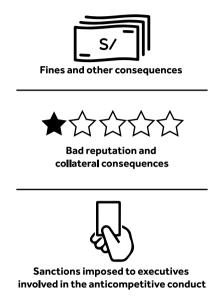
In that case, companies could inform the Technical Secretariat of possible evidence of anticompetitive behaviors or, if so, file a complaint based on the harm they suffered from such offenders.

³⁹ The first applicant to the Leniency Program may benefit from a 100% reduction of the administrative sanction under certain conditions. However, subsequent applicants may only receive a reduction of the sanction. See Section 26 of the Competition Act and the Leniency Program Guidelines, approved by the Commission by means of Decision 059-2017/CLC-INDECOPI, available at: https://www.indecopi.gob.pe/documents/51771/1981946/Leniency+Program+Guidelines+%E2%80%93+Peru+Indecopi/



3. COST OF NON-COMPLIANCE

Contrary to the benefits above mentioned, the consequences (costs) of infringing the competition statutes are listed below⁴⁰.



• Fines and other legal measures against economic agents. - If an economic agent infringes the competition rules, it may be subject to massive administrative fines, injunctions and civil liability (damages).

In addition, in the case of a cartel in a public procurement process 41 , the company could be debarred from participating in future public bids by the State Procurement Supervisory Body (OSCE, in Spanish) 42 .

- Bad reputation and collateral consequences. The commission of anticompetitive practices is likely to create a bad reputation around the company and, in that context, may involve customer losses, decrease of business opportunities, investments, sales and loss of market value; as well as hostility from customers and consumers who may feel deceived by the company, among other consequences.
- Sanctions imposed to executives involved in the anticompetitive conducts. Executives who exercise the direction, management or representation of companies that are involved in a sanctioning procedure for the commission of anticompetitive conducts are likely to be sanctioned by the Commission.

In order to describe it better, in 2019 the Tribunal of Indecopi confirmed the sanction imposed by the Commission to three companies that fixed the price of LPG cylinders between 2008 and 2011. In addition to the liability attributed to the companies, the Commission sanctioned seven executives with fines equivalent to a total of S/. 456 246.00 (around 195,000 USD)⁴³.

⁴⁰ These consequences are mainly addressed by the European Commission in the document "Compliance matters", which is available at: https://publication/78f46c48-e03e-4c36-bbbe-aa08c2514d7a/language-en.

⁴¹ See Guide to Fight Collusion in Public Procurement at the following link: https://www.indecopi.gob.pe/documents/51771/2961200/Gu%C3%ADa+de+Libre+Compras+P%C3%BAblicas+(versi%C3%B3n+en+Ingl%C3%A9s)/

⁴² See Final Second Supplementary Provision of the Competition Act and Twenty-third Final Complementary Provision of the Codified Law 30225, The Public Procurement Act.

⁴³ See Decision 100-2017/CLC-INDECOPI from September 28 of 2017 and Decision 157-2019/SDC-INDECOPI from August 26 of 2019.



Nationwide price-fixing of LPG cylinder cartel case

Between 2008 and 2011, three companies formed a cartel to fix the price of the Liquefied Petroleum Gas (LPG) cylinder. This cartel imposed on its distributors (or wholesalers) increases (overprices). These overprices on their distributors led to increases in retail prices and affected the final consumer.

The cartel was conducted in secret, through coordination among directors, general managers, business managers, and other companies' executives. Therefore, in addition to sanctioning the companies involved, natural persons were fined, as shown below:

Official	Company	Fine (PEN)	Fine (USD)
General Manager	Company 1	275 940	81 123
Director of the Board	Company 1	55 020	16 175
General Manager	Company 2	35 826	10 532
General Management	Company 2	46 158	13 570
General Manager	Company 3	38 010	11 174
Commercial Manager	Company 3	3 528	1 037.19
Sales Manager	Company 3	1 764	518 59
	Total:	456 246	185 470.19

Source: Commission for the Defense of Free Competition, 2017, Decision N $^{\circ}$ 100-2017/CLC-INDECOPI of December 18th, 2017. (on appeal).



4. ESSENTIAL REQUIREMENTS OF A COMPLIANCE PROGRAM

The companies, when defining their bylaws, have the power to define the scope of the components that their Compliance Programs will include, as well as the procedures or methodologies for their design, implementation and assessment, according to their own needs and characteristics. Regardless, this section will address the essential components that a Compliance Program should have, which are the following:

- (i) Real commitment to comply from the senior management;
- (ii) Identification and management of current and potential risks;
- (iii) Internal procedures and protocols;
- (iv) Training for employees;
- (v) Constant update and monitoring of the Compliance Program;
- (vi) Audits on the Compliance Program;
- (vii) Procedures for consultations and complaints; and
- (viii) Designation of a Compliance Officer or Compliance Committee.

It is worth noting that the essential components aforementioned are recognized as part of the prevention systems proposed by The Organization for Economic Co-operation and Development (OECD)⁴⁴; the United Nations⁴⁵, the World Bank⁴⁶, the World Economic Forum - WEF⁴⁷, the International Chamber of Commerce (ICC)⁴⁸. Transparency International y Social Accountability International (TI)⁴⁹ and the U.S. Foreing Corrupt Practices Act (FCPA)⁵⁰.

Similarly, overall, these components have also been considered as essential ones in other jurisdictions regarding competition matters, such as United States of America, Canada, United Kingdom, Chile, Brazil and the European Union.

4.1. Real commitment to comply from the Senior Management ("tone at the top")51

The real commitment to comply can be evidenced through the involvement of the Senior Management⁵² of the company, which consists of the General Management and the Board.

- 44 The Organisation for Economic Co-operation and Development (OECD), United Nations Office on Drugs and Crime (UNDOC) y Banco Mundial, "Ética Anticorrupción y Elementos de Cumplimiento", 2013.
 Available at: https://www.unodc.org/documents/corruption/Publications/2014/Etica-Anticorrupcion-Elementos-Cumplimiento.pdf.
- **45** United Nations Office on Drugs and Crime (UNDOC), "Programa anticorrupción de ética y cumplimiento para las empresas: Guía Práctica", 2013. Available at: https://www.unodc.org/documents/corruption/Publications/2013/13-85255 Ebook.pdf
- 46 World Bank Group, "Integrity Compliance Guidelines".
- $\label{lem:available} \textbf{Available at:} \ \underline{\textbf{https://siteresources.worldbank.org/INTDOII/Resources/Integrity_Compliance_Guidelines.pdf}$
- 47 World Economic Forum WEF, "Partnering Against Corruption Principles for Countering Bribery", 2016.
 Available at: http://www3.weforum.org/docs/WEF PACI Global Principles for Countering Corruption.pdf
- **48** International Chamber of Commerce ICC, "Reglas de la ICC para combatir la corrupción", 2011.
 - $Available\ at: \underline{https://iccwbo.org/content/uploads/sites/3/2011/11/Reglas-de-la-ICC-para-Combatir-la-CorrupciC3B3n.pdf}$
- **49** Transparency International y Social Accountability International, "*Principios empresariales para contrarrestar el soborno*", 2002. Available at: http://www.ub.edu/compres/documents/transparencia.pdf
- 51 This requirement resembles those detailed in the Guidelines from Canada ("Corporate Compliance Programs"), Chile ("Programas de Cumplimiento de la Normativa de Libre Competencia") and Brazil ("Guidelines Competition Compliance Programs"). These documents are accessible through the following links, respectively: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03927.html, https://www.fne.gob.cl/wp-content/uploads/2012/06/Programas-de-Cumplimiento.pdf and https://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/compliance-quidelines-final-version.pdf
- 52 "Support of the program from the company's top management is critical to the success of an antitrust compliance program. The Division has recognized that '[i]f senior management does not actively support and cultivate a culture of compliance, a company will have a paper compliance program, not an effective one". Antitrust Division of Department of Justice (DOJ). "Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigation", June 2019, p. 5. Available at: https://www.justice.gov/atr/p/file/1182001/download



This involvement can be mainly satisfied by allocating adequate and sufficient resources to mitigate the identified risks (such as, for example, economic, human and technical resources, among others). Likewise, the Senior Management can show their real commitment to comply by granting autonomy and power to the Compliance Officer or the Compliance Committee (see section 4.7 of the present Guidelines) for the exercise of their duties within the company^{53 54}.

It is important to notice that communicating values, principles and internal protocols to the employees without showing a real interest to comply with them, undermines the credibility of the Compliance Program and hampers its potential benefits.

In this regard, the concepts of "tone at the top" and "tone from the top" have been developed in order to refer to the leadership role that the Senior Management plays within the companies and its commitment to comply with the pertinent regulation for their economic activity and to develop an ethical, open and transparent cultural organization⁵⁵. Therefore, it can be noticed that the culture of a company has an important influence on the behavior of its employees, even greater than the influence of the Law or restrictive policies⁵⁶.

In the event of a lack of commitment from the Senior Management of the company, employees will be more likely to incur in non-compliance attitudes or act against the values and principles of the organization⁵⁷.

A real commitment to comply should also be evidenced by implementing a transparent Compliance Program, both inside and outside of the organization. The Senior Management of the company must clearly communicate that a non-compliance behavior won't be tolerated 58 .

Finally, here is a series of actions for the Senior Management (General Management and the Board) to demonstrate its serious commitment:

- The Senior Management puts on record the approval of the Compliance Program and provides information about its implementation and monitoring through the minutes of the Board or institutional documents, such as the annual report of the company (or a similar document)59. This action is highly recommendable.
- The Senior Management communicates to the members of the organization its commitment with the Compliance Program.
- The General Management or the Board requires a periodic compliance report to the CEOs of the different areas of the organization.
- Reports and plans related to the Compliance Program are reviewed and validated by the general management and, if applicable, by the company's board.
- The General Management and the Board, if so, participate in the training activities related to the Compliance Program.

⁵³ lbidem, p. 6.

⁵⁴ Regardless the assignment of an Compliance Officer or Committee, the commitment of the Senior Management towards the Program can also de evidenced by assigning one of their members the duty of articulating or coordinating with the Compliance Officer or Committee about certain matters related to the Compliance Program. Such designation will provide more transparency to the Compliance Program and will remark its importance as a fundamental aspect in the corporate policy.

The Organisation for Economic Co-operation and Development (OECD), United Nations Office on Drugs and Crime (UNDOC) y Banco Mundial, Op. Cit. In addition, see https://corporatefinanceinstitute.com/resources/knowledge/finance/tone-at-the-top/

⁵⁶ In this regard, see https://compliancesofficers.com/2017/08/02/la-importancia-del-tone-from-the-top-en-el-compliance-penal/

⁵⁷ In this regard, see https://www.accountingtools.com/articles/2017/11/3/tone-at-the-top

⁵⁸ United Nations Office on Drugs and Crime (UNDOC) y Banco Mundial, Op. Cit.

⁵⁹ Transparency International. "Guía práctica de autodiagnóstico y reporting en cumplimiento normativo, buen gobierno corporativo y prevención de la corrupción", 2018. Available at: http://integridad.org.es/wp-content/uploads/2017/07/TI-Guia-Pract-Autodiagnostico-DIGITAL-1.pdf



• The Compliance Officer or Committee responds directly to the General Management or the Board, as applicable. In particular, in order to attend cases in which alleged anticompetitive conducts involve the General Management, it is recommendable to have procedures that enable the Compliance Officer or Committee to report the results of the internal investigation to the Board or the Management of the head office or its equivalent, in the case of a transnational company.

4.2. Identification and management of current and potential risks⁶⁰

The second essential requirement for the implementation of a compliance program is the identification and management of risks regarding an infringement to the competition rules.

In that context, the risk can be understood as the probability of any conduct contrary to the competition rules to be materialized, considering the particular characteristics of the organization and its different business cores⁶¹.

By identifying the risks, the company will know the scope of the actions that will have to implement in order to avoid the existence of an infringement. In this analysis, the company might identify the areas that are more exposed to high risks, qualify employees according to the level of risk they are exposed to, acknowledge commercial practices that need to be modified, among other actions.

Bellow, some methodological considerations for the identification and management of risks are shown, regardless that each company may use the methodologies that considers pertinent, taking into account its own characteristics and needs⁶².

• **Communication and consultations:** Firstly, the companies should determine the group of people involved in the areas or procedures in which risks are going to be identified, with the purpose of promoting the exchange of relevant information and to bring awareness to the risks the organization is exposed to.

For example, the company must establish communication and consultation channels with the executives and employees that participate in the decision-making process (for instance, those related to prices, bonuses or discounts) or have contact with competitors, clients and suppliers, and also those that participate in the public procurement process and meetings of trade associations.

• **Scope, context and criteria:** At this stage, it is necessary to identify the processes in which the risks will be identified⁶³, the external and internal environment in which the company operates and the criteria to determine the risks that it might face in the development of its operations⁶⁴.

⁶⁰ This requirement is in line with those detailed in the Guidelines from Canada ("Corporate Compliance Programs"), Chile ("Programas de Cumplimiento de la Normativa de Libre Competencia") and Brazil ("Guidelines Competition Compliance Programs"). These documents are accessible through the following links, respectively: http://www.fne.gob.cl/wp-content/uploads/2012/06/Programas-de-Cumplimiento.pdf and http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/compliance-guide-lines-final-version.pdf.

⁶¹ In this regard, the Peruvian Technical Regulation ISO 31000 foresees that the risk is the effect of uncertainty on the objectives, this means, a deviation from something predicted. See: National Institute of Quality – INACAL. Peruvian Technical Regulation NTP ISO 31000:2018. Risk Management. Guidelines, p. 2.

The mentioned methodological considerations are based on the following sources: (i) NTP ISO 31000:2018 Op. Cit.; (ii) AIRMIC, "A structured approach to Enterprise Risk Management (ERM) and the requirements of ISO 31000". Available at: https://www.ferma.eu/app/uploads/2011/10/a-structured-approach-to-erm.pdf; (iii) Committee of Sponsoring Organization of the Treadway Commission (COSO), "Fraud Risk Management Guide", 2016. Available at: https://www.coso.org/Documents/COSO-Fraud-Risk-Management-Guide-Executive-Summary.pdf; (iv) International Chamber of Commerce, Op. Cit.

 $[\]textbf{63} \quad \text{The processes could the strategic or operational type, of programs or specific projects, among others.}$

^{1.} In this regard, the Peruvian Technical Regulation 31000:2018 (page 17) foresees that the organization should detail the quantity and type of risks that it can or cannot take, in relation to other objectives. It should also define the criteria to value the importance of the risk and support the decision-making processes. The risk criteria should resemble the values, objectives and resources of the organization and be coherent with the policies and statements regarding the risk management. Furthermore, the risks should be defined by taking into consideration the obligations of the company and the points of view of interested third parties.



Some elements to consider at this stage, among others, are the following⁶⁵:

- **(i) Size of the company.-** The risks faced by a company with fewer resources and personnel are different from those faced, for example, by a company with operations in several cities in the country or at an internationally level.
- (ii) Extension of the influence and power that the company has in the market in which it participates. For example, holding a dominant position generates risks of non-compliance different from those risks faced by companies without a dominant position.
- (iii) Characteristics and particularities of the company.- For instance, if the company is a member of a trade association, has a frequent and direct contact with competitors, has a multi-product business activity in different markets, has a record of committing anticompetitive conduct in the past, among other factors.
- **(iv)** Characteristics of the market in which the company participates. Considering the concentration *ratios*, the existence of homogeneous products or services in the supply of the market, the presence of high entry barriers, elasticity of the demand, the negotiation power of clients and/or suppliers, among other circumstances.
- **Identification, analysis and assessment of the risk:** In this phase, the risks that the company faces must be defined, analyzed and assessed, whether the backgrounds of the risks are under the control of the company or not.

For instance, the following scenarios could be considered when identifying the risks:

- (i) Direct agreements with the competitors over prices, commercial conditions or bids in the public procurement process in which they participate, whether through the communications that the employees have among them, meetings with competitors or trade association meetings.
- (ii) Direct agreements with competitors through the clients, suppliers or external companies or individuals.
- (iii) Unjustifiably denying the sale or purchase of products to certain suppliers.
- (iv) Allowing the exchange of sensitive information with competitors⁶⁶.
- (v) Allowing unjustifiably the imposition of resale prices.

When identifying the risks, the analysis should consider factors such as the causes of the risks, the hypothetical probability of their occurrence and the effects that these may generate for the company and its employees 67 .

These elements are also shared by the Fiscalía Nacional Económica de Chile in the list of factors that should be considered for the elaboration of a Compliance Program. See: Programas de Cumplimiento de la Normativa de Libre Competencia, p. 6.

In this regard, see section 2.2. of the Guidelines on Trade Associations and Competition. Available at: https://www.indecopi.gob.pe/documents/1902049/3761587/Guidelines+on+Trade+Associations+and+Competition.pdf/682f9c46-6950-7301-cc62-20d2a8600dad

The NTP 31000:2018 (page 20) foresees that the analysis of the identification of risks must consider its sources, consequences, probability of their occurrence, control, among others. Moreover, it warns that an event may have multiple causes and consequences and might affect multiple objectives. The analysis techniques could be qualitative, quantitative, or a combination of these, depending on the circumstances and the intended use.



Finally, in the risk assessment the results of the risk analysis are compared with the risk criteria established by the company, in order to determine the actions to put in place⁶⁸.

As an example, below there is a model of risk assessment based on the impact and probability of their occurrence:

Table N° 2: Example of a risk assessment

	Insignificant	Minimum	Important	Critical
Punctuation	1	2	3	4
Impact	There is no risk of fines, damages nor reputational impact	Not significant fines and/or potential damages (that do not exceed "X" UIT ⁽¹⁾) or reputational impact	Significant fines and potential damages (that surpass X UIT, but do not exceed Y UIT) and reputational impact	Fines or damages that surpass Y UIT and reputational impact.
Probability	Unlikely risk (probability bellow 10%)	The risk is likely to occur (probability between 10 and 25%)	Probable risk (probability between 25 y 50%)	Highly probable risk (probability higher than 50%)

(1/) This value shall be determined according to the assessment of each company.

Source: The matrix was adapted of the public version of the International Chamber of Commerce: "The ICC Antitrust Compliance Toolkit", 2013, page 22.

Available at: https://cdn.iccwbo.org/content/uploads/sites/3/2013/04/ICC-Antitrust-Compliance-Toolkit-ENGLISH.pdf.

• **Risk treatment:** At this stage, it is convenient to select and implement controls to address the identified risks, according to the assessment made in this regard.

The company must define the scope of the controls it intends to implement, so that the identified risks are eliminated or mitigated to the greatest extent possible.

Risk treatment involves the following activities: (i) formulating and selecting options for the treatment of the risk; (ii) planning and implement the measures for the treatment of the risk; (iii) assessing the efficacy of that treatment; (iv) deciding if the residual risk is acceptable; and, (v) if it is not, carrying out additional treatment⁶⁹.

As an example, the following actions could be taken into consideration in order to address the identified risks: establishing compliance policies for the Senior Management, training the employees, approving and disseminating the guidelines, offering legal advice, among others.

⁶⁸ In this regard, see: Fiscalía Nacional Económica de Chile. "Programas de Cumplimiento de la Normativa de Libre Competencia", 2012, p. 8.

⁶⁹ Residual risks are the ones that persist within the organization despite the implementation of controls. In order to measure these risks, the International Chamber of Commerce proposes to the companies to question themselves the following: (i) if there are controls, (ii) if controls are documented and if the documentation is available and updated: (iii) if the controls are articulated and if the articulation is clear or ambiguous; (iv) the means by which the people of the organization notice the existence of controls; (v) assessment of the success rates of the implemented controls; (vi) the existing sanctions for non-compliance regarding the implementation of the controls and (vii) the structure of the Program for monitoring the implemented controls. From this evaluation, the residual risks can be determined and, if that is the case, the implementation of additional controls by the company can be assessed. In this regard, see: International Chamber of Commerce, Op. Cit., page 24.



• Monitoring and review: The identification and management of risks must be subject to continuous monitoring and periodic review by the Senior Management and/or the Compliance Officer or Committee (see section 4.7 of these Guidelines). In this way, the risks will be reevaluated periodically, before the changes that the company faces in its commercial dynamics or due to modifications in the applicable regulations.

To this end, it is recommended to use indicators to measure the effectiveness of the treatment of the risks. As an example, indicators such as the incidence of non-compliance with the competition rules within the institution, *ratios* that measure the reputation of the company in the market, the involvement of the employees with the implementation of the Compliance Program, among others.

• **Registration and report:** Finally, it is necessary to put on record the risk management and its results. Likewise, the entities involved in the implementation of the Compliance Program should be informed, through the appropriate mechanisms. Finally, the dissemination of the results in the organization (without the need to incorporate sensitive information for the company) might strengthen the regulatory compliance within the organization.

Examples of standardized risk management and regulatory compliance systems

The standards established by ISO 31000, ISO 31010 and ISO 19600 can be very useful when designing the risk management system of companies, since they allow the organization to identify, control, mitigate or assume risks and facilitate the decision-making process.

ISO 31000 is an international standard that offers guidelines and principles to manage the risks of companies. This standard aims to enable organizations of all types and sizes to effectively manage risks within the company, which is why it recommends the organizations to continually develop, implement and improve a framework aimed at integrating the management process of risks in each of their activities.

Complementary to this standard, it has been developed the **ISO 31010** "Risk management. Risk assessment techniques". This standard provides a series of techniques for the identification and assessment of risks, both positive and negative ones.

Additionally, the **ISO 19600** standard for Compliance Management Systems establishes valid recommendations for all types of companies, based on their nature, complexity, structure and size, in order to help detecting and managing the risks related to non-compliance with legal obligations to which the organization is subject to.

Source: https://www.isotools.org/normas/riesgos-y-seguridad/iso-31000/ https://www.isotools.org/2017/01/19/la-norma-iso-19600-realizar-cumplimiento-legal/



Example of a risk identification matrix

				inpie o					
	Post assessment actions								
	Deep dives and findings								
	Net risk	16	2	2	М	м	16	9	М
Residual Risk	Likelihood (1-4) reflecting control effectiveness	4	2	1	Т	1	4	5	1
	Impact (1-4)	4	1	5	23	23	4	23	23
	Control 4: Legal Support	×	×				×	×	
Current Controls	Control 3: Guidance	×	×	×	×	×	×	×	×
Current	Control 2: Trainin g	×	×	×	×	×	×	×	×
	Control 1: Tone from the Top	×	×				×		
	Grossrisk	16	σ	Ō	12	12	16	12	б
Inherent Risk	Likelihood (1-4) based on preliminary review	4	м	м	4	4	4	4	м
	Impact (1-4)	4	М	ĸ	٤	M	4	دع	ĸ
	Activity/Risk	Agreement over prices	Exclusivity agreements with suppliers that have the purpose to restrain the competition	Unjustfiably denying to contract	Improper exchange of sensitive information	Facilitate the exchange of sensitive information among competitors (for example, clients)	Agree with competitors not to present offers or withdraw their bids in public procurement.	Imposition of resale prices	Impose territorial restriction to suppliers

Note:

- 10 The matrix was adapted from the public version by the International Chamber of Commerce, "The ICC Antitrust Compliance Toolkit", 2013, page 77. Available at: https://cdn.iccwbo.org/ content/uploads/sites/3/2013/04/ICC-Antitrust-Compliance-Toolkit-ENGLISH.pdf
 - (ii) The International Chamber of Commerce stablishes that it does not exist an standard methodology for the determination of the probability and impact of the identified risks, nevertheless. it recommends to use a range from 1 to 4, where 1 is the lesser impact and probability and 4; the higher of them.
 - (iii) The values considered for the impact and probability are assigned based on the considerations mentioned in the Table N°2 of these Guidelines.



4.3. Internal procedures and protocols

Internal procedures and protocols are essential components of a Compliance Program⁷⁰. They must be established based on the identified risks (see section 4.2 of these Guidelines) and should be constantly improved and updated⁷¹ considering the changes in the market, the commercial dynamic of the company, the regulation applicable, among others.

As an example, companies could implement internal procedures and protocols aimed at ruling the following aspects:

- The risks identification of noncompliance with the competition rules.
- The development of audits and monitoring.
- The assistance to meetings with competitors and trade association meetings.
- Determination of prices and other commercial conditions.
- Report of alleged infringements.
- Internal investigations and disciplinary procedures for alleged infringements.
- Participation in public procurement processes.
- The language used by employees in their communications.

Companies must take reasonable measures in order to make formal communications (memorandums, institutional communications) or oral communications through the trainings to the employees, work meetings, among others. In any case, it is recommendable that the Senior Management is responsible for making those communications, since that will resemble their institutional commitment to comply with the Law.

The frequency of the communication may vary, among other factors, due to the identification of new risks in the monitoring and supervision of the Program and the entry of new employees in the organizations.

Finally, all the internal procedures and protocols should be design in such a way that the organizational structure, as well as the commercial goals and benefits, are harmonized with the Compliance Program.

Examples of "Do's and Don't's" protocols, for relations with competitors

The International Chamber of Commerce, in the document "The ICC Antitrust Compliance Toolkit" of 2013, mentions as an example a Protocol of "Do's and Don'ts" in the following manner:

- Do not agree, even informally, with competitors on pricing, customers or markets without a lawful reason. Always get legal advice on whether a practice is lawful;
- Decision on the Company's pricing, production, customers and markets must be made by the Company alone;
- Do not discuss with competitors:
 - » Which suppliers, customers or contractors the Company deals and will deal with; or,
 - » Which markets the Company intends to sell into or on what terms the Company will deal;
- Leave industry meetings if competitively sensitive issues arise, and ensure your departure is noticed and recoded. Report the matter to the Company's Legal Department and your Business or Function Compliance Officer;
- Tell the Company if you know of any potentially anticompetitive practices or if you are uncertain whether practices are legal or not.

Source: The ICC Antitrust Compliance Toolkit, 2013, page 27.

⁷⁰ To this regard, see: Fiscalía Nacional Económica de Chile. "Programas de Cumplimiento de la Normativa de Libre Competencia", 2012, page 8.

⁷¹ Competition Bureau of Canada ("Corporate Compliance Programs"), 2015, page 14.



4.4. Training for employees⁷²

Training is an essential component for the implementation of a Compliance Program, since it not only allows the dissemination of relevant information to the employees from the organization regarding the content of the Program, but also generates a space of dialogue and motivation to the development of a compliance culture at an organizational level.

Moreover, training helps employees to carry out their work duties in a clear manner regarding what is allowed by the competition rules and to be in a better situation to resist pressures (internal or external) to infringe the law 73 .

It doesn't exist a standard method in order to obtain a successful training. It is necessary for each company to have a training strategy, according to the characteristics of its organization.

Notwithstanding the foregoing, it is recommendable to take into account the following considerations:

- **Providing the training of motivational content.** The implementation of the compliance program seeks to create a compliance culture in the organization. This way, the training sessions must not only deliver information, but also must motivate the employees to follow a compliance policy that inspires the program⁷⁴.
- **Training every employee of the organization.** Although training to the employees from areas identified with a higher risk (see section 4.2 of these Guidelines) should be prioritized, it is recommendable to train every employee about the scope of the Compliance Program.

To this end, it is recommendable to include a module about competition infringements in the training sessions of every employee.

- Requiring the services of qualified advisors on competition matters for the training sessions. As long as possible, it is recommendable that training sessions are in charge of a specialized professional with experience in competition law.
- **Adopting a case approach.** It is highly recommended that training lessons have mainly a case approach and are developed in a didactic and interactive manner, with hypothetical cases addressing the risks identified in the organization⁷⁵.

⁷² This requirement is according to the according to those detailed in the Guidelines from Canada ("Corporate Compliance Programs"), Chile ("Programas de Cumplimiento de la Normativa de Libre Competencia") and Brazil ("Guidelines Competition Compliance Programs"). These documents are accessible through the following links, respectively: http://www.fne.gob.cl/wp-content/uploads/2012/06/Programas-de-Cumplimiento.pdf y http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/compliance-guidelines-final-version.pdf

⁷³ International Chamber of Commerce, Op. cit., p. 25.

⁷⁴ Regarding the importance of the motivation content of training, see: Organization for Economic Co-operation and Development (OECD). ""Promoting compliance with competition law: Do compliance and ethics programs have a role to play? 2011, p. 11. Available at: http://www.oecd.org/regreform/sectors/48849071.pdf

⁷⁵ To this regard, teaching based on hypothetical cases is a fundamental tool for learning in our days. As an example, the Harvard Business School, pioneer in this system, uses the Case Method (casuistic method), recognizing it as "one of the highlights of the HBS experience, the case method is a profound educational innovation that presents the greatest challenges confronting leading companies, nonprofits, and government organizations—complete with the constraints and incomplete information found in real business issues—and places the student in the role of the decision maker". Available at: https://www.hbs.edu/mba/academic-experience/Pages/the-hbs-case-method.aspx

On the other hand, the Graduate School of Business from the Pontificia Universidad Católica del Perú (CENTRUM, in Spanish) also applies this method of teaching. This way, in its Manual and Guideline of Business Cases in Executive Education notes that a "business case is a detailed explanation of a real business situation, describing the protagonist's dilemma, who is a real person with a real job and who faces a real problem (...)". Available at: http://cdn.centrum.pucp.education/centrum/uploads/2016/05/24160650/03_D-14-03-03_guia-manual-casos-negocio_V10.pdf



- **Using on-site or virtual training methods.-** Aiming at guaranteeing a wider coverage of the training sessions, they could also be implemented in an on-site or virtual manner. However, for employees whose areas have a higher risk, it is recommendable to use an on-site training, in order to answer their doubts in the most effective way.
- Evaluating the performance of the employees considering the training sessions.- The periodic evaluations are a key element for the success of the Compliance Program. Through them, it can be examined the employees' levels of recognition about the seminary regulations, corporate policies and other related procedures⁷⁶.

The results of the evaluations will allow to reconsider the frequency of the training sessions, if that is the case.

It should be noted that training sessions are not only referred to as training classes, seminars or roundtables, but also as a permanent process. Thus, messages linked to the content of the Compliance Program can be disseminated through emails, intranet messages, informational materials, among others.

Finally, it is recommended to register the training program in documents, in order to keep records of its development and evaluate its results. The following is a list of documents that could be used for these purposes:

- Working plan of the trainings that will be carried out.
- List of the trainings that have already been carried out.
- List of attendance of the employees.
- Audiovisual material used in the trainings.
- If applicable, the contract and the act of agreement that certificates that the training sessions were carried out by an external and specialized professional in competition law.
- Record of the evaluations taken.
- Documentation of the interviews or surveys made to the employees about the trainings in which they participated.
- Continuous improvement measures that are implemented according to the training program.

4.5. Constant update and monitoring of the Compliance Program⁷⁷

It is important for the companies to record the development of the compliance program and to review its performance through a permanent monitoring. These tasks will allow them to improve continuously in order to achieve the objectives of the Compliance Program⁷⁸ and will demonstrate the seriousness of its implementation.

⁷⁶ International Chamber of Commerce, "Promoting antitrust Compliance: The Various approaches of National Antitrust Authorities", p. 26. Available at: http://ec.europa.eu/competition/antitrust/compliance/icc_comparative_study_en.pdf

⁷⁷ This requirement is according to those detailed in the Guidelines from Canada ("Corporate Compliance Programs"), Chile ("Programas de Cumplimiento de la Normativa de Libre Competencia") and Brazil ("Guidelines Competition Compliance Programs"). These documents are accessible through the following links, respectively: http://www.fne.gob.cl/wp-content/up-loads/2012/06/Programas-de-Cumplimiento.pdf y https://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/compliance-guidelines-final-version.pdf

⁷⁸ International Chamber of Commerce, "The ICC Antitrust Compliance Toolkit", 2013. Op. Cit., p. 68



Monitoring is a permanent process carried out by the Compliance Officer or Committee (see section 4.7 of these Guidelines), which has the purpose of assessing the performance of a Compliance Program, from a preventive perspective.

The results of the assessment should be recorded through periodic monitoring reports. These reports should address the strengths and weakness of the Compliance Program. If illegal behaviors or a high risk of its occurrence are detected, the company must take reasonable measures that respond to this contingency, in order to prevent similar behavior in the future, which implies making modifications to the Compliance Program⁷⁹.

It is important that the Senior Management guarantees that the people in charge of the monitoring duties have access to all the information they require (commercial contracts with clients, emails of the employees in charge of the commercial area⁸⁰, recordings of meetings, among others). Likewise, they must be able to carry out unexpected inspections of the areas subject to evaluation.

Likewise, when possible, audits will allow the firm to prove before the Commission that the infringement consisted of an isolated event and not ordered by the organization, as an argument of defense in a sanctioning administrative procedure.

From the application of these tools to the management of the Compliance Programs, large volumes of information can be analyzed, behavior patterns of the company and its workers can be identified and, in this way, the risks of alleged non-compliance conducts can be managed, for a correct treatment and response^{81 82}.

Thus, some Regtech (Regulatory Technology) companies offer technological solutions in order to help companies comply with their regulatory requirements. An example of this service is the Natural Language Processing (NLP), which enables the content of a company's text communications to be identified. In this way, the incorporation of a tool such as the NLP within an organization could be useful to monitor the communications that it exchanges with its competitors, in order to detect and prevent possible anticompetitive behavior, alerting in real time and, under lowers costs, if any communication could represent a risk of non-compliance with regulations⁸³.

- 79 Taking measures and remedies are key factors in a Compliance Programs, as it's recognized by the Department of Justice of the United States of America. In this regard, see: Department of Justice Antitrust Division of the United Stated, Op. Cit. page 12.
- 80 Competition Bureau Canada ("Corporate Compliance Programs"), 2015, Op. Cit., page 20. Regarding the monitoring, verification and reporting mechanisms, the aforementioned authority recommends: "Plan and carry out verification exercises, either with or without prior notice, to confirm whether a company, an area or personnel of a company, is complying with competition law; These exercises may include a review of printed and computer files (especially emails and other electronic message systems) of personnel who are in a position to engage in or be exposed to conduct in potential breach of the law."
 - If that is the case, it is recommended that access to the emails of the workers should be carried out with the prior consent of the employees at the beginning of the employment relationship, and they should be informed of possible monitoring tasks carried out in the organization.
- 81 Committee of Sponsoring Organizations of the Treadway Commission (COSO), Op. Cit.
- As an example, the following are some technological tools applied to the implementation and management of Compliance Programs in various matters:
 Regulatory technology (Reg Tech): It is the application of computer tools, such as Data Analytics and Big Data, to the management of a Compliance Program, for purposes such as the following:
 - L Compilation and analysis of company information and current regulations, in order to prepare risk identification matrices, considering the particular characteristics of the organization and its business lines.
 - In this way, a Compliance Program computer platform is established (compliance collaboration platform), which compiles the obligations derived from regulation, the risks identified, their assessment and corresponding treatment. For greater efficiency of the system, Artificial Intelligence (AI) and Machine Learning (ML) tools are used, in order to automate decision-making processes, as an added value.
 - ii. Management of identified risks through the establishment of alert systems of possible breaches in real time, in order to guarantee that appropriate actions are taken.
 - In this regard, see: Deloitte, "RegTech Universe 2020". Available at: https://www2.deloitte.com/lu/en/pages/technology/articles/regtech-companies-compliance.html#tab4 y ROTTNER, Shira. "Three ways artificial intelligence improves compliance", 2019. Available at: https://a-teaminsight.com/three-ways-artificial-intelligence-improves-compliance/?brand=rti
 - Third Party Management System: This tool has as its main function the identification and risk management of companies in their relationships with third parties. In this way, the risks derived from the companies' relationships with other competitors, clients (distributors), suppliers, among others, could be identified and managed in an automated manner. In this regard, see: https://www.traceinternational.org/compliance-platforms
 - In addition to the mentioned functionalities, there are systems that allow the exchange of information about the history of the company's infractions at the international level (watchlist). This could be an important input to know the history of the companies with which you will do business. As an example, see the information on TRAC, the platform developed by Trace International, at: https://traceinternational.org/low-medium-risk.
- 83 Deng Ai (2019). From the Dark Side to the Bright Side: Exploring Algorithmic Antitrust Compliance. Nera Economic Consulting. p. 3. Available at: https://www.nera.com/content/dam/nera/publications/2019/PUB_AT_Algorithmic-Compliance.pdf



4.6. Audits on the Compliance Program

An audit is a systematic, independent and documented process⁸⁴, the purpose of which is to obtain evidence and evaluate it objectively in order to determine the degree of compliance of the criteria used to assess the Program. It is recommended that this duty should also be carried out by external consultants.

The following aspects are evaluated in the audit: the identification and updating of risks, the operation of the reporting lines and consultations between the company and its employees, the dissemination of the Compliance Policy by the Senior Management, the implementation of internal procedures and protocols for the control or mitigation of identified risks, among others.

The evaluation results need to be documented through audit reports. The reports must address the strengths and weaknesses of the Compliance Program, as well as the main recommendations or actions to strengthen the Program.

There is not a fixed periodicity to audit the Compliance Program, since this depends on the commercial characteristics and needs of each company. However, in general terms, an annual periodicity is recommended. Furthermore, the audit may be *ad hoc* or due to the occurrence of risky conduct.

4.7. Procedures for consultations and complaints⁸⁵

The procedures for consultations and complaints are essential components of the Compliance Program, since they allow the employees of the company to be aware about the means they have to use and the persons to make contact with in case questions arise or potential or effective infringements.

For the implementation of these procedures, companies may use internal or external computer systems, email, telephone, website and intranet, among others.

Likewise, the following should be taken into account:

• Official in charge: The official in charge of answering consultations and handling complaints should be the Compliance Officer or Committee (see section 4.8 of this Guidelines) or, if needed, any other official within the organization.

In the event that an employee wishes to report the official who is precisely in charge of answering consultations or complaints, the company should have mechanisms to refer the complaint to another official, the board, or the headquarter, if applicable. For example, it could happen that the Compliance Committee is supervised by the General Manager and precisely the latter is the subject of a report for breaching the free competition statutes.

• **Responsibility:** It is highly recommendable that the Compliance Officer or the Compliance Committee should be in charge of the clearing of the consultations, for which they can request the support of the internal legal consultant or their external advisers, if necessary.

The reception and investigation of complaints may fall to the Compliance Officer of the Compliance Committee or it could also be entrusted to a third party different than the company. Outsourcing could be used to the reception of the complaint, which is then channeled to the internal department of the company in charge of the investigation. Nevertheless, the outsourcing service in this matter could also include the investigation of the information reported in order to confirm the accuracy of the complaint.

⁸⁴ INACAL. Op. Cit., page 7.

⁸⁵ This requirement is according to those detailed in the Guidelines from United States ("Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigations"), Canadá ("Corporate Compliance Programs"), Francia ("Framework-Document of 10 Februay 2012 on Antitrust Compliance Programmes") y la Comisión Europea ("La importancia de cumplir").



In the event that an employee whishes to report the official who is in charge of investigating the complaints or a conflict of interest arises, the company should have mechanisms to refer the complaint to another official, the board or the headquarters, if that's the case. For example, it could happen that the Compliance Committee is integrated or supervised by the General Manager and precisely this latter is the object of the complaint for non compliance with the antitrust statutes.

- **Confidentiality:** Companies must have mechanisms to ensure the confidentiality of information, especially the identity of the person making the consultation or complaint⁸⁶.
- **Policies of no retaliation:** The company must guarantee that there is a non-retaliation policy in the organization. To do so, it is possible to establish protection measures for employees who report infringements⁸⁷, such as stipulating that disciplinary proceedings are not going to be initiated against them or considering this aspect in possible career opportunities within the organization.

With the guarantees provided, whistleblowers will have incentives to use the internal channels of the organization and to file complaints⁸⁸.

Finally, it is important to mention that it may be decisive to have a work environment in which employees are motivated to express their concerns, doubts, and alerts for alleged infractions or proven infractions, to guarantee the effectiveness of the Compliance Program.

Cartel of agreements of prices and market allocation in the commercialization of tissue products (Chile)

The Tribunal for the Defense of Free Competition of Chile, in its Decision N° 160/2017, sanctioned two companies for having participated in agreements aimed at allocating the market shares and fixing prices of the tissue products from 2000 to December of 2011, which affected the national market of tissue wholesale.

In addition to the fines imposed, the Tribunal ordered the offenders to implement a compliance program in antitrust matters, which had to meet the requirements of the "Guidelines on Antitrust Compliance Programs" elaborated by the National Economic Prosecutor (Fiscalía Nacional Económica).

Among other obligations, the offending companies had to designate a Compliance Officer, who would serve full time and report his actions to the Board of Directors of the company.

This officer would be in charge, besides other obligations, of maintaining an anonymous reporting line that allows any employee to reveal directly to him, possible violations of the antitrust statutes.

Source: Tribunal for the Defense of Free Competition of Chile, 2017, Decision N° 160/2017 from December 28th of 2017.

⁸⁶ International Chamber of Commerce. "ICC Guidelines on Whistleblowing", 2008. Available at: https://iccwbo.org/content/uploads/sites/3/2008/06/ ICC-Whistleblowing-Guidelines.pdf

⁸⁷ International Chamber of Commerce. "The ICC antitrust compliance toolkit. Practical antitrust compliance tools for SMEs and large companies", Op. Cit, page 38.

⁸⁸ International Chamber of Commerce). "The ICC antitrust compliance toolkit. Practical antitrust compliance tools for SMEs and large companies", page 34.



4.8. Designation of a Compliance Officer or Compliance Committee

While the Senior Management of the company should be responsible for sponsoring and promoting a culture of sustainable compliance, the implementation of the Program may be delegated to a designated person (Compliance Officer)⁸⁹ or to a collegiate body (Compliance Committee). In the latter case, the President of the Compliance Committee will be responsible and part of the highest hierarchical structure of the organization⁹⁰.

It is worth mentioning that the Compliance Officer or Committee must not only be an integral part of the highest hierarchical structure of the organization, but must also have direct access to other relevant bodies such as the Audit Committee and the Social Responsibility Committee⁹¹.

The Compliance Officer or Committee must be provided of functional independence and visibility in the organization, must report directly to senior management and have the necessary financial and human resources to carry out their duties⁹².

The Officer or the members of the Compliance Committee must have the experience and training necessary to fulfill their role. Likewise, it is recommended that senior management ensure that they receive constant training in the matter.

The functions in charge of the Compliance Officer or Committee are as follows:

- Effectively implement the Compliance Program and articulate its implementation to the company's own dynamics⁹³. The Compliance Officer or Committee must ensure that the Competition Compliance Program is incorporated into a major one, which addresses managing risks of non-compliance of regulations on various matters, simultaneously. Likewise, the Compliance Officer or Committee must promote the inclusion of the Program in the dynamics of the economic activity of the organization. In this way, it can guarantee its sustainability and effectiveness over time.
- Identify and supervise the risks of the company. The Compliance Officer or Committee must participate alongside with the senior management in the identification of the risks that the company faces and in the design of the measures (internal procedures and protocols) to face them (see sections 4.2 and 4.3 of these Guidelines). Once the risks and applicable measures have been identified, the Compliance Officer or Committee must supervise their compliance.
- Assign responsibilities derived from the Compliance Program to all employees. The Compliance
 Officer or Committee shall identify the roles and obligations of the employees of the company according
 to the framework of the Compliance Program. For greater effectiveness, it is recommended to include the
 functions identified within the job description.
- Advise on the Compliance Program. The employees of the company may contact the Compliance Officer or Committee in order to obtain answers to their questions about the Program, in case of potential infringements situations arise or their actual occurrence. (see section 4.7 of these Guidelines).
- **Periodic report of the performance of the Compliance Program.** A good practice within the duties of the Compliance Officer or Committee is to prepare periodic reports on the development of the Program. It is recommended to prepare, as a minimum, an annual report.

⁸⁹ International Chamber of Commerce. "The ICC Antitrust Compliance Toolkit" Op. Cit., page 10.

⁹⁰ References to the Compliance Officer in this document should also be understood as applicable to the Compliance Committee.

⁹¹ International Chamber of Commerce. "The ICC Antitrust Compliance Toolkit" Op. Cit., page 10.

⁹² Competition Bureau of Canada ("Corporate Compliance Programs"), 2015, page 11.
Available at: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03927.html.

⁹³ In this regard, see: OECD. "Policy Roundtables. Promoting Compliance with Competition Law 2011", Op. Cit., pages 12 y 13.



Notwithstanding this, the Compliance Officer or Committee shall immediately report to the board of directors, in the event of alleged or proven infringements or in the face of the identification of new risks that the company must face.

• Coordination and management of the competition compliance at an international corporate level. - In the event that the company has an international presence or part of its production process is located in several countries, it is the responsibility of the Compliance Officer or Committee to coordinate compliance with the competition rules with their peers, in other venues.

Finally, it is appropriate to mention that certain information from the Compliance Officer or Committee within the exercise of their functions could be exceptionally protected in a similar way to the attorney-client privilege, whenever this protection is related to the protection of the right of non-self-incrimination⁹⁴.

5. WHAT ELEMENTS DOES A COMPLIANCE PROGRAM INCLUDE?

As noted above, companies, when defining their bylaws, have the power to define the scope of the components that will form part of their Compliance Programs, as well as the procedures or methodologies for their design, implementation and evaluation, according to their own needs and characteristics.

Notwithstanding this, in addition to the essential components developed in these Guidelines that should be part of a Compliance Program model, below are certain components that, despite being complementary, can significantly strengthen the effectiveness of the Program:

5.1. The Competition Manual

The company must propose and develop a compliance strategy according to its particular situation, which will be presented clearly, concisely and in writing through a Competition Manual 95.

The Competition Manual is aimed at all employees of the organization. It must include the description of the requirements of the applicable legislation, the obligations of the employees, their practical application, the consequences of their infringement, as well as providing the means to make confidential consultations and complaints (safeguarding the identity of the whistleblower) in the event of a suspected infringement of the Competition Act⁹⁶. It is recommended to add practical examples linked to the economic activity of the organization.

In order to ensure compliance with the obligations set out in the Manual, the following aspects should be taken into account:

- Use of simple language and practical approach.- It is important that the obligations of the employees
 are communicated in a clear and simple way, in order to ensure their full understanding. For didactic
 purposes, a list of "prohibited actions" and "expected actions" could be used against the risk situations
 identified by the organization.
- Articulation with Codes of Conduct or Internal Regulations of the organization. In order to ensure compliance with the obligations set out in the Manual, these duties should be incorporated into the Codes

⁹⁴ Sanko, P. Clinton. "Protecting Privilege of the Corporate Compliance Officer". 2017. Disponible en: https://www.bakerdonelson.com/protecting-privilege-of-the-corporate-compliance-officer

⁹⁵ European Commission, "La importancia de cumplir". Luxemburgo: Publications Office of the European Union 2012, page. 14.

⁹⁶ Fiscalía Nacional Económica de Chile. Op. Cit., page 12.



of Conduct or Internal Regulations of the organization, in order to establish disciplinary sanctions in the event of infringement.

• **Dissemination of the Manual to all employees.-** The impact of the Manual could be limited if it is not adequately communicated and explained to the employees of the organization, especially those who work in areas exposed to greater risk.

In order to promote and disseminate the Manual, institutional emails, the company's website, the intranet, among others, can be used to do so. Moreover, employees may also be asked to sign a declaration that they have accessed the contents of the Manual and understood its scope.

Finally, a recommended practice is the dissemination of the Manual to suppliers and third parties which the company is commercially involved with, in order to demonstrate its commitment to comply with the competition rules in a cross-cutting manner within its business operations.

Annex A of these Guidelines contains, for reference purposes, a Model of a Competition Manual.

5.2. Incentives for employees

Companies may use incentives to motivate the participation of employees in the identification of risky or prohibited behaviors and in the implementation of the Compliance Program in general⁹⁷.

For example, the following measures could be taken:

• Recognition of proactivity and showing interest in the fulfillment of the Program. - Honorific awards or other forms of social recognition could be granted. For example, the Senior Management of the organization could award a recognition diploma or a letter of congratulations. Material prizes could also be awarded, such as coupons, free parking benefits, free afternoons, bonuses, participation in raffles among outstanding employees, among other options.

If employers choose to use this measure in order to promote respect for competition rules, the selection of employees deserving recognition must be objective.

For this purpose, the following criteria can be considered: (i) participation in voluntary training; (ii) evaluation scores; and (iii) the frequency in the use of the consultation line, among others.

Regardless of the aforementioned, it is also possible to give group recognitions or awards (for example, to a specific area of the company) or even to the entire organization if, for example, positive results are obtained in the framework of the audits regarding the performance of the Program be evaluated.

• **Promotions**⁹⁸.- In order to promote the involvement of employees in the implementation of the Competition Compliance Program, it is suggested to consider, as one of the criteria to be taken into account for the granting of a promotion, the evaluation of the performance of the employee in the framework of the Competition Compliance Program.

⁹⁷ The importance of incentives is also highlighted by the United States Department of Justice. See: Department of Justice - Antitrust Division, Op. Cit.,

⁹⁸ Society of Corporate Compliance and Ethics. "Using Incentives in your Compliance and Ethics Program", 2011. Available in: https://assets.hcca-info.org/Portals/0/PDFs/Resources/library/814_0_Incentives/CEProgram-Murphy.pdf.



As in the previous case, it is important to consider an objective criterion in order to grant this kind of reward. As an example, the following criteria could be considered in the evaluation for promotion: (i) that the employee has satisfactorily participated in the training related to the Program and (ii) for promotion to management positions, that the employee has special training courses related to compliance issues; among others⁹⁹.

• **Reminders about compliance¹⁰⁰.** These notices could be made through e-mails, *pop-ups* when logging in or entering the company's **system**, **among other means**; **and**, if possible, they should be personalized. In addition, these reminders should not become routine and identical messages since they could lose their effect over time.

It is recommended to carry out these reminders especially in the periods in which the greatest risk have been identified (for example, in case the sales of the products have seasonal increases in periods such as Christmas, national holidays, among others).

• Send comparisons on the use of the consultation line. The company could send comparisons about the use of this tool by the employees. For example, through a personalized e-mail containing a message such as "You use the consultation line 70% less than the rest of your colleagues from your area and 30% less than the rest of the employees of the company".

Some ideas about the use of incentives in the Competition Compliance Program

- The different areas of the organization could nominate people who best complies with the Program. The Senior Management would choose the winner or winners and could provide free parking for one year.
- Award prizes such as pins or other visible symbols. By accumulating a considerable number of them, employees could receive a gift or a recognition.
- Grant tickets for shows or coupons, as rewards.
- Create an Annual Award to the employee who actively participates in the Antitrust Compliance Program and grant it to the winner at the annual meeting of shareholders, in a public event.
- Select the area of the organization that best complies with the Program. The criteria to do that selection could be having completed the trainings on time, having the best individual qualifications, among others. The prize to be awarded could be a lunch for the entire area
- Employees in leadership positions, with better qualifications and performance under the Program, could be awarded scholarships to attend academic events about Compliance Programs.
- Consider the Compliance and Ethics Program certificate as an important condition to grant a promotion.
- Give awards to employees for making recommendations and suggestions in order to improve the Compliance Program in the organization. This, besides being an incentive, will provide the organization with new ideas.

Source: Society of Corporate Compliance and Ethics. "Using Incentives in your Compliance and Ethics Program", 2011, pages 49 to 52.

⁹⁹ The evaluation of employees for promotion could include, among others, a qualification criterion linked to the Compliance Program and ethics in general. Each candidate would be rated on a scale of 1 to 5 in that area. Employees who score more than 3 may be eligible for promotion. Finally, the weight given to the qualification criteria linked to the Compliance Program will depend on each Company. See: Society of Corporate Compliance and Ethics, Op. cit., page 24.

¹⁰⁰ This measure to achieve regulatory compliance has been implemented in tax matters. For example, this experience was developed in Kosovo by the World Bank. For more information, see: The World Bank, "Promoting tax compliance in Kosovo with Behavioral insights", 2019. Available in http://documents.worldbank.org/curated/en/747661551725011887/pdf/135032-WP-PUBLIC-Kosovo-Tax-Compliance.pdf.



5.3. Disciplinary measures

When an infringement is detected, the company must take action and immediately stop the infringing conduct. It must investigate the incident and, if proven, take appropriate internal action.

It is important to note that organizations should not only introduce disciplinary measures when an employee or manager breach the competition rules, but also when one of them has not taken the necessary measures to prevent or detect the infringing conduct, depending on the position that they hold¹⁰¹.

Disciplinary measures must follow a predetermined, known and predictable internal process. Thus, the company must develop an internal code of conduct, in strict compliance with national labor regulations. This is important not only for deterrence purposes, but also as a reflection of the real commitment of the company to integrate and promote a compliance culture.

The disciplinary policy should be applied to all employees of the organization under equal conditions and, in particular, to senior managers, who should not be protected against disciplinary measures in case of infringement of the rules. The organization should ensure that the internal process does not contravene labor laws and, if possible, should be verified by a legal adviser.

In this regard, it is important that in order to ensure transparency the organization establishes and communicates to employees the principles that will guide internal investigations on the code of conduct, such as (i) confidentiality; (ii) impartiality and objectivity of all investigators; (iii) personal integrity and expertise of investigators; and, (iv) protection against retaliation¹⁰².

Codes of conduct must stablish the prohibited conducts for employees within their relationship with competitors, customers and suppliers of the company; and within the framework of public procurement processes and trade associations in which the company participates ¹⁰³. In this regard, among others, disciplinary measures should be imposed for conducts such as ¹⁰⁴:

- Agreeing with competitors sales and purchase prices or commercial conditions or limiting production.
- Agreeing with competitors on the allocation of customers, suppliers, geographical areas, production lines or quotas and sources of supply.
- Sending or receiving sensitive commercial information, from the company or competitors, either directly or through third parties.
- Facilitating the exchange of sensitive information between companies (for example, customers or suppliers) that are competitors with each other.
- Agreeing exclusivity agreements with suppliers in contravention of the Compliance Officer's recommendations.
- Exchanging information on the positions that each competitor will present in a public procurement selection process.

¹⁰¹ Competition Bureau Canada, Op. Cit. page 20.

¹⁰² Cámara Internacional de Comercio (International Chamber of Commerce). "The ICC antitrust compliance toolkit. Practical antitrust compliance tools for SMEs and large companies", Op. cit., page 42.

¹⁰³ The Code of Conduct is different from The Antitrust Manual. The Code of Conduct establishes a list of prohibited conducts and sanctions, among others. The Antitrust Manual is a didactic document that explains in simple terms what can and cannot be done under the Compliance Program.

¹⁰⁴ It is recommended to review the "Guide to Fight Collusion in Public Procurement" and "Guidelines on Trade Associations and Competition" approved by the Commission, in order to identify prohibited conducts within the framework of companies participating in selection processes and trade associations, respectively.



- Agreeing with competitors the non-submission or retirement of positions in a public procurement selection process.
- Participating in activities of a trade association that aim to coordinate the pricing policies, customers or markets among the competitors.
- Promoting decisions or recommendations within trade associations that have the effect of unjustifiably restricting competition.

Finally, the code of conduct may establish mitigating and aggravating factors for the determination of liability by employees. As an example, it could be considered a mitigating factor that the employee cooperates with the internal investigation, that he or she does not hold a management position or that he acted in good faith; while it could be considered an aggravating factor that the employee holds a management position or has acted ignoring the orders of the superiors, among other assumptions established by the organization.

6. IMPLEMENTATION OF THE COMPLIANCE PROGRAM ACCORDING TO THE SIZE OF THE COMPANY

As mentioned above, there is not a single Compliance Program model applicable to all companies. A Compliance Program must be elaborated and executed according to the needs, characteristics and circumstances of each of them.

National legislation has recognized the importance of establishing different provisions based on the size of the company, so that the Compliance Program model in such cases could be limited according to the nature and characteristics of the organization and the possession of the essential components, leaving out the complementary components recommended for larger organizations¹⁰⁵.

The aforementioned does not necessarily mean that a small or medium-sized company is exposed to minor risks of violating the Competition Act or that the consequences of such infringements will have a minor impact on its operation. This differentiation, however, addresses the needs and costs of developing an effective Compliance Program when the organization of the company is of a smaller size and complexity.

On the other hand, section 3 of the aforementioned Act, classifies enterprises on the basis of their annual sales or, in the absence of such information, as well as for nonprofit organizations, according to the number of workers that the enterprise has, as shown below:

Company categorization	Annual Sales Tax Unit (UIT)=S/ 4300.00	Equivalent in USD	Number of workers
Large Enterprise	Over 2300 UIT	2 872 435.33	Over 250
Medium Enterprise	Over 1700 UIT and up to the maximum amount of 2300 UIT	2 123 104.37 2 872 435.33	From 51 and up to 250
Small Enterprise	Over 150 UIT and up to the maximum amount of 1700 UIT	187 332.74 2 123 104.37	From 11 and up to 50
Micro Enterprise	Up to the amount of 150 UIT	187 332.74	From 1 and up to 10

 $Source: Supreme \ Decree \ 002-2019-JUS, Regulation \ of Act \ 30424, Act \ regulating \ the \ administrative \ liability \ of \ legal \ persons \ in \ a \ criminal \ court. \ Elaborated \ by \ the \ Technical Secretariat \ decree \ de$

¹⁰⁵ For reference only, it is important to mention that, on the one hand, section 17 of the Regulations of Act 30424. Act regulating the administrative liability of legal persons in a criminal court, enacted by Supreme Decree 002-2019-JUS, provides that in the case of micro, small and medium-sized enterprises, the prevention model will be limited to its nature and characteristics, and should have any of the minimum elements of the prevention model set out in that standard.



Therefore, it is important to establish special provisions for the implementation of Competition Compliance Programs in small and medium-sized enterprises (SMEs). For these smaller companies, the Compliance Program Model only includes the essential components number 1, 2, 4 and 8 included in section 4 of the present Guide. These are the following:

- (i) Actual commitment to comply;
- (ii) Risk Identification:
- (iii) Training programs; and,
- (iv) Compliance Officer, whose duties may be fulfilled by a high functionary of the company.

The aforementioned components shall be understood according to the provisions established in this Guide, adapting their content to the nature and characteristics of the SMEs.



7. COMPLIANCE PROGRAMS AND INFRINGEMENT DETECTION

The implementation of a Compliance Program by a company does not eliminate the possibility of infringements of competition regulations. Compliance Programs are not infallible. Nevertheless, even in these cases, Compliance Programs can help companies to detect potential infringements in an early manner and to be benefited by taking timely actions.

Therefore, if an infringement occurs despite having a Compliance Program, the company must act as quickly as possible. To do this, the company shall identify the causes of non-compliance, correct them and implement the necessary adjustments to return to the compliance status of the regulations.

7.1. Detection of infringements at an earlier stage

If the contravention of a competition regulation occurs, the Compliance Program will allow the company to detect such conduct in the shortest possible time and stop its participation in it, limiting the damages in the market and reducing its own exposure to risks of fines and lawsuits¹⁰⁶.

7.2. Timely collaboration with the authority or fine reduction benefits

In the face of a timely detection of non-compliance, the company might adhere to the benefits of exemption or reduction of the sanction provided in the regulations of the matter for those who collaborate with the detection and prosecution of cartels through the Leniency Program¹⁰⁷.

For this purpose, companies may submit to the Technical Secretariat all information concerning the infringement, which would be the one obtained in the internal investigation carried out by the company under the Compliance Program.

¹⁰⁶ European Commission, "Compliance matters", Op. Cit., page 17.

¹⁰⁷ Section 26 of the Competition Act and Leniency Program Guidelines.



7.3. Calculation of the fine

At a comparative level, the competition authority may consider the fact that the infringing company has developed an effective Compliance Program within its organization prior to the occurrence of an infringement, as a factor for calculating the applicable fine.

For example, on the one hand, Brazilian legislation allows the reduction of fines if companies can prove to have had an effective Compliance Program at the time of incurring in the infringement¹⁰⁸. Similarly, Chilean legislation¹⁰⁹ accepts the possibility of considering the implementation of a Compliance Program in the event of the infringer presenting a requirement to reduce the possible penalty¹¹⁰.

On the other hand, the U.S. Department of Justice published in July 2019, the document "Evaluation of Corporate Compliance Programs". This guide expressly acknowledges that having a Compliance Program in competition matters can have a positive impact on the reduction of the fine to be imposed, or even in the filing of charges against the company¹¹¹ 112.

Similarly, the fact that the company had an effective Compliance Program when the infringement was committed will be valued as a mitigating factor for the fine to be imposed¹¹³. For this purpose, the following considerations shall be taken into account:

• **Compliance with the essential components:** For the purpose of the calculation of the fine, a Compliance Program will be considered effective, if it complies with the essential components of the Program, in accordance with the size of the company (see sections 4 and 6 of this Guide).

For methodological purposes, independently from the assessment carried out in each particular case, the Commission shall use the flow charts pointed in **Annexes B and C**, to assess Compliance with this requirement.

• **Isolated infringing event:** The company must demonstrate that the infringement committed relates to an isolated event. This implies, among other considerations, that the senior management has not participated in the infringement and that the disclosed conduct constitutes an external and incompatible circumstance of the Compliance Policy of the company.

In this regard, the U.S. Department of Justice states that it must be presumed that this requirement is not fulfilled when the senior managers participated, endorsed or were negligent (for example, regarding their monitoring role) in relation to the detected non-compliance¹¹⁴.

- **108** For more information, see "Guidelines for Competition Compliance programs" in the following link:
 - $\underline{\text{http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/compliance-guidelines-final-version.pdf}$
- 109 For more information, see "Programas de Cumplimiento de la Normativa de Libre Competencia" in the following link: https://www.fne.gob.cl/wp-content/uploads/2012/06/Programas-de-Cumplimiento.pdf
- 110 In addition, in the same vein, the Korea Fair Trade Commission promotes, as an incentive, for companies that implement Compliance Programs to benefit from the reduction of sanctions
 - For more information, see: International Chamber Commerce, "Promoting Antitrust Compliance: The Various Approaches of National Antitrust Authorities", page 6. Available at: $\frac{\text{http://ec.europa.eu/competition/antitrust/compliance/icc_comparative_study_en.pdf}.$
- **111** Department of Justice United States Antitrust Division. Op. Cit., page 15.
- European Union's Court of Justice maintains a contrary position in this regard, arguing that the ideal reward towards the company for implementing a Compliance Program is the elimination of possible anticompetitive conducts, not a fine reduction for the participation in a cartel that took place despite the implementation of an ineffective program. Schindler Holding Schindler Holding Ltd and Others v European Commission (C-501/11). Available at: http://curia.europa.eu/juris/document.jsf?text=&docid=71530&pageIndex=0&doclang=ES&mode=Ist&dir=&occ=first&part=1&cid=3893141
- 113 This is consistent, with section 246.3 of Act 27444, the General Administrative Procedure Act, enacted by Supreme Decree 004-2019/JUS, which provides that, when sanctioning a breach classified as an infringement, the administrative authorities must take into account whether or not there is intentionality in the conduct of the offender when calculating the sanction.
- **114** Department of Justice United States Antitrust Division. Op. Cit., page 14.



• **Timely and early action against non-compliance:** This requirement implies that, in the event of a possible occurrence of an infringement, the company has carried out the relevant internal investigations promptly and seriously, adopting reasonable measures to stop the infringement in a timely manner. In addition, once the infringing conduct has been discovered through its Compliance Program, the company must promptly report it to Indecopi, and before the authority has materialized prosecuting actions that have been brought to its knowledge¹¹⁵, in particular to apply for benefits under the Leniency Program. ¹¹⁶

Under these assumptions, when a Compliance Program of a company satisfactorily meets the three criteria set out above, the Commission may grant a reduction of 5% to 10% of the fine that would have been applicable ¹¹⁸. This percentage will vary depending on the time at which the company reported the infringement to the authority and the effectiveness of the measures taken under its Compliance Program.

It should be noted that the company has the burden of proving compliance with the requirements listed to obtain the benefit in the calculation of the fine.

Finally, for summary purposes, see **Annex D** of these Guidelines, which illustrates the Commission's analysis to determine whether, it is appropriate to reduce the fine when the company possess an effective Compliance Program.

8. COMPLIANCE PROGRAMS AS INJUNCTIONS IMPOSED BY THE COMMISSION

Section 49.1 of the Competition Act provides that, in addition to penalties for infringements of the rule, the Commission may issue injunctions leading to the restoration of the competitive process or preventing the commission of anti-competitive conducts, including the development of training programs and the elimination of risks of non-compliance with the competition rules¹¹⁹.

From October 2016 to date, the Commission has issued numerous injunctions consisting on the implementation of Compliance Programs for companies involved in cartels. The following chart summarizes the cases of Compliance Programs issued by the Commission and, if applicable, ratified by the Tribunal of Indecopi:

^{115 &}quot;Did the compliance program assist the company in promptly reporting the illegal conduct? Did the company report the antitrust violation to the government before learning of a government investigation? How long after becoming aware of the conduct did the company report it to the government?" See Department of Justice- United States Antitrust Division. Op. Cit., 14.

¹¹⁶ The Antitrust Division states that undertakings may deny the presumption that their Compliance Program was not effective by demonstrating, among other cases, that it promptly informed the authority of the infringement that occurred, being relevant for the analysis the application to the Leniency Program.

[&]quot;Division prosecutors should consider whether the Guidelines' presumption that a compliance program is not effective applies and, if it does, whether the presumption can be rebutted under U.S.S.G. § 8C2.5 (f)(3)(C)(i)–(iv). Relevant to this inquiry is whether: (...) (iii) the company promptly reported the violation to the Antitrust Division; (...) whether and when the company applied for a leniency marker under the Division's Corporate Leniency Policy often will be a key factor in assessing whether or not the presumption can be rebutted". See Department of Justice – United States Antitrust Division. Op. Cit., page 15.

¹¹⁷ Undertakings may report infringements they have discovered as a result of their Compliance Programs, even when they are not under the scope of the Leniency Program, so they can benefit from the reduction of the fine referred to in this section.

¹¹⁸ Other competition agencies around the world have also considered applying a penalty reduction rate to those companies that had or had implemented an effective compliance program. For example, the competition authority of the United Kingdom and France provide a 10% reduction of the fine, while in Italy, the competition authority has considered granting a reduction of 5% to 15% of the fine, depending on the opportunity for the implementation of the program, its adequacy and effectiveness. In this regard, see, respectively: <a href="https://assets.publishing.service.gov.uk/government/uploads/system

¹¹⁹ Amendment made by Section 1 of Legislative Decree 1396, published on the September 7, 2018.



Chart N° 4: Injunctions consisting of the implementation of Compliance Programs issued by INDECOPI¹²⁰

Supervised market	Type of infringement	Summary of the minimum content of the Program for the infringing company
Pharmaceutical products nationwide ¹²¹ .	Price fixing of thirty-six (36) pharmaceutical products from January 2008 to March 2009.	 Annual training on competition regulations made by a specialist. Identification and mitigation of risks (measures to counter them) made by a specialist. Identification made by a specialist in charge of facilitating Compliance with the regulations.
Toilet paper and other tissue paper products ¹²² , nationwide.	Price fixing and other commercial conditions of toilet paper and other tissue paper products, between 2005 and 2014.	 Annual training on competition regulations, implemented by a university. Identification, evaluation, mitigation and risks of non-compliance evaluation made by a consultant (legal person) Designation of a Compliance Officer to facilitate Compliance with regulations.
Vehicular Liquefied Petroleum Gas (LPG) ¹²³ , in the city of Chimbote	Price fixing of the sales price of vehicular LPG between June 2012 and February 2014.	 Training on competition regulations made by the Technical Secretariat. Alternatively, if the company considers it convenient and affordable, the training can be implemented by a university, under certain parameters. Designation of a Compliance Officer.
Gas balloons nationwide ¹²⁴	Price fixing of gas balloons of 10, and 45kg. Between 2008 and 2011.	 Annual training on competition regulations may be done by a university. In addition, in the event of insufficient supply or if the company cannot bear the costs, it could be requested that the training may be dictated by the Technical Secretariat. Identification, evaluation, mitigation and non-compliance risk evaluation made by a consultant (legal person). Designation of a Compliance Officer.
Vehicular Liquefied Petroleum Gas (LPG) ¹²⁵ , in the city of Chiclayo	Price fixing of the sales price of vehicular LPG, between December 2009 and June 2014.	 Training on competition regulations made by the Technical Secretariat. Alternatively, if the company considers it convenient and affordable, the training can be implemented by a university, under certain parameters. Designation of a Compliance Officer.
Liquid fuels, in the city of Chimbote ¹²⁶ .	Price fixing of the sales price of diesel and gasohol, between May 2012 and October 2014.	 Training on competition regulations made by the Technical Secretariat. Designation of a Compliance Officer.
Vehicular Natural Gas (VNG) in Lima and Callao ¹²⁷ .	Price fixing of the sales price of VNG, between July 2011 and May 2015.	 Annual training on competition regulations may be done by a university. In addition, if the company cannot bear the costs, the training may be dictated by the Technical Secretariat. Implementation of a program focused on detection, neutralization and non-compliance risk evaluation, including the designation of an independent Compliance Officer.

Source: Commission for the Defense of Free Competition Elaborated by the Technical Secretariat

¹²⁰ It includes the injunctions issued by the Commission and the Tribunal of Indecopi.

¹²¹ See: Resolution 078-2016/CLC-INDECOPI from October 12, 2016 and Resolution 0738-2017/SDC-INDECOPI from December 27, 2017.

¹²³ See: Resolution 099-2017/CLC-INDECOPI from December 7, 2017 and Resolution 0225-2019/SDC-INDECOPI from December 10, 2019.

¹²⁴ See Resolution 100-2017/CLC-INDECOPI from December 18, 2017 and Resolution 0157-2019/SDC-INDECOPI from August 26, 2019.

¹²⁵ See: Resolution 101-2017/CLC-INDECOPI from December 18, 2017 and Resolution 0171-2019/SDC-INDECOPI from September 12, 2019.

¹²⁶ See: Resolution 049-2018/CLC-INDECOPI from September 3, 2018 (On appeal).

¹²⁷ See: Resolution 104-2018/CLC-INDECOPI from December 31, 2018 (On appeal).



As can be seen, all cases in which the Commission has dictated the implementation of Compliance Programs as injunctions are cartels. In addition, the common elements in the measures issued are the following: (i) training their employees on competition rules; (ii) identifying, assessing, mitigating and evaluating the risks of noncompliance; and, (iii) designating a specialist or Compliance Officer to facilitate compliance with competition regulations.

It is also important to mention that the Commission has also dictated the implementation of Compliance Programs as a measure to mitigate its concerns about anticompetitive conducts of those companies that decided to terminate the administrative sanctioning proceeding in advance, through the settlement procedure ¹²⁸. For example, this has happened in the shipping companies proceeding (maritime conferences) ¹²⁹ and the PET plastic market ¹³⁰.

In the same vein, it is important to mention that, in other jurisdictions, competition agencies have also issued the implementation of Compliance Programs as injunctions or as part of the measures that companies agree to comply in the context of conventional or anticipated terminations of proceedings against them (agreements, settlements or commitments, among others). Thus, such measures have been dictated in countries such as the U.S. 131 , Brazil 132 and Chile 133 .

Apple v. United States of America

The District Judge of the State of New York found the company Apple Inc responsible for having provided information to fix prices in the e-book market.

The District Judge imposed an injunction that included four aspects: (i) prohibited conduct, (ii) required conduct, (iii) the designation of an **Antitrust Compliance Officer**; and (iv) the designation of an **external compliance monitor**.

- Deliver a copy of the judgment to the senior management of the company and the employees involved, directly or indirectly, in the operation of the iBook Store.
- Make sure that all people involved in the operation of iTunes and the App Store receive adequate training on the requirements and scope of the judgment issued.
- Obtain a statement from those involved, certifying that they are informed of the content of the judgment and their willingness to comply with it, in addition to not having become aware of violations of what is stated in the judgment or any other anti-competitive conduct.
- Conduct an annual audit on antitrust matters.
- Inform Apple employees that they can communicate about the possible violation of the scope of the sentence or the antitrust laws.
- Take immediate action upon learning of a possible violation of the requirements of the judgment or the rules of free competition.

On the other hand, the **designation of an external compliance monitor** was intended for the Court to select a person outside the structure of Apple Inc, in order to guarantee that it complies with the ordered corrective measure.

Source

13-3741-cv, United States of America v. Apple Inc. United States District Court of New York, July of 2013.

13-3741-cv, 13-3748-cv, 13-3783-cv, 13-3857-cv, 13-3864-cv, 13-3867-cv, United States Court of Appeals for the Second Circuit, August of 2014.

 $[\]textbf{128} \ \ \text{See section 25 of the Competition Act}.$

¹²⁹ The Commission ended the administrative sanctioning proceeding by approving the settlements submitted by 15 shipping lines investigated for alleged horizontal agreements, to fix prices or commercial conditions for the maritime shipping service of freight containers between 2009 and 2013. See Resolution 035-2017/CLC-INDECOPI and the Technical Report 027-2017/ST-CLC-INDECOPI.

¹³⁰ The Commission approved the settlement achieved between the Technical Secretariat and the companies Amcor Rigid Plastics del Perú S.A. and San Miguel Industrias PET S.A., which were investigated by an anti-competitive practice in the form of customer allocation in the 'spot' segment of the PET plastic packaging preforms market, during 2008 and 2016, nationwide. See Resolution 10-2019/CLC-INDECOPI and 11-2019/CLC-INDECOPI.

¹³¹ The United States Court of Appeals for the Second Circuit ordered Apple, as an injunction measure, to implement a Competition Compliance Program in order to improve its illicit prevention system in this area and to assign a monitor to ensure compliance with the measure. See: https://www.justice.gov/atr/case-document/file/624326/download

¹³² In the case of the fuel cartel, the Brazilian Competition (Conselho Administrativo de Defesa Economica – CADE) ordered under the framework of a settlement agreement, the implementation of a Compliance Program. See: http://en.cade.gov.br/press-releases/cade-signs-agreement-in-cartel-investigation-regarding-the-market-of-fuel-resale-in-the-federal-district

¹³³ In the case of the tissue paper cartel, the Free Competition Court of Chile dictated the Company CMPC Tissue S.A., as an additional measure to the imposed fine, the obligation to adopt a Compliance Program that satisfies the requirements set out in the "Guía de Programas de Cumplimiento de la Normativa de Libre Competencia" (elaborated by the Fiscalía Nacional Económica of Chile). See: https://www.fne.gob.cl/wp-content/uploads/2017/12/SENTENCIA-N160-2017-TDLC_2.pdf. The Supreme Court confirmed this measure on January 6, 2019. Available at: https://www.fne.gob.cl/wp-content/uploads/2020/01/sent_cs_01_2019.pdf



9. ADDITIONAL CONSIDERATIONS MADE BY THE COMMISSION WHEN THE OFFENDING COMPANY HAS ALREADY ADOPTED A COMPLIANCE PROGRAM

It may be the case that, when determining the dictation of an injunction measure consisting of the implementation of Compliance Programs against an infringing company, this one has already a Compliance Program in progress. In this scenario, the Commission will analyze the reasonability and proportionality of such measure¹³⁴, so that certain elements of the Program that are considered appropriate can be maintained; and that the Program can be strengthen or complemented in its most deficient areas.

When the parties invoke the existence of a Compliance Program, the Commission shall carry out an assessment in which it shall verify, among other aspects:

- (i) The role of the Program in relation to the infringement, in order to verify its effectiveness. For example, if it allowed the infringement to be warned or reported in a timely manner to the competition authority.
- (ii) The pertinence of the Program components with those essential components developed in sections 4 and 6 of this Guide, as applicable.

In accordance to the analysis carried out, the Commission may order the company to adapt its Compliance Program to the essential components developed in this Guide.

In all cases of infringing companies¹³⁵, the Commission considers, in accordance with its previous decisions, that the Compliance Officer must have knowledge or experience in competition matters and guarantee independency withing the exercise of her functions, so that the Compliance Program can be suitably implemented and reduce the risk of infringements such as the sanctioned.

Shipping liner companies case

In 2018, the Commission sanctioned six transnational shipping companies ¹³⁶ for having incurred in customer allocation (manufacturers or importers of cars and trucks) in the market of maritime transport of vehicles of various brands, between 2001 and 2012.

The infringing companies, **as of the decision date, had already implemented Compliance programs abroad.** In addition, certain difficulties were identified for the Technical Secretariat and the Commission to administer a compliance program in relation to non-national headquartered enterprises.

As a result, an injunction was issued to inform the Commission of the components of the Compliance Programs adopted by the companies to prove within 30 working days (consented or confirmed the resolution) and, if applicable, to report on the specific actions in order to inform its officials of the importance of complying with competition regulation and to detect and counter risks of non-compliance with such regulations. If the companies had not demonstrated the adoption of these actions within the time limit, the Commission would impose the terms of the Compliance Program.

Source: Commission for the Defense of Free Competition, 2018, Resolution 030-2018/CLC-INDECOPI from May 14, 2018 (On appeal).

¹³⁴ In accordance with the criteria established on section 47 of the Competition Act.

¹³⁵ It is also applicable to settlements and commitments cases.

¹³⁶ See: Resolution 030-2018/CLC-INDECOPI from May 14, 2018 (On appeal).



In addition, as part of the enhanced Compliance Program, the Commission may require the infringing companies to introduce notification mechanisms to the Technical Secretariat, which can be activated in the event of risks or potential breaches competition regulations. The notification should be made in the shortest possible time and must include the report of the actions that were implemented or that are going to be implemented.

Finally, the Commission may consider necessary to order the designation of an External Compliance Monitor ¹³⁷, in cases of special complexity and severity. The designated official would have the function of monitoring the implementation of the Program adopted by the company, in an external way to the organization, and reporting to the Technical Secretariat. In this way, the Monitor performs additional supervising work to that of the Compliance Officer or Committee that reports directly to the company¹³⁸.

10. SYNTHESIS: EFFECTIVE COMPLIANCE PROGRAM

As noted, these guidelines are not mandatory; consequently, companies are not required to have a Compliance Program. However, the adoption of this Program is highly recommended in light of the benefits they can bring to the company and its business partners, as well as to consumers and society as a whole.

Although companies are free to define the scope of their Compliance Programs, as well as the procedures and methodologies for their implementation, this Guide has proposed essential and complementary components of a Compliance Program model.

The essential components identified are the following:

- (i) Real commitment to comply from the senior management.
- (ii) Identification and management of current and potential risks.
- (iii) Internal procedures and protocols.
- (iv) Training for employees.
- (v) Constant update and monitoring of the Compliance Program.
- (vi) Audits on Compliance Program.
- (vii) Procedures for consultations and complaints.
- (viii) Designation of a Compliance Officer or Committee.

The complementary or optional components that may increase the effectiveness of Compliance Programs are the following:

- (i) Competition Manual.
- (ii) Incentives for employees.
- (iii) Disciplinary measures.

In addition, these guidelines recognize the need to establish special provisions for small and medium-sized enterprises (SMEs), taking into account their particular characteristics. In this regard, the Compliance Program model for these organizations includes the following essential components:

- (i) Actual commitment to comply.
- (ii) Risk identification.
- (iii) Training program.
- (iv) Compliance Officer, whose duties may be exercised by a senior official of the company,

¹³⁷ For the designation of an External Compliance Monitor, it is recommended to consider the same requirements applicable to the selection of Compliance Officers, in terms of incompatibilities and the required profile for the tasks to perform.

¹³⁸ For reference, we can observe the functions that the District Court of New York attributed to the External Monitor in Apple vs. the United States of America (13-3741-cv, United States of America v. Apple Inc. United States District Court of New York, July 2013); and the contents of the Report of the External Compliance Monitor prepared by this designated Monitor



On the other hand, it should be noted that one of the most important benefits of Compliance Programs is their infringement prevention potential of competition regulations. However, even if the infringements occur, the Compliance Program will allow the company to discover and stop the infringement at the earliest stage, to collaborate in a timely manner with the authority, and even to be benefited from an exemption or reduction of the fine.

Finally, if the nature of the program allows it and without affecting its effectiveness, the Commission promotes for the Competition Compliance Program to be incorporated into a more comprehensive program that simultaneously addresses the management of non-compliance risks and other matters (e.g. money laundering, corruption of officials, tax and the environment, among others).

Annex E introduces in a succinct and didactic manner the set of Good Practices related to the implementation of Compliance Programs contained in this Guide.

11. HOW TO CONTACT THE AUTHORITY

For queries about the scope of these Guidelines, any person can contact the Technical Secretariat, Monday to Friday, from 8:30 a.m. to 5:30 p.m., through the following means:

Phone: (+511) 2247800, Extension 3101 Email: st-clc@indecopi.gob.pe Address: Calle de la Prosa 104, San Borja, Lima 41

ANNEXES:

ANNEX A: Competition Manual Model.

ANNEX B: Check-list for the analysis of the Compliance Program effectiveness (Large Enterprises).

ANNEX C: Check-list for the analysis of the Compliance Program effectiveness (SMEs).

ANNEX D: Check-list for the analysis of the implementation of a Compliance Program as a fine mitigation

mechanism.

ANNEX E: Good practices related to the implementation of Compliance Programs



REFERENCES

- ADMINISTRATIVE COUNCIL FOR ECONOMIC DEFENSE BRASIL, "Guidelines Competition Compliance Programs. Guidelines on the structuring and benefits of adopting competition compliance programs". Available at: http://en.cade.gov.br/topics/publications/guidelines/compliance-guidelines-final-version.pdf/view
- AIRMIC, "A structured approach to Enterprise Risk Management (ERM) and the requirements of ISO 31000". Available at: https://www.ferma.eu/app/uploads/2011/10/a-structured-approach-to-erm.pdf
- ALMUNIA, Joaquín, "Compliance and Competition Policy. Discurso presentado en "Businesseurope & US Chamber of Commerce. Competition conference", 2010. Available at: http://europa.eu/rapid/press-release SPEECH-10-586 en.htm?locale=en
- ASSOCIATION OF INSURANCE AND RISK MANAGERS IN INDUSTRY AND COMMERCE, "A structured approach to Enterprise Risk Management (ERM) and the requeriments of ISO 31000", 2010. Available at: https://www.theirm.org/media/886062/ISO3100_doc.pdf
- BULGARIAN COMMISSION FOR THE PROTECTION OF COMPETITION. UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, "Guidelines for implementing competition advocacy". Available at: https://unctad.org/meetings/en/Contribution/ccpb SCF_AdvocacyGuidelines_en.pdf
- BUSINESSEUROPE, "Business Compliance with competition rules", 2011. Available at: http://ec.europa.eu/competition/antitrust/compliance/businesseurope_compliance_en.pdf
- CHIEF OFFICERS ROUND TABLE, "Annex 2 CLO Compliance "Blue Print" and covering letter", 2010. Available at: http://ec.europa.eu/competition/antitrust/compliance/clo_blue_print_en.pdf
- COMITTEE OF SPONSORING ORGANIZATION OF THE TREADWAY COMMISSION (COSO), "Fraud Risk Management Guide", 2016. Available at: https://www.coso.org/Documents/COSO-Fraud-Risk-Management-Guide-Executive-Summary.pdf
- COMPETITION AUTHORITY (AUTORITÉ DE LA CONCURRENCE) FRANCE, "Framework-Document of 10 February 2012 on Antitrust Compliance Programmes", 2012. Available at: http://www.autoritedelaconcurrence.fr/doc/framework_document_compliance_10february2012.pdf
- COMPETITION AND MARKETS AUTHORITY (AUTORITA GARANTE DELLA CONCORRENZA E DEL MERCATO) ITALY, "Guidelines on Antitrust Compliance", 2018. Available at: https://en.agcm.it/dotcmsdoc/guidelines-compliance/guidelines-compliance.pdf
- COMPETITION BUREAU CANADA, "Corporate Compliance Programs", 2015. Available at: https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03927.html
- CRIMINAL DIVISION OF THE U.S. DEPARTMENT OF JUSTICE AND THE ENFORCEMENT DIVISION OF THE U.S. SECURITIES AND EXCHANGE COMMISSION, "A Resource Guide to the U.S. Foreign Corrupt Practices Act", 2012. Available at: https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf
- DENG Ai. "From the Dark Side to the Bright Side: Exploring Algorithmic Antitrust Compliance". Nera Economic Consulting, 2019. Available at: https://www.nera.com/content/dam/nera/publications/2019/PUB_AT_Algorithmic-Compliance.pdf



- EUROPEAN COMMISION, "Compliance matters. What companies can do better to respect EU competition rules", 2012. Available at: https://publications.europa.eu/en/publication-detail/-/publication/78f46c48-e03e-4c36-bbbe-aa08c2514d7a/language-en
- INTERNATIONAL CHAMBER OF COMMERCE, "The ICC Antitrust Compliance Toolkit", 2013. Available at: https://cdn.iccwbo.org/content/uploads/sites/3/2013/04/ICC-Antitrust-Compliance-Toolkit-ENGLISH.pdf
- INTERNATIONAL CHAMBER OF COMMERCE, "The ICC antitrust compliance toolkit. Practical antitrust compliance tools for SMEs and large companies", página 34. Available at: https://cdn.iccwbo.org/content/uploads/sites/3/2013/04/ICC-Antitrust-Compliance-Toolkit-ENGLISH.pdf
- INTERNATIONAL CHAMBER OF COMMERCE, "Reglas de la ICC para combatir la corrupción", 2011. Available at: https://iccwbo.org/content/uploads/sites/3/2011/11/Reglas-de-la-ICC-para-Combatir-la-CorrupciC3B3n.pdf.
- INTERNATIONAL CHAMBER OF COMMERCE, "Promoting Antitrust Compliance: The Various Approaches of National Antitrust Authorities". Available at: http://ec.europa.eu/competition/antitrust/compliance/icc_comparative_study_en.pdf
- INTERNATIONAL CHAMBER OF COMMERCE, "Compliance as an antitrust law enforcement tool". Available at: http://ec.europa.eu/competition/antitrust/compliance/icc_compliance_general_en.pdf
- INTERNATIONAL CHAMBER OF COMMERCE Commission on Anti-corruption. "ICC Guidelines on Whistleblowing", 2008. Available at: https://iccwbo.org/content/uploads/sites/3/2008/06/ICC-Whistleblowing-Guidelines.pdf
- INTERNATIONAL COMPETITION NETWORK, "Anti-Cartel Enforcement Manual", 2012. Available at: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_ACEMAwarenessOutreachCompliance.pdf
- INTERNATIONAL COMPETITION NETWORK, "Report on the Agency Effectiveness Project. Second Phase Effectiveness of Decisions", 2009. Available at: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/AEWG_AEReportDecisions22009.pdf
- INTERNATIONAL COMPETITION NETWORK, "Ethics Rules in Competition Agencies. ICN Agency Practice Manual", 2016. Available at: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/AEWG_APMEthics.pdf
- INTERNATIONAL COMPETITION NETWORK, "Competition Agency Practice Manual. Chapter 2: Effective Project Delivery", 2012. Available at: https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/AEWG_APMProjectDelivery.pdf
- NATIONAL INSTITUTE OF QUALITY (INACAL), Norma Técnica Peruana NTP ISO 19600-2017. Sistemas de gestión de cumplimiento. Directrices, 2017.
- NATIONAL INSTITUTE OF QUALITY (INACAL), Norma Técnica Peruana NTP ISO 31000-2018. Gestión del riesgo. Directrices, 2018.
- MC ADAMS, Richard H. y Thomas S. ULEN. "Behavioral criminal law and economics". En: "John M. Olin Program in Law and Economics Working Paper N. 440-2008".



- MURPHY, Diana E., "The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics", 2002. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=358741
- OFFICE OF FAIR TRADING UNITED KINGDOM. "Howyour business can achieve compliance with competition law", 2011. Disponible en: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/ attachment data/file/284402/oft1341.pdf
- ORACLE Big data, Intel Inside. "Meeting the challenge of Big Data: Part Two". Available at: https://www.oracle.com/webfolder/s/assets/ebook/bigdata2/index.html
- ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), UNITED NATIONS OFFICE ON DRUGS AND CRIME (UNODC), WORLD BANK GROUP, "Anti-Corruption Ethics and Compliance Handbook for Business", 2013. Available at: https://www.unodc.org/documents/lpo-brazil//Topics_corruption/Publicacoes/2013_Anti-CorruptionEthicsComplianceHandbook.pdf
- ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), "Competition Law Compliance. Antitrust Compliance and Corporate Governance". Paper presented in Moscow, 2 January 2017. Available at: https://www.oecd.org/corporate/ca/Competition-Compliance-English.pdf
- ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), "Policy Roundtables. Promoting Compliance with Competition Law", 2011. Available at: http://www.oecd.org/daf/competition/ Promotingcompliancewithcompetitionlaw2011.pdf
- ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OCDE), "Promoting compliance with competition law: Do compliance and ethics programs have a role to play?", 2011. Available at: http://www.oecd.org/regreform/sectors/48849071.pdf
- ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OCDE), ""Behavioural insights and public policy. Lessons from around the world", 2017. Available at: https://read.oecd-ilibrary.org/governance/behavioural-insights-and-public-policy_9789264270480-en#page125
- ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OCDE), ""Behavioural insights. Reducing water consumption", 2017. Available at: http://www.oecd.org/gov/regulatory-policy/Bl%20cards%20ll%20to%20lv.pdfpolicy_9789264270480-en#page125
- ROTTNER, Shira. "Three ways artificial intelligence improves compliance", 2019. Available at: https://a-teaminsight.com/three-ways-artificial-intelligence-improves-compliance/?brand=rti
- SANKO, P. Clinton. "Protecting Privilege of the Corporate Compliance Officer". April 12, 2017. Available at: https://www.bakerdonelson.com/protecting-privilege-of-the-corporate-compliance-officer
- SOCIETY OF CORPORATE COMPLIANCE AND ETHICS Y HEALTH CARE COMPLIANCE ASSOCIATION, "Compliance Effectiveness Survey 2016". Available at: https://assets.corporatecompliance.org/Portals/1/PDF/Resources/Surveys/2016-compliance-effectiveness-survey-report.pdf?ver=2016-09-26-073541-920
- SOCIETY OF CORPORATE COMPLIANCE AND ETHICS. "Using Incentives in your Compliance and Ethics Program", 2011. Available at: https://assets.hcca-info.org/Portals/0/PDFs/Resources/library/814_0_ Incentives CEProgram-Murphy.pdf



- SPANISH COMPLIANCE ASSOCIATION, "Libro blanco sobre la función de Compliance", 2017. Available at: https://www.asociacioncompliance.com/wp-content/uploads/2017/08/Libro-Blanco-Compliance-ASCOM.pdf
- STEPHAN, Andreas, "Hear no evil, see no evil: Why Antitrust Compliance Programmes may be Ineffective at Preventing Cartels", 2009. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1432340
- THE NATIONAL ECONOMIC PROSECUTOR (FISCALÍA NACIONAL ECONÓMICA) CHILE, "Programas de cumplimiento de la normativa de libre competencia", 2012. Available at: http://www.fne.gob.cl/wp-content/uploads/2012/06/Programas-de-Cumplimiento.pdf
- THE WORLD BANK, ""Promoting tax compliance in Kosovo with Behavioral insights", 2019. Available at: http://documents.worldbank.org/curated/en/747661551725011887/pdf/135032-WP-PUBLIC-Kosovo-Tax-Compliance.pdf
- THE WORLD BANK, "Integrity Compliance Guidelines". Available at: https://siteresources.worldbank.org/ INTDOII/Resources/Integrity_Compliance_Guidelines.pdf
- TRANSPARENCY INTERNATIONAL, "Guía práctica de autodiagnóstico y reporting en cumplimiento normativo, buen gobierno corporativo y prevención de la corrupción", 2018. Available at: http://integridad.org.es/wp-content/uploads/2017/07/TI-Guia-Pract-Autodiagnostico-DIGITAL-1.pdf.
- TRANSPARENCY INTERNATIONAL AND SOCIAL ACCOUNTABILITY INTERNATIONAL, "Principios empresariales para contrarrestar el soborno", 2002. Available at: http://www.ub.edu/compres/documents/transparencia.pdf
- UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, "Strengthening private sector capacities for competition compliance", 2016. Available at: https://unctad.org/meetings/en/SessionalDocuments/ciclpd39_en.pdf
- UNITED NATIONS OFFICE ON DRUGS AND CRIME (UNODC), "An Anti-Corruption Ethics and Compliance Programme for Business: A Practical Guide", 2013. Available at: https://www.unodc.org/documents/corruption/Publications/2013/13-84498_Ebook.pdf
- UNITED STATES DEPARTMENT OF JUSTICE, "Evaluation of Corporate Compliance Programs", April 2019. Available at: https://www.justice.gov/criminal-fraud/page/file/937501/download
- UNITED STATES DEPARMENT OF JUSTICE—Antitrust Division, "Evaluation of Corporate Compliance Programs in Criminal Antitrust Investigation", July 2019. Available at: https://www.justice.gov/atr/page/file/1182001/download
- WILS, Wouter P.J., "Is criminalization of EU competition law the answer?" At: World Competition: Law and Economics Review. Volumen 28, No 2. 2005.
- WORLD ECONOMIC FORUM WEF, "Partnering Against Corruption Principles for Countering Bribery", 2016. Available at: http://www3.weforum.org/docs/WEF_PACI_Global_Principles_for_Countering_Corruption.pdf
- ZIGELSKI, Sabine (Senior Competition Expert OECD Competition Division), "Competition Law Compliance. Antitrust Compliance and Corporate Governance", 2017. Available at: https://www2.deloitte.com/content/dam/Deloitte/ru/Documents/finance/sabine-zigelski-oecd-competition-compliance-26-january-en.pdf



ANNEX A

Competition Manual Model¹³⁹

1. Competition Policy

"The company" promotes and maintains the highest ethical standards within its commercial development and, within the development of its economic activity, acts in strict compliance with the competition regulation, for the benefit of consumers. All members of the organization share this commitment: the senior management, directors, executives and employees in general.

Compliance with competition regulations is applicable, among others, to the following:

- The Company's interaction with its competitors;
- The Company's relationships with its customers and suppliers;
- The Company's participation in the trade associations of which it is a member;
- The Company's interaction with state authorities; and
- The Company's relationships with its employees.

The Competition Manual ("The Manual") aims to foster a culture of compliance with competition regulations, which is primarily reflected in the Competition Act¹⁴⁰.

In this way, it seeks to provide all employees with the necessary tools to understand the competition regulations, identify risks, take actions and, if applicable, report possible breaches of the legislation by any member of the organization.

2. ¿Why is Compliance with competition legislation important?

2.1 Benefits for the market and for consumers

- Peru has a social market economy as its economic system promotes sustainable development through open markets, competitive industries and systems of economic and social inclusion.
- The objective of this economic system is the existence of free and intensely competitive markets, which will be in the capacity to promote economic efficiency and, thus, generate economic growth in the country.
- Efficiency in the development of their economic activity allows companies to offer consumers better products and services at lower prices, to increase and diversify their offer to reach more consumers, and to innovate by developing new products and better alternatives.

2.2 Benefits for the company and its employees

• **Economic benefits.-** Developing in a competitive way allows the Company to generate cost savings, to devote its resources to the most demanded products and services, and to earn higher revenue from its best products or services.

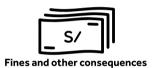
¹³⁹ This Compliance Manual Model is based on the premise that the company possesses a significant market share. In addition, any reference to the Compliance Officer may also be understood as addressed towards the Compliance Committee.

¹⁴⁰ Enacted by Supreme Decree 030-2019-PCM.



- **Reputational improvement.-** Compliance with competition regulations allow the Company to demonstrate the seriousness and responsibility of its performance in the market. In particular, if we take into account that contravening with competition regulations has detrimental effects on consumers. In addition, this image projected by the Company strengthens the confidence of investors, business partners, customers, suppliers and consumers.
- **Prevention of infringements and the costs they generate-** The Company shall avoid assuming the costs of fines, injunctions and civil liability (damages) and even the costs of defending itself in administrative or judicial proceedings arising from the infringements of competition regulation.
- **Reduction of the employee's exposure towards liabilities.-** Employees, in particular those who exercise the management, administration or representation functions of the Company, will be prevented from being punished for their possible participation in anticompetitive conducts¹⁴¹.

2.3 Consequences of infringing the regulation







Sanctions imposed to executives involved in the anticompetitive conduct

• **Fines and damage compensations.** In the event that the Company commits an infringement of competition regulation, it may be subject to fines, injunctions and, subsequently, to pay damages (civil liability). In addition, if the anticompetitive conduct has consisted on participating in a cartel within a public procurement process with the State¹⁴², the Company may be disqualified from participating in other public procurement processes made by the State Procurement Supervisory Agency (OSCE)¹⁴³.

The fine amount may rise up to 12% of the **gross** sales or income received by the Company or its economic group in the immediate year prior to the date in which Indecopi imposes the penalty¹⁴⁴. Such a fine may compromise the profitability of the Company and its future financial viability.

- Reputational damage and collateral consequences. The commission of anticompetitive conducts can generate reputational damages for the Company, which can lead customer losses, business opportunities, investments, sales decreases, market value, as well as hostility from customers and consumers, because they can feel deceived, among other consequences.
- Sanctions of executives involved in anticompetitive conducts.- Employees who exercise the management, administration or representation of the Company, and who are involved in a sanctioning procedure for having participated in the planning, implementation or execution of anticompetitive practices, are likely to be sanctioned by Indecopi. Fines imposed on each of them could reach 100 Tax Units (S/ 430,000.00¹⁴⁵), as determined to be liable for their illicit acts¹⁴⁶.

¹⁴¹ See section 2 of the Competition Act.

 $[\]textbf{142} \ \ \mathsf{See} \ \mathsf{the} \ \mathsf{Guide} \ \mathsf{to} \ \mathsf{fight} \ \mathsf{collusion} \ \mathsf{in} \ \mathsf{public} \ \mathsf{procurement}. \ \mathsf{Available} \ \mathsf{at} :$

 $^{{\}tt https://www.indecopi.gob.pe/documents/51771/2961200/Gu%C3\%ADa+de+Libre+Competencia+en+Compras+P\%C3\%BAblicas/ADa+de+Libre+Competencia+en+Compras+P\%C3\%BAblicas/ADa+de+Libre+Competencia+en+Compras+P\%C3\%BAblicas/ADa+de+Libre+Competencia+en+Compras+P\%C3\%BAblicas/ADa+de+Libre+Competencia+en+Compras+P\%C3\%BAblicas/ADa+de+Libre+Competencia+en+Compras+P\%C3\%BAblicas/ADa+de+Libre+Competencia+en+Compras+P\%C3\%BAblicas/ADa+de+Libre+Competencia+en+Compras+P\%C3\%BAblicas/ADa+de+Libre+Competencia+en+Compras+P\%C3\%BAblicas/ADa+de+Libre+Competencia+en+Compras+P\%C3\%BAblicas/ADa+de+Libre+Competencia+en+Compras+P\%C3\%BAblicas/ADa+de+Libre+Competencia+en+Compras+P\%C3\%BAblicas/ADa+de+Libre+Competencia+en+Compras+P\%C3\%BAblicas/ADa+de+Libre+Competencia+en+Compras+P\%C3\%BAblicas/ADa+de+Libre+Competencia+en+Compras+P\%C3\%BAblicas/ADa+de+Libre+Competencia+en+Compras+P\%C3\%BAblicas/ADa+de+Libre+Competencia+en+$

 $[\]textbf{143} \ \ \textbf{Second Final Supplementary Provision of the Competition Act and Twentieth Third Final Complementary Provision of the Government Procurement Act.}$

 $[\]textbf{144} \ \ \text{See numeral 1 of section 46 of the Competition Act.}$

¹⁴⁵ Tax Unit value in 2020 is S/ 4,300.

¹⁴⁶ See numeral 3 of section 46 of the Competition Act.



3. Competition authorities

The estate entity at the national level in charge of ensuring respect of competition regulation in all the markets, except telecommunications, is the National Institute for the Defense of Competition and the Protection of Intellectual Property ("Indecopi")¹⁴⁷.



Within Indecopi's organization, the Technical Secretariat of the Commission for the Defense of Free Competition ("Technical Secretariat") is the authority in charge of the investigation and prosecution of anticompetitive conducts, initiating and instructing sanctioning administrative proceedings against the alleged perpetrators. The Commission for the Defense of Free Competition ("The Commission") is the autonomous body that resolves such proceedings, declares the liability of offenders and imposes sanctions and the injunction measures that it deems relevant, with the aim of eliminating these illegal practices to promote economic efficiency, for the benefit of consumers.

Technical Secretariat CLC



4. Anticompetitive conducts: ¿What to do and what not to do?

Competition legislation on Peru is mainly contained in the Competition Act, which aims to prohibit and sanction anticompetitive conducts in order to promote economic efficiency in the markets for the welfare of consumers.

This regulation defines the conducts that infringe competition and are punishable, which consist of:

ANTICOMPETITIVE CONDUCTS

Horizontal Agreements: Decisions, agreements, recommendations or concerted practices between two or more competitors regarding a variable of competition in the market ¹⁴⁸. For example, price fixing of the sales price, market shares, limit production, among others.

Vertical Agreements: Decisions, agreements, recommendations or concerted prices between competitors operating at different levels of the production, distribution or commercialization chain, which have the objective to restrict, prevent or distort competition¹⁴⁹.

Abuse of dominant position: Unilateral conducts made by a company that has a dominant position on a particular market and which uses that position to restrict competition for different reasons than a mayor economic efficiency¹⁵⁰.







¹⁴⁷ In the public telecommunications services sector, the authority in charge of this field is the Supervisory Agency for Private Investment in Telecommunications - OSIPTEL.

¹⁴⁸ See section 11.1 of the Competition Act.

¹⁴⁹ See section 12.1 of the Competition Act.

¹⁵⁰ See section 10 of the Competition Act.



Below, certain rules of action are presented for employees when relating to competitors, customers and suppliers. In addition, there are rules to be considered when participating in public procurement processes and trade associations.

4.1. Company interactions with its competitors 151

What to do or not to do when relating with competitors?



Avoid any conversation regarding the company's pricing policies, production costs, promotions, discounts or any other element linked to the final price.

Avoid conversations about preferences or customer service, suppliers or geographical areas; as well as discussions about production volumes or the need to impose production limits or quotas.

Reject, prevent and do not use any sensitive competitor information to determine final prices, distribution and positioning strategies of products and services.

Reject invitations from competitors in order to meet and discuss sensitive commercial information, expressing that such interactions are inconsistent with the company's policy. In meetings where such discussions take place despite the rejection expressed, the employee should withdraw and request it to be recorded in the meeting minutes, if applicable.

Promote a competition culture, avoiding hindering new initiatives and inflows of competitors. Face competitors competitively (better prices, products and services, greater benefits for customers).

Put an end to anticompetitive actions and coordinations such as those indicated, immediately communicating to the Compliance Officer any information available, and facilitating the measures implemented by the Compliance Officer.



Agree on the sales or purchase prices (including maximum or minimum prices, as well as price ranges), discounts or promotions.

Agree to assign or distribute supplier, customers or geographical areas; or agree to reduce or limit production, determine production quotas or supply sources.

Provide or facilitate the exchange of sensitive information (e.g. internal pricing policies, discounts and promotions, cost structure, business or investment plans, customer lists), either directly or through third parties.

Hire or contribute with market research (such as benchmarking) that collect sensitive information from competitors, for later dissemination and thus, facilitate anticompetitive conducts.

Engage in abusive practices or competitive agreements conducts that aim to exclude other undertakings from the market, existing or incoming, including refusals to sale and other disciplinary policies against customers or suppliers.

Withheld to the Compliance Officer, in whole or in part, information about the participation of one or other workers in anticompetitive conducts or coordinations, or prevent the Compliance Officer from implementing the measures it deems appropriate.





Questionnaire 1

If my boss asks me to coordinate and price fix our products with another competitor. What should I do?

- **a.** I use third parties (e.g. customers) to comply the order and leave no coordination trace.
- **b.** I immediately report to the Compliance Officer and request consultancy to respond appropriately, because this conduct would involve the Company in anticompetitive conducts.
- **c.** I report my boss to the police.

Correct answer: (B)



Questionnaire 2

If I voluntarily or mistakenly receive a communication carrying sensitive commercial information (immediate or future prices, cost structures, etc.) from the competition. What should I do?

- **a.** I leave the mail or communication unanswered and continue with my work.
- **b.** I use the information immediately for the benefit of the company.
- **c.** I immediately report to the Compliance Officer, requesting advice to respond appropriately.

Correct answer: (C)



4.2. Company interactions with its customers or suppliers

What to do or do not do when relating with customers or suppliers?



Ensure that potentially sensitive information delivered to the customer or supplier is not disclosed to the competition.

Offer and negotiate the prices and other trading conditions of our customers or suppliers independently, without discriminatory, abusive or arbitrary clauses.

Before introducing or subscribing exclusivity, clauses, of most favored nation, as well as resale and similar conditions with customers or suppliers, inform the Compliance Officer for analysis.

The company's supplier and customer selection criteria are determined without the intervention of competing third parties, they are general and are applied in a non discriminatory manner. When involving exclusivity or other special benefits, inform the Compliance Officer.



Instruct, request or require to one or more customers or suppliers to facilitate the Exchange of sensitive information of the undertaking with third party competitors.

Threaten or unduly pressure customers or suppliers to cut their commercial ties with their competitors, to prevent them from offering or purchasing their products or services.

Impose on customers or suppliers exclusivity conditions, differential treatment or resale prices, without the prior approval of the Compliance Officer.

Establish contractual exclusivity clauses with customers or suppliers that have exclusory effects to other competitors from the market, without the prior approval of the Compliance Officer.





Questionnaire 3

If my boss asks me to agree with a customer (distributor) exclusivity clauses to prevent our competitors from expanding, what should I do?

- **a.** I contact the client and inform him of the exclusivity, indicating that the company will apply sanctions in cases of non-compliance.
- **b.** I contact the customer and inform him of the exclusivity, but I do not indicate any possible sanction in case of non-compliance.
- **c.** I inform my boss that those type of clauses must be previously analyzed by the Compliance Officer, who must give his approval.

Correct answer: (C)



Questionnaire 4

If my boss asks me to threaten one of our suppliers to stop selling products to the competition. What should I do?

- **a.** I threaten, press or otherwise transfer the need to the supplier to stop selling to the competition, as it will lose one of its most important customers.
- **b.** I inform my boss that such actions cannot be complied unless the Compliance Officer has previously given his approval.
- **c.** I inform my boss that i don't feel comfortable fulfilling this work and that I would prefer for this task to be delegated to another worker.

Correct answer: (B)



4.3. Company's participation in public procurement processes 152

The following rules apply mainly to public procurement processes. However, they are also generally applicable to private selection processes in which the company may participate as a bidder.

What to do or not to do when participating in public procurement processes?



Participate in public tenders, independently and competitively, seeking to present technical offers with high quality standards, as well as economically attractive.

Restrict interactions with other bidders in public procurement processes on pre-established formal instances in the procurement's basis and applicable legislation.

Maintain the proper reservation of the technical and economic offers submitted, or to be submitted, as well as the decision to participate or not participate in any public procurement process.

Contact the Compliance Officer in case of doubt about the actions adopted in the context of public procurement processes.



Coordinate with competitors about the technical or economic offers to be submitted in the selection processes, exchange information about these offers, or agree to not submit any offers or restrict them to certain entities.

Maintain, with other bidders, communications related to procurement processes or in the context of informal or outside the envisage instances for the process.

Announce, publicly or by any other means where a competitor may Access, the actions that the undertaking will take in a public procurement process (offer or not offer, increase or decrease its economic offer, etc.).

Hide relevant information to the Compliance Officer about the possible participation of the employees in illegal conducts in public procurements processes.



Questionnaire 5

If a competitor contacts me to discuss an upcoming public procurement process. What should I do?

- **a.** I talk with our competitors freely and smoothly.
- **b.** While I cannot directly inform my competitors, what conduct I will adopt in the public tender, I can inform third parties so that they can communicate my concerns and possible actions in the public tender.
- c. I participate independently and all communication with other bidders shall be restricted to the formal bodies established on the basis of a tender or in the applicable legislation. In addition, in case of any doubt on how to proceed I contact the Compliance Officer.

Correct answer: (C)



4.4. Companies participation in trade associations

Although trade associations play an important role in the commercial and social fields, they could also voluntarily or involuntarily be used to coordinate, decide or facilitate the formation of anticompetitive agreements and other harmful practices to the competition regulation.

In this regard, the following rules should be observed in relation with trade associations¹⁵³.

What to do or not to do when participating in trade associations?



Know and communicate within the association the importance of Compliance with the Competition Act.

Actively participate in the association's meetings and activities aimed at promoting the legitimate interests of the sector. If a meeting discusses an issue that may be contrary to the Competition Act, the employee must record his withdrawal from the meeting and inform the Compliance Program.

Maintain a reliable and up-to-date record, by any appropriate means, of the meeting incidents held within the partnership framework.

Define what information may be sensitive to your organization, in order to ensure its proper treatment and reservation.

Promote the respect of certain criteria such as objectivity, transparency and reasonableness, for the accession requirements to the association and the services it provides, as well as its decisions and recommendations.

Inform the Compliance Officer any action of the association or association partners that may be against the Law.



Celebrate, promote or facilitate the adoption of certain actions that may generate non-compliance risks to the Competition Act, in particular those that have the object or direct effect to eliminate the rivalry between competitors, or unjustifiably exclude third parties.

Participate in the association's activities that seek to coordinate pricing, customers or market policies with competitors.

Prevent association partners or the association itself from recording, by any appropriate means, the incidents of the meetings held within the partnership framework.

Request, receive or transfer sensitive information (e.g. prices) to the association or among association partners, without the existence of a protocol aimed at eliminating non-compliance risks with the Competition Act.

Promote requirement Access to the association or the services it provides, as well as decisions or recommendations, which have the effect of unreasonably restricting competition in your sector.

Hide, destroy or adulterate information that may reveal the existence of illegal conducts made by the association or associates.

¹⁵³ See Guidelines on Trade Associations and Competition, in the following link: https://www.indecopi.gob.pe/documents/1902049/3761587/ Gu%C3%ADa+de+Asociaciones+Gremiales+y+Libre+Competencia.pdf/38048db5-e2fb-7ba0-f889-609f864f7d07





Questionnaire 6

If sensitive information of a participant (immediate or future prices, cost structure, etc.) is discussed in a trade association meeting, on a scheduled or unforeseen way. What should I do?

- **a.** A) I remain silent and take notes of the discussion, wait for the meeting to end and inform my boss about the situation in order to assess what actions to assume.
- **b.** B) I inform the other associates that this discussion does not matches the company's policy and request this posture to be recorded. If this discussion continues, I require my withdrawal to be recorded in the minute for the reasons set out above, and immediately inform my boss and the Compliance Officer.
- **c.** C) I express my discomfort with this situation, but I take note of the information.

Correct answer: **(B)**

4.5. Recruitment of the staff

It is prohibited to request sensitive information from candidates of a competing company in which they have previously worked, in particular to those applying for positions linked to the determination of prices and other competitive strategies of the company. In addition, it is also prohibited to agree with other companies, unjustifiably, to not hire certain candidates or coordinate remuneration policies.

5. Language importance in the company's communications



It is important for all company's employees to be responsible for the language they use in their internal communications and in their relationships with third parties (competitors, customers, suppliers, among others). Improper use of certain words in these interactions can lead to an erroneous idea of the company's competitive behavior or to generate undue expectations for competitors.

Therefore, it is not enough to refrain from engaging in anticompetitive conducts but it is also necessary to avoid using words or phrases that may suggest the participation of the company in illegal conducts. As an example, phrases such as the following should be avoided:

- "Commercial policies needed to order the market"
- "Price orientation towards competitors"
- "Production stabilization for joint growth"
- "Understanding of competitors"





Questionnaire 7

The company sends all employees the following communication: "Management wants to congratulate our sales team for stabilizing the market after a period of aggressive competition". What do you think about this communication:

- **a.** It is positive, because sales department employees have to do everything they can to make profit for the company.
- **b.** It is negative, since it undoubtedly reveals the company's illegal activities.
- **c.** It is doubtful, as written, it could imply that there was an approach with competitors to "stabilize the market". Therefore, I raise my doubt to the Compliance Officer to take appropriate actions.

Correct answer: (C)

6. ¿What to do if you become aware or have doubts about the occurrence of a breach with competition regulation?

6.1 Inquiry line



For any questions about certain conducts that might imply a breach of competition regulations or about the rules set out in this Manual, the "Consultation Line", may be accessible through the established channels (e.g. mail, telephone, Whatsapp or the company's website/intranet).

6.2 Complaints line



The company has a "Complaints Line", which can be accessed through the established channels (e.g. mail, telephone, *Whatsapp* or the company's website/intranet).

The complaints line is available to the company's employees, customers, suppliers or other third parties, who will be timely informed of the existence of this line. It is the obligation of all employees to denounce any situations, which may constitute an infringement of the Competition Act.

Complaints are anonymous, so the company will keep the due confidentiality.

The company shall not retaliate against employees who consult or report any situation that may constitute an infringement of the Competition Act.



6.3 Contact the Compliance Officer

In case of doubts regarding a posible non-compliance, it is recommended for employees to contact the Company's Compliance Officer through the established channels (e.g. mail, telephone, Whatsapp or the company's website/intranet).

7. Collaboration with the authority



- Indecopi may perform surprise dawn raids (not announced) at the premises of the investigated companies, in order to examine and copy documents, conduct interviews and interrogate staff, take photographs or footage; and, in general, to access to any document, database or physical or electronic file that it deems relevant to obtain evidence of the existence of anticompetitive conducts.
- In such case, the company's employee shall facilitate the access of the inspectors to their offices, computers and other sources of information that Indecopi's officials might consider relevant to the investigation, providing the required passwords, identifying the users whose computers must be reviewed and ensuring their participation, if required.

The lack of cooperation with the authority in the context of a dawn raid, as well as those conducts that impede the performance of its functions, constitute a punishable offense up to S/ 4.3 millions¹⁵⁴¹⁵⁵ and is also incompatible with the company's policies. Therefore, employees are encouraged to provide full cooperation.

8. Sanctions in case of non-compliance with the rules established in the Compliance Manual



- Employees who fail to comply with the rules set out in this Manual, the Compliance Program or the Competition Act, shall be subject to disciplinary proceedings.
- Sanctions for this non-compliance are covered by the applicable labour legislation and the company's employment rules.

* * *

¹⁵⁴ Tax Unit in Peru is S/ 4,300.

¹⁵⁵ For more information, see the Guidelines on Dawn Raids.



ANNEX B Check-list for the analysis of the Compliance Program effectiveness (Large companies).

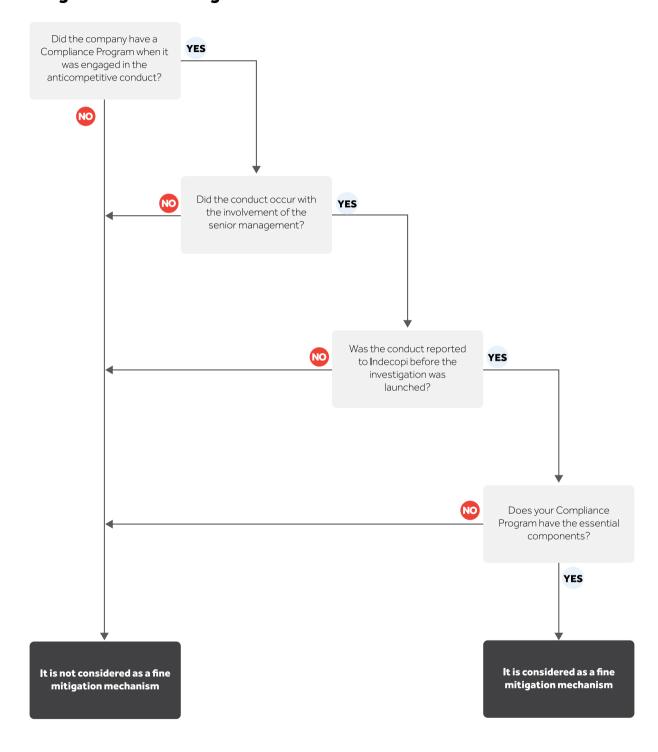
Compliance Program for Large Enterprises	
Have the senior officials <u>implemented concrete actions</u> for the implementation of the Program?	V
Have the <u>necessary resources</u> been allocated?	✓
Have the risks of non-compliance been identified and managed?	✓
Have the <u>commercial practices exposed to higher risks</u> been identified?	✓
Have internal procedures and protocols been established?	✓
Do the approved procedures gather day-to-day operations and identified risks?	✓
Have all employees been trained?	✓
Have a <u>special training</u> been given to those at increased risk?	<u> </u>
Have they <u>been evaluated periodically?</u>	\\\\\\\\\\\\\\\\\\\\\\\\\\\\\\\\\\\\\\
Has the program's performance <u>been reviewed periodically</u> ?	✓
Have the \underline{risks} of $\underline{non-compliance}$ been $\underline{updated}$? Have $\underline{sanctions}$ to the officials responsible for	
the non-compliance?	
Is there a <u>consultations or complaints system?</u>	✓
Is this system <u>confidential</u> and available to all employees?	
Do employees <u>know the protocol</u> to follow in case of Consultation or reporting?	
Has an officer in <u>charge ot the implementation</u> been appointed?	\ \ \
Do you have the necessary <u>training and resources</u> , as well as functional independence?	
Can you <u>report directly</u> to the senior officials?	\checkmark

ANNEX CCheck-list for the analysis of the Compliance Program effectiveness (SMEs).

Compliance Program for SMEs	
Have the senior officials <u>implemented concrete actions</u> for the implementation of the Program?	✓
Have the <u>necessary resources</u> been allocated?	✓
Have <u>risks</u> of non-compliance been identified and managed?	
Have the commercial practices <u>exposed at higher risks</u> been identified?	\checkmark
Have all the employees <u>been trained?</u>	✓
Has a <u>special</u> training been given to those employees at higher risks?	
Have they been evaluated periodically?	\checkmark



ANNEX DCheck-list for the analysis of the implementation of a Compliance Program as a fine mitigation mechanism





ANNEX E Good practices related to the implementation of Compliance Programs

The Commission invokes the companies to consider these guidelines as the minimum basis for the design of their Compliance Programs.

Companies are encouraged to improve the use of these tools and to share their implementation experiences with the Technical Secretariat and the Commission, so that they can be replicated by other companies.

The following is a summary of the elements provided in this Guide and a series of good practices related to the compliance with the essential components of a Competition Compliance Program:

1. Real commitment to comply (tone at the top, tone from the top):

- Responsibility for compliance with the competition regulations, and in particular, the Compliance Program developed for this purpose, rest with the general management and, ultimately, its board.
- General management manifests to the rest of the organization, regularly and expressly, its commitment with the Compliance Program. It also requests a periodic report (e.g. annual) to the managers in the different areas of the organization, with respect to the measures taken based on the objective.
- Plans and reports related to the Compliance Program are reviewed and validated by the general management and the board of directors.
- Penalties for the infringements related to the Compliance Program are proportional to their severity and apply to all the officials in the organization, regardless of their hierarchy.
- Management participates in training activities related to the Compliance Program that are aimed at all the employees of the organization.
- The officer in charge of the proper implementation of the Compliance Program responds directly to the general management and the board of directors.
- The grounds for the removal of an official are expressly and precisely typified in his employment contract.

2. Identification and management of current and potential risks:

- External specialists are regularly hired to carry out audits, which are considered as an input for the identification of potential risks of infringements of the competition regulation related to the activities of the organization.
- Internal and external documents, market data and interviews with officials of different levels within the organization are included in the audits. If possible, third-party interviews with individuals who have a commercial relationship with the companies (e.g. supplier representatives, distributor and sale points) should also be included.
- Resources for the Compliance Program are distributed in a way that the areas of the organization that pose an increased risk of non-compliance are privileged.



3. Internal procedures and protocols:

- The Compliance Program has a written manual that clearly and understandably includes the main aspects of internal procedures and protocols. The manual is distributed to all employees, especially to those exposed to higher risks due to the functions they fulfill.
- The above-mentioned manual is permanently available to all the employees and it is easily accessible. (e.g. on the company's intranet)
- The different procedures, internal protocols and guidelines related to the Compliance Program are distributed to all the employees of the organization through the different internal means of communication (e.g. forums, videos, brochures, e-mails or the intranet), so that they become part of the organizational culture.
- Employees are regularly trained on the different procedures, internal protocols and guidelines related to the Compliance Program.
- Employees are requested an acknowledgement of receipt, in writing or any other electronic mean, attesting the effective delivery of the documents and information related to the Compliance Program.

4. Training for the employees:

- All new employees are informed about the Compliance Program as part of their initial in-company training.
- All the employees in the organization, and in particular those working in areas of higher risks, are trained annually and personally, regarding the implementation of the Compliance Program. Such trainings are reinforced through electronic means.
- Employee participation in the training activities is certified and evaluated in some way
- The trainings are conducted by specialized professionals in competition matters and risk management.
- The training for the employees of the company that may relate to other competitors is reinforced, so that they know the type of information that can be shared in such interactions.

5. Constant update and monitoring of the Compliance Program:

- Monitoring activities are carried out within the company to evaluate the effectiveness and performance of
 the implemented Compliance Program, so possible weaknesses and vulnerabilities can be identified and
 corrected.
- A Management-Link Committee is appointed to follow up the proper implementation of the Compliance Program, as well as the identification of improvement opportunities.
- Each of the actions and initiatives aimed at implementing the Compliance Program are documented, so its continuous assessment and identification of opportunities for improvement are strengthened.



6. Audits on the Compliance Program:

• Audits include field investigations, which verify compliance with competition regulations made by the employees of the company (especially those in charge of the sales), in their interactions with other companies.

7. Procedures for consultations and complaints:

- A procedure for consultations and complaints¹⁵⁶ (e.g. a telephone line or computer system) to be regularly and effectively communicated.
- Appropriate means of communication are established so that workers can make known to their respective supervisors and leaders those conducts or policies of the organization that may contrary to the Competition Act.
- The complaint system is clear and provides at least two procedures: one aimed at regulating channels for employees to make the corresponding complaint internally and another aimed at establishing the steps to be taken by those responsible for assessing complaints.
- It is guaranteed that, in case the complainant is the general manager, the general manager will not be able to know the complaint or participate in its evaluation. In this case, whoever becomes aware and is in charge of the evaluation of the complaints is a higher body such as the Matrix's Management Board in the case of a transnational company.
- Confidentiality is guaranteed in the internal Reporting proceeding, for example, through the implementation of an anonymous hotline.
- An internal investigation is always carried out in the event of a complaint regarding a possible infringement of the competition regulation.
- Employees shall be assured that there will be no negative consequence or retaliation from the company or any other employee, when reporting a potential infringement of the competition regulation or when raising any consultations regarding the Compliance Program.
- The company evaluates the opportunity to have an "Internal Leniency Program", so employees who have participated in unlawful conducts can report internally in a timely manner, provide relevant information to the internal investigation, committing to not participate again in such actions and, for these reasons, not be fired.

8. Compliance Officer or Committee:

- The Compliance Officer or Committee has a team, with the necessary resources for a proper management of the Compliance Program.
- The management of the Compliance Program is carried out through computer systems that allow a permanent monitoring of the company's activities, with an alert system against possible infringement of the competition regulation, among other functionalities.

* * *

¹⁵⁶ International Chamber of Commerce, "The ICC antitrust compliance toolkit. Practical antitrust compliance tools for SMEs and large companies", page 37. Available at: https://cdn.iccwbo.org/content/uploads/sites/3/2013/04/ICC-Antitrust-Compliance-Toolkit-ENGLISH.pdf





www.indecopi.gob.pe