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Competition Compliance Programmes – Note by Peru

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More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/competition-compliance-programmes.htm>.

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1. Agency policies and experience with regard to compliance programs and sanctions

1. Compliance programs consist of a set of internal measures adopted voluntarily by a company to prevent and mitigate the risks of infringing the law. Thus, these programs play a key role within an organization, as they allow to prevent the occurrence of infringements, detect and timely report the risks of non-compliance, among other benefits.

2. It is important to note that compliance programs apply to various areas of law, such as money laundering, corruption, tax, environmental, labor, among others. In this manner, their use has become progressively universal in the framework of promoting the best corporate governance practices, until reaching the competition law field. In this context, compliance programs have -mainly- a triple function: prevention, detection and response to an ongoing risk that may lead to an anticompetitive conduct.

3. The National Institute for the Defense of the Competition and the Protection of the Intellectual Property (hereinafter, Indecopi), as the Peruvian Competition Agency, has not been unaware of the importance that compliance programs have gained in recent years. Indeed, in the experience of the enforcement of the Peruvian Competition Law¹ since 2016, compliance programs have acquired relevance in the administrative sanctioning proceedings. Certainly, when the Commission for the Defense of Free Competition² (hereinafter, the Commission) has reached a final decision at the end of administrative sanctioning proceedings, not only has it imposed fines to the companies that have committed anticompetitive conducts, but has also ordered to the infringing companies -as a remedy measure- the obligation to implement a competition compliance program to mitigate the risks of them engaging in anticompetitive behaviors again in the future.

4. Through competition compliance programs, Indecopi seeks to promote a corporate compliance culture within the companies in accordance with the Peruvian Competition Law, allowing them to identify any risk that may lead to a breach of competition rules.

5. The power of the Commission to order the implementation of compliance programs as a remedy finds its legal basis in Article 49 of the Peruvian Competition Law³. The current

¹ The Law for the Repression of Anticompetitive Behavior was approved by means of Legislative Decree 1034 (2008). The codified version of the Law was approved by means of Supreme Decree 030-2019-PCM.

² It is important to bear in mind that Indecopi is formed by several autonomous bodies, one of them being the Defense of Free Competition Commission, a technical and autonomous body in charge of determining the existence of an anticompetitive conduct and applying the corresponding sanctions. In order to fulfill its tasks in an effective manner, the Commission is served by a Technical Secretariat, entrusted with the initiation of investigations and administrative proceedings regarding anticompetitive conducts.

³ **Peruvian Competition Law**

Article 46.- Remedies.-

46.1. In addition to the sanction imposed for the violation of this Law, the Commission may order remedies leading to the reestablishment of the competitive process or to prevent an anticompetitive conduct to occur in the future, which, among others, may consist of:

a) The termination or performance of activities, even under certain conditions.
 b) According to the circumstances, the obligation to enter into an agreement, even under certain conditions; or,
 c) The unenforceability of an anticompetitive clause or act; or,

text was introduced by Legislative Decree 1396 in September 2018. This statute amended the previous text of Article 49 in order to include as one of the remedies to be ordered by the Commission “the development of training and compliance programs related to competition rules”⁴. It should be noted that the Statement of Motives of this legislative amendment expressly stated that this modification did not mean to increase the powers of the Commission to order remedies, but it rather was a clarification of the powers the authority already had. Based on this legal framework, the Commission has ordered remedies consisting of the obligation to the companies involved in cartels to implement competition compliance programs.

6. The first case in which this type of remedy was ordered was the “Pharmacy chains” case. By Decision 078-2016/CLC-INDECOPI, issued on October 12th, 2016, the Commission sanctioned five pharmacy chains for entering into a price-fixing cartel of thirty-six pharmaceutical products and related products from January 2008 to March 2009. As a remedy, the Commission ordered such companies to implement a competition compliance program for a period of three years. Specifically, the compliance program imposed by the Commission was comprised of the following elements: (i) an annual training in competition rules, aimed to the employees involved in the design, implementation, or supervision of the pricing policy of the company; and, (ii) the identification and mitigation of risks of non-compliance with competition rules. This compliance program was confirmed on appeal by the Specialized Competition Chamber of the Tribunal of Indecopi (hereinafter, the Tribunal), the second administrative instance on competition matters, by means of Decision 0738-2017/SDC-INDECOPI (December 27th, 2017).

7. Later, through Decision 010-2017/CLC-INDECOPI, issued on March 22nd, 2017, the Commission sanctioned Kimberly Clark Perú S.R.L. and Productos Tissue del Perú S.A. for fixing their prices and other commercial conditions in the commercialization of toilet paper and other tissue paper products from 2005 to 2014. As a remedy, the Commission ordered the companies to implement a competition compliance program for a period of five years that, in addition to the two elements indicated in the case mentioned above, included the obligation to appoint a Compliance Officer with extensive knowledge of competition rules, in order to facilitate compliance within the company.

8. These three essential elements of compliance programs were ordered again by the Commission in cartel cases sanctioned by Decisions 099-2017/CLC-INDECOPI, 100-2017/CLC-INDECOPI, 101-2017/CLC-INDECOPI, 049-2018/CLC-INDECOPI and 104-2018/CLC-INDECOPI⁵. In summary, the Commission has required, among other details, that the implementation of a compliance program ordered as a remedy must include the following essential elements:

- a **Compliance training on competition rules for the employees of the company:** for this purpose, the Commission requires the infringing companies to present to the Technical Secretariat of the Commission (hereinafter, the Technical Secretariat)

d) The access to a trade association or an intermediation organization.

e) The development of training and compliance programs related to competition rules.

⁴ Legislative Decree 1396, which amends the Peruvian Competition Law, was published on September 7th, 2018 in the Official Newspaper “El Peruano”.

⁵ Whereas Decisions 099-2017/CLC-INDECOPI, 100-2017/CLC-INDECOPI, 101-2017/CLC-INDECOPI and 049-2018/CLC-INDECOPI have been confirmed on appeal by the Tribunal, a final judgement is still pending on Decision 104-2018/CLC-INDECOPI. For more information, please refer to Decisions 157-2019/SDC-INDECOPI (issued on August 26th, 2019), 171-2019/SDC-INDECOPI (issued on September 12nd, 2019), 225-2019/SDC-INDECOPI (issued on December 10th, 2019) and 138-2020/SDC-INDECOPI (issued on October 30th, 2020).

an annual training plan, which must be taught by a university that has master programs in Competition, Market and/or Regulation matters. In some cases, depending on the characteristics of the sanctioned companies, the training is entrusted to the Technical Secretariat. Moreover, as part of the compliance program, employees must be evaluated to measure the knowledge they have gained during the training sessions.

- b **Identification, mitigation and evaluation of risks of non-compliance with competition rules:** regarding this requirement, each company must propose to the Technical Secretariat a consulting company specialized in risk assessment, with the main task of elaborating a risk matrix. The consulting company must also advise on the measures that should be taken to reduce the risks identified by the risk matrix. In order to evaluate the adequacy of this analysis, the consulting company must prepare an annual report concerning the risks identified and the effect of the mitigation measures that could have been executed. This annual report has to be reported to the senior management of the company, the Compliance Officer and the Technical Secretariat.
 - c **Appointment of a Compliance Officer that facilitates compliance to competition rules:** a Compliance Officer must be proposed by each infringing company, so that the Technical Secretariat can evaluate his or her suitability to such position. In general, this person should have enough knowledge of the Peruvian Competition Law, as well as knowledge in compliance matters. The Technical Secretariat can challenge up to two times the compliance officers proposed by the companies; so that, if a company fails to propose a suitable candidate for a third time, the Technical Secretariat has the power to designate a person to assume such responsibility and the Commission may initiate a sanctioning proceedings for the breach of the remedy imposed. In the same sense, the Technical Secretariat may request the removal of a Compliance Officer and appoint a new one in cases where it is considered that the current one is not fulfilling his or her functions properly. In order to monitor the performance of the program, the Compliance Officer is required to report to both the senior management of the company and the Technical Secretariat of any detected scenario of a possible breach of or risk of non-compliance with competition rules, in a period of three (3) business days after his or her acknowledgement of such event.
9. As aforementioned, the Tribunal has assessed the legality of the compliance programs imposed by the Commission as remedies. When doing so, it has made certain clarifications on the scope of such programs, in particular regarding the following aspects:
- a **Companies that already had a compliance program prior to the imposition of the remedy:** in cases in which the Commission ordered the implementation of a compliance program as a remedy and the infringing companies already had one in progress, the Tribunal held that this scenario did not necessarily imply that those companies were forced to implement an additional one since the elements of the compliance program ordered by the Commission must be understood as minimum conditions to be adopted. Therefore, the Tribunal concluded that such a measure did not affect the freedom that each company had to implement the most appropriate compliance procedures, as long as they do not contravene the minimum standards established in the final decision of the Commission.
 - b **The mandatory appointment of a Compliance Officer and the incompatibilities imposed to carry out the position:** when evaluating arguments based on how costly it could be for companies to appoint a compliance officer, the Tribunal has specified that the Commission has never required infringing

companies to hire a Compliance Officer as a full-time employee, since it is possible for this position to be performed by an external consultant; nor has it established the amount of money that should be paid to the person holding such position. Therefore, the Tribunal concluded that the decision of the Commission in this regard allows each infringing company to adapt the implementation of the compliance program and, specifically, the appointment of a Compliance Officer, according to their particularities (for example, whether the company has a considerable number of employees or not) and financial capabilities.

The Commission has also imposed certain restrictions that infringing companies must observe when choosing someone to hold the position of Compliance Officer. These restrictions bar any person who has been a lawyer, counselor or legal representative of such companies in the previous five years to be appointed as Compliance Officer. In addition, the appointee must not have any familiar relationship with the senior management or the Board of Directors of the company who designates him or her. As a consequence, some parties have questioned that these restrictions might represent a costly and unnecessary burden for small companies.

In response, the Tribunal has stated that such restrictions are justified in the independence and impartiality that is required from a Compliance Officer to properly exercise his or her duties. Indeed, the functions of a Compliance Officer demand an impartial performance, in order to enforce an effective compliance program. In this sense, if the appointee holds any degree of link, bond or kinship with the persons who he or she is supposed to supervise, this could affect the proper execution of his or her work. For that motive, the Tribunal upheld the reasonableness of such restrictions.

- c **The duration of compliance programs:** in its decisions, the Commission has ordered compliance programs to be applied in a period of three to five years, depending of the circumstances of each case. However, infringing companies have argued that such periods lack of justification.

In response, the Tribunal has stressed that the determination of the period in which a compliance program must be applied should take into account the type of anticompetitive behavior that is sanctioned, its length, the involvement of the company's senior management in the conduct, the affected market, the direct impact on consumers, among other criteria. In addition, the Tribunal pointed out that a three to five years' period can be reasonable and relevant for the purposes of maintaining a corporate culture that complies with competition rules, as well as contributing to the reestablishment of the proper functioning of the competitive process and the mitigation of risks of engaging in anticompetitive behaviors in the future.

- d **The duty of the Compliance Officer to report to the Technical Secretariat any breach of competition rules:** parties have questioned the obligation of the Compliance Officer to report any breach of competition rules or any related risk within a period of three business days since its acknowledgment, claiming that such measure would constitute a violation of their right of non-self-incrimination and would turn the Compliance Officer into an “arm of the authority to detect anticompetitive conducts”. In this regard, the Tribunal held that the establishment of such a period is necessary for the Compliance Officer to have a reasonable time to collect information and adopt an informed and well-founded decision. Furthermore, the Tribunal specified that such report does not bind the authority to initiate a sanctioning proceedings against the company nor does it intend to oblige the companies to assume the costs that would correspond to Indecopi in its

supervisory role; on the contrary, it seeks to prevent the companies from engaging in future anticompetitive conducts and being sanctioned again.

- e **A Compliance Officer should be a person from outside the organization and should not be the employee who performs the functions of General Counsel:** in a recently decided case, the Commission rejected the possibility of combining the functions of a compliance officer and the functions of a General Counsel in the same person within an organization, as was proposed by an investigated company. In greater detail, the Commission stated that, although there were reasonable justifications to advocate for a General Counsel to also serve as a Compliance Officer in a company, it finally decided that the separation between the person in charge of the legal area of a company and the one who holds the position of a Compliance Officer is a healthy and desirable practice due to the different objectives that both positions pursue. This becomes more relevant in cases where a violation of the Competition Law has been proven and the measures to prevent the company from engaging again in this type of illegal conduct must be reinforced in order to ensure a real change in the organizational culture of the company⁶. In that sense, the Commission upheld the position that the functions of a Compliance Officer should be performed by a person from outside the organization and different from the employee who performs the functions of the General Counsel. Thus, the Commission ordered the investigated company to hire a new employee to exercise the powers of a Compliance Officer.

This judgement was appealed by the party and one of the questioned aspects referred to the obligation to hire a new Compliance Officer. However, as in previous cases, the Tribunal confirmed the reasonableness of the compliance program ordered by the Commission. Regarding the Commission's decision to order the appointment of a new person as Compliance Officer different from the General Counsel of the company, the Tribunal stressed that such obligation was necessary to meet the independence and impartiality that a Compliance Officer needs to have in order to carry out their functions and tasks in an appropriate manner. Therefore, the Tribunal concluded that a Compliance Officer should be someone different than the employees that already play other roles within an organization⁷.

10. The framework described shows that compliance programs have acquired a main importance in the Commission's decisions issued in administrative proceedings. Nevertheless, these programs have also been applied in settlement decisions adopted by the Commission in recent years. Certainly, Article 25 of the Peruvian Competition Law allows a party to terminate the proceedings in which it is being investigated through a settlement application. In this application, the party must offer remedies aimed at ensuring the reestablishment of the competitive process, as well as reversing the harmful effects of the infringing conduct⁸.

⁶ See section 7.3 of Decision 014-2020/CLC-INDECOPI, issued on May 20th, 2020.

⁷ See Decision 037-2021/SDC-INDECOPI, issued on March 4th, 2021.

⁸ **Peruvian Competition Law**

Article 25.- Settlements

25.1 Within a period of forty-five (45) business days from the date of notification of the Statement of Objections, an investigated party may offer, individually or jointly, a commitment referred to the early termination of the sanctioning administrative proceedings in exchange for implementing effective remedies to offset the effects of the infringing conduct.
(...)

25.3 In order to assess the proposal for a settlement, in a discretionary manner, the Technical Secretariat will take into consideration the fact that the settlement applicants offer remedies aimed

11. Thus, the Commission has interpreted that one of the remedies aimed at ensuring the reestablishment of the competitive process is, precisely, the implementation of a compliance program. For example, in the “Liner conferences case”, where seventeen shipping lines were investigated for an alleged horizontal agreement to fix prices or commercial conditions for the maritime shipping service of freight containers between 2009 and 2013, the Commission accepted a settlement application submitted jointly by all the investigated shipping lines. As part of their offerings, the parties committed to maintain and update their competition compliance programs for a period of three years⁹.

12. Likewise, in the “PET case”¹⁰, the Commission approved the settlement applications submitted by Amcor Rigid Plastics del Perú S.A. and San Miguel Industrias PET S.A., after offering to implement and improve their competition compliance programs for a period of three (3) years. These companies were being investigated for an alleged horizontal agreement to allocate customers in the market of the ‘spot’ segment of the PET plastic packaging preforms, during 2008 and 2016¹¹.

2. Agency initiatives with regard to compliance advocacy

13. As many other competition agencies around the world, Indecopi has not only focused on prosecute and sanction anticompetitive conducts, but has also engaged in an advocacy role which ultimately seeks to prevent companies from colluding again in the future and helping them to understand that a compliance program is not a burden, but an investment and an effective way to strengthen the company’s corporate culture of respect for the Law.

14. As part of this advocacy role, on March 27th, 2020 the Commission approved the “Guidelines on Competition Compliance Programs”¹² (hereinafter, “the Guidelines”). This document, of soft law nature, was elaborated with the purpose of fostering a change within the corporate culture of companies and in the attitude of their employees, through the implementation of effective compliance programs or the improvement of existing ones.

15. While recognizing that companies are free to define the scope of the elements of their compliance programs in accordance with their own needs and characteristics, the Guidelines also stress the importance of companies making a real commitment in applying such programs and not “let them be swept under the carpet”. Therefore, it will be imperative that companies demonstrate that their competition compliance programs have a truthful purpose to comply with the law. An efficient way of doing so is to involve the Senior Management of the company in the enforcement of the program through actions, procedures, and policies that guarantee a culture of compliance.

at ensuring the reestablishment of the competitive process, as well as reversing the harmful effects of the infringing conduct.

⁹ See Decision 035-2017/CLC-INDECOPI, issued on May 8th, 2017 and Technical Opinion 027-2017/ST-CLC-INDECOPI, issued by the Technical Secretariat on April 3rd, 2017.

¹⁰ PET stands for *polietilene terephthalate*, a resin commonly used in the fabrication of clothing and containers for liquids and foods.

¹¹ See Decisions 10-2019/CLC-INDECOPI and 11-2019/CLC-INDECOPI, issued on March 20th, 2019 and the Technical Opinions 020-2019/ST-CLC-INDECOPI and 021-2019/ST-CLC-INDECOPI, issued by the Technical Secretariat on February 20th, 2019.

¹² These Guidelines are available at the following link:

<https://www.indecopi.gob.pe/documents/51771/4663202/Guidelines+on+Antitrust+Compliance+Programs/>

16. The Guidelines' main objective is to develop the minimum essential elements that could be part of an effective compliance program. These elements are the following:

- Real commitment to comply from the senior management.
- Identification and management of current and potential risks.
- Internal procedures and protocols.
- Training for employees.
- Constant update and monitoring of the compliance program.
- Audits on the compliance program.
- Procedures for consultations and complaints.
- Designation of a Compliance Officer or Compliance Committee.

17. Likewise, the Guidelines establish that, upon their own decision, companies may implement certain complementary elements in their compliance programs, in order to strengthen their effectiveness. These components are the following:

- A Competition Manual¹³.
- Incentives for employees who come forward and expose a breach of Competition Law.
- Disciplinary measures for employees involved in breaches of Competition Law
- Notwithstanding the advocacy that the Guidelines do for an effective compliance program, it also acknowledges there is no unique model applicable to every company. Certainly, the Guidelines encourage that compliance programs should be implemented according to the needs and characteristics of each company and its organizational structure, while taking into account the differences based on the size, resources, type of products or services offered, national or international market presence, among other factors.
- This becomes more relevant for companies that have fewer resources, such as small and medium-sized enterprises (SMEs), and might have inconveniences in adopting all the minimum elements in the same way as larger companies. Accordingly, the Guidelines propose that such companies could implement the following elements:
 - Real commitment to comply.
 - Risk Identification.
 - Training programs on competition rules.
 - The appointment of a Compliance Officer, whose duties may be fulfilled by an employee from the Senior Management.

18. The adoption of these minimum elements might prove worthy not only for the aid in diminishing the risks of non-compliance with competition rules, but also because the Guidelines have addressed for the first time the possibility of granting reductions to the fines that could be imposed by the Commission to infringing companies, if they demonstrate they have implemented an effective compliance program prior to the

¹³ It is also important to highlight that these Guidelines include as an “Annex A” a “Competition Manual Model”.

occurrence of the infringement. For this purpose, the Commission must evaluate the following conditions:

- a The compliance program must be comprised of all the essential elements that the Guidelines recommend, in order to be considered an effective compliance program; that is, the eight essential elements for larger companies and the four essential elements for SMEs.
- b The company must demonstrate that the infringement relates to an isolated event. To meet that condition, the infringement must be incompatible with the Compliance Policy of the company and the senior management must not have had any participation in the conduct.
- c In the event of the possible occurrence of an infringement, the company must have carried out an early and serious internal investigation and have taken reasonable actions to stop the infringement in a timely manner. In addition, once the alleged infringement has been discovered through its compliance program, the company must promptly report it to Indecopi, before the authority has initiated any prosecuting action or has been aware of it, especially in order to apply to the Leniency Program.

19. Nevertheless, it should be mentioned that, until the present date, there has not been any case yet in which the Commission has granted a fine reduction based on the existence of an effective compliance program.

20. Finally, it is worth mentioning that Indecopi's efforts to promote a culture of competition compliance has also been extended to trade associations. On August 8th, 2019, the Commission published the “Guidelines on Trade Associations and Competition”¹⁴, with the purpose of making recommendations to trade associations and their associates so that they are able to detect and mitigate the risks of incurring in anticompetitive conducts. Among these recommendations, the Guidelines promote the implementation of competition compliance programs and Codes of Conduct in competition matters within trade associations, as well as the implementation and dissemination of minimum standards that ensure a respectful and ethical interaction between associates and prevent them from engaging in any anticompetitive practice during their daily activities in the association’s agenda.

¹⁴ These Guidelines are available at the following link:
<https://www.indecopi.gob.pe/documents/1902049/3761587/Guidelines+on+Trade+Associations+and+Competition.pdf/682f9c46-6950-7301-cc62-20d2a860dad>