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Competition Compliance Programmes – Note by Chile

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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. This report will address the following aspects regarding the inception of competition compliance programs ("CCP" or "CCPs") as a tool for the prevention and detection of anticompetitive behavior by firms and other economic agents: 1.- Introduction and description of applicable legal framework; 2.- The competition agency´s ("FNE") policy to promote CCPs and other interventions; 3.- The TDLC´s precedents in relation to the implementation of CCPs. Finally, 4.- Examines those decisions related to the legal consequences and effects of adopting and implementing a CCP.

1. Introduction and legal framework for CCPs

2. As the introductory letter[1] for the WP 3 features, CCPs are comprised of sets of internal rules and procedures, guidelines, and training activities that businesses may devise and implement to ensure that all of their employees observe the competition laws applicable to their business activity.

3. In this regard, it is appropriate to state that the focus of these rules is to prevent cartel behavior. Apart from this objective, CCPs could expand to compliance measures in connection with other competition law regulations and prohibitions, including abuses of dominance. In Chile, they may also include standards and limits on contractual covenants that link providers, distributors, or clients with the company, pre-merger control reporting obligations, minority shareholdings filings and interlocking directorates prohibitions.

4. Decree Law No. 211, Chile´s competition statute ("DL 211"), does not consider prescriptions related to CCPs or its effects, nor any other statute or regulation. Therefore, its promotion and fostering has been conducted by the competition authorities in line with international standards developed by other jurisdictions. Other fields of regulations have statutes that relate specifically to compliance measures and its advantages (e.g., consumer protection regulations, environmental law, corporate criminal responsibility).

5. The main source of specific regulations for CCPs, although not binding for companies, was presented by the competition agency ("FNE") in June 2012 ("Guidelines"). In addition, through its decisions, the TDLC has endorsed CCPs, in line with the objectives of encouraging companies to take preemptive measures[2]. TDLC's initial case in which a corrective measure of implementing a CCP was ruled in 2015 (price fixing of doctor´s fees by a professional association[3]). Nevertheless, compliance issues were part of litigation previously. As an example, the TDLC, in a 2011 ruling, set standards related to a compliance "defense" brought forward by a company. The TDLC rejected this allegation in this case and stated that the standard to regulate or monitor compliance by employees requires the implementation of a formal, credible, and effective program[4].

6. The active intervention and advocacy measures promoted by Chilean authorities have been well recognized by companies and stakeholders in general, and the Supreme

[1] Compliance Programs. Feb. 19, 2021 COMP/2021.013.

[2] Chile has a prosecutorial system por competition law infringement in which the FNE investigates and may bring cases before the TDLC, a special and independent tribunal in charge of ruling competition law matters.

[3] Decision No. 145/2015.

[4] Decision No. 115/2011, par. 155.

Court has sided with these efforts upholding rulings that have imposed corrective actions such as the adoption of CCPs in accordance with the Guidelines.

2. Actions to promote CCPs and other interventions

7. The first compliance programs initiative was launched by the FNE in March 2012, to promote efficient and effective mechanisms for infringement prevention and "damage control" by economic agents.

8. The action plan included a preliminary version of the Guidelines open for public consultation and the FNE recognized it had used in its effort the relevant material provided in the 2011 OECD roundtables (Promoting Compliance with Competition Law) and the extensive work of other agencies (form UK-OFT, Australia, Norway, Canada, France, U.S., Turkey), the EC and the International Chamber of Commerce.

9. In June 2012, the Guidelines were approved and published (*Guía "Programas de Cumplimiento de la* Normativa *de Libre Competencia*" [5]).

10. The Guidelines consider the following key aspects:

- They provide directives on the FNE´s standards for CCPs, in a general and abstract manner. The agency stated that these programs are an efficient and effective mechanism for prevention, detection, and control of damage, as they provide internal guidelines on the correct forms of reaction and allow the avoidance or reduction of the negative effects of anticompetitive behavior for both company, and society. If the company provides information and education to employees, it increases the chances of identifying risk situations earlier, and the possibility of taking the necessary measures to avoid or mitigate them in a timely manner.
- They provide guidance on the main advantages of a CCP: a) prevention of incurring into anticompetitive conducts; and, b) detection and control of harm to the company**.** According to the Guidelines the prevention of anticompetitive conducts comprises setting a control network and support scheme for and between employees, which will permit them to precisely acknowledge competition law; to internally promote colleagues to not get involved into such conducts; and to be aware of the internal procedure to report them. Secondly, regarding the detection and control of the negative effects, they permit the company to identify anticompetitive conducts and to promote advocacy into the company.

11. They also describe the benefits the FNE may grant to a firm when it has implemented a compliance program even if it is involved in an infringement: a) the possibility of obtaining a fine reduction; b) to apply for the leniency programs; and, c) to reach an extrajudicial settlement with the FNE which entails the approval of the TDLC through a summary hearing (Art. 39 letter *ñ* D.L. 211)).

12. The CCP must fulfill certain requirements for those benefits to proceed: a) implementation of a serious, comprehensive and in good faith CCP; b) existence of controls within the company and delimitation of the harmful effects resulting from the anticompetitive conduct, and c) the commitment to comply with competition law.

13. Furthermore, enforcement actions led by the FNE have also compelled the adoption of CCP and other preventive measures. Cartel settlements reached before the TDLC have

[5] *Guía "Programas de Cumplimiento de la Normativa de Libre Competencia"*. See https://www.fne.gob.cl/advocacy/herramientas-de-promocion/programa-de-cumplimiento/

included internal codes of conduct to preclude any anticompetitive conduct in the market and avoid "improper" contacts among competitors, in reference to information exchange[6].

3. TDLC´s recent precedents in relation to the implementation of CCPs

14. As described above, the Tribunal has imposed the adoption of CCPs in different cartel cases[7] and these compliance measures have been confirmed during the appeals before the Supreme Court. The most recent case that led to discussion with regard to compliance issues is the 2016 Supermarkets case[8] brought forward by the FNE and decided by the TDLC in 2019.

15. This case led to the imposition of fines upon three supermarket chains for collusion –hub and spoke agreement– and, as a corrective measure, the TDLC ordered the adoption of a CCP that ought to meet, at a minimum, the requirements set out in the FNE Guidelines.

16. This CCP had to include the following measures, most of them to be executed for a term of five years:

- The board of the company shall create a compliance committee with one independent director –from the controlling shareholders–. The committee shall be established in the company's bylaws. Its duties include the designation of a compliance and full-time officer within the company.
- The company shall distribute a copy of the final decision to board members and officers who were responsible for the company´s business conduct, including decisions such as pricing policies; and to those executives who were involved in the conduct. The same individuals were ordered to provide a written certification that each of them has read and understood the terms of the ruling.
- The company shall provide comprehensive training on competition law matters by expert lawyers or economists.
- The company shall conduct internal audits –twice a year– relative to competition law compliance policies. These auditing actions should comprise, at the least: a) reviewing of corporate e-mails and phone call records through corporate telephones; b) monetary incentives included in the employees' contracts; c) involvement in trade associations; d) intervention of the company in quoting or price proposals, and in bidding procedures; and e) the internal competition law compliance program or policy.
- The company shall provide a confidential compliance hot line.
- The company shall report the implementation of the above-mentioned measures before the FNE.

17. All parties appealed the TDLC´s decision before the Supreme Court. These measures were not the subject of discussion before the Supreme Court. The dispute was centered on the effects of the CCPs already in place, according to the defendants. Presented as a compliance "defense", they alleged their mitigating effects or, furthermore, sustained

[6] As described in Decision No. 134/2014 and Decision No. 137/2014 (cartel cases in the interregional bus transportation market).

[7] E.g., Decision No. 148/2015; and Decision No. 171/2019 (car carrier case)

[8] Decision No. 167/2019.

a request of exemption from sanctions. This latest case will be examined in the following chapter.

4. Legal consequences and effects of adopting and implementing a CCP (Supermarkets case)

4.1. Compliance defenses presented by the firms involved

18. The defendants in the Supermarkets case argued that the FNE did not consider its compliance efforts when setting the level of fines requested before the TDLC. They also alleged that during its investigation, the agency did not request information of the companies' compliance efforts.

19. They claimed that a company should not be considered responsible for the behavior of personnel due to existence of an institutional commitment to abide competition law, which was proven by a code of conduct and the respective CCP. They supported their defenses explaining that these programs had been implemented by experts, providing detail of the steps taken.

20. One of the companies involved in the agreement argued that in case the TDLC found grounds to assert responsibility for the infringement, the CCP should be understood as a cause for the exoneration of such liability.

4.2. The TDLC's decision

21. The TDLC held that it is possible to sustain that a company that has implemented a CCP in accordance with the standards that were considered in its ruling, may well be exempt from responsibility. In these cases, the CCP whose execution and implementation has observed certain minimum attributes makes feasible to classify the occurrence of unlawful conduct as events which are impossible to prevent or to prevent with due diligence and, consequently, constituting a cause or grounds to allow exemption of liability[9].

22. Nevertheless, to obtain such exemption, the company must prove that the design of the CCP is reasonable. Ultimately, the TDLC rejected the compliance defense as an exemption but accepted it as a mitigating factor (15% reduction of the fine imposed).

4.3. The Supreme Court´s ruling

23. The Supreme Court upheld the accusation with regard to the infringement. In fact, the fines imposed were raised. In relation to the compliance defense, the Court held that the very existence of a CCP cannot be regarded as an exemption from liability, as this faces a legal obstacle.

24. According to this ruling, exemptions or exonerating circumstances are expressly regulated by law and, in this case, a code of ethics is not considered in DL 211 as a trigger or cause for this effect to proceed. The Court also based its conclusion on the fact that for leniency applications DL 211 expressly contemplates the benefit of an exemption for the company whose application is approved (immunity). Nonetheless, the Court explicitly stressed and promoted the implementation of compliance measures[10].

[9] Decision No. 167/2019, par. 176, 178.

[10] Supreme Court decision, April 8 2020, case No. 9361-2019.

25. Additionally, the Court rejected the mitigating effect of the CCP with respect to the defendant who received a reduction of the fine imposed by the TDLC on the grounds that the CCP was not suitable or effective in complying with its preventive purpose having the company been reprimanded for an anticompetitive conduct as in this case.