For Official Use **DAF/COMP/WD(2011)25**

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development **07-Jun-2011**

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/WD(2011)25
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ROUNDTABLE ON PROMOTING COMPLIANCE WITH COMPETITION LAW

-- Note by the Delegation of Chile --

This note is submitted by the delegation of Chile to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 29-30 June 2011.

English - Or. English

JT03303177

ROUNDTABLE ON PROMOTING COMPLIANCE WITH COMPETITION LAW

-- Note by Chile --

1. Determinants of compliance with competition law: a broader view

1. There are good reasons to claim that society's commitment with competition as a driving force (competition as a value) and as a rule of the game in markets (a rule enforced by law) is political, historical, and socio-cultural specific.

2. First, political specific, because using competition law as an instrument in order to support the commitment to competition is interdependent to general political economy options that have shaped different industries of our economies as well as the economy as a whole. Degrees of harmony or dissonance of competition policy and law with the rest of economic policies vary depending on the level of commitment of those policies to a competitive market[1].

3. Second, historical. For a small and isolated economy such as Chile, our two century experience shows that trade openness to foreign products is crucial. But this seems to be just as important as the traditional path of political power and ownership structure in a country. As a Chilean scholar recently explained, in the 19th century, a relative small number of families had control over a big part of businesses in agriculture, mining, banking, commerce and the media and, at the same time, they were part of the political elite, serving as ministers and congressmen[2]. It is a subject of historical controversy what such a political/ownership pattern meant in terms of economic outcomes, but the pattern existed. And over the years, it has changed in nuances but not in nature. Today, they are no longer just families; they are business groups, with -maybe less explicit but- not less influence in the political sphere[3].

4. Third, socio-cultural specific. Political and historical frameworks generate institutions that shape community values and influence individual behaviour. Compliance with the rules of the game (and abidance to the law, by and large) is not obvious. Rational choice theory, conceiving an a-historical and a-contextual man tells us that compliance with a legal rule is depending on the cost-benefit calculus of the would-be violator. If this is true, talking about compliance is nonsense and we must talk just about

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1 In May 2011, for instance, the Chilean government launched a program aimed at removing several barriers to competition, most of them requiring legal amendments. This is the case, for instance, of opening cabotage (maritime and air transportation between two national points) to foreign companies, so far reserved to Chilean companies. Members of the maritime industry in Chile rapidly opposed to the proposal. The issue shall be solved at a political level. Much more on this can be elaborated when one consider general perspectives regarding trade policies.

2 Lüders, Rolf, "Sistemas Económicos, tecnología y acción oficial en defensa de la libre competencia: Chile 1810-2010" in "La Libre Competencia en el Chile del Bicentenario", TDLC and CLCUC (eds.), Thomson Reuters, Santiago, 2011.

3 Harvard's scholar Michael Porter, in a recent speech in Santiago about Chile, stated: "Big business groups still play a disproportionate role", El Mercurio, B10, May 15th, 2011.

sanctions and remedies[4]. If we care about compliance broadly, on the contrary, we believe that competition authorities and community members in general can contribute to influence the shaping of those community cultural values and, in particular, to influence business community values. We are pretending to reach that grey area of business ethics. To be sure, if competition is not promoted by society from bottom up, but only be imposed by the government, we would be pretending that business community members will change a valid rule among their members (e.g., not to compete at all, limited competition, gentlemen agreements, and so on), by a rule imposed not by society at large, but only by a few government bureaucrats. Competition authorities are too weak for such a challenging task. Hence, involvement of society at large should be achieved.

5. Thus, compliance is political, historical and socio-cultural specific. The broader view presented above complements the traditional view which conceives compliance as a function of sanctions and risk of detection.

2. Determinants of compliance with competition law: the traditional view

6. A major case in competition law captured the attention of the media in 2009. Chilean competition agency, *Fiscalía Nacional Económica* ("the FNE"), filed a complaint against the three major retail pharmacy chains in Chile. Not long after the submission, one of the accused companies settled, confessing the involvement of some of its executives in irregular activities and paying USD 1m for social benefit.

7. This case, still before the Competition Tribunal ("TDLC"[5]) with the remaining accused parties, opened an intense debate about appropriate sanctions and remedies against hard-core cartel conduct. The discussion even justified the submission of a bill before Congress introducing a prison term as a sanction against cartel conduct. The bill is still in discussion. Is a prison conviction an effective determinant of compliance in the future? It is not clear and currently subject to debate in Chile. It is expected to have a clearer consensus on this issue in the following months.

8. Meanwhile, pecuniary sanctions are being imposed against companies and increasingly often against individuals. But pecuniary sanctions do not seem to be an effective deterrent and an actual determinant of compliance. Recidivism is not rare, even in cases of very well-known companies[6].

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4 Becker, Gary, "Crime and Punishment: An Economic Approach", 76 Journal of Political Economy 169 (1968).

5 TDLC stands for *Tribunal de Defensa de la Libre Competencia*.

6 For instance, in Chile, the group *Movistar (*formerly *Telefónica)* was fined three times for dominance (exclusionary conduct) in a period shorter than 4 years. First, a company of the group contractually restrained the development of Voice on Internet Protocol services (TDLC, Ruling N° 45, October 26th, 2006, upheld in part by the Supreme Court. Fine: *circa* USD$ 500.000). Second, a company of the group, by means of raising the price of an essential facility in the upstream market, blocked the development of the technology of converters (mobile boxes) in the downstream market (TDLC, Ruling N° 88, October 15th, 2009, upheld by the Supreme Court. Fine *circa* USD$ 2.7 m). Third, the same company of the first case was sanctioned for tying and bundled discount of services with foreclosure effects for the development of Voice on Internet Protocol services (TDLC, Ruling N° 97, March 4th, 2010, upheld by Supreme Court. Fine: *circa* USD$ 4.5 m). Another example could be taken from the retail industry, which in its strategy to increase financial services directly provided by the same retailers has tried to raise barriers to the entry of banking actors providing financing services for retail products. This happened for the first time during the Christmas 2002 season when the three largest retailer chains blocked the use of banking cards for paying product purchases from retailers in very favorable terms for consumers (Comisión Resolutiva, Ruling N° 704, August 20th, 2003, upheld by the Supreme Court. Fine: *circa* USD$ 180.000 to each company). Two of these retailers were sanctioned again in 2008 accused of blocking a fair, organized

9. The problem neither seems to be the lack of knowledge of the existence of competition law and institutions nor its content. If a company had doubts on whether its planned strategy may infringe competition law, Chilean competition law provides for a non-adversarial procedure, consultative in character, which would help companies to dissipate their doubts. In a recent conference in Santiago, that joined professionals from the corporate governance and competition policy fields, an antitrust attorney explained that due to the costs associated to that consultative procedure and the relatively low fear of detection and prosecution, directors in general, instead of submitting a consultation, prefer to omit it, implement the strategy, wait and see, and pay the fine that may be imposed in the event of prosecution.

10. It seems that the model of man we use for approaching the discussion about compliance is determinant. If we adopt the *homo economicus* approach, sanctions is the only thing that matters. What are the best sanctions would be the sole issue. If we adopt the *homo sociologicus* approach, considerations are broader, and we should identify how to influence individual preferences regarding values.

11. Maybe both approaches can complement each other and trigger actions of competition authorities in both fields. Promoting compliance, by and large, seems to require both kinds of actions, competition law enforcement and competition value creation[7]. Effectiveness of competition authorities cannot rest just on one of those pillars. And if corporate compliance programs bring support to competition authorities' efforts, their effectiveness rest also in both pillars.

3. Corporate compliance programs

12. Corporate compliance programs have not been around for a long time in the public discussion about competition policy and law in Chile. In fact, competition authorities have not implemented any policy and not even issued a statement, neither on their content for ensuring effectiveness nor on their role as an aggravating, mitigating or neutral factor.

13. The FNE is currently in the process of evaluating what approach to take regarding these programs, so this Roundtable is very timely for supporting our decision making.

14. We have been able to identify that there are companies in Chile that do have such programs and others that do not. But so far we have not initiated activities aimed to identify neither what are the specific contents of these programs nor the reasons for their adoption. We have not identified if they are part of a general corporate compliance policy or if they are specific for competition issues. Thus, a potential next step on this issue could be to work closer with the companies having these programs, in order to identify their features, but we are not quiet convinced if the benefits of such initiative are worth the effort.

15. What seems clear for the FNE is that compliance programs should not have the power of exonerating the company from its antitrust liability.

16. A center on competition and regulation affiliated to Universidad Católica in Santiago has been active on competition corporate compliance programs for a while, disseminating the benefits of their adoption[8].

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by a major bank, for selling flat-panel TVs (TDLC, Ruling N° 63, April 10th, 2008, upheld by the Supreme Court. Fine: *circa* USD$ 5m and 3m, correspondingly).

7 Also known as increasing public awareness of the benefits of competition in markets, or creating a 'culture of competition'.

8 References available at: http://www.lcuc.cl/?page_id=564

17. Similar developments have been presented recently in a joint conference in the fields of corporate governance and competition[9]. A speaker made the proposal for certain companies to implement a committee of board members in charge of monitoring compliance on competition law issues. The main tasks of such a body would be to implement codes of conduct, to review periodically company's commercial strategies and their regulatory risks, to assess risks of enforcement of competition law, to analyze competition law issues in which companies from the same industry/sector -or companies with which it interacts- might be involved and, if the company is subject to an order or injunction imposed by the Competition Tribunal, to evaluate it and monitor its compliance.

18. It is also worth to mention that professionals from the fields of ethics and compliance seem increasingly interested in getting training in competition law compliance[10].

4. Final remarks

19. Competition law compliance should rest on two pillars: competition law enforcement and competition value creation. Determinants of compliance are not limited to sanctions. Factors influencing compliance are complex. An important effort competition authorities should deploy is trying to identify these factors.

20. Corporate compliance programs on competition law may be a useful tool for complementing competition authority efforts, but in order to fulfill their tasks with great degrees of effectiveness, these programs should also be built on the two pillars mentioned above. To be sure, executive compensation structures should be aligned with those pillars too.

21. Be too actively involved in the design and implementation of corporate compliance programs could turn in a very complex problem for competition authorities. Companies may pretend to have a free pass or certification once the authority has been involved in their corporate program, which cannot be, under any view, a reasonable conception.

9 References available at: http://www.lcuc.cl/?page_id=2229

10 A series of conferences on ethics and compliance hosted this year by an association of business people considers two sessions on competition law each of them leaded by competition authorities' heads. Reference available at: http://www.generacionempresarial.cl/

ANNEX: RESPONSES TO A SHORT QUESTIONNAIRE

In order to have a rough idea of the state of affairs about compliance programs in competition law in Chile, we requested 4 big law firms with significant competition law practices in Santiago, randomly chosen, to answer a short questionnaire. The answers of three of them are summarized in the following paragraphs.

1. All the respondents said that promoting the design of corporate compliance programs in competition law was a service they had been providing for more than 2 years. At the same time, most of them explained that this service represented a small part of their competition law practice. Only one respondent said that their workload on compliance programs was significant.

2. Respondents identified general compliance with law and regulations -as an institutionalized corporate policy- as the most frequent and main determinant for adopting a corporate compliance program. A competition law enforcement action that had affected the company or another company in the industry was identified as another main determinant. One respondent explained that changes in control often trigger enhancements in corporate polices which give momentum for corporate compliance programs.

3. Describing the kind of activities they perform when promoting compliance with competition laws, they included training of higher executives and medium employees, drafting internal guidelines on compliance and even setting up internal reporting systems. Broader plans designed with the aim of adopting general changes in corporation's culture and structure are not common.

4. As to big firms, a great number of them (over 80%) are willing to adopt some kind of a promoting compliance initiative after the proposal by the law practice, for most of the respondents. The number is inferior for the other respondents who answered less than 40%. As to medium sized firms, the number is even lesser.

5. A final question aimed at getting the respondents' view on compliance of competition law by and large beyond corporate compliance programs. The main driver for compliance, according to two respondents was to implement a public-private partnership aimed at promoting cultural changes within corporations and industries. A change in the structure of sanctions was mentioned by another respondent. No respondent took into account the alternative of modifying compensation structure of higher executives and enhancing internal control systems aimed at deterring anticompetitive practices.