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Guidelines on “Compliance Programs for the Legislation on Free Competition:” An Effort to Promote Free Competition in Markets in Chile

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The first article of the Chile’s Competition Law, DL 211, states: “The present Act has as its main objective to promote and defend free competition in the markets.” To accomplish this objective, it establishes that the Defense of Free Competition Court (“TDLC” for its acronym in Spanish), and the National Economic Prosecutor (“FNE” for its acronym in Spanish) are responsible for enforcement of Act (art. 2 DL 2011)

In this context, the FNE has particularly focused on the defense of free competition and its advocacy.

- In the area of free competition defense, and under the leadership of Felipe Irarrázabal, the FNE has presented six cases of collusion, two on abuse of a dominant position, and one against a merger, which was undertaken without following the procedure of voluntary consultation established in the DL 211.
- In the advocacy field, an important part of FNE actions is focused on creating a competition culture and promoting its compliance.

This article discusses recent activity in advocacy. On June 11, the FNE published the final version of the *Guidelines for Compliance Programs of the Legislation on Free Competition*, in which guidance is given about these services, in both general and abstract terms. The Guidelines describe elements that a compliance program for free competition legislation should contain, with the aim of “providing basic guidance to economic agents, no matter what their size are, for the purpose of identifying their own risks and preventing or reducing them.”

This is the fourth publication of a series of promotional materials created by the FNE, which previously published the *Internal Guidelines for the Analysis of Horizontal Mergers*, the *Internal Guidelines for Researching Investigations and Judicial Proceedings by the FNE*, and the *Guidelines about Fine Exemptions and Reductions in Collusion Cases*. Also, some days after the publication of this Guideline, the FNE published the *Guidelines on Public Sector and Free Competition*, which, together with the *Guidelines on Compliance Programs*, advocate that the State’s main administrative entities assess their own actions from a free competition perspective,

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recognizing that the public sector, acting as a firm or regulator, can affect competition in the market.

The Guidelines describes optimal programs as follows: “The programs are an efficient and effective mechanism for prevention, for detection, and for control of damages, since they provide internal guidance about correctly reacting, thus barring the occurrence or reducing the adverse effects of anticompetitive behavior both for the firm and for society. Providing information and education to workers increases the possibilities of identifying risk situations at an early stage, as well as increases the possibilities to take timely steps to avoid or mitigate them.”

The Guidelines establish four requirements that every Program should satisfy:

1. It underscores that the essence of a compliance program is the creation of a “competitive compliance culture,” that is, that the firm takes on a real and effective commitment to comply with competition legislation.
2. It highlights the need to identify risks, i.e. “the most susceptible areas of actual or potential infractions of competition,” such that actions may be adopted that will allow the control or reduction of such risks. The Prosecutor recommends that economic agents hire expert professionals in competition policy and regulation to undertake a study that will allow the correct identification of such risks, as well as the adaptation of sufficient measures aimed at preventing or mitigating them.
3. It considers the need to “establish and determine the degree to which structures, such as the internal processes of the economic agent, are consistent with free competition rules,” and associate these goals with incentives to give to the firm’s workers.
4. It emphasizes the desirability that high-level officers and directors “have an active participation in the creation, implementation, and development of the Compliance Program” as well as have (in accordance with the degree of market power and with regard to the amount of resources) a person responsible for the compliance program who is solely independent and autonomous within the firm.

Following this, the Guidelines identify four elements that can constitute a compliance program. These begin with an internal Handbook (which implies lower costs and interference but also less effectiveness), then moves to the establishment of incentives and disciplinary measures for those who breach the program (which entail greater intervention, cost, and effectiveness), via training, monitoring, and audits:

1. With respect to the Handbook, the Guidelines state, “A Compliance Program should have at least a written manual which contains the main aspects of the program in a clear and comprehensive way.” This “must be shown to the entire personnel in the entity.” The complaint system described in the Handbook must be “clear, detailed, efficient, and effective,” and must at least consider the following criteria: (i) means by which workers can internally make a complaint, (ii) steps to be followed at every corporate level to receive a complaint, and (iii) ensure confidentiality.
2. The Guideline should emphasize the need to “communicate the scope and meaning of the Handbook” through training, and suggests “creating working groups of similarly situated persons, of similar rank, and exposed to similar risks.” It also recommends the training

“be undertaken by an external professional who has experience in competition subject matter.” Finally, it lists some characteristics that all economic agents should consider when determining the frequency of training.

3. Regarding monitoring and audits that seek to “evaluate the effectiveness and performance,” the Guidelines recognize the possibility that they may either be undertaken by external professionals or by internal heads within the companies, be structured with different frequencies and formats, and highlight the use of econometric tools (*screenings*) in the detection of possible attacks on free competition.
4. Finally, the Guidelines note that the Program can “expressly indicate penalties that the offending employee may accrue,” this is, disciplinary actions. In addition, eventually “it could be convenient to adopt stimulus through incentives to workers.”

In the field of detection and damage control, the Guidelines emphasize “three large benefits: (i) possible reductions of the penalties to be applied, in the context of a requirement before the Court of Defense of Free Competition; (ii) the timely use of the Compensated Dilation benefit, in case of collusion or cartel; and (iii) the possibility of an out-of-court settlement.”

According to the Guidelines, when benefits of complying with the Guidelines are to be considered, the FNE will especially analyze: the existence of the Program; the compliance with the requirements established in different sections of the Guidelines; and other relevant information, depending on the economic agent and market involved, reflecting on the serious, complete, and good faith implementation of the Program, as well as its effectiveness.

Finally, section VI section of the Guidelines analyzes who ought to implement a compliance program. It specifies that any economic agent can transgress free competition; however, it recognizes that the implementation of a Program can be costly and incorporates some suggestions for smaller actors. Without prejudice, it concludes that “economic agents themselves, aware of their characteristics, internal structure, market performance, etc., are the ones best situated to determine the most efficient, practical, and ideal forms or mechanisms for themselves.”

The Guidelines are the result of an FNE effort, working together with economic agents, academics, and other authorities who made timely comments to the draft of the Guidelines. This effort allowed the release of the first promotional material on *A Compliance Program in Chile*, whose use, we hope, will ultimately contribute to the creation of a competition culture in our country.