“The development of compliance programs in Chilean competition law - Taking stock, looking ahead”

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Chilean Competition Tribunal
(*opinions are strictly personal)
The diagnosis
Two undeniable facts
Contending regulatory approaches

Dissuasion

Compliance (& ethics)

Predominant in Latam...
What does dissuasion mean?

- For governments
  - C&C regulation
  - Rules, not standards

- For companies
  - Reactive approach
    - Fines can be “calculated”

- Optimal deterrence (Becker, 1968)
  - The “optimal” level of offenses is >0
  - So, \( S \geq \theta \times g - d \)
The "competition toolkit"

Ex post ("defense")
- Detection + prosecution
- Leniency
  - Wiretapping, dawn raids
  - Resources
- Disuasión
  - Fines
  - Disqualification orders
  - Criminalization
  - Damages
- C&E programmes
- Soft law and guidance
- Other

Ex ante ("advocacy")
- "Optimal deterrence"
Fact #1: Dissuasion is not enough

- Is this the most suitable strategy
  - NO: many negative externalities
- Enforcement is not enough
  - What to do?
- Recruiting the private sector
  - Need for sticks AND carrots
Different risks
"Our competitors are our friend. Our customers are the enemy!"

"People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."

"Cartels are bad!"
Latam prone to cartels?

- Dependence on extractive industries
- Isolation from many world markets"
- Product markets and capital ownership unusually concentrated
- Local market relatively small
- Distant from many major markets and production centres
- Insiders historically a closely confined group
- Well-developed market economy, but...
- ...much of the population operates in a less developed economic environment
- Strongly bipolar distribution of wealth and income
Libor “scandal”:

Hayes claimed he was “confused about everything”, including what rules may have been broken. He added: “So as far as I was concerned any rules I’d broke were like retrospectively being applied. And I wasn’t sure ... Libor wasn’t a regulated product. **We had no compliance training. No rules were outlined to us.**”

“I **knew that was not right**. I blatantly knew I should not have done that. **But I was participating in an industry-wide practice that pre-dated my arrival at UBS and post-dated my departure.**”

(The Guardian, 01.06.15)
Why if you don’t comply?

- Modify or terminate acts, contracts, covenants, systems or agreements
- Modification or dissolution of partnerships, corporations and other legal persons of private law
- Impose fines:
  - Double of economic benefits
  - 30% of sales
  - Up to 60,000 UTA (US$50m aprox)
- Prohibition of contracting with the State (for cartels)
- Incarceration (for cartels)

The highest sanctions in Chilean Law

You can go to jail

You can pay damages for third parties actions
It **does** happen
Multinational firms:
“Think globally, act locally”
Figure 5. Number of cross-border M&A deals: 1995 - 2011
Fact #2: huge competition risks

- Competition law
- Corruption
- Frauds
- Discrimination / harassment
- Environmental

- Lobby
- Conflicts of interest / gifts
- Consumer protection
- Privacy
- Employment
"Can we, just for a moment, Your Honor, ignore the facts?"

There are good reasons for preventing!
What can we do?

Compliance 2.0 - preventing wrongdoing before it starts
Compliance

By risk area

50’s: caso GE

Compliance 2.0

OECD guidance (2010)
What does compliance *really* mean?

Management *commitment* to do the right thing

Management step to make it happen

*It is business management!*

(Perhaps “Compliance Management Systems” instead of “Compliance Programmes”? As in ISO 19,600)
Thoughtful management

(1) Corporate self-policing

(2) Fostering a compliance & ethics culture

(3) Detecting and evaluating risks
A three-part effort

- Firms
- Third-parties
- Government

But mainly an internal effort of firms!
In an email dated May 19, 2000, Mike Brighty, sales director of Hasbro, wrote to Ian Thomson, Hasbro's account manager for Littlewoods:

"Ian... This is a great initiative that you and Neil [Wilson, Hasbro's account manager for Argos] have instigated!!!!!!! However, a word to the wise, never put anything in writing, it's highly illegal and could bite you right in the arse!!!! Suggest you phone Lesley and tell her to trash? Talk to Dave. Mike."

Hasbro Sales Director in UK Toys case – fined £5 million
- CAT Judgment (2004):

Email in the Sevenoaks Survey case (2005) (price fixing of tuition fees in private schools):
- “Confidential please, so we are not accused of being in a cartel”
- Case was settled

Chilean cases are similar (a cartel even in public deeds!)
Where we are

Competition compliance worldwide
Compliance and competition law

- Anti-corruption
- Competition law
What we hear... (too often)

There is an infraction because the programme failed.

The programme was designed to cover up a cartel.

We will recognize programmes only for the future.

If the programme fails, we will increase the fine.

Compliance is only for big firms (too expensive).

Compliance is only for leniency.
Competition authorities are reacting

Scarce recognition

Express recognition

- Canada
- Australia
- UK
- Chile
- Brazil
- Israel
- Singapore
- Austria
- Germany
- Mexico
- US (crim. Div)
- Etc.

+ WB, OECD
FX Spot Market agreement (US v Barclays PLC), guilty pleas, 2015:

“The parties further agree that Recommended Sentence is sufficient, but not greater than necessary to comply with the purposes set forth in 18 U.S.C. §§ 3553(a), 3572(a), in considering, among other factors, the substantial improvements to the defendant’s compliance and remediation program to prevent recurrence of the charged offense.”

(http://www.justice.gov/file/440481/download)
"We can always count on the Americans to do the right thing, after they have exhausted all the other possibilities"
p.10: ‘Does the company use any type of screen, communications monitoring tool, or statistical testing designed to identify potential antitrust violations?’...
Wow, giant step forward!
The Chilean FNE

- Tougher enforcement
- Clear standards: guidelines (2012)
  - Way different than our criminal law system
- Requested compliance programmes on settlements and cases
- Main downside: no CECO (!)
Imposing compliance programmes is not a “sanction”
Specific requirements and details:

- Compliance committee within the Board
- CECO
- Handle copies of the judgement to key persons
- Affidavit
- Training in competition law
- Audits
- Hotline
- Reporting to the comp. agency
Main precedent in Chile (so far)
- Strongest statement supporting compliance programmes

A firm can be exempted from liability
- Not only the fine
- The programme has to be serious, credible and effective
- Its objective must be prevention (of any violation)

Assessment
- The Tribunal decides
  - Based on reasonableness and completeness of the programme
  - Based on design, implementation and application when needed
- Burden is on the firm
What to do
Beyond paper and preaching

- Building blocks:
  - Standards & procedures
  - *Compliance* infrastructure (CECO)
  - *Screening* & delegation
  - Training & communication
  - Auditing/monitoring, reports & constant evaluation
  - Discipline & incentives
  - Appropriate responses & prevention
Some concerns about common statements

- Tone from the top
  - Senior management needs full training
  - Performance evaluations need to take compliance into account
  - They need to be subject to discipline
  - Not “talk at the top”
    - It’s action! Not only saying the right things
Some concerns about common statements (2)

- No “one-fits-all” solutions
  - Basics do still apply
    - These are management principles
  - The idea is “structured flexibility”
    - There is a real role of guidelines
Some concerns about common statements (3)

- Courses and Manuals
  - Training should be
    - results-oriented (videos, apps...)
    - Updated
    - Use cases!
    - Be aware of the results/objectives of mock dawn raids
  - Nobody reads manuals!
    - It depends on the format (check-lists are much better)
    - Competition law (specially on cartels) requires few and simple explanations
Gracias!

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