

T R A N S L A T I O N

I-137/21

**GOVERNMENT OF CHILE
UNDER-SECRETARIAT OF
INTERNATIONAL ECONOMIC RELATIONS**

**CER
RESPONSIBLE BUSINESS CONDUCT
NATIONAL CONTACT POINT - OECD**

FINAL STATEMENT

Walmart & Arpal SpA

Specific Instance

20th May 2021

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1. Introduction

Chile's National Contact Point (hereinafter, NCP) before

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the Organisation for Economic Cooperation and Development (hereinafter, OECD) responsible for the OECD Guidelines for Multinational Enterprises (hereinafter, the Guidelines), reporting to the Responsible Business Conduct Division of the Under-Secretariat of International Economic Relations, is submitting the *final statement* set forth herein.

The *final statement* describes the process and outcomes of the analysis carried out in connection with the specific instance. It is based on information received from the parties and the steps taken by the NCP. Confidential information submitted to the NCP during the procedure has not been used in the preparation of this statement. According to the rules of procedure of the Chilean NCP, they will always prepare a final statement, which is public, whether it was preceded by an Initial Statement or good offices.

The final statement marks the closing of the procedure before the NCP.

2. The Parties

2.1 Background of the submitter

Arpal SpA (hereinafter, the Requesting Party) is an SME of incorporated over 30 years ago, whose business is the manufacture, import and distribution of articles for birthday parties and related celebrations, such as balloons, hats, *piñatas*, cardboard plates, etc. They supplied their products to the D&S enterprise, Walmart's predecessor, and then to the latter, who used to sell them under their "Líder" brand.

2.2 Background of the enterprise

Walmart is a multinational corporation of supermarkets

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originated in the United States, which in 2009 carried out the purchase of Distribución y Servicio (D&S) -now Walmart Chile S.A.- which is the parent company of the Líder supermarket and other supermarket chains. According to their website, with a presence of 60 years in the Chilean market and more than 370 stores, Walmart Chile remains the main player in the national supermarket industry.

3. Summary of the Request

On 6 May 2019, the requesting party submitted a request for review to the Chilean NCP, which mentioned alleged violations of the Guidelines by the enterprise, in connection with chapters II. General Principles, and VIII. Consumer Interests.

According to reports submitted by the requesting party, the alleged violations mentioned in their submission would relate to "undue charges applied by the enterprise." The requesting party declares that, back in 2013, they had been made to sign a contractual agreement with Walmart called Supplementary Particular Agreement or "SPA" (which is integrated with another instrument called TCSG, or "General Terms and Conditions for the Supply of Goods"). This would have been demanded by the latter as a requirement to allow that Arpal continued supplying the goods manufactured or imported by it, thus allowing Walmart to continue selling them under their "Líder" brand.

The "SPA" expressly set forth that Walmart would charge for the item they call "Automatic Goal" or "Automatic Rebate",

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which amounts to 10% of the amount purchased by Walmart from Arpal. This so-called Rebate or Automatic Goal is a charge imposed by Walmart for the preferential display or promotion services of the products they acquired from Arpal. Due to this charge, from 2012 to the filing date, Arpal paid Walmart the amount of CL\$1,180,042,667 for the promotion or rebate services. It was noted that, although Arpal subscribed the "SPA" in 2013, rebate charges allegedly generated from 2012 to date were enforced.

The submission sets forth that their website expressly stated that, with regards to the so-called smaller suppliers – such as Arpal—"they are not applied exhibition charges." Such information would have been ratified by telephone by a Walmart executive working in the "Birthdays and Hardlines" division.

In short, between 2012 and the date of submission, the requesting party would have paid for a "promotion" or "exhibition" service, which, in their opinion, should have never been charged on the understanding that other enterprises of the same category, namely smaller enterprises that supply goods to Walmart, would be exempted from this charge.

In the request for review, the requesting party describes alleged breaches by the enterprise to the following recommendations of the OECD Guidelines:

Chapters mentioned in the request for review:

Chapter II. General Principles: Sections A. 3, 7 and 8

Chapter VIII. Consumer Interests: Section 3

Outcomes expected by the requesting party through the procedure carried out by the Chilean NCP:

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Arpal SpA requests the good offices of the Chilean NCP so that Walmart takes the appropriate measures regarding the following:

- Refund to Arpal by Walmart, of the amounts paid to the latter for exhibition or promotion services ("Rebate"), between 2012 and the date of submission, amounting to the total amount of CL\$1,180,042,667.
- Application of effective self-discipline and management practices that promote a relationship of trust.

4. Summary of Walmart's Reply

By means of a letter dated 10 June 2019, the enterprise replied that they disregard and firmly reject any eventual breaches of the OECD Guidelines for Multinational Enterprises.

In said letter, Walmart Chile states that they received a communication from Arpal on 6 February 2019, requesting the refund of the amount of CL\$1,117,985,509, corresponding to the payments that Arpal would have made between 2012 and 2018, for the concept of automatic rebate. Walmart states that such payments were made by the supplier in accordance with an agreement reached by the parties in the relevant Supplementary Private Agreement SPA) signed by them on 17 April 2012.

On 20th February 2019, Walmart Chile replied to the letter mentioned above, rejecting the request on proper grounds. In the letter, Walmart Chile informed Arpal that it was not possible to accept their request because:

- (i) Such amounts would correspond to collections made within the framework of commercial agreements jointly agreed upon

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by Walmart and Arpal.

(ii) These agreements would be, and would have always been, subject to review and to the possibility of renegotiation, should the supplier so request.

(iii) These charges would fully abide by the commercial terms set forth in the Supplementary Private Agreement subscribed upon by the parties.

Regarding the statement submitted to the NCP by Arpal, Walmart Chile's reply states that in no case have they forced Arpal to sign a contractual agreement, and that said agreements are the product of a bilateral, free, and voluntary negotiation between Walmart and their suppliers. Additionally, regarding the conversation that Walmart Chile executives had with Arpal's representatives, the former states this was an error committed by their executive, since there would be no prohibition for the collection of automatic goal or automatic rebate from smaller enterprises. The enterprise points out that there could be a confusion with the benefit of "no charge for the incorporation of new goods to the assortment available in our supermarkets", which is referred to in the "Good Practices" handbook available on the website.

Here, the enterprise states that they are working to review their website and suppress any section that may generate confusion regarding the rules that regulate Walmart Chile's relationship with their suppliers.

Finally, they offered their full availability to continue participating in the process before the NCP, notwithstanding the fact that is not possible to accept Arpal's request for money

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refund, and they reiterated their willingness to review their commercial relationship to seek new business opportunities.

5. Assessment by NCP on specific instance

During 2019, a series of meetings were held with both parties separately, where interests and expectations were discussed. This way, in accordance with the OECD Guidelines for Multinational Enterprises, after having carried out the background analysis following the criteria set forth in the Procedures for the implementation of the Guidelines, the details of which are shared in this section, the NCP decided not to continue with the analysis of the questions referred to in this Specific Instance.

Is the Chilean NCP the relevant entity to assess the issues raised in the notice?

In this case, the requirements granting competence to the Chilean NCP are met since the background information provided relate to alleged violations by a multinational enterprise taking place in their national territory. However, the situation herein refers to a commercial relationship between private parties, which requires more detail to assess relevance from the Guidelines perspective, as well as the feasibility to contribute positively to the resolution of the issues raised. In this sense, it is noted that this NPC is not able to rule on the central issue mentioned in the submission, namely, the relevance of the exhibition or promotion charges, as raised by the requesting party.

Who are the requesting parties and what are their

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interests?

The requesting party, namely Arpal, is a smaller enterprise enjoying a long business relationship with Walmart and their predecessor, D&S. Arpal claims to have been affected by a "vicious commercial practice" on the part of Walmart, having had to "forcibly pay for an unnecessary exhibition or display service". Their interest is to recover the amounts paid for this concept.

Walmart stated that the conditions agreed in the SPA subscribed with Arpal are the result of an open, free, and voluntary negotiation between the parties, which is in accordance with the provisions of the TCGA. The TCGAs referred to by Arpal -which are published on Walmart Chile's corporate page and are freely accessible to suppliers and the general public- set forth that SPAs are essentially renegotiable if any of the parties states so at the time such agreements are renegotiated, with the only limitation being that Walmart Chile must respect a minimum term of 6 months.

It is noted that, during the process, the requesting party submitted comments and information from third parties after Walmart delivered their reply. The latter, due to the potential impact on free competition matters, is not included in this report.

Regarding Walmart's reply, Arpal insisted that there was a lack of information, including about the possibility of renegotiation, and delivery of contradictory information by Walmart. In addition, they pointed out that they had not had exhibitions and had not been able to agree on new commercial

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proposals in the following years. They also noted that, as from the year 2013, there was a sudden change in their commercial relationship.

In various meetings and contacts held with the requesting party's representatives, the interest of working on other options for possible agreements other than the restitution of money was explored, which would prioritise maintaining the contractual relationship, among other options that are more general than specific. The requesting party was not available to start talks under that broader framework of understanding, as they did not satisfy their main interest.

Is the question raised significant and well-grounded, and in accordance with the Guidelines?

Given their contribution to a favourable business environment, and a harmonious relationship between two enterprises - especially when one of them is multinational enterprise and the other is a smaller domestic enterprise - this instance is, without a doubt, of interest from the general point of view of a responsible business conduct, and specific to the Guidelines. In this case, it is a contractual relationship between a multinational enterprise and a supplier; therefore, there is a connection between the activities of the enterprise and the question raised.

However, the decision to resolve a contractual difference with a business partner in various ways is a sovereign matter for any enterprise or entity, and their eventual relationship with the Guidelines must be analysed on a case-by-case basis. On the contrary, it would be linked to them if the issue had a

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clear component of general interest.

In this case, the requesting party is an enterprise and not a group of enterprises. As this NCP pointed out in *Minera Escondida & Escapes Santander* (2011), reiterated in *TENSA-EIP & Liquidador* (2020), if it were several enterprises, the impact on economic or social progress of a significant scale and magnitude could be the basis for an in-depth analysis of the enterprise's relationship with their suppliers, according to the objectives of the Guidelines.

Considering the background information reviewed -which was kept at sight during the processing of this case- there was no record of the general interest involved in the case under discussion. Therefore, the specific commercial contractual nature of the dispute is clear from the statements submitted by both parties.

Notwithstanding the foregoing, and in the spirit of making a positive contribution to the dispute, the NCP also looked for options to start a dialogue within that broader framework of understanding.

Is there a connection between the activities of the enterprise and the question raised?

Yes, there is a prior commercial relationship between the parties, and the issues raised are connected to the activity of the enterprise -which is multinational enterprise- with one of its SME suppliers.

What is the relevance of the applicable legislation and procedures, including court decisions?

Walmart Chile states that they are obliged to comply with

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the General Terms and Conditions for the Supply of Goods (TCGA), pursuant to an agreement reached with the National Office of the Economic Prosecutor in 2007, in connection with the process followed before the Court for the Protection of Free Competition, under Roll C-101-2006, which was issued by said court on 17 January 2007.

In this regard, during 2020 this NCP held a meeting with the Market Studies Division of the National Office of the Economic Prosecutor, with said entity providing information and technical support.

In what way similar issues, or issues related to this specific case, have been or are being dealt with in connection other local or international processes?

Upon submission, the requesting party filed a claim for compensation for damages, in the Local Police Court of Quilicura for an alleged violation of the Consumer Protection Law. This action led to the Enterprise's decision not to continue participating in this process and to focus their efforts on defending the Enterprise in the judicial process mentioned above.

The requesting party also filed a civil lawsuit against Walmart before the 14th Civil Court of Santiago (case C-30912-2019), based on the charges for rebates, which is an ongoing case. The requesting party states that advertising or promotion services were never provided to Arpal since the products made by Arpal - which Walmart purchased from them to be sold in their establishments- are "private label" products, that is, products that Walmart purchases from them but must bear the "Líder" brand

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label.

Will the review of the issues contribute to the object and effectiveness of the Guidelines?

The Guidelines do not contain a complete detail of the relationship between multinational enterprises and their suppliers.

However, they set forth some recommendations linked to this relationship. Thus, the chapter on general principles and the general references to risk-based due diligence state below some relevant recommendations regarding enterprises to be considered by this NCP, namely:

3. *Encourage the generation of local capacities through close cooperation with the local community, including the interests of entrepreneurs, while carrying out the activities of the enterprise in internal and external markets in a way compatible with the need for healthy commercial practices.*
7. *Develop and implement self-disciplinary practices and effective management schemes that promote a relationship of mutual trust between enterprises and the societies where they operate.*
8. *Promote knowledge and compliance, by the employees of multinational enterprises, with enterprise policies by properly disseminating them, including through training programmes.*
12. *Strive to prevent or mitigate negative impacts, even in cases where enterprises have not contributed to them, if they have a direct link with their*

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activities, goods, or services by virtue of a commercial relationship (...).

In addition, regarding the disclosure of information:

3. *Enterprises are encouraged to post additional information about:*

(a) *statements of principles or standards of conduct designed for public disclosure and, should their importance to the enterprise activities justify it, information about their policies in connection to the issues covered by the Guidelines.*

(c) *their performance in complying with said statements or codes.*

Regarding the chapter on consumer interests, mentioned in the requesting party's submission, the following section is considered as relevant for the case herein:

3. *Facilitate consumer access to out-of-court mechanisms, conflict resolution mechanisms and equitable corrective measures, easy to use, fast and efficient, without unnecessary costs or burdens.*

In its analysis, the NCP could not determine that said chapter was relevant regarding this specific instance since it is a commercial contract for the supply of products, where there is no enterprise-consumer relationship.

This way, even though there are recommendations that can be linked to the relationship between a multinational enterprise and a supplier, based on the other elements for analysis, it was determined that reviewing the issues would not contribute to the object and effectiveness of the Guidelines.

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6. Conclusion

With the available information and after the analysis carried out, it is possible to conclude that there is not enough basis within the Guidelines to give further consideration to the question raised.

Furthermore, the Chilean NCP made efforts to bring positions closer together and to bring a positive contribution to the resolution of the issues raised. Walmart expressed total availability to continue participating in the process and to review the business relationship aimed at seeking new business opportunities, although it was not prepared to accept the request for a refund. Arpal, for its part, was not prepared to start a dialogue in that broader framework of understanding, given that it did not satisfy their main interest, namely, a monetary restitution, thus filing legal actions in that regard. Therefore, a space for contribution was not identified from the point of view of the parties' interests. The foregoing was communicated directly to both parties in a timely manner.

Chile's NCP considers that talks are in themselves a positive action that should be considered as a permanent tool. Indeed, from the point of view of the Guidelines, it is not reprehensible for an agent or natural or legal person to be available to hold discussions, but not to negotiate exactly on the terms requested, because they are convinced that they have acted in accordance with the law. Nevertheless, if it had been a space available for informed talks and for allowing the committed involvement of both parties, the matter could have

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been resolved earlier and, consequently, the dispute could have been prevented.

Based on this point and with the aim to promote continuous improvement considering the background information submitted and the Guidelines recommendations set forth above, the Chilean NCP makes the following observations and recommendations.

6.1 Observations and Recommendations by NCP

The Chilean NCP values the willingness of the parties to analyse their interests and explore options, and concludes this final statement with the following recommendations:

Recommendations of the Chilean NCP for the Walmart Chile

- (i) The existence of the "Supplier Ombudsman" is highlighted as a good practice, focused on being "a formal and open channel to resolve supplier complaints." It would be positive if said channel could also operate as a space to receive enquiries, including on contractual terms, thus reinforcing the approach used to prevent potential differences and enhance permanent dialogue with suppliers. Periodic assessments of the operation of the mechanism are also recommended -including consultations with suppliers- to ensure its effectiveness over time and incorporating improvements if necessary.
- (ii) Similarly, it is recommended that Walmart consider the inclusion of staggered dispute settlement clauses or alternative dispute settlement mechanisms with their suppliers, so that disputes that cannot be resolved by the Office of the Supplier Ombudsman may have an instance of mediation by a third party, without prejudice to ordinary

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legal and/or free competition organisations.

- (iii) Regarding the enterprise workers, recommendations include reinforcing internal dissemination practices through training programmes on enterprise policies regarding the relationship with suppliers, considering the TCGA and good practices associated with suppliers, thus promoting knowledge and compliance of the same.
- (iv) Regarding published information, changes made to the enterprise's website are included under the "Suppliers" tab. In this regard, recommendations include giving greater visibility to the definition of SMEs, considering their incorporation in the section "How to be a Walmart supplier?" and not only in the "Assistance to current suppliers" tab.
- (v) Lastly, we acknowledge that the enterprise took into consideration the directions contained in the Guidelines throughout the process before the NCP. The NCP takes this opportunity to remind the enterprise of the importance of maintaining the implementation of risk-based due diligence processes in the management of the enterprise, according to OECD guidelines.

According to the Guidelines, confidentiality must be kept during the procedure. Information and opinions provided during the proceedings shall be confidential, unless the party concerned consents to the disclosure of the information or views or where confidentiality contravenes the provisions in the

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domestic laws and regulations.

According to the transparency principle governing the NCP duties, the final statements are published in the NCP's website and translated into English, informed, and sent to OECD Working Group on Responsible Business Conduct.

It is noted that, throughout the process carried out in this specific instance, the social context in Chile since October 2019 and the pandemic since March 2020, have had an impact on the processing capacity of the NCP. The understanding of the parties regarding the time elapsed for its formal closure is appreciated.

Before the final statement is issued, the parties are given the opportunity to comment on the draft thereof, bearing in mind that the drafting of the statement is always the responsibility of the NCP, who will decide on the final version of the document.

The Chilean NCP appreciates the participation of both parties, as well as the comments shared by the United States' NCP in the context of this specific instance.

Marcela Paiva Véliz

Chile's National Contact Point to the OECD
Responsible Business Conduct Division - SUBREI

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NCP Chile Secretariat

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ANNEX: Procedure before the NCP

- 6 May 2019 : Request is submitted by Arpal SpA regarding the enterprise Walmart Chile S.A.
- 7 May 2019: NCP acknowledges receipt of submission.
- 7 May 2019: Arpal SpA lawyer submits supplementary background information.
- 20 May 2019: NCP notifies Walmart through Letter No. 2635 of 20 May 2019.
- 29 May 2019: The United States NCP is informed about receipt of the specific instance.
- 11 June 2019: Walmart Chile sends Reply Letter to the NCP.
- 21 June 2019: Walmart Chile reports receipt of the complaint submitted for compensation for damages.
- 17 June 2019: The case is briefly discussed with the United States' NCP.
- 4 July 2019: NCP meeting with Walmart lawyer at Walmart's offices.
- 10 July 2019: Meeting including lawyer, ARPAL representatives and their commercial advisor at NCP's offices
- 23 July 2019: Meeting with lawyer representing Walmart at NCP's offices.
- 25 October 2019: Walmart's lawyer enquires about the status of the process.
- 12 November 2019: NCP replies by pointing out that the country's

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situation has made it difficult to report some progress, and they will be informed when they have news.

27 December 2019: Mail is sent to both parties setting forth that the Final Statement will be prepared during 2020.

27 May 2020: Mail is sent to all parties in specific instance, stating that the NCP is carrying out her work in a teleworking mode, trying to give continuity as far as possible to the tasks, and expressing availability to receive consultations and hold meetings.

29 October 2020: Meeting with the Office of the National Economic Prosecutor.

20 April 2021: A draft of the final statement is sent to both parties, giving 10 days to receive feedback.

3 May 2021: Feedback is received from the requesting party. A meeting is suggested.

4 May 2021: Mail is sent to Walmart, to confirm receipt of draft. The reply is affirmative, indicating that it is under review.

10 May 2021: A meeting is held with the requesting party's lawyer. The deadline to send feedback for both parties is extended until 13 May.

13 May 2021: Feedback is received from both parties.

19 May 2021: Version with final statement is shared with both parties.

20 May 2021: Publication of the final statement is defined,

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and the closure of specific instance is shared
with the United States' National Contact
Point.

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Translated by Pamela Gallardo V., Res. N° 1,703 dated 28 July 2014.

DONE IN SANTIAGO, CHILE, on this 17th day of June 2021.

ORIANA GONZÁLEZ BUSTILLOS

ASSISTANT ADMINISTRATIVE DIRECTOR

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Revised by the Chilean NCP Secretariat, on the 15th day of
July 2021. In case of discrepancy, the Spanish version shall
prevail.