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SANCTIONS IN ANTITRUST CASES

Contribution by Peru

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SANCTIONS IN ANTITRUST CASES

-- Peru --

1. Anticompetitive conducts constitute violations to the Competition Act¹. The Commission for the Defense of the Free Competition (hereinafter, the Commission), its Technical Secretariat (an investigation body) and, on appeal, the Specialized Chamber in Defense of the Competition of the Tribunal of Indecopi (hereinafter, the Tribunal) are the authorities in charge of the enforcement and compliance of the Competition Act in Peru.

2. Sanctions resulting from anticompetitive infringements have, essentially, an administrative nature. Indeed, one of the main tools of the Commission and the Tribunal to promote compliance with the Competition Act is the ability to impose sanctions. A fundamental goal of these sanctions is to have a dissuasive effect for the undertakings, so they will have incentives to comply with the Competition Act.

3. The administrative sanctions that the Commission could impose encompass **fin**es and **corrective measures**.

1. Fines

1.1 General rules

4. In issuing its final decision at the administrative procedure, the Commission can sanction all economic agents, companies or individuals, who have incurred in anticompetitive practices. As a consequence of the 2015 amendment to the Competition Act, the Commission can also sanction those individuals or companies acting as planners, intermediate or facilitators of hardcore cartels, including public officials who, exceeding their powers, promote or facilitate cartels.

5. Depending on the seriousness of the infringement, the Commission can impose fines up to 12% of the income of the offender or its economic group², according to the following table:

Caps applicable on fines

Seriousness of the infringement	Applicable fine (Tax Units ³)	Cap (% of gross income ⁴)
Minor	No more than 500	8%
Serious	No more than 1000	10%
Very serious	More than 1000	12%

¹ The Act for the Repression of Anticompetitive Behavior was approved by Legislative Decree 1034 (2008) and amended by Legislative Decree 1205 (2015).

² Relating to all its economic activities in the year previous to the date of the final decision of the competition authority.

³ 1 Tax Unit equals to PEN 3950 or about USD 1160. The Peruvian «Sol» (PEN) is the local currency. Currently, one USD equals to 3.4 PEN approximately.

⁴ Total sales or gross income earned by the offender, or its economic group, in the year previous to the decision of the Commission.

6. Fines are determined following the criteria established in the section 44 of the Competition Act, specifically:

- Illegal benefit;
- Probability of detection;
- Scope of the restriction;
- Size of the affected market;
- Market shares of the offenders;
- Effect of the restriction on providers and consumers;
- Extent of the restriction;
- Recidivism;
- Procedural misconduct.

7. These criteria are also included in Section 230.3 of General Administrative Procedure Act⁵ (Law 27444), that establishes proportionality as one essential principle that must be followed by every administrative authority in applying sanctions:

8. Reasonability: The authorities shall ensure that the commission of an infringement would not be more advantageous to the offender than to comply with the rules infringed or paying the applicable fine. However, sanctions to be applied **shall be proportionate** to the offense qualified as an infringement and, for purposes of graduation, shall observe the following criteria in the order of precedence here presented:

- The severity of damage to the legal interest protected;
- Resulting financial damage;
- Recidivism;
- Circumstances of the commission of infringement;
- Illegal benefit;
- The intent of the infringer.

1.2 Determination of fines

9. As mentioned, Section 44 of the Competition Act comprised a set of criteria in order to determine the monetary sanctions, such as the expected illicit benefits, the probability of detection, the scope of the restriction, the dimension of the affected market, the market share of the offenders, the actual effects of the restriction, the duration of the restriction, recidivism and the procedural behavior of the undertakings.

⁵ Law 27444 (2001).

10. Taking into account these criteria, the Commission establishes a basic fine for infringements to the Competition Act, using the following formula:

$$\frac{B_{Exp}}{P_{det}} \leq Fine$$

11. In this formula, the basic fine is equivalent to the expected illicit benefit⁶ (B_{Exp}) divided by the probability of detection⁷ (P_{det}) of the anticompetitive conduct. This basic fine might be adjusted according to mitigating or aggravating circumstances that reduce or increase the sanction to the undertakings.

12. The basic fine can then be modified if there are aggravating and mitigating circumstances. For instance, the fines could be reduced if the party recognizes the indictment⁸. By contrast, recidivism or a significant negative effect on the consumers will be considered as aggravating circumstances and will therefore increase the applicable fines. Also, the Tribunal has ruled that the reluctance of the undertakings to collaborate with the authority in the proceedings could be considered an aggravating circumstance⁹.

13. The applicable fine is subject to a discount of 15% if the offender pays the fine and does not appeal the decision of the Commission. When the decisions are confirmed (or not appealed), Indecopi can initiate coercive enforcement proceedings in order to recover the amount owed.

1.3 Confirmation of sanctioning decisions by the Judiciary

14. The sanctions imposed by the Tribunal of Indecopi can be appealed before the judicial courts. In relation to hard-core cartels, by December 2015, decisions by the Tribunal imposing fines that have been appealed to the Judiciary have been confirmed in most of the cases.

1.4 Observation of the proportionality principle

15. According to the above mentioned, the proportionality principle is observed by the Commission, when determining fines, by applying criteria as the illicit benefit expected by the offender for the infringement of the anticompetitive conduct and the probability of detection. As mentioned, with these criteria, the authority determines the basic fines and then modifies it if aggravating or mitigating circumstances are applicable. Finally, in order not to impose disproportionate fines, the sanctions will be imposed considering the caps mentioned before (8 to 12% of gross income of the offenders).

⁶ The illicit benefit would be determined by the authority as the difference between the anticompetitive price and the competitive price, and will consider the duration of the infringement.

⁷ The probability of detection is determined by the difficulty to detect the investigated offense. If there is a difficulty to uncover an illicit conduct, the probability will proportionally increase the applicable fines.

⁸ This mitigating circumstance was recognized by the Commission and introduced, by a 2015 amendment, into the Section 26-A of the Competition Act.

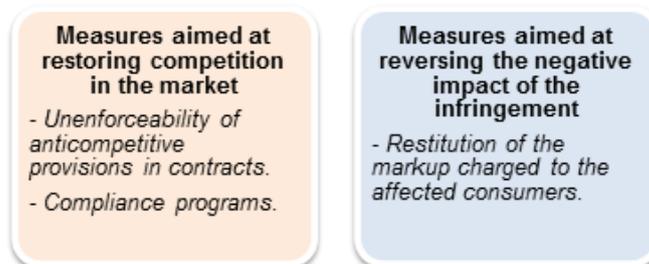
⁹ Decision 069-2010/CLC-INDECOPI, available at:
<https://www.indecopi.gob.pe/documents/20182/143803/Res069-2010.pdf>

Decision 0756-2013/SDC-INDECOPI, available at:
<http://servicio.indecopi.gob.pe/buscadorResoluciones/getDoc?docID=workspace://SpacesStore/969f3d3a-8358-4b38-92ab-98b4cd74b96a>

2. Corrective measures

16. Indecopi may also impose non-monetary sanctions. Indeed, in addition to the fines that the Commission could impose when declaring liability of the offenders, it could also impose corrective measures as provided in Section 46 of the Competition Act (as amended in 2015). Corrective measures are behavioral remedies aimed at reversing the effects of the infringement and restoring competition in the affected markets. The following chart includes examples of each type of corrective measures:

Corrective Measures (examples)



17. The Commission has imposed corrective measures aimed at removing distortions caused by anticompetitive practices in the market. Examples of recent corrective measures that the Commission has imposed are:

1. The obligation of the offending association to inform its members (in the transport of passengers market in the north of Peru) that agreements or recommendations to alter the independence in the determination of prices were prohibited¹⁰;
2. The elimination of anticompetitive provisions in the bylaws of the Peruvian Engineers Association¹¹.

18. It is worth to mention that, regarding anticompetitive behavior in public tenders, the Competition Act provides that bid rigging offenders will be listed by the Supervisory Agency for State Procurement (OSCE) in a registry of disqualified companies. As a result, these companies will be banned from contracting with public agencies.

19. Corrective measures are mandatory. According to Section 48 of the Competition Act, failure to comply with the corrective measures imposed constitutes an independent infringement that may be sanctioned through compulsory fines (of up to 4-times the original fine).

3. Civil damages

20. The agents harmed by the unlawful conduct have the opportunity to fulfill a lawsuit before the courts, claiming compensation for damage caused for anticompetitive behavior. According to the Section 49 of the Competition Act, a civil action for damages could be filed after the final decision by the Commission declaring an infringement to the Competition Act, if appealed, is confirmed by the Tribunal of Indecopi.

¹⁰ Decision 002-2015/CLC-INDECOPI, available at: <https://www.indecopi.gob.pe/documents/20182/143803/Res002-2015-%20CLC.pdf>

¹¹ Decision 040-2014/CLC-INDECOPI, available at: <https://www.indecopi.gob.pe/documents/20182/143803/Res040-2014-CLC.pdf>

4. Criminal sanctions

21. In Peru, currently there are no criminal sanctions (prison terms) applicable to infringements to the Competition Act.

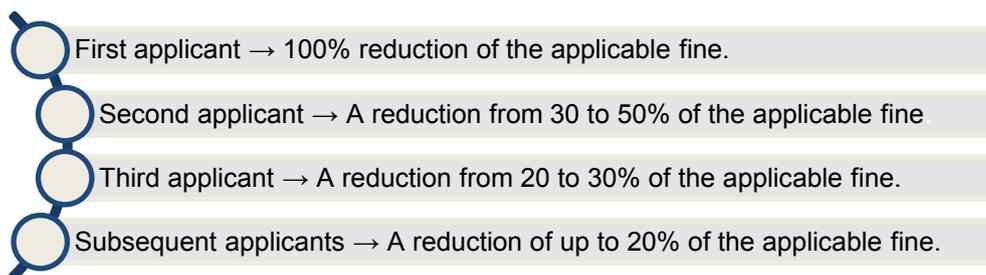
5. Leniency program

22. According to the Leniency Program described in Section 26 of the Competition Act (as amended in 2015), individuals and companies that have incurred in an infringement could benefit from an exemption or reduction of the applicable sanctions in exchange of their full collaboration with the authority in the detection and prosecution of the other offenders.

23. If the application of benefits is accepted, the Technical Secretariat will grant to the applicant a conditional benefit consisting in a discount of the total amount of the fine imposed to the applicant. The Commission will only deny the definitive granting of the benefit if the applicant breaches its cooperation duty with the authority.

24. The first applicant to come forward before formal proceedings have started and which complies with its cooperation duty will benefit from a full exemption of the applicable fine (i.e. a 100% reduction of the fine). Subsequent applicants could benefit from a reduction of the applicable fine as follows:

Benefits for leniency applicants



6. Plea agreements

25. According to the Plea Agreement provisions in the Act (Section 25, as amended in 2015), the Commission will consider not to impose fines to the undertakings that offer an agreement related to the early termination of the procedure, in exchange of the fulfilment of corrective measures aimed at reversing the effects of the infringement and restoring competition in the affected markets (see Corrective measures above). In addition, the applicants may provide complementary measures that demonstrate their intention to comply with the Law.

26. Once approved by the Commission, plea agreements are mandatory. According to Section 25 of the Competition Act, failure to comply with the corrective measures approved constitutes an independent infringement that may be sanctioned through compulsory fines (up to 1000 Tax Units). It is important to mention that Plea Agreements do not exempt any applicants from civil liability. However, any markup refunded to the affected consumers could be discounted from any damages awarded.