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Alternatives to Leniency Programmes – Contribution from Peru

- Session II -

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More documentation related to this discussion can be found at: oe.cd/atlp.

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Alternatives to Leniency Programmes

- Contribution from Peru¹ -

1. General overview

1. As previously explained in our contribution for the Latin American and Caribbean Competition Forum, held on September 2022², Indecopi's Leniency Programme is recognized in article 26 of Peru's Competition Law³ and has had an outstanding development since the first leniency application was received, in 2012.

2. Hence, as other competition legislations around the world, article 26 provides for the exemption or reduction of the fine that would have been imposed on offenders (companies and individuals), in exchange for the provision of information that allows for the detection, investigation, prosecution and punishment of collusive practices, such as cartels. This effective co-operation mechanism aims to destabilise cartels by encouraging "betrayal" among their members and to facilitate access to evidence of collusive behaviour⁴.

¹ This contribution has been prepared by Mr. Diego Reyna Garcia, senior official at the National Directorate for the Investigation and Promotion of Free Competition, which is part of the National Institute for the Defence of Free Competition and the Protection of Intellectual Property (Indecopi) – the Peruvian competition agency. Unless otherwise indicated, this report does not necessarily reflect the opinion of the Commission for the Defence of Free Competition or other Indecopi bodies.

² Available at: [https://one.oecd.org/document/DAF/COMP/LACF\(2022\)15/en/pdf](https://one.oecd.org/document/DAF/COMP/LACF(2022)15/en/pdf). Please bear in mind that all the provisions described in the aforementioned document are still in effect and have not been modified.

³ Approved by Legislative Decree No. 1034 (2008) and amended by Legislative Decree No. 1205 (2015), Legislative Decree No. 1396 (2018) and Act No. 31112 (2021). The references in this document correspond to the consolidated amended text approved by Supreme Decree No. 030-2019-PCM.

⁴ **Peru's Competition Law**

Article 26 – Exemption from penalty

26.1. Prior to the initiation of an administrative sanctioning proceeding, any person may apply to the Technical Secretariat to be exempted from the sanction in exchange for providing evidence that will help detect and prove the existence of a collusive practice, and sanction those responsible.

26.2. The application for exemption from the sanction shall be submitted in writing and shall be processed confidentially, in accordance with the following procedure:

a) Upon receipt of the application, the Technical Secretariat shall immediately verify that it contains general information on the conduct reported that is sufficient to give a priority order to the applicant. If so, it shall grant the applicant a maximum of five business days to complete such information, under penalty of being considered as not submitted.

b) Within five working days of the application being submitted, the Technical Secretariat shall communicate to the applicant its order of priority in the case of concurrent applications, granting the applicant a maximum of 30 working days to submit all the information related to the infringements disclosed, under penalty of losing the priority granted. This term may be extended for an equivalent

period if the complexity of the investigation so requires. The Technical Secretariat may conduct any additional investigative activities it deems appropriate.

c) If the Technical Secretariat considers that the applicant has provided relevant evidence to initiate an administrative sanctioning proceeding, it shall negotiate the signing of a sanction exemption commitment with the applicant. This commitment shall establish the scope of the applicant's duty to co-operate, the Commission's commitment to exempt the applicant from the sanction, and the Technical Secretariat and Commission's duty of confidentiality with respect to the applicant's identity. The sanction exemption commitment shall be signed by the applicant and the Technical Secretariat. To this end, the Technical Secretariat has all the negotiating powers necessary to establish the terms of the commitment. Failure to comply with the confidentiality obligation will result in administrative and criminal liabilities for the official, as provided for in the case of information declared confidential by the Commission.

d) Compliance with the duty to co-operate established in the sanction exemption commitment – from its signing until the Commission issues its final decision under the administrative sanctioning proceeding on anti-competitive behaviour – exempts the applicant from the sanction with respect to the infraction or infractions covered by the commitment. Neither the Commission nor any other administrative authority may pursue or initiate proceedings against the applicant for the same acts.

e) If, within the framework of the sanctioning proceeding on anti-competitive behaviour relating to the application for exemption, the Technical Secretariat considers that the applicant is not complying with its duty to co-operate, it shall inform the applicant and grant it a reasonable term to remedy its non-compliance, under penalty of informing the Commission at the time it must decide whether to grant the benefit of exemption.

f) If the Commission imposes sanctions within the framework of the administrative sanctioning proceeding, it shall grant exemption of the sanction to the applicant. It may only refuse exemption when the Technical Secretariat has informed it of the applicant's failure to comply with the duty to co-operate, in which case the Commission shall evaluate such failure when deciding whether to grant exemption.

26.3. If several economic agents apply for sanction exemption, only the first to have provided evidence of the existence of the anti-competitive behaviour and the identity of the offenders will benefit from the exemption. Other economic agents that provide relevant information may benefit from reduction of the fine, if such information adds significant value to the investigative and sanctioning activities of the Technical Secretariat and the Commission. The Technical Secretariat will analyse the relevance of fine reduction in each case, according to the following scale:

a) The second applicant for sanction exemption may receive a 30-50% reduction of the fine that would have been applicable.

b) The third applicant may receive a 20-30% reduction of the fine that would have been applicable.

c) Subsequent applicants may receive a maximum reduction of 20% of the fine that would have been applicable.

26.4. The Technical Secretariat may reject applications for exemption or reduction of penalties submitted after an administrative sanctioning proceeding has been initiated. However, it may accept such applications to the extent that they introduce evidence that adds significant value to the investigative and sanctioning activities of the Technical Secretariat and the Commission. In this case, the applicant may only benefit from a reduction of the fine, applying the ranges indicated in the previous paragraph.

26.5. Any economic agent who has coerced other agents into an infringement may not benefit from the exemption of the applicable sanction. It may, however, benefit from a reduced fine if it introduces evidence that adds significant value to the investigative and sanctioning activities of the Technical Secretariat and the Commission, applying the ranges indicated in paragraph 26.3 of this article.

26.6. The exemption or reduction of the applicable sanction does not eliminate or limit the civil liability of the accused for damages caused, if any. (...)

3. Dispositions regarding Indecopi’s Leniency Programme are not only to be found in the Competition Act. In 2017, the Commission for the Defence of Free Competition (hereinafter, the Commission) approved the Leniency Programme Guidelines⁵, which set out the conditions, requirements and benefits applicable to agents who, having participated in a cartel, disclose its existence to the National Directorate for the Investigation and Promotion of Free Competition (hereinafter, the Directorate) and provide relevant information for the corresponding investigative proceedings. Depending on when the applicant approaches the authority and the status of the investigation, the following benefits are available:

- **Type A Leniency:** an applicant who is granted this leniency receives total exemption from a penalty fine. Only available before the authority has initiated an investigation.
- **Type B Leniency:** an applicant who is granted this leniency receives 50-100% reduction of the penalty fine. Only available before the authority has evidence to initiate an administrative proceeding but after it has initiated an investigation.
- **Type C Leniency:** the applicant is granted up to 50% reduction of the penalty fine. Available when (i) the authority has received a previous application and the applicant provides information with significant added value or (ii) the application is submitted after the initiation of an administrative proceeding.

2. Criminalization of anti-competitive behaviours: the challenges introduced by Law 31040

4. In years 2017 -2018, a rise in the submission of leniency applications was experienced, reaching 9 applications, with its peak in 2018, when 5 applications were received. This number decreased in the two following years, but in 2021 the applications dropped to zero. As has been argued by several practitioners and Peruvian competition experts, the direct cause of this severe drop was the enactment of Law 31040, which amended the Criminal Code and the Consumer Protection and Defence Code, regarding hoarding, speculation and adulteration. Moreover, article 1 of this piece of legislation, published in the Official Gazette on 29 August 2020, introduced criminal sanctions against anti-competitive behaviour by defining the crime of “abuse of economic power” in the following terms:

Article 232 – Abuse of economic power

Any person who abuses their dominant market position, or participates in restrictive practices and agreements in productive, mercantile or service activity with the purpose of preventing, restricting or distorting free competition, shall be punished with a prison sentence of not less than two nor more than six years, with a 180 to 365 day fine and disqualification pursuant to Article 36, paragraphs 2 and 4.

5. The formula adopted by Law 31040 did not foresee implementing legislation in relation to those benefiting from penalty exemption and reduction under the leniency programme. In addition, it significantly affected the operability of the leniency programme for two fundamental reasons:

⁵Available at: <https://www.indecopi.gob.pe/documents/1902049/3761587/Gu%C3%ADa+del+Programa+de+Clemencia.pdf>.

- Given international experience on the matter, this regulation should have necessarily replicated the benefits for co-operation granted to leniency applicants in administrative proceedings. The omission of such benefits in criminal proceedings could diminish the incentives for individual offenders and company officials to co-operate with the authorities. This significantly affected the authority's ability to detect cartels, making it easier for them to continue operating with impunity.
- Law 31040 did not provide for guarantees aimed at protecting the identity of leniency applicants and the confidentiality of sensitive information contained in leniency application files. Thus, if a representative of the Public Prosecutor's Office were to request this information for its investigations and not ensure the necessary confidentiality throughout the process, it would increase the likelihood of reprisals, therefore discouraging the co-operation of prospective leniency applicants.

6. After a careful analysis of the implications of the Law, the Commission deemed convenient to issue a report in order to explain the flaws in which said legislation had incurred. Such report was issued on 31 August 2020, and explained that the following criteria should be included in any legislation that would criminalize anticompetitive conducts:

- Criminal prosecution should be restricted only to cartels, due to its harmful impact in markets and consumers.
- Criminal prosecutions should only take place after Indecopi had issued a decision regarding the existence on an infringement.
- In any circumstance in which criminal prosecution is implemented, it should take into account the opinion of Indecopi, specifically, regarding what infringements should be prosecuted criminally due to its gravity, the markets involved, and other criteria around its seriousness.
- Any legislation that implements criminal prosecution of anticompetitive conducts should include full or partial immunity from criminal liability.
- Any legislation that implements criminal prosecution should ensure that the actions taken by the Public Prosecutor Office do not endanger the autonomy of the competition authority in its decision-making process related to which cases are brought for administrative sanctioning.

3. Amendments in the criminalization of anticompetitive conducts: the entry into force of Law 31775

7. Throughout the year 2021, Indecopi elaborated several bills in order to repeal Law 31040 and replace it with a more suitable legislation, in accordance with the best international practices on this matter. These were coordinated with the Ministry of Justice and the Office of the Prime Minister⁶, and considered all the criteria laid out in the report issued by the Commission and that have been described in the previous paragraph. Hence, these bills: (i) restricted criminal prosecution to cartels, (ii) mandated that criminal prosecution could only take place after Indecopi had finished with the analysis of a cartel

⁶ Notwithstanding the autonomy and independence of INDECOPI, due to its institutional organization and its classification as a specialized public body, it functionally depends on the Office of the Prime Minister.

case in all administrative instances and (iii) included full immunity from criminal sanctions for those which have been granted full leniency by the Commission (Type A Leniency). For those agents which could receive Type B and Type C Leniency benefits (meaning, reduction on fines up to 50%), the bills deemed appropriate to set forth that such agents could receive a proportionate reduction on the criminal sanctions that could be imposed.

8. The bills drafted by Indecopi could not be passed to Congress for its review. Nevertheless, a bill was presented on 22 November 2022, drafted by Congress members, which included some of the criteria described in the Commission's report and, therefore, aimed at reversing the harmful effects of Law 31040. After several months of legislative process, the bill was sanctioned on a plenary session of Congress held on 4 May 2023. Finally, Law 31775 was enacted and published in the Official Gazette on 7 June 2023.

9. Law 31775 main aspects include the following: (i) it reduces the scope of the criminal offense of "abuse of economic power" to hard-core cartels alone (horizontal agreements subject to an absolute or *per se* prohibition), (ii) it requires the Criminal Prosecutors to wait for a final decision by Indecopi on any possible infringement at the administrative stage before starting their own criminal preparatory investigations, (iii) provides for full immunity against criminal sanctions for those parties benefited with full immunity from administrative sanctions under Indecopi's Leniency Program, and (iv) provides for the protection of the identity of leniency applicants whose identity was also kept confidential during the administrative stage.

10. Although this legislation corrected most of Law 31040's flaws, there are still many questions regarding its effects. In particular, it is still to be seen how criminal prosecution will effectively be enforced. Moreover, there are still doubts as to what benefits could be offered, by Criminal Prosecutors, to those leniency applicants that were granted reductions on fines, if any. Finally, there are concerns that the enforcement of criminal prosecution could negatively affect the development of commitments to cease, a mechanism set forth in article 25 of Peru's Competition Law and used for the early termination of cartel cases (similar to a European settlement).

11. Despite these new challenges, INDECOPI will continue to strengthen its Leniency Program and its determination to prosecute and sanction anticompetitive conducts that may affect Peruvian consumers.