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resolution of cartel cases in Latin America and the Caribbean**

- Contribution from Peru -

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Session III: Early resolution of cartel cases in Latin America and the Caribbean

Commitments to cease as effective tools for the resolution of antitrust proceedings

- Contribution from Peru¹ –

1. Legal framework of commitments to cease from 1993 to 2018

1. A mechanism for the early termination of antitrust proceedings in Peru has existed since Legislative Decree 701, the first Peruvian Competition Law (in force since 1993). Nevertheless, this legislation lacked the necessary flexibility required to be applied in all cases, due to the following reasons:

- this mechanism could only be applied to ongoing conducts, not conducts that would have already ceased,
- the outcome of this mechanism was the *suspension* of the antitrust proceeding, rather than its *termination*, and,
- any breach of the terms of a commitment to cease could be sanctioned with fines, although these were not properly defined, which led to the impossibility of imposing such measures.

2. In order to correct these flaws, and others that deemed Legislative Decree 701 outdated, a new competition law was enacted in July 2008 through Legislative Decree 1034. However, this new piece of legislation proved to be insufficient: not only did it reiterate the main deficiencies of the previous mechanism but also established that commitments to cease were only applicable to anticompetitive conducts that would have not caused serious harm to consumers' welfare. Hence, commitments to cease were rarely applied from July 2008 to September 2015 (only 4 commitments to cease applications were received during that timeframe).

3. In time, it became obvious that such legal framework was inappropriate to foster the adequate development of early termination tools that could provide effective remedies to the negative outcomes of anticompetitive conducts. Therefore, Legislative Decree 1034 was amended in 2015 and 2018² in order to correct the flaws previously described. Currently, commitments to cease, according to article 25 of the Peruvian Competition Law, display the following characteristics:

¹ This contribution has been prepared by Mr. Diego Reyna Garcia, Senior Legal Advisor 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 From September 2015 to December 2018, only 4 commitments to cease applications were approved.

4. Unlike under Legislative Decree 701, now the early termination (and not merely the suspension) of an antitrust proceeding can be achieved through a commitment to cease. Moreover, they are applicable to any kind of conduct, this is, horizontal and vertical agreements, abuse of dominance and hard-core cartels.

- The amendments clarified the corrective measures that should be offered by a commitment to cease applicant to secure its approval, thus reducing unnecessary discretion from the authority and uncertainty for the applicants.
- In line with the aforementioned corrective measures, a 60 working days timeframe has been set in order for the authority and the applicant to negotiate the terms of the commitment to cease. This allows a more active involvement of the applicants, since they can change their offered commitments as negotiations develop. Furthermore, the authority has been empowered to conduct the negotiations in any way required to establish the final terms of the proposal for a commitment to cease.
- Additionally, confidentiality clauses were established to protect information provided by the commitment to cease applicant during negotiations. In this way, such information cannot be used against said applicant, but if the commitment to cease is approved, it can be used against other investigated parties to establish their responsibility in the infringement.
- Finally, it was established that some corrective measures (called supplementary measures) could be directed to contribute with activities of investigation, promotion and defense of competition, which could include the funding of such activities.

5. This new legal framework has proven to be successful, at least by the number of commitments to cease applications that have been approved from 2019 to 2023. Certainly, within this timeframe, 24 applications were approved, all related to cartel proceedings.

2. General aspects of commitments to cease in Peruvian antitrust proceedings since 2019

6. As previously mentioned, all commitments to cease applications approved from 2019 to 2023 have been related to cartel proceedings. During the aforementioned time period, this mechanism has had 4 distinctive features: (i) an acknowledgment of the participation of the applicant in the investigated conduct has been required by the authority, (ii) in all cases, the applicants have been required to offer correctives measures for the reestablishment of competition, (iii) in some cases, corrective measures aimed to redress the harmful effects of the investigated conduct have also been required; and, (iv) a payment, subject to a discount, has been offered by the applicants as a form of supplementary measure.

2.1. Acknowledgment of participation in the investigated conduct

7. In line with the practice of major competition agencies around the world (such as the European Union's DGCOMP, Germany's Bundeskartellamt, Brazil's CADE, France's Autorité de la Concurrence and the United Kingdom's Competition and Markets Authority), a commitment to cease in a cartel proceeding requires that the applicant acknowledges its participation in the investigated conduct that led to the initiation of a proceeding against them. Although this is not a legally-set requirement, it has been demanded by the authority during the negotiation stage.

8. Acknowledgment from the applicants has two clear procedural advantages: it eases any criticism towards the authority for an alleged “easy way out” of an investigated party from an antitrust proceeding (especially regarding the possibility of future claims regarding civil liability for damages to consumers) and allows the authority to use information provided by the applicant against other investigated parties.

2.2. Corrective measures for the reestablishment of competition

9. The second sort of corrective measures offered by commitment to cease applicants have been measures for the reestablishment of competition. Although these could range from the cease of the investigated conduct to more complex behavioral or structural measures, the authority has often construed them as the necessity to implement an antitrust compliance program.

10. These antitrust compliance programs are a set of internal measures that the applicant must adopt within its organization in order to prevent and minimize the risk of infringements of Competition Law. These programs are often designed under the scope of the Guidelines of Antitrust Compliance Programs, in force since March 2020³. Nevertheless, they are required to incorporate 8 essential components:

- Real commitment to comply from the Senior Management (“tone at the top”)
- Identification and management of current and potential risks
- Development of internal procedures and protocols
- Training for employees
- Constant update and monitoring of the Compliance Program
- Audits on the Compliance Program
- Procedures for consultations and complaints
- Appointment of a Compliance Officer or Compliance Committee

11. Although not as frequent as the mandatory Compliance Programs, other actions have been required as measures for the reestablishment of competition, such as the publication of an advertisement in the applicant’s social media and/or web page with a statement regarding its compliance with competition laws, or the amendment of internal documents that could foster anticompetitive conducts.

2.3. Corrective measures aimed to redress the harmful effects of the investigated conduct

12. The third sort of corrective measures required by law are measures aimed to redress the harmful effects of the investigated conduct, which have been construed as the need to offer an adequate compensation to consumers affected by said conduct.

13. Compensations are not usually adjudicated in administrative instances, since this is a task that often corresponds to judicial processes in civil matters. Notwithstanding, experiences in other jurisdictions show that some competition authorities lean towards the idea of granting such compensations, at least, to some degree. For example, in its

³ The Guidelines are available in the following link: <https://www.gob.pe/institucion/indecopi/informes-publicaciones/2115544-guidelines-on-antitrust-compliance-programs>.

Enforcement Response Guidelines, New Zealand's Commerce Commission states that, as part of a negotiated settlement (also called Agreed Outcome) with an investigated party, remediation or compensation can be offered to affected consumers, businesses or others that have been harmed by the conduct⁴.

14. In the 2006 *Independent schools* case, the Office of Fair Trading (predecessor of UK's CMA) initiated a proceeding against 50 private schools for entering into an agreement by which the schools engaged in the exchange of specific information regarding future pricing intentions (the schools' intended fees and fee increases, which were set annually with effect from the beginning of each academic year, that is, from September) on a regular and systematic basis, between March 2001 and June 2003. This case was settled and the schools, among other commitments, agreed to make an *ex gratia* payment to fund a £3 million educational trust fund for the benefit of students who attended the investigated schools during the academic years in respect of which fee information was exchanged.

15. Following these experiences, in a cartel case settled in 2023, regarding a price fixing agreement between sellers of bottled water in Puerto Maldonado, a city in Peru's amazonian region, Indecopi accepted the investigated parties' commitments to cease in which one of the proposals was the donation of approximately 31 000 liters of bottled water directly to consumers and social welfare institutions.

16. Therefore, commitments to cease under Peruvian Competition Law allow the offering of compensations to consumers for conducts that may have had a harmful effect on vulnerable groups or may have affected sensitive goods (such as medicines or others alike).

2.4. Supplementary measures

17. Lastly, commitments to cease applicants are required to offer supplementary measures that show "evidence of its atonement", as the Law states. These measures must contribute to activities of research, promotion and defense of competition, which could include their financing.

18. Given this last requirement, these kinds of measures are offered in the form of payment, which is negotiated with the authority and determined as follows: a potential fine is calculated as if would have being imposed if there were an infringement decision, afterwards, a discount between 28% and 35% is applied. This discount is meant to be lower than those that could be offered if the applicant would have opted for the Leniency Program, in order to keep the incentives of this latter mechanism.

19. Although the offering of a payment, subject to a discount, is a practice that has no legal recognition under Peruvian Competition Law, it has been negotiated with applicants in commitments to cease and has been brought from the experience of other competition agencies in settlement proceedings. Moreover, it has been applied in all 24 commitments to cease approved from 2019 to 2023. As this payment is set as a result of a negotiation between the authority and the applicant, and not after all stages of a proceeding are finalized, it cannot qualify as a fine.

⁴ Enforcement Response Guidelines (July 2024), 38.4 (Agreed Outcomes, including negotiated settlements and enforceable undertakings), available at: https://comcom.govt.nz/__data/assets/pdf_file/0016/356002/Enforcement-Response-Guidelines-July-2024.pdf.

20. As a final remark on supplementary measures, payments made under this mechanism can be directed to the Peruvian state budget or could be delivered through trust funds, which happened in two cases. The funds were later used for the funding of advocacy activities regarding Leniency Program, in one case, and the refurbishment of the authority's Forensic Lab, in the other.

3. Challenges for the future application of commitments to cease under Peruvian Competition Law

21. As mentioned, commitments to cease under Peruvian Competition Law have only been used in hard-core cartel cases, which leaves uncertainty on what the authority's approach could be in other anticompetitive conducts, especially, in abuse of dominance cases. On the other hand, it remains to be seen how commitments to cease and leniency applications could interact, considering that the Law does not preclude a leniency applicant to submit a commitment to cease application at the same time.

22. In September 2026, a draft Guidelines on commitments to cease have been published by Indecopi for public consultation until December 11th, 2026. The draft clarifies certain aspects of the commitments that must be offered, specifies which of them could be required for each type of anticompetitive conduct, explains the relationship between leniency and commitments to cease applications, and sets some general procedural rules for the applications' assessment⁵.

5 The draft Guidelines are available here (in Spanish): <https://www.gob.pe/institucion/indecopi/informes-publicaciones/8602407-proyecto-de-lineamientos-sobre-compromisos-de-cese>.