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**LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM – Session I: Strengthening
incentives for leniency agreements**

– Contribution from Peru –

27-28 September 2022

The attached document from Peru is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session I at its forthcoming meeting to be held on 27 28 September 2022 to be held in Rio de Janeiro, Brazil.

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Session I: Strengthening incentives for leniency agreements

Leniency programme incentives

- Contribution from Peru¹ -

1. Peru's leniency programme

1. Peru's Law for the Repression of Anti-competitive Behaviour² 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 behaviour.³

¹ This contribution has been prepared by David Fernández and Rodrigo Delgado, officials 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 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 adopted in Supreme Decree No. 030-2019-PCM.

³ **Law for the Repression of Anti-competitive Behaviour**

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

2. The first applications for co-operation benefits, which arose from investigations into transnational cartels around 2012, made it clear that Indecopi needed transparent, predictable and reliable rules so that interested applicants could clearly understand the procedure applicable to such applications, the procedure and requirements for obtaining the benefit, and the specific powers of the bodies involved (investigative body, decision-making body). Such rules were also needed to establish a framework that would encourage a greater number of applications, both locally and internationally.

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. With these objectives in mind, Indecopi implemented significant reforms in the rules governing applications for co-operation benefits. These efforts resulted in the comprehensive reform of Article 26 of the Law for the Repression of Anti-competitive Behaviour being approved in September 2015.⁴ Similarly, in August 2017, the Commission for the Defence of Free Competition (hereinafter the Commission) approved the Leniency Programme Guidelines (2017),⁵ which were pre-published for specialist and citizen feedback. It should be noted that the Leniency Programme Guidelines won the award for Best Soft Law in the 2018 Antitrust Awards competition.⁶

4. The Leniency Programme Guidelines (2017) 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:** Total exemption from the sanction. Available before the authority has initiated an investigation.
- **Type B Leniency:** 50-100% reduction of the penalty fine. Available before the authority has evidence to initiate a sanctioning procedure.
- **Type C Leniency:** Up to 50% reduction of the penalty fine. Available when the authority has received a previous application and the applicant provides information with significant added value.

5. Peru's leniency programme is therefore supported by the provisions of the Law for the Repression of Anti-competitive Behaviour and the Leniency Programme Guidelines (2017). However, the authority has been able to strengthen the programme based on other instruments, as explained below.

2. The incentive not to be sued for damages

6. In 2021, the Commission introduced an important incentive for potential leniency applicants, stating that it would not file claims for damages for anti-competitive behaviour against companies that co-operated with the authority under a Type A Leniency Agreement (i.e. cases in which the leniency application was filed before an investigation had been initiated).

7. This rule was introduced in the Guidelines on Compensation for Damages Caused to Consumers as a Result of Anti-competitive Behaviour, approved by the Commission in 2021 (hereinafter the Guidelines on Compensation for Damages).⁷ The rule was intended to strengthen incentives for companies and officials to co-operate in the detection of cartels of which the authority is not yet aware.

⁴ Reform approved by Legislative Decree No. 1205 (2015).

⁵ The Leniency Programme Guidelines (2017) are available at www.indecopi.gob.pe/documents/1902049/3761587/Gu%C3%ADa+del+Programa+de+Clemencia.pdf.

⁶ Organised by the *Concurrences* journal and George Washington University.

⁷ Available at <https://bit.ly/3hBYqnA>.

8. In this regard, the Law for the Repression of Anti-competitive Behaviour empowers the Commission to sue for damages arising from anti-competitive behaviour that has affected consumers once the administrative resolution sanctioning such conduct is final.⁸ It therefore establishes a “follow-on” system.

9. However, potential parties interested in co-operating with the authority under the leniency programme may be dissuaded from doing so by the risk that this same authority may eventually sue for damages arising from the infringement reported. The Guidelines on Compensation for Damages therefore seek to clarify the exercise of this power in order to prevent a deterrent effect, expressly establishing that Indecopi will not make claims for compensation against applicants for Type A Leniency.⁹

10. It is important to emphasise that the central objective of leniency programmes is the detection of cartels that would otherwise have been unlikely to be detected due to the clandestine nature and elusive behaviour of cartelists and, therefore, would have continued to operate with impunity.¹⁰ Effective leniency programmes therefore destabilise existing cartels, creating distrust among their participants and making the establishment of new cartels less profitable, thereby discouraging their formation.¹¹

11. Therefore, it is crucial to incentivise the reporting of behaviour that the authority has not yet detected, i.e. Type A Leniency as set out in the aforementioned guidelines, since this behaviour fully meets the aforementioned objective. In addition, reporting of such behaviour allows considerable savings in the costs that the Administration normally

⁸ Law for the Repression of Anti-competitive Behaviour

Article 52 – Compensation for damages

Once the administrative resolution declaring the existence of anti-competitive behaviour is final, any person who has suffered damages as a consequence of such behaviour – even if they have not been a party to the proceeding before Indecopi and provided that they are able to show a causal link with the behaviour declared anti-competitive – may file a civil claim for damages before the judiciary.

In the case mentioned in the preceding paragraph, after a favourable report from the Technical Secretariat, the Commission is entitled to initiate, in defence of the individual and collective interests of consumers, a judicial proceeding for compensation for damages arising from the behaviour prohibited by the present regulation, in accordance with the provisions of Article 82 of the Civil Procedure Code, under which the existence of the corresponding procedural requirements must be verified. Notwithstanding the foregoing, the terms, rules, conditions or particular restrictions necessary to exercise this action shall be approved by guidelines from the Commission, at the proposal of the Technical Secretariat.

⁹ Guidelines on Compensation for Damages Caused to Consumers as a Result of Anti-competitive Behaviour

Article 3 – Subjective scope of application

3.4. The Commission will not exercise the power referred to in Article 2.1. of these Guidelines against subjects who, in accordance with the Leniency Programme Guidelines, qualify as Type A Leniency applicants, provided that they waive the confidentiality of their identity as co-operators.

Notwithstanding the foregoing, injured parties reserve the right to file claims for compensation against such parties, pursuant to the first paragraph of Article 52 of the Law for the Repression of Anti-competitive Behaviour.

¹⁰ ICN (2019), *Good practices for incentivising leniency applications*, p. 5.

¹¹ OECD (2014), *Use of Markers in Leniency Programmes*, note by the Secretariat, DAF/COMP/WP3(2014)9, p. 4; ICN, *Anti-Cartel Enforcement Manual*, Chapter 2, Drafting and implementing an effective leniency policy, p. 4.

assumes in detecting cartels. These two considerations are key to the granting of co-operation benefits.¹²

12. In this regard, the Organisation for Economic Co-operation and Development (OECD) has noted that, while the right to full compensation would imply that, in principle, the immunity recipient should not be shielded from damages actions or from any reduction of its civil liability, some jurisdictions have reduced the recipient's liability in order to preserve the attractiveness of leniency programmes. Leniency programmes in the United States and the European Union provide examples of this benefit.¹³ Therefore, at the comparative level, the common challenge is to find a balance between protecting the attractiveness of leniency programmes and facilitating access to full compensation for those affected by anti-competitive behaviour.¹⁴

13. Moreover, it is worth noting that, in the case of Peru, the OECD has specifically recommended that Indecopi should not bring civil actions for damages against leniency beneficiaries, notwithstanding the right of private agents to make claims for damages against those same beneficiaries.¹⁵

14. Given these considerations, the Commission established a rule that it will not file claims for damages against the co-operating companies that have availed themselves of Type A Leniency, expressly reserving the right of affected parties to file claims for compensation against such parties, at their own expense. As indicated in the Guidelines on Compensation for Damages,¹⁶ the right to claim compensation can be exercised against any of the companies that participated in a cartel, since their civil liability is joint and several, in accordance with Peruvian law.

¹² “Immunity from fines will reward firms that provide important insider information and evidence to the Commission at two crucial stages of a cartel investigation: either with the disclosure of a cartel previously undetected or by supplying unknown crucial evidence that will lead to the successful prosecution of the cartel members.” European Commission (2002), Commission adopts new leniency policy for companies which give information on cartels, press release from the European Commission on the 2002 leniency programme, https://ec.europa.eu/commission/presscorner/detail/en/IP_02_247.

¹³ OECD (2017), *Report on International Experiences with Class Actions and Private Enforcement*, p. 23, [www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3\(2017\)33&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2017)33&docLanguage=En).

¹⁴ Moodaliyar, K. (2014), “Access to leniency documents: should cartel leniency applicants pay the price for damages?”, *Yearbook of Antitrust and Regulatory Studies*, Vol. 7/10, pp. 159-190.

¹⁵ OECD (2018), *OECD-IDD Peer Reviews of Competition Law and Policy: Peru*, Organisation for Economic Co-operation and Development, p. 144, www.oecd.org/daf/competition/PERU-Peer-Reviews-of-Competition-Law-and-Policy-2018.pdf.

¹⁶ **Guidelines on Compensation for Damages Caused to Consumers as a Result of Anti-competitive Behaviour**

Article 3 – Subjective scope of application

3.2. When several parties are responsible for the anti-competitive behaviour declared by means of a final decision, they shall be jointly and severally liable for the damages caused, in accordance with the provisions of Article 1983 of the Civil Code.

3. Disincentives to criminalise anti-competitive behaviour

15. Despite Indecopi's efforts to generate additional incentives for economic agents (companies and their representatives) to join the leniency programme, a recent law enacted by the Peruvian Congress could significantly discourage such co-operation.

16. Article 1 of Act No. 31040 amending the Criminal Code and the Consumer Protection and Defence Code, regarding hoarding, speculation and adulteration, 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.

17. The formula adopted by Act No. 31040 does not foresee implementing legislation in relation to those benefiting from penalty exemption and reduction under the leniency programme.

18. Act No. 31040 significantly affects the operability of the leniency programme for two fundamental reasons: i) Given international experience on the matter,¹⁷ the regulation should necessarily have replicated the benefits for co-operation granted to the leniency applicant in administrative proceedings. Omitting such benefits in criminal proceedings could nullify the incentives for individual offenders and company officials to co-operate with the authorities. This significantly affects the authority's ability to detect cartels, making it easier for them to continue operating with impunity.

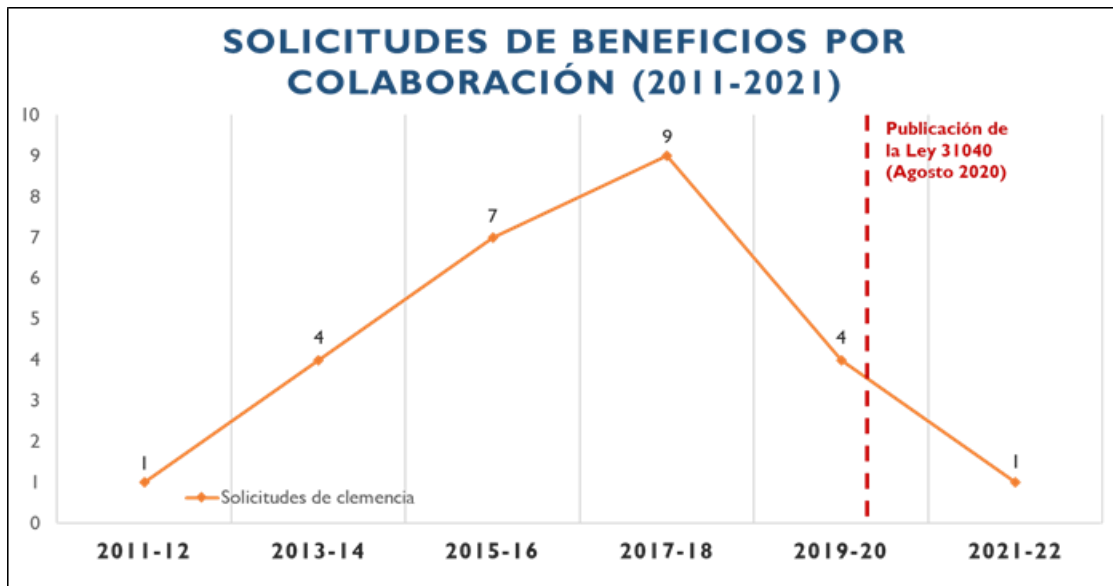
19. ii) Act No. 31040 does not provide for confidentiality guarantees aimed at protecting the identity of the co-operator and the sensitive information contained in the confidential file used to process the application for benefits. If a representative of the Public Prosecutor's Office were to request this information for its investigations and not ensure the necessary confidentiality throughout the process, it would increase the likelihood of reprisals and therefore discourage co-operation.

20. Therefore, Act No. 31040 should have expressly recognised in criminal proceedings benefits for co-operators who have applied for exemption or reduction of sanctions in administrative proceedings, and who have complied with all the requirements established in the regulations to grant them such benefits. It should also have provided for protecting the confidentiality of their identity and the file used to process their application for benefits.

21. Following the publication of Act No. 31040, there has been an immediate decline in the filing of applications under the leniency programme, as shown in the following figure. This decline is a strong indicator that the aforementioned effect has indeed occurred.

¹⁷ For example, the United States, United Kingdom, Mexico, Brazil and – recently – Chile.

Figure 1. Co-operation benefit applications (2011-2021)



Source: National Directorate for the Investigation and Promotion of Free Competition – Indecopi

22. Indecopi is therefore currently facing the great challenge of restoring confidence in the leniency programme and increasing the number of applications for co-operation benefits. At present, the free-competition authorities are aware that the solution to this problem could require legislative reform.

4. Conclusions

23. In the last decade, Indecopi (the Peruvian competition agency) has implemented significant reforms to establish and strengthen the leniency programme, to align it with best international practices in this area. Among other things, it implemented the comprehensive reform of Article 26 of the Law for the Repression of Anti-competitive Behaviour – on co-operation benefits – and approved the Leniency Programme Guidelines (2017).

24. In addition, the issuance of the Guidelines on Compensation for Damages Caused to Consumers as a Result of Anti-competitive Behaviour (2021) introduced an important incentive to the leniency programme. These guidelines establish that Indecopi will not make claims for damages arising from anti-competitive behaviour against companies that join the leniency programme before an investigation has been initiated, and whose co-operation is therefore crucial for the detection of cartels (Type A Leniency). This is without prejudice to the right of affected parties to take direct action against any of the companies participating in the cartel, under their joint and several liability established by law.

25. Despite Indecopi's efforts to create solid incentives for economic agents (companies and their representatives) to join the leniency programme, the recent approval of Congressional Act No. 31040 may introduce a significant disincentive to such co-operation, by introducing criminal sanctions against anti-competitive behaviour without replicating the co-operation benefits or confidentiality guarantees granted to the leniency applicant in administrative proceedings.