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**LATIN AMERICAN COMPETITION FORUM**

**Session III: Unannounced Inspections in Antitrust Investigations**

**Contribution from Peru**

**3-4 September 2013, Lima, Peru**

*The attached document from Peru is circulated to the Latin American Competition Forum FOR DISCUSSION under Session III at its forthcoming meeting to be held on 3-4 September 2013 in Peru.*

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## LATIN AMERICAN COMPETITION FORUM

-- 3-4 September 2013, Lima (Peru) --

### Session III: Unannounced Inspections in Antitrust Investigations

#### CONTRIBUTION FROM PERU

1. Over the two decades it has been in existence, Indecopi<sup>1</sup> has acquired significant experience in relation to inspection visits (also known as dawn raids). This has had an impact on the probability of detection and punishment of anticompetitive behaviour by the Peruvian competition agency, strengthening its power of deterrence and the presence of the authority in different sectors. With the promulgation of Legislative Decree 1034, Law on Suppression of Anticompetitive Conduct (2008), the powers of Indecopi departments to undertake inspection visits have been better defined. However, in the exercise of these powers, conflicts have been caused by the lack of willingness shown by certain operators, which Indecopi has had the opportunity to resolve, using mechanisms and sanction information.

2. In Peru, the competition authority for the majority of markets<sup>2</sup> is the Commission for the Defence of Free Competition (hereinafter, “the Commission”) which is the administrative body responsible for resolving, in the first instance, disciplinary proceedings initiated under the scope of Legislative Decree 1034. The Special Tribunal for the Defence of Free Competition (hereinafter, “the Tribunal”) hears appeals made against the Commission’s decisions.

3. Furthermore, the Technical Secretariat of the Commission for the Defence of Free Competition (hereinafter, “the Technical Secretariat”) carries out investigative work on the procedures of suppression of anticompetitive conduct,<sup>3</sup> essentially researching different markets, initiating disciplinary proceedings and

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<sup>1</sup> Acronym for the National Institute for the Defence of Competition and Protection of Intellectual Property (Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual), Peru’s competition agency.

<sup>2</sup> According to Article 17 of Legislative Decree 1034, the authority responsible for enforcing competition law in the Peruvian market for public telecommunications services is the Supervisory Agency for Private Investment in Telecommunications – OSIPTEL.

<sup>3</sup> **Legislative Decree 1034, Law on Suppression of Anticompetitive Conduct. Article 15.- The Technical Secretariat.-** 15.1. The Technical Secretariat of the Commission is the body with technical autonomy that

proposing sanctions and corrective measures to the Commission or, where appropriate, proposing measures to foster competition. To this end, Legislative Decree 1034 has granted the Technical Secretariat broad powers for market investigation and for obtaining relevant information by conducting inspection visits.

4. In this regard, the Technical Secretariat has general powers to request relevant information for its investigations from natural or legal persons as it deems appropriate, as provided in paragraph a) of Article 15.3 of Legislative Decree 1034.<sup>4</sup> In addition, paragraph c) of the same article expressly recognises the authority of the Technical Secretariat to conduct “dawn raids” or unannounced inspection visits:

*15.3. For the furtherance of its investigations, the Technical Secretariat is empowered to: (c) Carry out inspections, with or without prior notification, in the premises of natural or legal persons, irregular partnerships and trusts and to examine the books, records, documents and property, assess the development of production processes and take statements from the people found there. During the inspection copies may be taken of physical, magnetic or electronic files, together with any other documentation deemed relevant, and any photographs or videos considered necessary may be taken. The support of the police may be requested to gain entry. [Emphasis added]*

5. This ability is fundamental to ensuring the work of the Technical Secretariat is carried out effectively and timely. As such, these powers serve the principle of material truth,<sup>5</sup> according to which the competent administrative authority should fully verify facts that serve as reason for their decisions, taking all evidentiary measures that are considered necessary, and authorised by law. By the same token, the cooperation of economic operators is essential, and is consistent with the general obligations of Articles 56.2 and 57.2 of Law 27444, General Administrative Procedure Law.<sup>6</sup>

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is responsible for carrying out the procedure to investigate and sanction anticompetitive behaviour and that issues an opinion on the existence of the offense.

<sup>4</sup> **Legislative Decree 1034. Article 15.- The Technical Secretariat.-** 15.3. For the conduct of its investigations, the Technical Secretariat is empowered to: (a) Require individuals or corporations, irregular partnerships and independent trusts, to present all kinds of documents, including accounting and corporate books, payment vouchers, internal or external correspondence and magnetic records including, where applicable, the programs necessary to read them, as well as request information regarding the organization, business, market shares and ownership structure of the companies.

<sup>5</sup> **Law 27444, General Administrative Procedure Law. Article IV.- Principles of the administrative procedure -** 1. The administrative procedure is based primarily on the following principles, without prejudice to the validity of other general principles of Administrative Law: 1.11. Principle of material truth. – During the procedure, the competent administrative authority should fully verify the facts that serve as reason for their decisions, taking all evidentiary measures that are considered necessary, and authorised by law, even if they have not been proposed by the inspected parties or agreed has been made for exemption from them. In the case of trilateral procedures, the administrative authority shall be empowered to verify by all available means the truth of the facts that are proposed by the parties, without this replacing their duty to present evidence. However, the administrative authority shall be obliged to exercise this power when its ruling could also involve the public interest.

<sup>6</sup> **Law 27444. Article 56.- General duties of inspected parties** – With regard to the administrative procedure, and to those who conduct it, the inspected parties have the following general duties: 2. Offer their support in the clarification of the relevant facts. **Article 57.- Supplying information to agencies.** 57.2 During investigative procedures, the inspected parties are obliged to supply the information and documents seen and reasonably deemed relevant to the purposes of the investigation to achieve material truth, according to the provisions of the chapter on pre-trial investigation.

6. For these reasons, obstructing inspection visits or unjustified failures to respond to requests for information made as a result, constitutes an infringement of Article 5 of Legislative Decree 807,<sup>7</sup> punishable by a fine of up to 50 tax units (TUs) or approximately USD 66,500.<sup>8</sup>

7. The authority to make inspection visits, carry out interviews and collect copies of relevant documentation may be exercised by the Technical Secretariat without judicial authorization, and it has the support of the police for these purposes. Notwithstanding, the Legislative Decree sets out the obligation of the Technical Secretariat to have such *judicial authorization* in the following cases:<sup>9</sup>

- When it is necessary to remove books, files, documents, correspondence and, in general, *previously immobilized* records. In this case, copies are not taken but the original documentation.
- To undertake *forced entry* to the premises of agents that refuse access to the authority, or when these are found to be closed.
- To obtain copies of *private correspondence* in physical or electronic files. *Private* is understood to refer to information relating to personal and family matters of the person whose information is required.

8. In general terms, in the pursuit of its inspection visits, the Technical Secretariat follows a protocol consistent with international best practices on the subject,<sup>10</sup> which may be summarized as follows:

- Before carrying out the inspection visit, the staff is divided into multidisciplinary teams (including lawyers and economists from the Technical Secretariat and computer specialists) who will make the visit to those under investigation simultaneously. The groups meet to coordinate, at a strictly confidential meeting, the main aspects of the visit to take place such as: (a) the nature

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<sup>7</sup> **Legislative Decree 807, Law on Powers, Standards and Organization of Indecopi** - Article 5.- Whoever knowingly supplies a Commission, an Office or a Court of the Special Tribunal for the Defence of Free Competition and Intellectual Property with false information or conceals, destroys or alters information or any book, record or document which has been requested by the Commission, Office or Court of the Tribunal, or that is relevant for purposes of the decision taken, or who without justification does not comply with the information requests made to it, or refuses to appear, or by force or threat obstructs or impedes the exercise of the functions of the Commission, Office or Court of the Tribunal, shall be punished by a fine not less than one TU nor greater than fifty (50) TUs, without prejudice to the corresponding criminal responsibility. The fine will be successively doubled for repeat offenders.

<sup>8</sup> Considering the TU for this year (2013) to be equal to 3,700 nuevos soles (approximately USD 1,330).

<sup>9</sup> **Legislative Decree 1034, Law on Suppression of Anticompetitive Conduct. Article 15.- The Technical Secretariat.**- 15.2. The functions of the Technical Secretariat are as follows: f) Exceptionally and with prior approval of the Commission, it may detain for a period not exceeding ten (10) working days, extendable for another period of equal length, books, files, documents, correspondence and records in general belonging to the natural or legal person under investigation, and take copies of them. In the same circumstances, it may remove them from the premises where they are found, for a period of up to fifteen (15) working days, upon receipt of judicial authorization to proceed with removal in accordance with the special process provided for in subparagraph c) of paragraph 15.3 of this Article. 15.3. For the conduct of its investigations (...) the Technical Secretariat shall obtain judicial authorization to proceed with forced entry in the event of refusal of entry to the premises or where these were closed, and for copying private correspondence that might be contained in physical or electronic files.

<sup>10</sup> The experiences and recommendations contained in the first section of the *Anti-Cartel Manual* (2009) published by the Cartel Workgroup of the International Competition Network (ICN) are particularly useful. Available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc340.pdf>

and operation of the market under investigation; (b) the alleged practices under investigation; (c) conduct of the visit (including interviews); (d) treatment of the information collected; and (e) what to do in the event of a refusal to hand over information.

- While performing the inspection visit, Indecopi officials identify and inform those involved about the reasons for their visit, delivering a formal investigation request which outlines the scope of their powers and possible sanctions for non-compliance. Once informed of the scope, officials proceed to review and copy the electronic and physical documents deemed necessary. In addition, they undertake interviews and the other activities planned.
- Once the relevant information has been gathered, an Inspection Visit Document is completed detailing all the documents of which copies have been retained by the Technical Secretariat staff. In the case of electronic files, these will be stored in a folder created especially for this purpose, taking note of the number and size of all information collected. Photocopies will be signed by the representative of the company, to indicate recognition of their contents.

9. Finally, those under investigation will be prompted to state whether they wish to make a request for confidentiality with regard to the information collected, it being the Technical Secretariat's responsibility to provide them with the relevant information to be used in the file in order for the confidentiality request to be individualised.

10. In the recent experience of the Technical Secretariat, inspection visits have been made to analyse the possible existence of anti-competitive behaviour in markets as diverse as public transport, health, oil and construction supplies. Moreover, it is interesting to note that inspection visits have proved to be equally effective for the detection and punishment of cases of horizontal collusive practices (cartels) as for cases of abuse of dominant position and vertical collusive practices. As an example, we may examine the cases of Huaraz Freight Services (2011) and that of Cement (2013).

11. The case of Huaraz Freight Services (2011) concerns horizontal collusive practices. Based on documentation circumstantial submitted by the Public Prosecutor, in June 2008 and February 2009, the Technical Secretariat conducted surprise inspection visits at the premises of an association of freight carriers in the city of Huaraz, gathering documents and holding interviews. Among other documents, copies of statements were obtained reminding associates of the price agreement previously adopted. As was evident, the aim of the freight carriers agreement between was to increase prices for transporting cement—per metric tonne and per bag—on the route Lima–Huaraz and vice versa, introducing a system of penalties consisting in the imposition of fines and expulsion from the association. Evidence was also found of an agreement to distribute customers in this market, establishing a system of shifts for each load and penalties consisting of fines and suspension of vehicles in the cargo distribution system, thus limiting the possibility of competition between the partners. At the outcome of the investigation, offenders were fined a total of 726.76 TUs (in 2011, approximately USD 970,000).<sup>11</sup> This penalty is pending revision by the second administrative body.

12. The case of Cement (2013) concerns vertical collusive practices. The Technical Secretariat received a complaint filed by a building materials retail against one of the three largest distributors of the dominant cement producer in the central regions of Peru (including the capital, Lima). Consequently, the Commission initiated a preliminary investigation of the cement market in the centre of the country, performing simultaneous surprise inspection visits, holding interviews and making requests for information to the cement company and other economic operators in the cement market. At that time documents and

<sup>11</sup> The decision of the Commission is available at:  
[http://www.indecopi.gob.pe/RepositorioAPS/0/2/par/RES\\_056\\_2011\\_CLC/Res056-2011CLC.pdf](http://www.indecopi.gob.pe/RepositorioAPS/0/2/par/RES_056_2011_CLC/Res056-2011CLC.pdf)

emails were found that demonstrated the existence of an agreement between the dominant cement company and its distributors to establish a system of penalties against retailers that sell cement from other cement companies, implemented by refusals to supply the cement requirements of these retailers between August 2007 and November 2008. At the outcome of the investigation, the infringement was classified as “very severe” and imposed fines totalling 1,617 TUs (in 2013, approximately USD 2,150,600).<sup>12</sup> This penalty is pending revision by the second administrative body.

13. Notwithstanding the above, it is necessary to point out that in the pursuit of its activities, the Technical Secretariat has encountered, in some cases, difficulties with conducting inspection visits. In particular, the principal contingencies related to conducting inspection visits dealt with by the Technical Secretariat include the following:

- The refusal, in some cases, of those under investigation to provide information or allow access to Technical Secretariat staff, although inspection visits are carried out in line with legal provisions. Although in the majority of cases the Technical Secretariat has been able to conduct inspection visits without major problems, on certain occasions the parties involved have sought to prevent Indecopi officials gathering copies of physical or electronic documents, with recourse to arguments such as the inviolability of the home or an apparent violation of the right to privacy due to the type of document that contains the relevant information.

Both refusing entry to the premises of those under investigation and allowing entry but denying access to information sources have, in practice, exactly the same effect, because they obstruct the investigative work of the Technical Secretariat and undermine the purpose of the inspection visit. Similarly, claiming that information is protected by the right to privacy to prevent Technical Secretariat officials accessing virtual or physical records, without allowing them to verify the type of information they contain or identify any information relevant to the investigation, constitutes an unjustified obstruction and may be penalised. This is because the simple invocation of the existence of protected information cannot prevent the authority from checking for information relevant to its purposes, and demanding additional formalities would lose the “surprise effect” that characterises and makes effective inspection visits.

In such cases, the officials responsible for the visit first act in an informative role, explaining to those under investigation the scope of the investigative powers of the Technical Secretariat and pointing out that they are not looking for information relating to personal or family matters, but information of a commercial nature; and further indicating the illegality of obstructing the authority in the pursuit of its functions. In cases where obstructive conduct persists, disciplinary proceedings have been initiated and the appropriate fines have been implemented.<sup>13</sup> However, the cap currently applicable to fines for obstruction of inspection visits hardly makes it a deterrent. Notwithstanding the above, Indecopi is at present promoting a proposal to significantly increase the cap level for these fines, making it unproductive for the offender to resort to obstructive behaviour to prevent detection of possible anticompetitive behaviour.

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<sup>12</sup> The decision of the Commission can be found at:  
[http://www.indecopi.gob.pe/RepositorioAPS/0/2/par/RES\\_010\\_2013\\_CLC/Res010-2013.pdf](http://www.indecopi.gob.pe/RepositorioAPS/0/2/par/RES_010_2013_CLC/Res010-2013.pdf)

<sup>13</sup> See for example the following decisions made by the Commission:  
<http://www.indecopi.gob.pe/RepositorioAPS/0/2/par/RESCLC2007/Res067-2007.pdf>  
<http://www.indecopi.gob.pe/RepositorioAPS/0/2/par/RESCLC2007/Res065-2007.pdf>

- Lack of coordination with the courts, or their lack of diligence in issuing permits for forced entry to the premises of those under investigation. Although the law establishes tight deadlines, the procedure for obtaining an authorization can take a considerable length of time and risks compromising the aim of the investigation. This situation requires that, in the near future, Indecopi's School of Competition and Intellectual Property and the Technical Secretariat take a leading role in the training of judges and judicial officials.

14. As may be seen, the Technical Secretariat of Indecopi's Commission for the Defence of Free Competition, the Commission itself and the Special Tribunal for the Defence of Free Competition have acquired significant experience in the conduct of inspection visits which is reflected in the increased ability to detect and punish anticompetitive behaviour. However, certain problematic aspects remain, whose swift and efficient resolution is a priority for Indecopi.