



Organisation for Economic Co-operation and Development

DAF/COMP/LACF(2019)13

Unclassified

English - Or. English

13 September 2019

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

**LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM - Session I:
Fining methodologies for competition law infringements**

- Contribution from Peru -

24-25 September 2019, San Pedro Sula, Honduras

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 24-25 September 2019 in Honduras.

Ms. Lynn Robertson, Manager GFC, LACCF ; Competition Expert - Lynn.Robertson@oecd.org.

JT03450950

Session I: Fining Methodologies for Competition Law Infringements

– Contribution from Peru* –

1. The Peruvian Competition Act¹(hereinafter, the Competition Act) allows the Peruvian Competition Authority to impose sanctions for anticompetitive behaviors. The authorities in charge of the enforcement of the Competition Act in Peru are the Commission for the Defense of the Free Competition, the first instance (hereinafter, the Commission), its Technical Secretariat (an investigation body) and the Specialized Chamber in Defense of the Competition of the Tribunal of Indecopi, the second instance (hereinafter, the Tribunal).
2. Sanctions resulting from anticompetitive infringements have, essentially, an administrative nature. The sanctions aim to create a dissuasive effect on the undertakings, so they will have incentives to comply with the Competition Act.
3. As a consequence of the 2015 amendment introduced in 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.

1. General Rules

4. In issuing its final decision at the administrative proceeding, the Commission can sanction all economic agents, companies or individuals, who have incurred in anticompetitive behavior. Depending on the seriousness of the infringement, the Commission can impose fines up to 12% of the income of the offender or its economic group gotten the previous year to the decision².
5. To determine the seriousness of the infringement, the Commission follows the criteria established in the provision 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;

* The document was prepared by Jesús Espinoza, Humberto Ortiz and Hector Palacios, members of the Technical Secretary of the Commission for the Defense of Free Competition.

¹ The last amended of Peruvian Competition Act was approved by Supreme Decree 030-2019-PCM.

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

- Effect of the restriction on providers and consumers;
 - Extent of the restriction;
 - Recidivism;
6. Procedural misconduct.
Under the principle of 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, following the principle of proportionality when the authority imposes fines, has to take in consideration the damages generated by the infringement.

2. Calculation of fines

7. As mentioned, the provision 44 of the Competition Act establishes a set of criteria in order to determine the monetary sanctions to the undertakings, such as the expected illicit benefits, the probability of detection and the duration of the restriction.
8. Taking into account these criteria, the Commission establishes a basic fine for infringements to the Competition Act, using the following formula:

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

9. In this formula, the basic fine is equivalent to the expected illicit benefit (B_{Exp}) divided by the probability of detection (P_{det}) of the anticompetitive conduct. For example, in horizontal collusive practices the illicit benefit would be determined as the difference between the collusive price and the competitive price, multiplied by the volume of sales during the infringement.
10. The probability of detection is determined by the difficulty to detect the investigated offense; this probability can range from 15% to 60%. The factors that determine the value of the probability of detection are:
- The beginning of the investigation, if it begins due to actions carried out ex officio by the authority or a complaint.
 - The availability of data base to analyze the behavior of the economic agents in the market;
 - The strategies used by infringers to hide evidence, such as keeping the evidence divided or contained in emails or telephone communications; and
 - The mechanism for carrying out the infraction, such as coordination through a third party.

11. In order to maintain the dissuasive effect of the sanction, the base fine is adjusted by a component that allows it to maintain its value over time. In most cases, the Commission has used the Peruvian Consumer Price Index as an adjustment factor; however, in a particular case³, the Commission decided to use the United States of America Consumer Price Index as adjustment factor, because the undertakings were located outside Peru and their transactions were recorded in United States dollars.

12. The basic fine can be modified if there are aggravating and mitigating circumstances. In its last decisions, the Commission has considered as aggravating circumstances the importance of the good or service in the basic family basket⁴, the effect of the goods or service on life and health⁵, and the territorial scope of the conduct⁶.

13. Currently, the existence of a compliance program, has not been considered as a mitigating circumstance; however, a draft of the compliance programs guidelines is scheduled to be published and will motivate the discussion about whether the existence of a compliance program could be considered as a mitigating circumstance.

14. In its final decision, depending on the seriousness of the infringement, the Commission can impose fines up to 12% of the income of the offender or its economic group, according to the following table:

Table 1. Caps applicable on fines

Seriousness of the infringement	Applicable fine (Tax Units ⁷)	Limit (% of gross income)
Minor	No more than 500 ⁸	8%
Serious	No more than 1000 ⁹	10%
Very Serious	More than 1000	12%

³ Decision 030-2018/CLC-INDECOPI, available at: <http://servicio.indecopi.gob.pe/buscadorResoluciones/getDoc?docID=workspace://SpacesStore/8674348c-f4d7-46ae-a60b-a2f7935b9c00>

⁴ Decision 100-2017/CLC-INDECOPI, available at: <http://servicio.indecopi.gob.pe/buscadorResoluciones/getDoc?docID=workspace://SpacesStore/06182860-6244-45d8-a531-51db2a02a551>

⁵ Decision 078-2016/CLC-INDECOPI, available at: <http://servicio.indecopi.gob.pe/buscadorResoluciones/getDoc?docID=workspace://SpacesStore/2b1b5306-38bd-469a-a612-8e73ac903e1c>

⁶ Decision 104-2018/CLC-INDECOPI, available at: <https://www.indecopi.gob.pe/documents/51771/3027268/Resoluci%C3%B3n+104-2018-CLC-INDECOPI/>

⁷ One Tax Unit equals to PEN 4 200 or about USD 1 276,6. The Peruvian «Sol» (PEN) is the local currency. At July 2019, one USD equals to 3.29 PEN approximately.

⁸ Approximately USD 638 300.

⁹ Approximately USD 1 276 600.

15. 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.

2.1. Economic group

16. In some decisions, the Commission decided to impose jointly fines to an economic group. This decision was based on the fact that, although one of them did not operate in the investigated market, it participated in the implementation of the infringement and it exerted a decisive and preponderant influence on the competitive strategy of the other companies¹⁰.

2.2. Leniency program

17. According to the provision 26 of the Competition Act, individuals and companies that 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.

18. The first applicant to come forward before starting a formal proceeding and presenting evidence to identify and prove the existence of an illegal practice and punish the offenders, 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 if their information gives significant added value to the investigation.

Table 2. Benefits for leniency applicants

Applicant	Reduction of the applicable fine
First applicant	100% reduction of the applicable fine
Second applicant	A reduction from 30 to 50% of the applicable fine
Third applicant	A reduction from 20 to 30% of the applicable fine
Subsequent applicants	A reduction of up to 20% of the applicable fine

2.3. Settlements

19. According to the provision 25 of the Competition Act, the Commission will consider not to impose fines to the undertakings that offer an agreement related to the early termination of the proceeding, in exchange of the fulfilment of corrective measures aimed at reversing the effects of the infringement and restoring competition in the affected markets.

20. In addition, the applicants may provide complementary measures that demonstrate their intention of amendment by providing an amount of money that contribute to the financing of investigation activities, promotion and defense of competition. The amount offered is a percentage of the estimated fine. Thus, the settlements do not reduce the dissuasive effect of sanctions.

¹⁰ Decision 99-2017/CLC-INDECOPI, available at: <http://servicio.indecopi.gob.pe/buscadorResoluciones/getDoc?docID=workspace://SpacesStore/291173cd-11cd-4fed-8c44-597e2177ee06>

2.4. Appeal before the judicial courts

21. The sanctions imposed by the Tribunal of Indecopi can be appealed before the judicial courts. In relation to hard-core cartels, by August 2019, decisions by the Tribunal imposing fines that have been appealed to the Judiciary have been confirmed in all the cases.