

DAWN RAIDS

Guidelines

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DAWN RAIDS

Guidelines

GLOSSARY

For the purposes of these Guidelines, the definitions set out below will be used:

TERM	MEANING
Economic agent	Any of the individuals defined as such by section 2 of the Competition Act.
Cartel	<p>Horizontal collusive conduct subject to an absolute prohibition, in accordance with section 11.2 of the Competition Act.</p> <p>These infringements consist on agreements between competing agents to limit competition on prices, quantities or commercialization conditions of their products, including restrictions on competition in public procurement.</p> <p>Decisions or recommendations issued by trade associations that have the same object or effect, directly harming the interests of consumers without any justification, are also considered under this definition.</p>
Commission	The Commission for the Defense of Free Competition of Indecopi
Constitution	The Political Constitution of Peru of 1993
Colaboration duty	A set of obligations to be observed by the company in the context of a dawn raid, seeking to facilitate the exercise of the authority's investigative powers.
Investigation faculties	<p>Set of powers legally conferred to the Technical Secretariat with the aim of obtaining evidence of judgment on a possible anticompetitive infringement.</p> <p>The execution of dawn raids on the establishments of the economic agents are part of the investigation powers.</p> <p>For the purposes of these Guidelines, the terms of investigation powers, control, supervision, inspection, overseeing or surveillance shall be used interchangeably, due to their substantial identity.</p>
Guidelines	These Dawn Raids Guidelines

ICN	The International Competition Network, organization that brings together different competition authorities worldwide.
Reasonable evidence	Sets of evidence to establish, on a probationary level, the commission of an infringement liable for sanctions, supporting the initiation of an administrative sanctioning proceeding.
Indecopi	The National Institute for the Defense of Competition and the Protection of Intellectual Property
Competition Act	Supreme Decree N° 030-2019-PCM, which approved the codified version of Legislative Decree N° 1034, Act on the R of Anticompetitive Conducts.
Act on the Organization and Functions of Indecopi	Legislative Decree N° 1033, which approved the Act on the Organization and Functions of Indecopi.
LPAG	Supreme Decree N° 004-2019-JUS, which approved the Codified Version of the Law N° 27444, The General Administrative Procedure Act.
OECD	Organisation for Economic Co-operation and Development
Sanctions	Measures of a punitive and pecuniary nature which the Commission - or Tribunal - may impose on economic agents as a result of an infringement of the Competition Act.
Technical Secretariat	The Technical Secretariat of the Commission
Tribunal	The Specialized Chamber for the Defense of Competition of the Tribunal of Indecopi.

EXPLANATORY MEMORANDUM

I. THE IMPORTANCE OF DAWN RAIDS ON COMPETITION

Pursuant with section 61 of the Constitution, the State is obliged to facilitate and monitor competition, fighting any unlawful practice that limits or restricts it¹. The protection of competition constitutes an essential principle that guides the country's economic regime, since a market under competitive conditions allows the entry and interaction of multiple bidders, resulting in a correct allocation of resources and different benefits in favor of the consumers and the society.

However, the benefits associated with competition can be distorted by different conducts carried out by the economic agents in order to obtain advantages that they would not obtain in a competitive market, so it is essential for the State to pursue and punish these anticompetitive conducts². On the basis of this premise, the Competition Act is the national regulation that develops the previously outlined constitutional mandate, whose purpose is to sanction anticompetitive conducts that affect the free development of the market and to promote economic efficiency for the well-being of consumers³.

At the same time, the legal system states that the authority responsible for protecting the competitive process and sanctioning anticompetitive conducts - abuse of a position of dominance and collusive practices - is Indecopi,⁴ through the Commission and the Technical Secretariat⁵. On the one hand, the Commission is the administrative body of first instance charged with the sanctioning of infringements of competition through the imposition of sanctions and injunctions, where appropriate⁶.

On the other hand, the Technical Secretariat is primarily responsible for the duty of investigation and prosecution of possible anticompetitive conducts. Thus, it has different and important powers to carry out these actions, within which the so-called powers of investigation, control or inspection stand out.

1 Political Constitution of Peru

Section 61.- The State facilitates and oversees free competition. It fights any practice that would limit it and the abuse of dominant or monopolistic positions. No law or arrangement may authorize or establish monopolies.(...).

2 On the State legal role contained in section 61 of the Constitution, the Tribunal states that "The State has an obligation to protect competition, through the facilitation (actively) and surveillance (through the sanctions) of the competitive process, the latter being the legal good under protection". Cfr. Resolution N° 1263-2008/TDC-INDECOPI of June 27th 2008, relapse in File N° 10-2007/CLC.

3 The Competition Act

Section 1. Purpose of this Act.-

This Act prohibits and sanctions anticompetitive conducts in order to promote economic efficiency in the markets for the well-being of consumers.

4 Act on the Organization and Functions of INDECOPI

Section 2. Functions of INDECOPI.-

2.1 INDECOPI is the autonomous body responsible for: (...)

b) Defend free and fair competition, sanctioning anticompetitive and unfair conducts and ensuring that there is effective competition in the markets; (...).

5 With the exception of the infringements carried out on the public telecommunications service market, in which case the competent authority is the Supervisory Body for Private Investment in Telecommunications – Osiptel, as provided for in section 17 of the Competition Act.

6 The decisions issued by the Commission may be appealed before the Tribunal, the body of second and final instance at the administrative level. Consequently, the decisions of the Tribunal are only challengeable through an action before the Judiciary Branch – i.e., judicial review.

Within the framework of the supervisory and surveillance powers of the Public Administration, the investigative functions include all activities carried out with the aim of verifying whether the conducts of the companies are legal⁷. Among these techniques are included dawn raids, through which representatives of the authority come with or without prior notification to the establishments of the companies, in order to verify *in situ* the development of their commercial activities and to access to the documentation, registrations and goods found in those facilities. Dawn raids take on particular relevance in competition, having a fundamental role for the authority to adequately fulfil its role of detecting anticompetitive conducts (especially regarding the so-called “cartels”, unanimously considered by economic and legal doctrine as the most harmful and damaging conducts against competition)⁸. In this regard, the clandestine nature of the cartels is among the main factors that challenges the inspection duty of competition agencies.

In fact, in the case of infringements dealing with sensitive commercial aspects and of high relevance to the economic agents, these anticompetitive conducts are usually planned, directed and carried out by highly qualified and rational subjects, who in turn play a key role in the decision-making of those companies (high-ranking managers, directors and executives, among others).

As they become aware of the illegality of their acts, these subjects usually take various measures to avoid leaving a trace of such unlawful acts, as they provide for the possibility of a potential investigation by the authority. Thus, evidence of such infringements will generally not be reflected in written media and such activities will not be recorded. Therefore, the evidence of these infringements is often scarce or even non-existent⁹.

As a result, cartels and other anticompetitive conducts are characterized by its clandestine and secret nature, and, as they belong to the internal jurisdiction of companies (under strict control of a few subjects), there is a high risk for the evidence attesting to their realization to be altered, concealed or even easily destroyed¹⁰. This situation becomes more serious because, unlike other areas where the authorities’ inspection tasks are intended to verify that the companies perform the legal duty to possess certain documentation (classifying the non-possession of such information as an infringement)¹¹. This clearly does not happen in the case of competition agencies, whose functions are geared towards obtaining predominantly secret and very difficult evidence¹².

The complexity associated with the probation of anticompetitive conducts determines that dawn raids are a key tool for clarifying the disputed facts and uncovering evidence of such infringements. In fact, the surprising nature of those raids allows the authority to attend to the establishments of companies without prior notice, allowing them to immediately access certain documentation and reducing the likelihood for it to be modified, concealed or eliminated. In turn, the versatility and immediacy of these procedures allows inspectors to review or copy information that would be relevant to the investigation, as well as to make different inquiries or questions to the economic agent’s employees.

⁷ MACERA defines the inspection function as a “material and instrumental activity in which an agent of the authority, duly enabled by an administrative act, may enter or burst into the private area of an industrial company to review and verify whether the activity carried out is in line with legality, without the need for judicial authorization”. Cfr. MACERA, Bernard Frank, “The problem of the assumption of administrative inspections by private entities (special reference to the environmental monitoring system of industrial activities)”, in *The Administrative Law on the threshold of XXI Century. Homage to Professor Dr. D. Ramón Martín Mateo*, Volume II, Coord. SOSA WAGNER, F., Tirant lo Blanch, Valencia, 2000, p. 1606.

⁸ Cartels are universally recognized as the most harmful of all types of anticompetitive conduct. Moreover, they offer no legitimate economic or social benefits that would justify the losses that they generate. Thus, they are condemned in all competition laws; in some countries they are classified as a crime. Thus, there is consensus that such infringements must be subject to the rules of an absolute prohibition. In this regard, see: OCDE, *Competition Committee. Fighting Hard Core Cartels: Hard, Effective Sanctions and Leniency*, 2002, p. 75-76.

⁹ The OECD recognizes this situation, stating that “cartels pose a special problem for enforcers because they operate in secret, and their members usually do not co-operate with investigations of their conduct”. In: OCDE, *Prosecuting Cartels Without Direct Evidence*, 2006, p. 18.

¹⁰ In this regard, the General Court of Justice of the European Union has stated that “it is normal for the activities that imply those practices and anti-competitive agreements to take place clandestinely, and for meetings to be held in secret, most frequently in a non-member country, and for the associated documentation to be reduced to a minimum”. In Case T-439/07 from June 27th 2012.

¹¹ Consider, for example, a dawn raid carried out by a Municipality and aimed at verifying compliance with the operating regulation of a commercial establishment (that has the operating license and the corresponding ITSE Certificate), authorizations that are mandatory and are contained in documents that must necessarily be displayed in a visible place of the premises.

¹² About this matter, SCORDAMAGLIA states that a cartel is distinguished by the obstacles for accessing the incriminating evidence. For this author, “(...) in view of today’s increasing technological advancements, evidence detection is more difficult and cartelists remain in full control over its existence and its elimination. Moreover, regardless of their clandestine character, cartels are difficult to prove due to their varying and mutating characteristics. (...) These specificities impose a near unbearable threshold for competition authorities to prove in detail an infringement, let aside to impose an appropriate sanction reflecting the cartelists’ real participation”. SCORDAMAGLIA, Andreas, “Cartel Proof, Imputation and Sanctioning in European Competition Law: Reconciling effective enforcement and adequate protection of procedural guarantees”. In: *The Competition Law Review*, N° 7, 2010, p. 7.

At an international level, the OECD recognizes dawn raids as one of the most appropriate and important instruments for combating anticompetitive conducts¹³, increasing its detection potential and strengthening the deterrent capacity of competition authorities in the market¹⁴.

Such importance has also been highlighted by the Tribunal, emphasizing its decisive nature in obtaining evidence and preventing evidence from being destroyed¹⁵:

"Dawn raids without prior notice and immediate access to documentation (physical, magnetic, electronic, as well as any other) found at the establishments of those companies during such procedure are two of the authority's main tools for identifying or finding evidence of anticompetitive conducts, such as price agreements between competitors (horizontal collusions).

In fact, within the detection and repression of cartels, the aforementioned mechanisms allow the authority to obtain evidentiary means for the initiation of proceedings and, in many cases, to access evidence regarding the existence of an agreement between competitors. Therefore, it makes sense for the legislator to have granted these faculties to the Technical Secretariat as part of its powers to conduct investigations". (Underline added).

At this point, it must be stated that, although dawn raids are particularly relevant for detecting cartel cases, this does not exclude the possibility for such proceedings to be used successfully by the Technical Secretariat in the context of investigations relating to other types of anticompetitive conducts, since the Competition Act does not limit the scope of these investigation functions to cartel cases or excludes their enforcement on different infringements, allowing their implementation in cases where the Technical Secretariat deems it relevant.

On the contrary, both international¹⁶ and national case law confirm the importance of dawn raids in the detection of all types of anticompetitive conducts. As an example, on an investigation related to the cement market, dawn raids carried out by the Technical Secretariat provided access to various emails showing the existence of a vertical collusive practice among the companies investigated, under the form of a concerted and unjustified refusal to supply (among other anticompetitive restrictions). This evidence was decisive in order to hold such economic agents liable for incurring in such infringement, a sanction that was ultimately ratified by the Judiciary¹⁷.

In connection with the above, the inspector's powers – and specifically dawn raids – are a fundamental tool for the Technical Secretariat, since their swiftness and surprising nature allow to obtain evidence on the existence of anticompetitive conducts, identifying the responsible individuals for those infringements and facilitating the detection and possible sanction by the authority. These powers must in turn be sufficiently effective, in order to generate in economic agents the conviction that their market action is rigorously surveilled.

Given these particularities, dawn raids are also a complex task that involve the implementation of numerous activities by the Technical Secretariat, which have a direct impact on the private sphere of economic agents. Under this consideration, and to the extent that the exercise of any power must be justified and have a legal basis, it is necessary to ensure that such actions are not arbitrary or disproportionate, and are subject to the current legal regulations.

¹³ For this Organisation, "cartel operators know that their conduct is unlawful and they operate their conspiracies in secret. In some cases they devise elaborate schemes for concealing their arrangements (...). Thus, cartels are unique investigative methods are required to combat". Cfr. OCDE, *Hard Core Cartels. Recent Progress and Challenges Ahead*, Library of the OCDE, Paris, 2003, p. 20.

¹⁴ In addition, the ICN highlights the need for effective investigative powers, especially regarding the prosecution of cartels. Review: ICN, *Defining Hard Core Cartels Conduct. Effective institutions. Effective Penalties*, ICN Working Group on Cartels, Conference in Bohn, Germany, June 8th 2005.

¹⁵ Decision N° 0486-2017/SDC-INDECOPI of August 17th 2017, relapsed in File N° 001-2013/CLC.

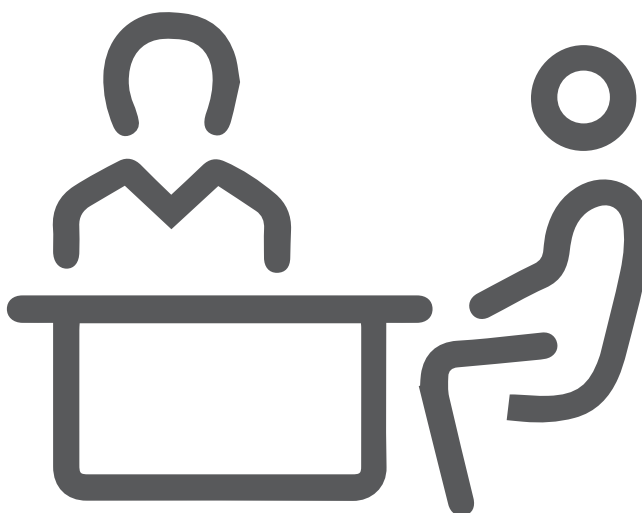
¹⁶ On this point, review Decision 1507/2016 of April 6th 2016 of the Supreme Court of Spain, which validated the legality of a dawn raid on a vertical agreement between a producer and its distributors, for the fixing of prices and commercial conditions of the sale of motorcycles.

¹⁷ Cfr. Decision of the Supreme Court of January 5th 2018, relapsed in in File N° 2873-2015.

In view of this, as well as the need for the companies to also observe different obligations in the context of these procedures, it is appropriate to establish certain guidelines related to the object, scope and limits of the dawn raids carried out by the Technical Secretariat, in order to guide those raided on their demeanor and rights in the course of these actions. This is also in line with the importance of ensuring the effectiveness of the investigation functions of the Technical Secretariat and protecting the constitutional legal good of competition.

On the basis of this premise, these Guidelines aim to provide greater transparency and to define the scope of action of the Technical Secretariat in the context of a dawn raid, describing its main characteristics and particularities, as well as the rights and obligations of the economic agents who are the subject to these proceedings.

To this end, and as an explanatory memorandum, the foundations that underpin the publication of these Guidelines and determine its validity will be developed in accordance with national and international legislation, doctrine and jurisprudence on the matter.



II. REGULATIONS ON DAWN RAIDS

II.1 Foreign regulations

Competition regulation is characterized by granting their respective authorities different powers of investigation and inspection, in order to detect anticompetitive conducts. While the characteristics of these powers may differ depending on the institutional policy of each country, there is currently a consensus on the importance for competition agencies to have sufficiently rigorous and adequate investigation powers to protect the proper functioning of the market.

In this regard, and for the purposes of having basic references on the scope of these systems, the main supervisory powers of certain foreign competition authorities are set out below, with particular emphasis on those systems that share a legal tradition similar to that of our country.

a) European Union

Without prejudice to the competition dawn raid regime applicable to each country of the European Union, the European Commission¹⁸ also has the powers to conduct dawn raids in member states. This power is contained in EC Regulation No. 1/2003, related to the application of competition regulation in the European common market.

Thus, article 20 of that Regulation provides for the possibility to perform dawn raids as a result of an order issued by the European Commission, which has the following powers¹⁹:

- i.** To enter any premises, land and means of transport of undertakings and associations of undertakings.
- ii.** To examine the books and other records related to the business, irrespective of the medium on which they are stored.
- iii.** To take or obtain in any form copies of or extracts from such books or records.
- iv.** To seal any business premises and books or records for the period and to the extent necessary for the inspection.
- v.** To ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers.

¹⁸ This entity is an executive body of the European Union responsible for proposing community regulations and monitoring their compliance. Cfr.: <https://bit.ly/2qgHFU9>, last visited on April 7th 2020.

¹⁹ Council Regulation (EC) No 1/2003

Article 20. The Commission's powers of inspection.-

1. In order to carry out the duties assigned to it by this Regulation, the Commission may conduct all necessary inspections of undertakings and associations of undertakings.

2. The officials and other accompanying persons authorised by the Commission to conduct an inspection are empowered:

- (a) to enter any premises, land and means of transport of undertakings and associations of undertakings;
- (b) to examine the books and other records related to the business, irrespective of the medium on which they are stored;
- (c) to take or obtain in any form copies of or extracts from such books or records;
- (d) to seal any business premises and books or records for the period and to the extent necessary for the inspection;
- (e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers.

Moreover, that article also states that in certain cases the inspectors shall exercise their powers upon the presentation of a dawn raid decision, which must cover a number of minimum requirements. Among them, the document shall indicate the object and purpose of the dawn raid, as well as the possible penalties for possible breaches²⁰.

In addition, Community regulation also provides that member countries' competition offices may cooperate in the European Commission's dawn raids (or of another Member State), acting on behalf of that authority in the terms covered by EC Regulation No. 1/2003.

Therefore, the Community authority has extensive supervisory powers, being able to access company's establishments and to require the submission of the documents it deems necessary for the investigation, being sufficient with the presentation of the European Commission's decision. Correspondingly, economic agents should undergo inspections and actively cooperate with inspector officials, at the risk of being sanctioned.

Finally, in order to increase the effectiveness of their actions and to make them more transparent, the European Commission has published various information guidelines on good practices describing and detailing a number of aspects related to the authority's supervisory powers, as well as the ways in which these steps are implemented and the extension of those powers²¹.

b) Spain

In the Spanish case, the competent authority to monitor compliance with the competition regulation²² is The National Commission on Markets and Competition (hereinafter, the CNMC), according to the powers conferred by Law No. 3/2013, Law on the Creation of the National Commission on Markets and Competition²³.

In accordance with these provisions, and in accordance with Community legislation, the CNMC is empowered to access any premises or establishment of the companies under investigation. Once such admission has been made, CNMC inspectors may request, verify and copy all information necessary to determine the possible configuration of the investigated anticompetitive infraction (books, computers and any other documents), as well as to question the employees or representatives of the investigated companies, among other powers²⁴.

20 Council Regulation (EC) No 1/2003

Article 20. The Commission's powers of inspection.- (...)

3. The officials and other accompanying persons authorised by the Commission to conduct an inspection shall exercise their powers upon production of a written authorisation specifying the subject matter and purpose of the inspection and the penalties provided for in Article 23 in case the production of the required books or other records related to the business is incomplete or where the answers to questions asked under paragraph 2 of the present Article are incorrect or misleading. In good time before the inspection, the Commission shall give notice of the inspection to the competition authority of the Member State in whose territory it is to be conducted.

4. Undertakings and associations of undertakings are required to submit to inspections ordered by decision of the Commission. The decision shall specify the subject matter and purpose of the inspection, appoint the date on which it is to begin and indicate the penalties provided for in Articles 23 and 24 and the right to have the decision reviewed by the Court of Justice. The Commission shall take such decisions after consulting the competition authority of the Member State in whose territory the inspection is to be conducted.

21 For more information, please check on the following link: (last visited on April 7th 2020): <https://bit.ly/Vn7vDC>

22 Contained mainly in Law No. 15/2007, Spanish Competition Act.

23 It should be noted that the CNMC was created in 2013 on the occasion of the integration of six Spanish regulatory bodies, including the former National Competition Commission.

24 Act No. 3/2013, Act on the Creation of the National Commission on Markets and Competition

Section 27. Powers of inspection.-

1. Tenured civil servants of the National Markets and Competition Commission, duly authorized by the relevant director, shall have the status of an agent of the authority and may conduct as many inspections as required at companies and associations of companies for the proper implementation of this Act.

2. Staff authorized for that purpose shall have the following powers of inspection:

a) To access any premises, facilities, land and means of transport belonging to companies and associations of companies and the private dwellings of traders, directors and other members of company staff. Moreover, they may check the items used in the services or activities of the operators or the persons who carry out the activities referred to in this Act, the networks they install or operate and as many documents as they are required to possess or retain.

b) To check the books, registers and other documents relating to the activity in question, regardless of its material format, including computer programs and files of a magnetic, optical or any other nature.

Therefore, in the course of the dawn raid CNMC agents may require all kinds of information and explanations necessary for the matter of the investigation. The investigated must undergo these proceedings and avoid any act that may constitute an obstruction of their progression.

For its part, it will be sufficient for the representatives of the CNMC to exhibit the written authorization of the Director of Investigation, contained in the dawn raid decision²⁵.

Finally, in the event that companies object to the inspectors' access to their offices - or if there is a risk of such opposition - the CNMC may apply for a judicial authorization ordering such admission, and may also have the support of the police forces in the cases that apply²⁶.

c) Mexico

The Federal Economic Competition Commission (hereinafter, COFECE) is the body responsible for protecting the competitive process in Mexico and ensuring compliance with the obligations contained in the Federal Economic Competition Act²⁷. For this purpose, COFECE has an Investigating Authority, a body empowered to initiate and conduct investigations associated with the existence of possible anticompetitive practices²⁸.

In order to carry out its duties, the Investigating Authority may request information about the events under investigation from any person, as well as summon to declare any individual who may have relevant information to the investigation and to carry out dawn raids intended to obtain evidence of possible prohibited conducts (called "verification dawn raids")²⁹.

c) To make or obtain copies or extracts, in any format, of such books or documents.

d) To retain, for a maximum period of 10 days, the books or documents referred to in letter b).

e) To seal all premises, books or documents and other company property for the time and to the extent necessary for the inspection.

f) To ask any representative or member of staff at the company or association of companies for explanations on acts or documents related to the aim and purpose of the inspection and to record their answers.

The exercise of the powers described in letters a) and e) shall require the express prior consent of the affected party or, failing that, appropriate judicial authorization

25 For more information, review the following document "Information Note on Inspections carried out by the CNMC Competition Directorate in Competition Protection", located at the following link: <https://bit.ly/2JUj6WF>. Last visited on April 7th, 2020.

26 Act No. 3/2013, Act on the Creation of the National Commission on Markets and Competition
Section 27. Powers of inspection.- (...)

4. If a company or association of companies objects an inspection, or if there is a risk of such objection, the competent body of the Commission shall, if the inspection entails a restriction on fundamental rights, apply for the appropriate judicial authorization from the judicial review courts, which shall issue a decision within a maximum period of 48 hours. Public authorities shall provide the necessary protection and assistance to the staff of the National Markets and Competition Commission for the exercise of their inspection functions.

27 Except in cases concerning the telecommunications and broadcasting sectors, in which the competent authority is the Federal Telecommunications Institute.

28 Federal Economic Competition Act

Section 26.- The Investigative Authority is the Commission's unit responsible for conducting the investigation stage and is a party to the trial-like procedure. In the exercise of its powers, the Investigative Authority shall have technical and administrative autonomy in order to decide on its operation and resolutions.

29 Federal Economic Competition Act

Section 72.- The Investigative Authority may require any individual or undertaking to submit the information or documents deemed necessary in performing its investigations, and shall state the legal status the individual or undertaking have under the investigation, either as a defendant or as a collaborating third party. Moreover, it may summon individuals or undertakings related to the facts for interviews, as well as order and conduct on-site inspections, regarding locations where there may be elements to be included in the substantiation of the investigation. (...).

In order to carry out these procedures, the “dawn raid decision” must be issued, which shall contain various data related to the object, scope and duration of the dawn raid³⁰. In turn, in the context of these dawn raids, inspectors are empowered to access any type of premises or offices of those investigated, as well as to verify and obtain a copy of the documents or files linked to the investigation and to make the queries they deem appropriate³¹.

As a result, those investigated are also required to cooperate with the inspectors throughout the course of the dawn raid, either by providing information or facilitating the access of officials to their teams and units, at the risk of being sanctioned.

d) Colombia

In Colombian law, the authority responsible for ensuring competition is the Superintendency of Industry and Commerce (hereinafter, the SIC)³², supervising that economic agents do not engage in anticompetitive conducts that threatens the market. Pursuant to the provisions of Decree No. 4886 of 2011, the SIC is empowered to carry out dawn raids and collect all the information necessary for the performance of its functions. In the context of these dawn raids, the authority may also question the economic agents and request the provision of data, reports, books and any other documents required for the exercise of their powers³³.

It is then noted that the SIC’s power to conduct dawn raids has legal support, enabling it to access the companies’ establishments and to collect the information it deems relevant based on each specific investigation.

From the review of the described systems is confirmed that comparative law contains uniformity in recognizing the importance of providing competition authorities with a wide range of investigation powers, including the conduct of surprise dawn raids and the possibility of requesting and copying

30 Federal Economic Competition Act

Section 75.- The Investigative Authority’s head may order the performance of on-site inspections, which will be subject to the following rules:

I. The Investigative Authority shall issue the inspection order, that shall contain the purpose, scope and duration to which the procedure will be restricted; the name and address of the inspected individual or undertaking; the name or names of the authorized personnel that shall carry out the inspection either jointly or separately, as well as a warning indicating that should access be denied, hindering the performance of the procedure or refusing to provide the documents or information requested, the enforcement measures established in the Law shall be imposed (...).

31 Federal Economic Competition Act

Section 75.- The Investigative Authority’s head may order the performance of on-site inspections, which will be subject to the following rules: (...)

IV. The inspected Economic Agent, its officers, representatives or supervisors of its facilities or buildings are obligated to allow the on-site inspection, facilitating the Investigative Authority’s authorized personnel to carry out their duties, which shall be authorized to:

- Access any office, premise, site, means of transport, computer, electronic device, storage device, file cabinet or any other media that could contain evidence regarding the acts or facts pertaining to the visit;
- Verify ledgers, documents, papers, files or information, whatever its material support, related to the inspected Economic Agent’s economic activity;
- Produce or obtain copies or extracts in any format, of said ledgers, documents, papers, files or information which may be stored or generated by electronic means;
- Secure all ledgers, documents and other means from the inspected Economic Agent during the time and in the measure required to conduct the on-site inspection; and,
- Request explanations regarding the facts, information or documents related to the purpose and objective of the on-site inspection from any of the inspected Economic Agent’s officers, representatives or personnel, and record their answers.

32 Act No. 1340, implementing rules on the protection of competition

Section 6. National Competition Protection Authority.-

The Superintendency of Industry and Commerce shall be free to know of administrative investigations, impose fines and take other administrative decisions regarding the infringement of the provisions on competition protection, as well as in relation to administrative monitoring of compliance with the provisions on unfair competition.

33 Decree No. 4886, amending the structure of the Superintendency of Industry and Commerce, determines the functions of its units and dictates other provisions

Section 1. General functions.- (...)

The Superintendency of Industry and Commerce shall perform the following functions:

- As the National Competition Protection Authority, to ensure compliance with the provisions in this matter in national markets (...)
- To conduct dawn raids, decree and carry out evaluations and collect all conducting information, in order to verify compliance with the legal provisions for which control is responsible and to adopt appropriate measures in accordance with the law.
- To ask natural and legal persons to provide data, reports, books and commercial papers that are required for the proper exercise of their functions.
- To interrogate under oath and in compliance with the formalities provided for this kind of evidence in the Code of Civil Procedure, any person whose testimony may be useful for the clarification of the facts during the performance of their functions (...).

certain information in the course of such procedure. In addition, it is also found that, as a general rule, competition authorities may carry out such actions on their own initiative, without the need for authorization from other bodies.

Having identified these models, it is now appropriate to analyze the regime of the inspector activity applicable in Peru; especially in the case of the Technical Secretariat.

II.2 National regulation of the investigation powers.

a) Constitutional foundations

Our Constitution does not provide for specific provisions related to the exercise of the investigation power by the Public Administration authorities. However, there are a number of constitutional precepts that refer to these functions³⁴:

- i. In the context of the right to secrecy of communications, Section 2.10 of the Constitution expressly provides that books, receipts, and accounting and administrative documents are subject to inspection or audit by the relevant authority in accordance with the law³⁵.
- ii. With regard to the tax regime applicable to schools, the supreme rule states that those non-affected will be subject to the supervising mechanisms legally provided for this purpose³⁶.
- iii. Section 65 of the Constitution recognizes as a constitutional value the defense of the interests of consumers and thus imposes to the State the active duty to ensure their security and guarantee their right of information and health³⁷. In this regard, the State is required by that mandate to monitor the actions of suppliers on the market.
- iv. Finally, section 61 of the Constitution states that the State is obliged to actively defend competition in the market, prosecuting and sanctioning conducts that violate or distort it.

Our Constitutional Court has ruled on several occasions on this latter provision, recognizing the importance of promoting competition and ratifying that the State should promote and protect it³⁸:

³⁴ As TIRADO explains: "even if the Constitution does not expressly contain the inspection or supervision as a function of the Administration, it is easily appreciable that it was clearly present, and, at least indirectly, it achieves constitutional recognition". TIRADO, José Antonio, *Reflexiones en Torno a La Potestad de Inspección o Fiscalización de La Administración Pública*, Magazine Derecho & Sociedad, 2015, p. 259-262.

³⁵ **Political Constitution of Peru**

Section 2.- Every person has the right: (...)

10. To the secrecy and inviolability of private communications and documents.

Communications, telecommunications, or any private correspondence may only be opened, seized, intercepted, or tapped by the authority of a warrant issued by a judge and with all the guarantees provided in the law. Any matter unrelated to the circumstances under examination shall be kept secret.

Private documents obtained in violation of this provision have no legal effect.

Books, receipts, and accounting and administrative documents are subject to inspection or audit by the relevant authority in accordance with the law. Any action thus taken may not include removal or seizure, except by a court order.

³⁶ **Political Constitution of Peru**

Section 19.- Universities, colleges, and all other educational institutions established in accordance with the law enjoy exemption from all direct and indirect taxes levied on assets, activities, and services concerning their educational and cultural purposes. On the subject of import tariffs, a special arrangement for allocation of taxes may be established for specific assets.

Scholarships and grants for educational purposes shall be exempt from taxes and enjoy tax benefits in the manner and within the limits prescribed by law.

The law sets forth the tax provisions that will govern the above-mentioned institutions, as well as the requirements and conditions to be met by cultural centers that, by way of exception, may enjoy the same benefits.

For private educational institutions that generate revenues legally defined as profits, the income tax may be applied.

³⁷ **Political Constitution of Peru**

Section 65.- The State defends the interests of consumers and clients. For this purpose, it guarantees the right to information on goods and services available to them on the market. Likewise, it especially watches over the health and security of the population.

³⁸ Decision of the Plenary of the Constitutional Court of April 30th 2014, relapsed in File N° 3479-2011-PA/TC.

"In a social market economy, the right to freedom of enterprise, together with the rights to the private free initiative, freedom of trade, freedom of industry and of competition, are regarded as the basis of the country's economic and social development, and as a guarantee of a democratic and pluralistic society (...)" (Underline added).

From what has been mentioned by this collegiate body, it has been reaffirmed that the defense of competition is a fundamental value for the development of society, ensuring that the economic resources are allocated efficiently. In addition, regarding the obligation of the State to combat any anticompetitive practice, the highest interpreter of the Constitution states the following³⁹:

"In accordance with such imperatives, the existence of an antitrust legislation and the development of regulatory frameworks that allow higher levels of competition, for which the regulatory agencies (sic) and INDECOPI play a leading role, both in the promotion and defense of competition and in the protection of consumers and users, are justified.

Precisely this Collegiate body has stated that these entities fulfil a special duty for the protection of fundamental rights, which implies requiring the accomplishment of their duties to monitor, regulate and sanction conducts and practices that are contrary to competition and consumer laws, functions that are fully armed within the legal framework of the powers granted to it for these purposes". (Underline added).

As stated above, the defense of competition is enshrined as a constitutional legal good and an essential expression of the economic public order, thereby requiring Indecopi – specifically the Commission and the Technical Secretariat – its protection and guarantee, by taking all the measures that have been legally attributed to it for that purpose. And one of its main tools is the exercise of the inspection function - in accordance with the parameters set out below – which is a fundamental element when combating anticompetitive practices, characterized by their clandestineness and a high degree of harmfulness, which means that the competition authority must have the sufficiently effective powers to detect them.

b) General regulation of the inspection activity

Without prejudice to the inspection powers conferred to the Technical Secretariat after the modifications introduced by Legislative Decree N° 1272 of December 20th 2016, the LPAG incorporated a new chapter related to the administrative activity of monitoring or inspection, defining it as the set of activities linked to the verification of compliance with the obligations, prohibitions and limitations demandable to the companies⁴⁰.

In this sense, the LPAG expressly recognizes various powers to the Administration in the exercise of its administrative function, such as: (i) requiring the submission of all types of documentation and information necessary for the dawn raid; (ii) asking questions to the investigated subjects; (iii) carrying out dawn raids with or without prior notice; and, (iv) expanding or modifying the object of the investigation, among others⁴¹. The

³⁹ Decision of the Plenary of the Constitutional Court of December 5th 2006, relapsed in File N° 1963-2006-PA/TC. In turn, the collegiate body stated that competition "must be monitored and preserved by the State, whose main function is to maintain and promote the existence of free, competitive and transparent markets, as well as to take all the necessary measures to prevent their obstruction or restriction". Decision of August 10th 2009, relapsed in File N° 3116-2009-AA.

⁴⁰ **Codified Version of the General Administrative Procedure Act**
Section 239. Definition.-

239.1 The monitoring activity constitutes all acts and investigation procedures, supervision, control or inspection on compliance with obligations, prohibitions and other limitations demandable to the companies, arising from a legal or regulatory standard, contracts with the State or other legal source, under a policy enforcement, risk prevention, risk management and guardianship of protected legal assets.

Only by law or Legislative Decree the inspection activity can be attributed to the entities (...).

⁴¹ **Codified Version of the General Administrative Procedure Act**
Section 240. Faculties of the entities that carry out the monitoring activity.-

(...) 240.2 The Public Administration in the exercise of the monitoring activity is empowered to carry out the following:

1. To require the company that is subject to the dawn raid, the display or presentation of all necessary documentation, files, records or other information, in compliance with the principle of legality.

Access to information that may affect personal or family privacy, as well as the matters protected by banking, tax, commercial and industrial secrecy and

setting of these powers determines correlatively that there are certain duties that those inspected must fulfill, being obliged to tolerate and cooperate with the work of the authority. These duties include those related to: (i) providing the necessary facilities for inspectors to exercise their powers; (ii) allow the inspectors the access to their establishments; and, (iii) to sign the dawn raid record⁴².

In addition, the Administration should observe a number of duties when carrying out its inspection function, ensuring for its performance to not be arbitrary and adopting the necessary measures to properly verify the investigated matter. Thus, the LPAG provides different duties related to the execution of these dawn raids, such as: (i) to identify at the request of the company; (ii) to cite the legal basis for its competencies and powers; and, (iii) to provide a copy of the dawn raid record, allowing the company to incorporate the observations it deems relevant, among other things⁴³. This makes it possible to adequately define the extent of the inspection powers and their development in each case.



the protection of personal data, is governed by the provisions of the Political Constitution of Peru and special laws.

2. To question the subjects of the dawn raid or their representatives, employees, officials, advisers and third parties, using the technical means it deems necessary to generate a complete and reliable record of their declarations.

The summons or personal appearance to the headquarters of the administrative entities are governed by Sections 67 and 68.

3. To carry out dawn raids, with or without prior notification, on the premises and/or property of the natural or legal persons subject to the dawn raids, complying with the fundamental right to the inviolability of the domicile where applicable.

4. To make a copy of the physical, optical, electronic or any other files, to take pictures, to make prints, audio or video recordings with prior knowledge of the administrated and, in general, to use the necessary means to generate a complete and reliable record of the dawn raid.

5. To conduct forensic examinations on documentation and other technical aspects related to the dawn raid.

6. To use the equipment it deems necessary when performing the monitoring actions and other procedures. The company should allow the access to such equipment, as well as to allow the use of their own equipment, when it is indispensable for the dawn raid.

7. To expand or modify the object of the dawn raid in the event that, as a result of the actions and procedures carried out, additional breaches are detected to those initially expressed in that object.

8. Others established by special laws.

42 Codified Version of the General Administrative Procedure Act

Section 243. Duties of the inspected companies.-

The duties of the inspected companies are the following:

1. To perform or provide all the facilities for the execution of the powers listed in Article 238.

2. To allow the access to its units, facilities, goods and/or equipment, of direct administration or otherwise, without prejudice to their fundamental right of the inviolability of the domicile where applicable, to the authorities, public servers and third parties, without prejudice to their fundamental right to inviolability of the domicile where appropriate.

3. To subscribe the dawn raid record.

4. Others established by special laws.

43 Codified Version of the General Administrative Procedure Act

Section 241. Duties of the entities carrying out the inspection activity.-

241.1 The Public Administration carries out its inspection activities with diligence, responsibility and respect for the rights of the companies, adopting the necessary measures to obtain the appropriate evidence to support the verifiable facts, if applicable.

241.2 The competent authorities have, among others, the following duties in the exercise of their inspection activity:

1. Prior to the inspection actions and dawn raids, to carry out the review and/or evaluation of the documentation containing information related to the specific case under inspection.

2. To identify themselves at the request of the company, by presenting the credential granted by their entity, as well as the national identity document.

3. To cite the legal basis that supports its competence to inspect, its powers and obligations, to the companies who requests it.

4. To provide a copy of the dawn raid record or a similar document to the company at the end of the dawn raid procedure, clearly and accurately consigning the observations made by the company.

5. To maintain reservation of the information obtained in the dawn raid.

6. Duty of impartiality and prohibition of conflicting interests.

For its part, Section 242 of the LPAG recognizes the following rights of those inspected⁴⁴:

- i. To be informed about the nature and scope of the inspection. This allows them to know and identify the inspected matter, in order to determine what obligation or conduct is being monitored by the authority at that time.
- ii. To require the identity and documentary credentials of the inspectors.
- iii. To record or film (whether in audio or video) the dawn raids in which they participate, in order to have a reliable endorsement of the facts verified by the inspectors. Naturally, the inspectors should be informed about these recordings.
- iv. To include observations in the dawn raid records, as well as to submit additional documentation or arguments after its reception.
- v. To bring professional advice to the dawn raids if they deem it necessary.

c) Inspection powers of the Technical Secretariat

Pursuant to Section 15.1 of the Competition Act, the Technical Secretariat is the autonomous body in charge of conducting relevant investigations and inquiries of possible anticompetitive conducts, as well as the prosecution and sanction proceedings for the violations of that regulations⁴⁵.

In order to develop its investigation activities in a timely manner, the Competition Act grants the Technical Secretariat the following inspection powers⁴⁶:

44 Codified Version of the General Administrative Procedure Act

Section 242. Rights of the inspected companies.-

The rights of the inspected companies are the following:

1. To be informed of the object and legal basis of the monitoring action and, if foreseeable, of the estimated period of its duration, as well as of its rights and obligations in the course of such action.
2. To require the credentials and national identity documents of the officials, public servers or third parties in charge of the dawn raid.
3. To be able to make audio or video recordings of the dawn raids in which they participate.
4. For their observations to be included in the corresponding dawn raid record.
5. To submit additional documents, evidence or arguments after the reception of the dawn raid record.
6. To bring professional advice to the dawn raid if the company considers it necessary.

45 The Competition Act

Section 15. The Technical Secretariat.-

15.1. The Technical Secretariat of the Commission is the body with technical autonomy that carries out the duty of instruction of the investigation procedure and the sanctioning of anticompetitive conducts and that issues an opinion on the existence of the infringing conduct

15.2. The powers of the Technical Secretariat are the following:

- a) To conduct preliminary investigations; (...).

46 The Competition Act

Section 15. The Technical Secretariat.-

(...) 15.2 The powers of the Technical Secretariat are the following:

- (f) Exceptionally and with the previous agreement of the Commission, it may freeze for a period of no more than ten (10) business days, which can be extended by another period, books, files, documents, correspondence and records in general of the natural or legal person investigated, taking a copy of them. In the same circumstances, it may withdraw them from the premises in which they are located, for fifteen (15) working days, requiring judicial authorization to proceed with the withdrawal, in accordance with the special process provided for in paragraph (c) of numeral 15.3 of this Section (...);
- 15.3. For the development of its investigations, the Technical Secretariat is empowered to:
 - (a) Require natural or legal persons, irregular companies and autonomous assets to display all types of documents, including accounting and corporate books, payment vouchers, internal or external correspondence and magnetic or electronic records, including, in this case, the programs that were necessary for their reading; as well as to request information regarding the organization, business, shareholding and the ownership structure of companies.
 - b) Summon and interrogate, through the officials designated for the purpose, the investigated persons or their representatives, employees, officials, advisers and third parties, using the technical means that it deems necessary to generate a complete and reliable record of their statements, being able to use magnetophonic recordings, video, compact disc or any other type of electronic instrument.
 - c) Carry out dawn raids, with or without prior notification, in the premises of natural or legal persons, irregular companies and autonomous assets and examine the books, records, documentation and goods, being able to check the development of productive processes and take the declaration of the persons who are in them. At the time of the dawn raid, to make copies of the physical, magnetic or electronic files, as well as any other documents deemed relevant, or to take any photographs or films deemed necessary. To gain access, the support of the public force may be requested.

- i.** To require the display of all types of documents, including accounting and corporate books, payment vouchers, internal or external correspondence and magnetic records. Likewise, to request any information regarding the organization, business and structure of the investigated company
- ii.** To summon and question the subjects of the investigation, their representatives, collaborators or third parties.
- iii.** To perform dawn raids with or without prior notice to the premises and establishments of the economic agents. In the context of these proceedings, inspectors may examine the documentation they find, take photographs and record films, and take the statements they deem necessary, as well as to copy the books, physical, electronic or other documents they deem relevant (including correspondence and emails).
- iv.** With the previous agreement of the Commission, to freeze books, documents and files of the investigated companies.

The Competition Act also sets out cases in which the Technical Secretariat must have prior judicial authorization to carry out certain actions ⁴⁷:

- i.** In view of the refusal of the investigated company to give access to its establishment (or in case the premises were closed), it may apply for judicial authorization to unlock the premises with the support of the public force.
- ii.** Refusal of the reproduction of the correspondence. As specified by the Tribunal, this injunction is only necessary in the event that a rejection of the company is verified against the reproduction of its communications by the inspectors. Thus, judicial authorization will only be mandatory in the event that the Technical Secretariat decides to persist in obtaining such correspondence⁴⁸.

It should be added that national judicial bodies have also validated this criterion. In the context of that administrative contentious proceeding initiated by different economic agents of the cement market, the Lima Superior Court of Justice confirmed that the judicial authorization is only necessary to copy correspondence in the event of a refusal from the investigated agent⁴⁹. In addition, in connection with an action brought by a sanctioned pharmaceutical chain for fixing the prices of different medicinal products, the court concluded that the reviewed judicial authorization was residual –enforceable only in the face of a refusal to copy such documents – also affirming the fine imposed by Indecopi⁵⁰.

It should be noted that the Explanatory Memorandum of the Competition Act confirms the residual nature of the prior judicial authorization in cases of refusal of access to the establishment of the company and the refusal of the reproduction of the correspondence⁵¹.

47 The Competition Act

Section 15. The Technical Secretariat.-

15.3. (...) The Technical Secretariat must obtain prior judicial authorization to proceed with the unlock in case there was a refusal of access the premises or in case these were closed, as well as to copy private correspondence that may be contained in physical or electronic files (...)

d) Request the lifting of the secrecy of communications to gather evidence of judgment of an infringement, when appropriate (...).

- 48** Decision N° 0486-2017/SDC-INDECOPI of August 17th, 2017 relapsed on File N° 001-2013/CLC. The senior hierarchical instance considered that, while the Technical Secretariat only required the accused to display and provide a copy of the emails related to the investigated market, this requirement remarked the legal framework provided by the Competition Act. Consequently, and to the extent that such order did not involve an arbitrary interruption or interception of the company's communications (which would have happened if the authority had taken such communications on its own and without consent), its refusal qualified as an unjustified breach of the request made, leading to the imposition of a penalty.
- 49** Decision January 5th 2018, relapsed in File N° 2873-2015, which affirms the first instance's decision of March 28th, 2017 issued by the Twenty-fifth Specialized Administrative Contentious Court (with Sub Specialty in Market Issues). Although that judgment was challenged by the economic agents involved made by an appeal, this appeal was dismissed by the Transitional Third Chamber of Constitutional and Social Law of the Supreme Court of Justice, by the Order published on April 30th 2019. Consequently, the judiciary ratified the sanction imposed by Indecopi and rejected the defendants' claim.
- 50** Decision of the Twenty-Fifth Administrative Contentious Court of Lima of June 6th, 2019, relapsed in File N° 04855-2018-0-1801-JR-CA-25. It should be noted that this decision was appealed, with the decision of the corresponding hierarchical superior being pending to date.
- 51** Indeed, the Explanatory Memorandum expressly states that *"in the event of a refusal of the inspection on premises or refusal of the reproduction of emails, it is established that the Technical Secretariat may obtain a judicial authorization to unlock, as well as to access to the private correspondence that may be contained in physical or electronic files"*.

Finally, and in accordance with the rules established by the Competition Act - and also recognized by the Tribunal -, the Technical Secretariat may request a judicial authorization without prejudice of initiating a sanctioning proceeding against the company who incurs in such refusal, since refusing to provide the documentation required by the Technical Secretariat may constitute a case of obstruction of its inspection functions.

- iii.** Lifting of the secrecy of communications. To access and copy the information contained in mobile devices (cellphones, etc.) or call records, and always with the objective of investigating and prosecuting anticompetitive practices, the Technical Secretariat will require judicial authorization.

This, without prejudice to the possibility for one of the participants of such communications to give their consent or spontaneously facilitate the access of the Technical Secretariat to this information – whether through the leniency program or other mechanisms –, in which case no such judicial authorization will be required.

- iv.** Withdrawal of books, files, correspondence or original documents from the premises of the investigated economic agent. As is to be assumed, this judicial authorization is not necessary in cases of reproduction of information by the inspectors appointed by the Technical Secretariat, as previously explained.

In order to illustrate the scope of these powers, a graphic detailing the functions that the Technical Secretariat can perform on its own has been included as Annex 1 of these Guidelines, opposing the exceptional cases in which prior judicial authorization is required.

It can be concluded that the investigative powers contained in the Competition Act match with those regulated in countries with similar legal tradition and competition policies, giving their respective authorities essential and effective inspection tools to fulfil the difficult mission of protecting society from the distortions caused by anticompetitive practices⁵². These tools are in turn compatible with the provisions established by the constitutional framework applicable to the protection of competition, limiting their scope of action and granting sufficient guarantees to the company exposed to a dawn raid.

⁵² In this regard, TIRADO emphasizes that *"the exercise of administrative investigation powers have a general public significance and relevance, and directly serve to the protection of the rights and interests of the citizens, which are directly and immediately affected by anticompetitive practices"*. TIRADO, José Antonio, *La doctrina del hallazgo casual durante las actuaciones de inspección: un comentario a la reciente jurisprudencia del Tribunal Supremo español*, 2020, p. 7.

III. LEGAL CONFIGURATION OF DAWN RAIDS

There are two parameters that must be weighted by the Technical Secretariat when planning and conducting a dawn raid, essentially linked to the legal clearance required to carry out such procedure.

III.1 Material parameter: Suspicions about a possible infringement

As is well known, in order to initiate a sanctioning proceeding for infringements of the Competition Act, it is necessary to have reasonable evidence that indicates the possible commission of such anticompetitive offences. Under this scenario, dawn raids are intended to investigate and obtain information on the existence of such infringement, in order to verify whether there is sufficient evidence to promote the initiation of the relevant administrative sanctioning proceeding.

Naturally, carrying out dawn raids entails for the authority to incur in various costs, related to the use of economic and technical resources, such as the presence of inspectors at the premises of the companies for the duration of the procedure⁵³. This situation, coupled with the importance of ensuring the effectiveness of these dawn raids and their invasive nature of the activity of the companies, determine that it is essential for the Technical Secretariat to carry out dawn raids in cases it considers that these will be fruitful, with suspicions about the possible existence of evidence held by the investigated company associated with the investigated infringement.

Under this scenario, before performing a dawn raid, the Technical Secretariat should carry out a reserved labor of prior inquiry, in order to obtain information that will allow it to determine the need to undertake these dawn raids. Thus, in the exercise of its powers of investigation, the Technical Secretariat may access different sources of information (public or private) that can reveal possible restrictive practices of competition – e.g., reports issued by other entities, complaints, communications from third-party informants or even testimonies derived from the use of the leniency program or rewards program, as well as the market monitoring duties carried out by the authority staff (screening).

In the context of such prior inquiry, the Technical Secretariat shall analyze this information in order to validate its suitability and to verify whether suspicions are expressed about the configuration of possible anticompetitive conducts. Given that during this time the Technical Secretariat is preparing its investigative hypothesis, any data that allows the authority to reasonably assume the possible existence of anticompetitive practices will qualify as suspicion, being necessary to carry out a dawn raid in order to corroborate such suspicions and obtain further evidence of the facts investigated⁵⁴.

Therefore, and since the information obtained during the labor of prior inquiry can be insufficient, sparse and/or fragmented, once these elements have been analyzed, the need for carrying out the dawn raid will be weighed. In this regard, the Technical Secretariat will carry out these dawn raids in the event of suspicions that certain economic agents are immersed in possible practices restricting competition⁵⁵, so there is no doubt about the eminently discretionary nature⁵⁶ of the authority to plan a dawn raid⁵⁷.

⁵³ On the budgetary expenditure generated by dawn raids, TIRADO notes that "The Administration does not usually have sufficient resources to even exercise in a relevant sector of the population its inspection powers; it is also not socially desirable for the Administration to be permanently behind individuals to observe and verify that they comply with the law." Cfr. TIRADO, José Antonio, Ob. Cit., pp. 254-255.

⁵⁴ It should be added that different international competition authorities use this parameter to conduct their dawn raids. As an example, in the United Kingdom the Office of Fair Trading (hereinafter, the OFT) conducts dawn raids in case of reasonable grounds about possible anticompetitive practices, using sources such as third-party testimony, denouncements, etc. In this regard, review section 25 of the "1998 Competition Act" and the referential guide "Powers of Investigation" of the OFT, it can be found in the following link: <https://bit.ly/32JWUWq> (last seen on April 7th, 2020).

⁵⁵ As a reference, the Court of Justice of the European Union states that "having reasonable grounds for suspecting infringement of the competition rules is a prerequisite for the Commission to order an inspection (...)". Cfr. Decision of June 20th 2018, relapsed in Case T-325/16.

⁵⁶ In this regard, a power is considered to be discretionary where, through a rule with legal range, the Administration is given a margin of discretion to choose the most appropriate alternative for the attainment of a particular purpose. For greater scopes in this category, review GARCÍA DE ENTERRÍA, Eduardo and FERNÁNDEZ, Tomás, *Administrative Law Course I*, Thomson Civitas (13th edition), Madrid, 2006, p. 464 and ss.

⁵⁷ Thus, the decision to carry out a dawn raid will be made on the basis of the suspicions of the Technical Secretariat and the particularities of each individual case, so, as BERMEJO indicates, the inspection power "is discretionary from the point of view of its implementation". Cfr. BERMEJO, José, *La Administración inspectora*, Journal of Public Administration No. 147, Madrid, 1998, p. 54.

Therefore, the prior investigation of the Technical Secretariat serves a dual purpose:

- i. To ensure that the companies are not exposed to indiscriminate dawn raids or to unsustained searches, such as the so-called fishing expeditions; and,
- ii. To ensure the effectiveness of these dawn raids, confined to cases in which the authority has suspicions about the possible realization of the unlawful conducts under investigation. Indeed, these suspicions are the ones that allow the Technical Secretariat to assume the existence of anticompetitive conducts, providing the execution of dawn raids in order to define its investigation.

It is also necessary to mention that, considering that we are in the context of a preliminary investigation - in which a dawn raid has not even been carried out - the Technical Secretariat still lacks detailed or profound information to define the scope of the investigated infringement or to identify precisely its characteristics. Thus, while in this time the authority is just elaborating its investigative hypothesis on this anticompetitive practice (based on information pending corroboration), such suspicions could not be required to hold a standard of certainty or qualified judgment or to comply with the estimates required to qualify as evidence of a possible infringement (in fact, there is not even a formal imputation or charge of liability against the investigated subjects during the investigation).

On the contrary, international experience recognizes that the standard for executing a dawn raid is unfailingly less rigorous than that required to initiate a sanctioning proceeding, as it is precisely the dawn raids that allow it to complement such suspicions, obtain evidence of the investigated conduct and, if applicable, initiate the corresponding proceeding to sanction them. In this regard, the General Court of Justice of the European Union states the following⁵⁸:

"(...)in order to justify inspections, it is not necessary for the information in the Commission's possession to be of such a kind as to establish beyond reasonable doubt the existence of the infringement found in the contested decision. That standard of proof is required for Commission decisions in which it finds the existence of an infringement and imposes fines. By contrast, in order to adopt an inspection decision (...), it is sufficient that it is in possession of information and evidence providing reasonable grounds for suspecting an infringement". (Underline added).

The CNMC has also stated the following⁵⁹:

"(...)It is clear that if the DI has decided on an inspection it is because, on one hand, it needs additional elements of judgment to fulfil the purpose that the LDC attaches to the reserved information, that is, to obtain evidence of judgment to assess whether or not to bring sanctioning proceedings and because, on the other hand, documents other than those to which the DI may have access through the information request are sought (...)" (Underline added).

As a logical consequence of the reserved nature of these proceedings, the Technical Secretariat is also not obliged to transfer to the investigated persons the information linked to the suspicions available, since this would jeopardize the effectiveness and usefulness of the inspection and the consequent detection of the investigated anticompetitive practice⁶⁰. Indeed, if the elements of the dawn raid are known, the economic agents could hide or delete any documentation related to that investigation, as well as alert other subjects who

⁵⁸ Decision of June 20th 2018, relapsed in Case T325/16.

⁵⁹ Decision of December 28th 2009, relapsed in File R/0026/09.

⁶⁰ Regarding this, REBOLLO reaffirms the need to ensure the reservation of these investigations, since this ensures the efficiency of the actions carried out by the authority. In that regard, the author states that inspection powers "may be supplemented by the adoption of provisional measures, no longer to prevent further unlawful action or adverse effects, which is already a matter outside the inspection function, but to ensure investigation". REBOLLO, Manuel, "La actividad inspectora", in the inspection function. Proceedings of the VIII Congress of the Association of Administrative Law Teachers, Coord. DIAZ SÁNCHEZ, J. J., INAP, 2013, p. 10.

may also be involved in such infringements, impairing the development of the investigation and preventing the Technical Secretariat from fulfilling its role of defending competition (constitutional legal good).

This position has been recognized by the General Court of Justice of the European Union⁶¹:

"(...) the complaint of the plaintiffs on how the Commission did not advise them of the information already in its possession is also irrelevant. (...) It is the notification of the statement of objections, on the one hand, and the access to the file enabling the addressee of the statement of objections to peruse the evidence in the Commission's file, on the other, that ensure the rights of the defense and the right of the undertaking concerned to a fair legal process. It is by the statement of objections that the undertaking concerned is informed of all the essential evidence on which the Commission relies at that stage of the procedure. Consequently, it is only after notification of the statement of objections that the undertaking is able to rely in full on the rights of the defense. If the abovementioned rights were extended to the period preceding the notification of the statement of objections, the effectiveness of the Commission's investigation would be undermined, since the undertaking would already be able, at the first stage of the Commission's investigation, to identify the information known to the Commission, hence the information that could still be concealed from it". (Underline added).

In that sense, that collegiate body reiterates that the basis of this position is no other than to protect the effectiveness of the authority's investigation, stating⁶²:

"(...) at the preliminary investigation stage, it cannot be required to indicate, besides the putative infringements that it intends to investigate, the evidence, that is to say, the indicia leading it to consider that Article 102 TFEU has possibly been infringed. Such an obligation would upset the balance struck by the case-law between preserving the effectiveness of the investigation and upholding the rights of defense of the undertaking concerned". (Underline added).

In the same line, it should also be weighted that these suspicions may arise from testimonies of individuals who joined the rewards program or leniency program (among other reserved mechanisms). Given that communicating these suspicions would involve recognizing the existence of such sources, placing them at risk and infringing duties of confidentiality, it is not possible for inspectors to disclose such suspicions; less so, consider these would be susceptible to contradiction or a cross out.

It should be noted that this situation does not infringe the rights of defense of the investigated party at all. On the contrary, the evidence that may be obtained during the dawn raid shall be discussed in the relevant sanctioning proceeding (to initiate such proceedings), referring to the company in order to contradict or refute them. Finally, and as indicated in the following paragraph, the dawn raid order shall communicate to the company the necessary information on the object, scope and purpose of the investigation, so that they can know the essential facts underpinning the conduct of the inspection (without disclosing the suspicions of the authority or the sources from which they derive).

Therefore, in the context of its preliminary investigation, the Technical Secretariat will conduct dawn raids in case it has suspicions about a possible infringement, based on efficiency criteria and prior analysis of the reasonableness and suitability of such suspicions⁶³. In addition, it would not be necessary to communicate to the company the information on which the Technical Secretariat is based in order to implement such actions, to avoid affecting its research hypothesis and to ensure the effectiveness of its work.

⁶¹ Decision of April 28th 2010, relapsed in Case T-446/05.

⁶² Decision of June 20th 2018, relapsed in Case T-325/16.

⁶³ On the criteria used to carry out a dawn raid, the CNMC has also stated that "the Administration, with criteria of administrative effectiveness, will determine which inspections are necessary and which are unnecessary, without affecting the principle of equality since all companies investigated in a possible anticompetitive infringement do not have to be in the same situation because there may be different degrees of participation in the alleged infringement, different availability of evidence, different market position, etc.". Decision of February 3rd 2009, relapsed in File R/0009/08.

III.2 Formal Parameter: Dawn raid decision

According to the overall international experience, in order to conduct a dawn raid, the representatives of the authority must previously deliver the so called "dawn raid decision", which is a document that contains the written authorization by the correspondent authority -in our case, signed by the Technical Secretariat- in order to conduct such proceeding.

The Commission and the Technical Secretariat consider its exhibition -once the inspectors have arrived to the premises of the investigated company- as a manifestation of the companies' right to be informed of the object and legal justification of the dawn raid, foreseen in the Section 242.1 of the LPAG. Nonetheless, even before that regulation, the Technical Secretariat conducted the dawn raids delivering the mentioned document at the beginning of the dawn raid.

Under that scenario, the dawn raid decision that entitles inspectors to entry into the premises of the investigated companies fulfill a double purpose:

- i. To allow the company to understand the nature and the extension of the investigation -as well as the information that will be subject to the dawn raid decision⁶⁴- and thus being able to know the extension of its collaboration duty⁶⁵; and,
- ii. To frame the dawn raid into determined conducts that might be one -or multiple- anticompetitive practices⁶⁶.

For this double purpose, the dawn raid decision must contain a number of elements and requirements, with the following being the most important: i) the name of the company subject to the dawn raid; ii) the identification of the premise in which the dawn raid will be developed (considering that the company could have various premises); iii) the identification of the inspectors in charge of the proceeding; iv) the date of the beginning of the dawn raid; v) the legal basis of the dawn raid powers of the authority, as well as the documents and information that is aimed to be obtained and / or evaluated⁶⁷; vi) the duties and obligations of the investigated company, including the sanctions and consequences to possible infringement scenarios; and, vii) the object and purpose of the dawn raid.

⁶⁴ In Spanish jurisdiction, the CNMC specifies that the investigation decision allows the investigated company to know the terms under which the dawn raid will take place, indicating its objective and framing it according to certain facts. For more information, see the Decision of February 4th 2016, under the File R/AJ/121/15.

⁶⁵ In this regard, in many occasions the Court of Justice of the European Union has ruled that the requirement of establishing the object and purpose in the investigation decision constitutes a guarantee for the companies subject to the dawn raid. For more information, cfr. Decision of October 17th 1989 on the Case 85/87 and Decision of June 25th 2014 on the Case C-37/13.

⁶⁶ Through many decisions the CNMC has manifested that dawn raid powers must be exercised under the scope of the investigation's object. Cfr. Decision of February 4th 2016 under the File R/AJ/121/15 and the Decision of June 30th 2016 under the File R/AJ/036/16.

⁶⁷ As expected, it does not mean that the dawn raid decision has to individualize every and each of the documents that will be required or that the authority has to carry an specific list about those documents, which would be impossible to comply and would rest versatility to the proceeding. On the contrary, it will be enough any reference to the type of information that will be requested during the dawn raid.

This last point acquires more relevance and has been object of analysis by the Court of Justice of the European Union, with the purpose to limit the essential content of the dawn raid decision⁶⁸:

"Thus, so far as concerns, specifically, the Commission's inspection decisions, it is apparent from Article 20(4) of Regulation No 1/2003 that those inspection decisions must indicate, inter alia, the subject and the objective of the inspection. (...)

Although, admittedly, the Commission is obliged to indicate as precisely as possible the evidence sought and the matters to which the investigation must relate (...), it is, on the other hand, not essential in a decision ordering an inspection to define precisely the relevant market, to set out the exact legal nature of the presumed infringements or to indicate the period during which those infringements were committed, provided that that inspection decision contains the essential elements set out above". (Underline added).

In that same sense, the CNMC considers that⁶⁹:

"(...) This Court considers that the Investigation Decision must establish in the clearest way possible the evidence that is expected to be proved and the elements that the dawn raid is based on, even though it is not mandatory to exactly limit elements such as the relevant market or the subjects that might be involved in the investigated practices". (underline added)

These decisions are coherent if we take into account that the purpose of these dawn raids is to collect the information that allows to reasonably assume the existence of an anticompetitive practice, which will be the object of evaluation and discussion during an eventual sanctioning procedure.

As it was mentioned, since these dawn raids are conducted in a preliminary investigation phase, the authority lacks the sufficient information to frame with precision or limit exactly the controversial facts at that moment, which makes it difficult and unreasonable (and even impossible in many cases) to require the dawn raid decision to contain in a detailed manner the information, features or details of the investigated conducts. This is precisely because the dawn raid proceedings have as its objective to obtain more evidence about the infringement, in order to limit its extension⁷⁰.

This has been ratified by the CNMC, concluding that⁷¹:

"(...) As it is logic, when a dawn raid is conducted, the Competition Direction cannot be certain of the existence of an infringement. It is precisely for this reason that it is equipped with these instruments to know as precisely as possible the existence of facts that allow it to initiate a formal procedure for the infringement of the competition rules and to identify those responsible for such conduct. But it is not essential, from the enabling point of view to carry out a dawn raid, that the dawn raid body must know in advance the possible participants in the conduct, nor is it necessary for the decision to detail the specific facts and the markets investigated, since this would limit the CNMC's investigative powers" (underline added).

Considering this context, and according to the international practices in this issue, the dawn raid decision must not (nor can) contain exhaustive or detailed information about the features of the investigated conduct, since in many cases these elements are impossible to be identified at that moment.

⁶⁸ Decision of June 25th 2014 under the Case C-37/13P.

⁶⁹ Decision of February 23rd 2017 under the File S/0545/15.

⁷⁰ In this regard, see the Decision of the CNMC of September 30th 2016 under the File R/AJ/036/16.

⁷¹ Decision of February 23rd 2017 under the File S/0545/15. In the same sense, the European Court has indicated that "given that dawn raids take place at the beginning of the investigation (...) the Commission does not have the precise information to issue a decision and must verify first the source of its suspicions and the scope of the facts and to gather evidence regarding an infringement subject to a suspicion is precisely the purpose of the dawn raid". Decision of June 25th 2014 in the Case C-37/13P.

Under that scenario, it is not necessary for the dawn raid decision to reflect in a detailed or specified manner elements such as: i) the market subject to investigation (or its geographic scope); ii) the legal qualification of the controversial facts; or, iii) the time period in which the investigated conduct had allegedly taken place⁷².

This position has been supported by the Tribunal when ruling on an appeal brought by several companies, sanctioned for collusion in the liquid petroleum gas market, who disputed the validity of the dawn raids conducted by the Technical Secretariat, proceeding that was decisive to prove the aforementioned infringement. The Tribunal rejected these arguments⁷³:

"(...) The Competition Act does not establish that for the administrative authority to conduct a dawn raid and legitimately deploy its dawn raid powers, it must carry out a legal classification of the alleged anticompetitive conduct under investigation, identify the position that the investigated company will adopt in a hypothetical and future sanctioning procedure, indicate the period in which the investigated conduct allegedly had taken place or define precisely the level of the marketing chain in which the conduct would have been carried out (...)

The requirement of the information indicated (...) in the preliminary investigation stage of an anticompetitive conduct is not reasonable precisely because the administrative authority is still collecting documentation and information (evidence) that allow it to identify more accurately the alleged infringement and the companies involved.

A different conclusion could harm the investigations in this matter because, given its complexity, a detailed identification of the investigated conduct and the individuals involved in the preliminary investigation stage could leave outside of the investigation many conducts that could only be exposed with the development of preliminary inquiries. " (Underline added).

As a result, the Technical Secretariat and the Commission consider that the dawn raid decision must contain, at the very least, the description of the essential features of the conduct and the investigated market, in order to indicate the scope of the proceeding and allow the company to understand the aspects that will be covered by the dawn raid. Therefore, sufficient features must be pointed out for the company to be aware of the context of the investigation and what is being pursued through the dawn raid, as well as the main characteristics of the investigated infringement.

It should be noted that, once the evidence obtained during the dawn raid has been evaluated, this situation does not prevent the Technical Secretariat to update information in a later stage in order to define more accurately these features and make a global identification of the infringing conduct, in case the Technical Secretariat decides to initiate a sanctioning procedure and carry out the pertinent evidentiary activities. In this sense, the dawn raid decision will refer to the possible infringing conduct and the investigated market, always considering that we are in a preliminary investigation stage in which it is not possible to provide exhaustive or detailed information.

⁷² Regarding the time period of the conduct, the CNMC has declared that "it is not possible to determine since when those practices have been happening, which justifies the fact that the dawn raid decision did not detailed the time period, precisely because one of the objectives of that proceeding is to exactly determine that duration. The practical experience of the Competition Authority proves that certain conducts might largely extend in time, so that, in absence of more specified evidence that determine otherwise, it is coherent that the dawn raid decision does not detail a time period of the duration of the investigated conduct, since a contrary solution would mean leaving outside the investigation precisely the evidence that helps to prove and limit the specific period of time of the conduct, which is one of the elements that the dawn raid is aimed at, and that moreover contributes to define the seriousness of the anticompetitive conduct regarding the available evidence". Cfr. Decision of June 30th 2015 under the File R/AJ/036/16.

⁷³ Decision 0157-2019/SDC-INDECOPI of August 26th 2019, under the File 011-2015/CLC.

These considerations on the investigated conduct are not only consistent with international practice but are also compatible with the provisions in the Competition Act regarding the limitation period⁷⁴. In fact, Section 45 of this Act provides that anticompetitive infringements expire five years after the last act of execution of the conduct, a period that is interrupted by any act of the Technical Secretariat that is related to such investigation and is brought to the attention of the investigated company (such as a dawn raid decision)⁷⁵.

The purpose of this provision is to guarantee that the company is aware that it is involved in an investigation of anticompetitive practices, regardless of whether the specific characteristics of such violation have not yet been fully defined⁷⁶. Consequently, and in accordance with the aforementioned paragraphs, the dawn raid decision will inform the companies that they are involved in an investigation and indicate in general terms its objective and the facts and scope that will be covered by the proceeding.

Therefore, the dawn raid decision must describe the basic features of the conduct investigated and the reference market, based on the information that has been accessed - without disclosure - and without the obligation to provide a large degree of detail on the object of the investigation, whose characteristics will be delimited once the evidence obtained in the dawn raid has been analyzed and the pertinent evidentiary actions have been carried out.

74 In this regard, the limitation period is a legal institution that extinguishes the possibility of exercising an action linked to a right that is said to be unknown or violated, as a result of the pass of the legally established time for its exercise. Regarding its application on administrative procedures, see BACA, Víctor, *La Prescripción de las infracciones y su Clasificación en la Ley del Procedimiento Administrativo General*, Revista Derecho & Sociedad No. 37, Lima, 2015, pp. 265-277.

75 The Competition Act

Section 45.- Limitation period of an administrative infringement

Infringements under this Act shall expire five (5) years after the last act of execution of the offending conduct. The limitation period is interrupted by any act of the Technical Secretariat related to the investigation of the infringement that is brought to the attention of the alleged responsible party. The computation of the term will be restarted if the procedure remained paralyzed for more than ninety (90) business days for reasons not attributable to the investigated.

76 In this regard, see the Decision No. 0157-2019/SDC-INDECOPI issued on august 26th, 2019, under the File No. 011-2015/CLC.

IV. BEGINNING OF THE DAWN RAID

IV.1 Preliminary matter: Complying with the principle of reasonableness

The Public Administration has been granted with a series of powers in order to verify compliance with the legal obligations and limitations by the companies through the dawn raid powers. As any other administrative action, the dawn raid power must be strictly subject to different parameters and principles, such as the principle of proportionality or reasonableness in administrative proceedings⁷⁷.

In accordance with this principle, when developing any administrative function, there must be sufficient consistency between the means used by the authority and the purpose intended to achieve, avoiding to generate excessively harmful consequences for those parties and proscribing any abusive or arbitrary action⁷⁸. Since dawn raid powers are precisely restrictive or limit rights -imposing duties and obligations-, the application of the principle of reasonableness becomes more relevant since it is essential for these powers to be properly exercised, in accordance with a public interest and adjusting to the particularities of the specific case without disturbing or unnecessarily challenging the activity of the company subject to the dawn raid⁷⁹.

This does not mean that the dawn raid duty cannot impact in any way the activity of private parties (by its nature this would be utopian, as this power always carries a limitation of rights), but that this impact must be consistent with the purpose sought, adopting the least harmful means possible and reducing such affectation to a minimum level⁸⁰.

Thus, the investigation of the Technical Secretariat must be based on certain facts that may constitute a possible infringement. Furthermore, dawn raids should not imply the suspension of all commercial activity in the establishment of the investigated company⁸¹. In turn, dawn raids must be made at appropriate office hours.

Finally, the impact of the principle of reasonableness must always be weighed taking into account that the Technical Secretariat has the mission of protecting the free competition in the market - a legal asset with constitutional relevance-, so it is necessary for its investigative powers to be oriented towards such objective, ensuring its effectiveness.

IV.2 The collaboration duty of the companies

Given that the dawn raid powers granted by the legal framework entail a limitation of the rights of the parties, these are obliged to collaborate with the entities and assume the consequences derived from such supervisory action, known as "collaboration duty".

77 General Administrative Procedure Act

Section IV. Principles of the administrative procedure.-

The administrative procedure is based essentially on the following principles, regardless of others general principles of the Administrative Law (...):

1.4. Principle of reasonableness. - The decisions of the administrative authority, when they create obligations, qualify infringements, impose sanctions, or establish restrictions to the parties, must be framed into the limits of their power and maintaining the adequate proportion between the means to deploy and the public interests that it has to protect, so that they respond to what is strictly necessary for the satisfaction of their task.

78 The Constitutional Court has ruled that the principle of reason "requires that the restrictive measure shall be justified in the need for preserving, protecting or promoting a constitutional valuable purpose". Cfr. Decision from February 18th, 2005, under the File No. 2235-2004-AA/TC. In addition to that, the same public body mentioned that "firstly, this test controls whether the differentiated treatment is provided of a justification; secondly, whether there is a relation between the adopted measure and the aimed purpose, and finally, it is determined whether it is a adequate and necessary measure (...)". To this purpose, see: Decision from June 17th, 2003, under the File No. 1277-2003-HC/TC.

79 Regarding the need to conduct these functions with serious caution, see FERNÁNDEZ, Severiano, *La actividad administrativa de inspección. El régimen jurídico general de la actividad inspectora*, Comares, Granada, 2002, pp. 131-132.

80 As ZEGARRA indicates, the principle of proportionality implies that "the Administration will seek those facts that may be relevant to what is the subject of investigation, always in the least restrictive way and in the least damaging form and measure, always having to be justified by the eventual affectation of interests publics that are tried to be known and limited". ZEGARRA, Diego, *La Participación de los Privados en la Actividad de Supervisión en el Sector Eléctrico Peruano: Breve Aproximación a su Estudio*, Revista de Derecho Themis No. 69, Lima, 2016, p. 126.

81 Regardless of the fact that, in the framework of their duty to collaborate, the employees and representatives of the companies must facilitate the work of the inspectors and meet the requirements that are formulated in a timely manner, avoiding behaviors that may hinder or delay the development of the dawn raid.

This collaboration duty constitutes an essential element of dawn raids: through these activities the Administration seeks to know facts and obtain information that is not under its control -especially in the field of free competition-, it is necessary that the companies subject to a dawn raid allow the exercise of those functions and provide all the information that the inspectors consider relevant for the purposes of the investigation⁸².

Such importance has been highlighted by the Tribunal in many occasions⁸³:

"This collaboration duty provides real effectiveness for the investigative powers of the Public Administration, since without it the entities could not fully comply with the legal mandate of protecting the defense of free competition". (Underline added)

The collaboration duty also has a legal recognition. The aforementioned Section 243 of the LPAG indicates that the parties are obliged to allow the development of the dawn raid and facilitate the work of the inspectors. In turn, the norm also provides that those parties must collaborate in clarifying the facts analyzed by the investigating authority, as well as provide documentation and information for that purpose⁸⁴.

The importance of this duty reflects on the fact that its non-compliance constitutes an infringement classified under the Section 46.7 of the Competition Act, subject to a sanction with fines up to 1000 UIT⁸⁵. As it can be seen, this type of infringement regulates different cases of obstruction to the functions of the Technical Secretariat, such as the submission of false information, concealment, destruction or alteration of the required information, unjustified non-compliance with the requirements formulated by the authority, the refusal to appear and the obstruction of the functions of the authority, all of them applicable to the context of a dawn raid.

Therefore, under this prohibition there is a breach of the collaboration duty of the company, which has the object or effect of damaging the investigation actions of the Technical Secretariat - either hindering or delaying them - and preventing the authority from fulfilling the functions that have been legally entrusted to it, regardless of whether or not this failure frustrates the performance of the dawn raid⁸⁶.

Considering the peculiarities of this type of infringement, it is pertinent to mention as an example a series of conducts that are applicable to the cases of the Section 46.7 of the Competition Act. The publication of this enunciative list constitutes an additional guarantee in favor of the companies, allowing them to know what type of specific behaviors could qualify as an obstruction of the functions of the authority and generating greater predictability on the companies that compete in the market.

82 REBOLLO develops this issue by stating that "Legally, among the most characteristic aspects of a dawn raid, which expresses as other few activities the supremacy and imperium of the Administration, is that it is based and manifested by imposing duties, so that it cannot be considered to be entirely pure material or technical activity of the Administration. Many of these dawn raid duties are established directly and abstractly by the regulations. Other times they are imposed in the specific case by the Administration". REBOLLO, Manuel, Ob. Cit., pp. 59-66.

83 Resolución No. 0486-2017/SDC-INDECOPI del 17 de agosto de 2017, recaída en el Expediente No. 001-2013/CLC.

84 **General Administrative Procedure Act**

Section 67. General duties of the parties in a procedure.-

Regarding the administrative procedure, the parties and any other that participates in it have the following general duties: (...)

2. Collaborate for the clarification of the facts. (...)

Section 68. Providing information to the entities.-

(...) 68.2 In the investigative procedures, the parties are obliged to provide the information and documents that they are aware of and are reasonably adequate to the purpose of the procedure to achieve the truth, in accordance with the provisions of the Section about investigation.

85 **The Competition Act**

Section 46. Amount of the fines.-

(...) 46.7. The submission of false information, or the concealment, destruction or alteration of information or any book, record or document that has been required by the Technical Secretariat, the Commission or the Tribunal, or that is relevant for the purposes of the decision that is issued, or the unjustified failure to comply with the information requirements that they formulate, or the refusal to appear, or the obstruction of the functions of the Technical Secretariat, the Commission or the Tribunal, may be sanctioned by the Commission or the Tribunal, as appropriate, with a fine of no more than one thousand (1000) UIT, provided that it does not exceed ten percent (10%) of the sales or gross income of the infringer party, or his economic group, corresponding to the fiscal year immediately prior to the decision of the Commission; regardless of the corresponding criminal liability.

Translator note: For 2020, the value of a Tax Unit is equivalent to 4300 Peruvian soles (around 1,263 USD). The exchange rate is approximately 1 USD = 3,357 PEN.

86 In this regard, the Decision of October 27th 2010 of the National Hearing of Spain concluded that "the type of the infringement does not in any case requires that the obstruction to completely frustrate the dawn raid duties, and this is corroborated by many of the examples of obstructions that Section 62.2 e) from the Spanish Competition Act, which do not foresees nothing but a hindering to the dawn raid".

It should be noted that the examples enlisted over this type of conducts are not unusual in the free competition field. As a reference, in Spain the CNMC published an informative note on its dawn raids, which not only details the consequences that the companies would face if they refuse or obstruct a dawn raid, but, based on their jurisprudence, list different behaviors that could qualified as these infringements⁸⁷.

Considering the aforementioned, the following conducts are some, but not limited to, examples of this type of infringement:

INFRINGING CONDUCT	INFRINGEMENT CLASSIFICATION
Denying or unreasonably hindering inspectors' access to the company's premises (or to certain sources of information) ⁸⁸ .	Hindering the functions of the Technical Secretariat.
Erroneously identifying those responsible for the areas under investigation (or their offices), as well as providing inaccurate information about their presence or the location of certain sources of information ⁸⁹ .	Hindering the functions of the Technical Secretariat.
Failing to submit (or do so incompletely) the documents or files requested by the inspectors ⁹⁰ .	Unjustified failure to comply with the information requirements.
Providing false or inaccurate information (either through declarations and / or documents), as well as altering, hiding or destroying any type of item subject to the dawn raid ⁹¹ .	Provision of false information or concealment, destruction or alteration of information.
Unjustifiably refusing to provide the explanations requested by the inspectors ⁹² .	Hiding information.
Obstruct the exercise of the functions of the inspectors by violence or threat.	Hindering the functions of the Technical Secretariat.

⁸⁷ See the following link: <https://bit.ly/2JUj6WF>. Seen last time in April 7th 2020.

⁸⁸ In the Decision of the CNMC under the File SNC/02/08, a company was held liable for, among others, denying without justification the inspector's access to the office of the General Manager.

⁸⁹ In the Decision of the CNMC under the File SNC/14/11, a company was sanctioned for, among others, formulating ambiguous pleads about the presence of one of its employees out of the office.

⁹⁰ In this regard, in the Decision 0486-2017/SDC-INDECOPI, the Tribunal affirmed the sanction imposed to a company for not presenting a copy of the mails required under a dawn raid.

⁹¹ In Spain, in the Decision of the CNMC under the File SNC/10/11, a company was sanctioned for stealing documents that inspectors had gathered to make a copy later.

⁹² In the same previous case mentioned, it was considered an obstruction conduct the fact that the employees of the company had refused to provide information about the places where the stolen documents were hiding.

If such infractions are committed, and regardless of any possible criminal liability⁹³, these facts will be evaluated by the Commission in a sanctioning procedure, allowing the accused company to exercise its right of defense as well as to provide its explanations or justifications related to the charged conduct. As previously mentioned, in case a company is held liable for such infringement, a fine of up to 1000 UIT may be imposed, a sanction that can be enforced coercively through the mechanisms provided by the pertinent legislation.

Therefore, the indications the Technical Secretariat may make - both through the dawn raid decision and through the inspectors during the visitation - regarding the sanctions provided by the Competition Act in the event of possible obstructions of its functions do not imply under any circumstances a threat, intimidation or harassment towards the companies. On the contrary, these indications are only the result of the obligation of the authority to report on the possible consequences that companies could face if they do not comply with their collaboration duty during the procedure. This does not mean that the consent the company may have granted to 'the exercise the inspectors' powers is diminished or flawed⁹⁴.

In this line, the legal system recognizes the importance of the companies to collaborate with the inspectors of the Technical Secretariat throughout the dawn raid, an obligation whose immediate foundation lies in ensuring the effectiveness of the procedure and is based on the surveillance of free competition, which is a task entrusted by the Constitution itself. For this purpose, the Competition Act also prohibits all types of conduct that have the object or effect of hindering the duties of the Technical Secretariat or disturbing the development of the dawn raids.

IV.3 Beginning of the proceeding: access to the companies' premises

The Competition Act empowers the Technical Secretariat to carry out dawn raids to the premises of the investigated companies. This attribution reflects one of the most frequent forms of dawn raid powers, allowing those designated by the Technical Secretariat to go directly to the premises where the companies carry out their commercial activities, in order to verify any possible anticompetitive infringement.

The regulation also foresees the possibility to carry out these dawn raids in a surprising way – i.e., without prior notice, in order to immediately access the information sought and mitigate its risk of deletion. In fact, the notification of the development of a dawn raid could distort its purpose, allowing not only the companies to hide or even destroy the evidence, but also alert others involved in the possible infringement, emptying the content of the proceeding and turning it ineffective⁹⁵. That is why the dawn raids acquire a real dimension when they are carried out surprisingly and, if applicable, simultaneously at the premises of the investigated companies.

In this sense, and regardless of the fact that the Competition Act provides for the possibility of carrying out dawn raids with or without prior notification, the Technical Secretariat and the Commission agree in recognizing that dawn raids made on a surprise basis are the most suitable to guarantee the efficacy and usefulness of these proceedings, providing them with greater versatility and guaranteeing the gathering of the evidence pursued by the authority on time.

93 The Criminal Act

Section 366. Violence against the authority to prevent the exercise of their functions.

Anyone who uses intimidation or violence against a public official or against the person assisting him under a legal duty or upon request, to prevent or avoid the execution of an act proper to the legitimate exercise of his functions, shall be punished with deprivation of liberty of not less than two nor more than four years or with community service of eighty to one hundred and forty days.

Article 368. Resistance or disobedience to authority.-

Anyone who disobeys or resists the order legally issued by a public official in the exercise of his powers, except in the case of his own detention, shall be punished with deprivation of liberty of not less than three nor more than six years (...).

⁹⁴ The Spanish authorities have sentenced in the same way. In the Decision of May 26th 2015 under the Procedure No. 175/2013, the National Hearing indicated that *"It cannot be understood that the mere indication of the obligation to collaborate with CNMC personnel is sufficient reason to deduce that there has been any coercion, in the absence of other data included in the dawn raid decision. Consequently, it cannot be said that there has been no consent of the company, nor is applicable (sic) the Supreme Court's Jurisprudence that the plaintiff has quoted, or that such consent has been flawed"*.

⁹⁵ We reiterate that international experience supports this position. As an example, the SIC stresses that *"it would be absurd to require the dawn raid authority, surveillance and control to carry out a dawn raid previously notified in order to collect evidence, since the requirement would distort the purpose to pre settle the evidence on the commission of an infringement of the competition rules"*. Resolution No. 18727 of March 26, 2014 (File No. 13-147566).

Taking this into account, the following are two very important aspects that the Technical Secretariat must comply with when beginning a dawn raid.

a) Notification of the dawn raid decision and identification duty

According to the Section 241 of the LPAG, due to the dawn raid, the inspectors have the duty to identify themselves at the request of the company, presenting the pertinent documents for this purpose: ID and institutional credentials. The purpose of this identification duty is to prove that the inspectors are adequately appointed and duly authorized to carry out the procedure⁹⁶.

In this scenario, once they appear in the premises of the company, the inspectors of the Technical Secretariat will announce themselves to the reception area of the company - bearing their credentials - and will communicate the development of the procedure, for which they will request the presence of a representative of the company, previously showing the dawn raid decision and giving a copy for signature.

Thus, through these actions, inspectors fulfill a double purpose:

- i.** To let the companies know the inspectors that will carry out the dawn raid, who will be duly designated for such work.
- ii.** To record the time of the beginning of the dawn raid -through the signature of the copy of the dawn raid decision, either at the reception area or at any other similar office-, facilitating the verification of possible cases of delay or dilation of the visitation.

On the one hand, it is necessary to specify that the concept of "representative of the company" must be interpreted in a broad and non-formal sense, understanding as such any person who exercises a position that allows them to attend these kind of procedures (that is, without the need to have corporate or specific registry powers on the matter). Otherwise, there would be a risk of creating negative incentives that would harm the work of the Technical Secretariat, since certain companies could take advantage of this situation and assure that the "representative with powers" is not in the office, in order to delay or avoid the development of the dawn raids.

As a result, it would not be valid or reasonable to try to condition the development of the dawn raid to the presence or arrival of an specific representative (for example, by saying that the dawn raid could only and exclusively be carried out with the presence of the general manager), since this would mean another unjustified obstacle to the duties of the Technical Secretariat.

These considerations have been supported by the Supreme Court of Justice: after a complaint filed by a company that refused to provide the information required by the Technical Secretariat, the court indicated that it is not necessary for the legal representative of the company to be present at the dawn raid, since if such requirement were valid, it would unjustifiably protect an excuse to avoid the dawn raid actions of the authority⁹⁷.

On the other hand, during the notification of the dawn raid decision, the companies are obliged to collaborate with the inspectors, so they can start their duties without problems. To facilitate its fulfillment and the proper development of the visitation, the Technical Secretariat will go to the company's senior personnel found in the office and will explain the scope of the visitation and the company's duty to collaborate, so they are able to coordinate with each employee the timely attention to the requirements of the Technical Secretariat.

⁹⁶ FERNÁNDEZ stresses that "the circumstance of the development of the dawn raid mainly outside the Administration offices, joined with the fact that the inspectors (...) lack uniformity, has long established the need to provide these officials with documents distinctive both to assert their authority before the administered (...)".

⁹⁷ Cfr. Decision of the Civil Court of May 30th, 2012 (File No 1460-2011). Thus, the judicial authority indicated that although one of the employees interviewed by the Technical Secretariat did not exercise the legal representation of such company, he could have transfer the responsibility of giving the required information to the respective management areas.

In this sense, the company will not be able to carry out conducts aimed at delaying the beginning of the dawn raid or delaying the reception of the dawn raid decision; for example, unreasonably keeping inspectors in a waiting room (or off-premises) until the arrival of a specific adviser.

Finally, and according to the Section 32 of Legislative Decree 807, which approves the Powers, Regulations and Organization of Indecopi (hereinafter, Legislative Decree No. 807), any person authorized by the Technical Secretariat or the Commission can make a dawn raid⁹⁸. Under that scenario, the Technical Secretariat may designate any person to carry out the procedure, regardless of their professional status or link with Indecopi.

b) The right to legal assistance

In the context of a dawn raid, companies are allowed to request professional advice if they consider it appropriate, as stated in the Section 242.6 of the LPAG. This right is usually reflected in the presence of a lawyer during the proceedings, in order to accompany the inspectors, make observations, and review the content of the dawn raid records at the end of the it.

However, the exercise of this right does not mean any abusive or negligent conduct aimed at hindering the development of the dawn raid, and thus the presence (or absence) of the lawyer should not condition the legality or undermine the beginning of the dawn raid. In fact, given the nature of anticompetitive infringement, the first minutes of the procedure are a key factor to obtain the relevant information sought by the authority; otherwise, the risk of this information to be altered or destroyed increases exponentially, along with the possibility of other parties involved in the alleged unlawful conduct to take measures in order to undermine the duties of the Technical Secretariat.

In this context, it would not be efficient to condition the beginning of the dawn raid to the eventual arrival of the legal advisor to the company's premises - a circumstance that depends on different factors that are outside the control of the Technical Secretariat-, thereby undermining its effectiveness and usefulness. Therefore, it is necessary to highlight the importance of the immediacy that dawn raids require when being carried out, for companies not to try to hinder or delay the proceeding based on the presence of their advisor.

This position has been recognized by different international authorities. In this regard, the CNMC has stated the following⁹⁹:

"(...) both national and community jurisprudence have expressly stated that legal assistance through an external or internal lawyer cannot condition the legality of a competition dawn raid or undermine the proper conduct of such proceeding". (Underline added)

The Spanish Supreme Court agrees with this statement¹⁰⁰:

"There is no absolute right to legal assistance during the investigation, and, in general, there is no right to legal assistance in administrative proceedings - although it is in criminal investigation, where it is a fully guaranteed right - and this regardless that the parties may voluntarily appoint a lawyer to assist him. Therefore, the presence of a lawyer in the investigation carried out by the Service is not essential, although it may be requested by the interested party". (Underline added)

98 The Powers, Regulations and Organizations of Indecopi Act

Section 32.- In the case a dawn raid was necessary to conduct, this will be carried out by the Technical Secretary or a person designated by him or the Commission to that effect (...).

99 Decision of June 19th, 2016 under the File R/AJ/021/16. In that same line, the Colombian competition authority (SIC in spanish) specifies that "although it is ideal to have the presence of a legal representative, such element is not an essential requirement (sine qua non) for the development of these type of proceedings". Decision No. 18727 of March 26th, 2014 (Proceeding No 13-145766).

100 Decision of March 17th, 2013, under the Proceeding No. 10329/1997.

In the same line the Court of Justice of the European Union¹⁰¹:

"The Court therefore takes the view that the presence of an undertaking's external or in-house lawyer is possible when the Commission carries out an investigation, but that the presence of an external or in-house lawyer cannot determine the legality of the investigation. (...). In order to ensure that the exercise of that right to legal assistance does not impair the proper development of the investigation, the persons charged with carrying out the investigation must be able to enter into all the undertaking's premises immediately, to notify it of the dawn raid decision and to occupy the offices of their choice, without waiting until the undertaking has consulted its lawyer. The persons charged with carrying out the investigation must also be put in a position to control the undertaking's telephone and computer communications in order, in particular, to prevent the undertaking from contacting other undertakings which are also the subject of an investigation decision. (...)". (Underline added).

The international case law is coherent because dawn raids seek to obtain information associated with an alleged anticompetitive practice, regardless of the person who can provide such information. Thus, it would not be reasonable for this duty to be hindered by the absence or delay of the legal advisor of the investigated company.

In fact, the presence of the lawyer during a dawn raid is such an optional element that the section 242.6 of the LPAG indicates that this right may be exercised *"if the company considers it"*, recognizing that his or her absence does not imply an obstacle to begin the visitation. That is regardless of the fact that the inspectors may grant a reasonable period of time to wait for the arrival of the legal adviser or any person considered necessary and continue the proceeding, without preventing the entry of the inspectors to the offices in order to begin the preparation of the proceeding.

It should be noted that the characteristics of each investigation and the peculiarities of the dawn raids show that it is not possible to determine a maximum waiting time applicable to all cases, since during the proceeding different circumstances may arise that make it necessary to conduct the dawn raid more or less quickly. In this sense, once these circumstances are analyzed, the inspectors will decide the time that will be granted to wait for the arrival of the legal adviser, always considering the importance of beginning the visitation as soon as possible and trying to keep this period short¹⁰².

The companies may even contact their lawyer or representative by telephone or virtually in order to receive advice, and have these advisers to contact the inspectors in charge of the dawn raid¹⁰³.

According to current legal framework regarding dawn raids, and in accordance with extensive international practice and case law, the presence of the legal adviser cannot constitute an indispensable requirement to carry out the dawn raid, nor does it violate the rights of the companies investigated.

Finally, legal or professional advisers who attend the proceedings must comply with the rules of good faith and procedural loyalty that govern their legal actions, avoiding the commission of conduct that directly or indirectly interferes with the dawn raid duties.

101 Decision of September 27th, 2012, in the Case T-357/06.

102 In this regard, the European Court states that "the period that the Commission is obliged to allow a company to contact its lawyer before beginning to consult books and other documents, make copies of them, seal the premises or documentation or request oral explanations from any representative or member of the company's staff depends on the particular circumstances of each specific matter and, in any case, it can only be extremely brief and be reduced to the strict minimum". Decision of September 27th, 2012, under the Case T-357/06.

103 This has also been recognized by the CNMC. Cfr. Decision of February 4th, 2016 under the File R/AJ/121/15 and the Decision of September 29th, 2015 under the File R/AJ/092/15.

V.DEVELOPMENT OF THE DAWN RAID

In accordance with the provisions of the Competition Act, once the proceeding has begun, the inspectors may exercise the following powers:

V.1. Access and copy of the documents and information relevant to the investigation

During the dawn raid, the Technical Secretariat is empowered to access, review and copy all those files and documents it deems pertinent, regardless of their material support (physical, electronic, etc.), as well as to obtain information associated with the commercial activity of the investigated company (organizational charts, accounting or commercial policies, relationships with distributors, etc.).

As it is well-known, one of the dawn raid's objectives is to verify the existence of evidence of possible anticompetitive behavior. In the case of preliminary investigations, where there is no detailed data on the possible infringement at the moment, it is not possible for the authority to prepare an exact list of the documentation that will be required (or of the sources where such information will be found)¹⁰⁴. In fact, it is possible - and extremely frequent - that in the development of the procedure the Technical Secretariat identifies useful documents for the investigation that did not know about prior to the dawn raid. Under this scenario, and to avoid hindering the versatility of the proceeding, it is essential to collect all the information that may lead to evidence of possible infringements to the free competition during the dawn raid.

This situation becomes more relevant in the case of documents and files in electronic format, as it is not surprising to anyone that the technological progress of the last decades has substantially modified social and work relations, notably influencing the form of internal communication of the companies. Regarding the free competition field, companies often use emails to coordinate and execute anticompetitive practices (as demonstrated by extensive national and international experience), constituting perhaps the most direct evidence of such illicit acts.

Regarding the influence of electronic means and their relationship with the dawn raids conducted by the competition authorities, the CNMC has indicated the following¹⁰⁵:

"(...) It is also necessary to highlight the current importance of the technological development achieved by companies in relation to the storage of information and documentation on computer media (...). Firstly, regarding the volume of information that will be the subject of the dawn raid. Currently, the personal computer of an employee of a company may contain a greater volume of commercial documentation in comparison to a room full of documents, often mixed with the employee's own personal documentation and without a clear separation from it within the computer's electronic files. This situation can be repeated throughout the company, giving rise to a huge volume of documentation that must be the basis of the competition authority's duties within a short time, without undermining the normal operation of the company.

Secondly, technological development also allows the information and documentation existing in the company's information systems (servers, computers, etc.) to be easily reached and quickly eliminated by third parties located in a remote place (other than the premises of the company) if the appropriate computer tools are available. Both characteristics: huge volume of information and ease

¹⁰⁴ The SIC shares this position, stating that "When executing a dawn raid during a preliminary stage (...) the authority has not carried out any assessment judgment or classification analysis that allows circumscribing or delimiting the facts to be investigated. For this reason, it cannot elaborate a precise and exhaustive documentary statement of what is required (...) It is possible that during the proceeding, the authority finds useful, conductive and pertinent information whose existence was unaware of before the visitation and therefore it was not possible to request it in writing". Decision No. 18727 of March 26th, 2014 (Procedure No. 13-145766).

¹⁰⁵ Decision of October 3rd, 2008, under the File R/0006/08.

of elimination, together with the frequently secret, furtive and clandestine nature of the information sought, are elements that cannot be ignored when evaluating the dawn raids duties of any authority".
(Underline added)

The intrinsic difficulties to the dawn raid on electronic documents -both for their quantity and for their possibility of elimination from remote places- become more evident when analyzing the context in which anticompetitive conducts take place: given their clandestinely and complexity, it is not possible for the inspectors to break down what will be the relevant information for the investigation in a short time during the dawn raid, so the risk that this data will remain hidden or be destroyed increases.

These circumstances reaffirm the need for the Technical Secretariat to have sufficiently efficient and effective dawn raid powers -according to the current legal framework - in order to discover the prosecuted anticompetitive infringements and guarantee competition in the market.

Therefore, inspectors must have suitable and extensive powers to access, examine and copy all kinds of documentation -especially the electronic one-, in order to fulfill the mission entrusted by the Constitution.

The European Court also sees like that, stressing that¹⁰⁶:

"(...) the Commission is able to conduct exhaustive searches of certain offices or filing cabinets even if it is not clear that information concerning the subject-matter of the investigation is present therein, provided that there are reasons to suggest it. As the Commission rightly points out, were it to confine itself to entering premises or examining filing cabinets with a clear link to the subject-matter of the investigation, there is a risk that it would not be able to locate important items of evidence. Those items of evidence might be hidden or incorrectly filed.

Furthermore, the link to the subject-matter of the investigation is not necessarily easy to identify at the outset and it may be the case that such identification is only possible after a thorough examination. As the Commission points out, since its officials do not have complete technical knowledge of all the sectors covered by the investigation, it is not always possible for them to ascertain the relevance of a document immediately, so that they have no option but to carry out a relatively wide search".
(Underline added)

This position is also shared by the CNMC as the following¹⁰⁷:

"In summary, the case law examined shows that the company subject to the dawn raid does not have the right to avoid that the competition authority carries out an exhaustive investigation and has access to documents that do not belong to the purposes of the investigation, whether personal or professional documents, nor this mere access to the documentation breaches the company's right of defense". (Underline added).

The importance of collecting emails from the companies in dawn raids is also pointed out by Colombian jurisdictions: after a complaint filed by a company in order to dispute a dawn raid in which the SIC collected a series of emails and electronic documents, the judicial authority declared the following¹⁰⁸.

"(...) It is enough to reiterate that the dawn raid right is a legal power held by those who carry out surveillance or auditing functions, so it can be wrongly affirmed that, by requesting the pertinent emails, the right to emails of the EAAB-ESP is being undermined, since such activity is proper to the SIC by legal provision and that an entity by it supervised (...)". (Underline added).

¹⁰⁶ Decision of September 6th, 2013 (Cases T-289/11, T-290/11 and T-521/1).

¹⁰⁷ Decision of September 23rd, 2013, under the File R/0148/13.

¹⁰⁸ Decision of the Civil Supreme Court of the Judicial District of Bogota of April 30th, 2013.

The Colombian Constitutional Court has also ruled on the review and search for emails by the SIC during a dawn raid, concluding that these powers do not violate the rights of those subject to a dawn raid. On the occasion of a lawsuit aimed at challenging the constitutionality of the SIC's dawn raid powers (among other entities), the Court stated the following¹⁰⁹:

"Dawn raids are evidentiary proceedings that allow authorities to exercise its constitutional power to require the presentation of "private documents" or "merchant documents" contained in paragraph 4 of section 15 of the Constitution. Therefore, the review, search and retention of those documents that fall within the category of "private documents" by the authorities do not violate or interfere with the right to privacy of the investigated company and therefore cannot be classified as a registration or interception of private communications subject to judicial jurisdiction. Thus, the Court does not share the complainant's interpretation regarding that the review of documents contained in computers, tablets and institutional emails, that is to say, owned by companies and for business purposes, constitute an interception or registration in the terms of subsection 3 of section 15 of the Constitution. According to what has been previously explained, the documents contained in such media, in principle, are related to the activity of the company. Therefore, they would be part of the category of private documents that the authorities can have access to for dawn raids and surveillance purposes under subsection 4 of section 15 of the Constitution". (Underline added)

Finally, regarding different claimants from various companies questioning the power of the European Commission to copy the hard drives of the computers of some of their employees, and subsequently analyze them in offices of the authority using specialized forensic instruments (hereinafter, FIT), the Court of Justice of the European Union ratified the validity of the dawn raids¹¹⁰:

"Contrary to the applicants' submission, it is not apparent from Article 20(2)(b) and (c) of Regulation No 1/2003 that the Commission's power to take or obtain copies of or extracts from the books and records related to the business of an undertaking under inspection is limited to the books and records related to the business that it has already reviewed.

Moreover, it should be observed that such an interpretation could undermine the effectiveness of Article 20(2)(b) of Regulation No 1/2003, in so far as, in certain circumstances, the examination of the books and records related to the business of the undertaking under inspection may necessitate the copying of such books or business records beforehand, or be simplified, as in the present case, by that copying.

Consequently, given that making the copy-image of the hard drive of the computers in question was part of the process by which the Commission operated the FIT, the purpose of which was to search for information relevant to the investigation, the making of those copies fell within the scope of the powers provided for in Article 20(2)(b) and (c) of Regulation No 1/2003". (Underline added).

Taking into account international experience, and considering the powers entrusted by the Competition Act (which have a constitutional basis), during a dawn raid the Technical Secretariat will be able to access and copy all those documents that it considers relevant, including the full content of email accounts¹¹¹, information stored in digital or remote sources that can be accessed (clouds or external servers) and any other file that may contain information related to the investigation. This, always bearing in mind that the large volume of documentation that can operate on the computers and equipment implies, as a general rule - and even in

109 Decision C-165/19 of April 10th, 2019. Although the unconstitutionality complaint was referred to the dawn raids powers of the SIC in consumer protection matters, the analysis of the Constitutional Court can be extended to the dawn raid powers that the SIC exercises in the free competition field, whenever they present substantial identity.

110 Decision of July 12th 2018, under the File T 475/14.

111 This copying duty Will includes as well those emails erased that are still available on the computer's storage. Those emails will be accessed through IT forensic tools by the personnel of the Technical Secretariat.

almost all cases - that there is no clear separation that would allow identifying the information that would be relevant to research; even less, in the short time in which a dawn raid takes place.

In this sense, denying the exercise of these powers would mean limiting the effectiveness of the dawn raids, hindering the possibility of obtaining evidence *in situ* and increasing the risk that companies hide or extract relevant documentation for the proceeding¹¹². This position would not only neutralize the investigations of the Technical Secretariat and prevent the achievement of the constitutional public purpose consisting in the defense of free competition, but would also ultimately harm consumers, who would be exposed to different anticompetitive practices without the State being able to fight them in an adequate and effective manner.

Regardless of the aforementioned, it is necessary to reiterate that the exercise of these powers does not entail a violation of the guarantees of the companies under investigation. Far from it, the Technical Secretariat observes a reasonable protocol of action when collecting this information with a series of parameters designed to protect its rights.

Certainly, the fact of having the power to access and copy the information that it deems relevant does not mean concluding that the searches of the Technical Secretariat will be indiscriminate or will require elements clearly unrelated to the investigation. On the contrary, their actions will be conducted under the object of the dawn raid¹¹³ (for example, limiting the access to computers of certain users) and the verification of compliance with the Competition Act, regardless of the aforementioned impossibility to carry out an individual review of each and every physical or electronic documents under the control of the companies in the short term of the dawn raid.

Likewise, the reproduction of the information contained in such equipment will be done using specialized and appropriate tools, avoiding harming the functioning of the computers and guaranteeing that such information is not damaged. These instruments will be used by the IT staff of the Technical Secretariat, who have the duty to answer to any technical or IT query regarding the reproduction process.

In a complementary way, during the dawn raid, it will be allowed that, prior to the access and reproduction by the inspectors, the company may indicate which information is not related to the investigation (for example, folders with intimate or personal photographs, protected information due to professional privilege, family documents¹¹⁴ or files manifestly unrelated to the commercial activity), requesting not to collect it. For such purposes, the collaboration of the companies -who are in the best position to filter this information- is essential, and they can accompany the inspectors to properly identify such documentation and explain the reasons why it should not be copied¹¹⁵. To this regard, the inspectors will briefly evaluate the situation and decide whether to accept the request of the company, allowing the latter to register in the dawn raid record any related circumstance that they consider relevant.

112 The CNMC stresses that: "the claim of the appellant saying that the verification of the documents must be conditioned to the company and/or its legal representatives' own identification of the files that are going to be deleted to be examined undermines the efficiency of the dawn raid, since the compromising documentation could be hidden, for which could even become an obstruction of the dawn raid tasks, to the extent that this mechanism will be used to extract from the file those data that may prove the alleged infringement

113 The Spanish Supreme Court agrees with this, stating that "the development of the dawn raid must try at every moment to limit itself to the object of the authorized investigation, through the collaboration of the company's employees, if occurs so, and, in any case, through an action in proportion and aimed at that objective. This, of course, does not mean that the dawn raid and the information requirement are carried out in the most careful way possible not that only the previously identified material can be intervened nor that at the exact time of the registration it is fully accredited that corresponds to the object of the investigation, since such a claim would turn a dawn raid into a very complex performance and probably ineffective on many occasions". Decision of April 6th, 2016 (Procedure No. 113/2015).

114 Regardless to the fact that people who maintain consanguineous or affinity ties may incur anticompetitive practices, where such documentation could be relevant to the investigation.

115 Regarding this power, the CNMC remarks that "it should be noted that during the dawn raid the personnel of the company or its legal representatives had the opportunity to indicate what was strictly personal and that, consequently, it should not be collected, which was provided in the dawn raid record as a satisfied request, as a general way, by the dawn raid team of the DI". Decision from February 3rd 2009, under the File R/0010/08.

However, it must be noted that in the case of files and emails, this identification task can be more difficult (if not impossible), since commercial information relevant to the dawn raid and personal data unrelated to the investigation are usually mixed in the computers and similar equipment of the companies¹¹⁶, not being possible to easily separate such information during the short term of the procedure. Under this scenario, and in order to continue the dawn raid in a timely manner, the company has the possibility to request a reasonable period of time to carry out this separation work, which will be determined depending on the circumstances of the case, the volume of the material to be collected and the greater or lesser ease to identify such information.

For referential purposes, the Technical Secretariat usually grants a period of up to one hour to carry out the identification and separation of the information that, in its opinion, must be excluded from the dawn raid, which is a period that may vary according to the circumstances of each case.

In addition, in these cases the inspectors will also be empowered to preliminarily verify the content of such documents (this could be performed randomly), with the purpose of validating whether it is indeed intimate or irrelevant information for the investigation and to make a decision about its compilation. Otherwise, indirect incentives would be created to undermine the Technical Secretariat's duties since the mere statement of the companies that their documents or email accounts contain irrelevant information would be enough to avoid or obstruct a dawn raid.

It should also be noted that in the hypothetical scenario that the authority obtains electronic documentation not related to the facts under investigation, despite the indicated guarantees, this will not violate the rights of the companies subject to the dawn raid. Far from it, in that scenario the Competition Act provides that those under a dawn raid proceeding may require the generic confidentiality of all the information collected or declared during the dawn raid, and may address this request in the respective dawn raid record¹¹⁷. This power is also regulated by the Directive 001-2008/TRI-INDECOPI, Directive on the confidentiality of information in the procedures followed by the functional bodies of Indecopi (hereinafter, the Directive on Confidentiality), which establishes that the company may request the confidentiality of all the information collected during the dawn raid¹¹⁸. Finally, it should be noted that, after the dawn raid, all the information that is not pertinent to the investigation will be returned or destroyed by the Technical Secretariat, at the request of the company¹¹⁹.

116 This situation has also been addressed in the Colombian jurisdiction. In a procedure in which the SIC's dawn raid powers were questioned, the authority stated that "it is clear that the SIC has the power to inspect emails and electronic documents that are related to the ordinary activity of the business under an administrative dawn raid, and consequently the institutional emails of its employees are, in the words of the Supreme Court of Justice, considered as "commercial" and therefore, it is not appropriate to deny the access and review to the authority by saying that they are of a "mixed nature" for simultaneously containing business and private or personal information of the partners and the legal representative". Decision No. 53878 of September 5th, 2014 (Procedure No. 13-191521).

117 The Competition Act

Section 35. Confidential Information.-

35.1 At the request of a party or third party with a legitimate interest, including public entities, the Technical Secretariat or the Commission shall declare the confidentiality of any information that is confidential, whether it is a commercial or industrial secret, information that affects the personal or family privacy, the disclosure of which could harm its owner and, in general, information provided as such in the Transparency and Access to Public Information Act. (...)

35.2 Only the members of the Commission and the members of the Tribunal, the Technical Secretaries and the persons duly authorized by them who work or maintain a contractual relationship with INDECOPI have access to the information declared under confidentiality. (...)

35.5 In the case of a dawn raid or an interview, and at the time this procedure is carried out, the interested party may request the generic reservation of all the information or documentation declared or delivered to the Technical Secretariat. The latter, subsequently, must inform the interested party what information or documentation is pertinent to the investigation, granting a reasonable period for the interested party to individualize, among the relevant information, the confidentiality request in accordance with the provisions of the preceding paragraph.

35.6 The Technical Secretariat or the Commission may declare ex officio the confidentiality of the information related to personal or family privacy

118 Directive on Confidentiality

3.8. In the case of information collected from interviews or dawn raids carried out by INDECOPI, the information collected may be declared confidential by the respective authority, at the request of the party. To do this, the parties may request, in general, the confidentiality of all the information collected.

119 Confidentiality Guidelines of the Commission for the Defense of Free Competition

8. According to the aforementioned, the Commission considers that the requirements applicable to confidentiality requests can be organized as follows:

i. That the information is pertinent (...)

In the case of an interview or dawn raid, when carrying out this procedure, the company may request the generic confidentiality of all the information declared or delivered to the Technical Secretariat, who must subsequently summon the company to communicate the information that is pertinent to the preliminary investigation or to the corresponding procedure.

In that sense, both the exercise of the aforementioned right of separation and the possibility of requiring the generic confidentiality of the documentation obtained during the dawn raid allow to protect the rights of the company, guaranteeing that the duties of the Technical Secretariat are framed under what is relevant for the purposes of the investigation.

Furthermore, when reviewing of the information collected during the dawn raid, the Technical Secretariat will use specialized technological instruments and objective and reasonable search criteria (for example, keywords), in order to classify the information and limit it to the relevant evidence for the investigation, which is a process internationally known as "indexation"¹²⁰.

The use of these filtering elements is also recognized by foreign competition agencies. In this regard, we reiterate that the General Court of Justice of the European Union declared the legality of the power to copy information so that, later, and using specialized technology instruments, identify the documentation that would be relevant to the investigation¹²¹.

"In the present case, the practice of making a copy-image of a hard drive of a computer or a copy of data stored on a digital data carrier is used in the context of the operation of forensic information technology ('FIT'), which Commission officials use during inspections (...) that technology involves using specific software to search the hard drive of a computer or any other digital-data carrier for relevant information in the light of the subject matter of the inspection by using keywords. (...) That copy-image makes it possible to obtain a true copy of the hard drive under inspection, containing all the data on that hard drive at the precise moment that the copy is made, including files which have apparently been deleted.

In that regard, first, it should be stated that, in so far as (i), as was explained in paragraph 49 above, the copying of data stored on the digital data carrier of an undertaking under inspection is carried out for the purposes of indexation and (ii) that indexation is intended to make it possible to then search for documents relevant to the investigation, making such a copy falls within the scope of the powers conferred on the Commission by Article 20(2)(b) and (c) of Regulation No 1/2003". (Underline added)

Moreover, regarding the argument of a company addressing the dawn raid powers of the SIC, the Colombian authority stated that¹²²:

"The private party is not the one entitled to choose what type of information is relevant for the procedures carried out by the SIC, or what indicators should be used to track the information that the authority seeks (...)

Accepting such interpretation and pretending that it is the citizen who determines the information search criteria of this type of evidence, it would undermine the dawn raid, surveillance and control powers not only of the SIC but of any other administrative authority that intend to exercise its functions". (Underline added)

This filtration will be carried out at the premises of Indecopi, using spaces duly conditioned for those tasks, ensuring the preservation of the information through the adequate security parameters and restricting access exclusively to the qualified personnel of the Technical Secretariat. On the one hand, this constitutes an additional guarantee in favor of the companies, safeguarding the originality and integrity of the documentation

120 Regarding the technical aspects related to this duty, the Court indicated that through indexation "(...) the software puts all the letters and words on the hard drive of a computer or other digital data carrier under inspection in a catalogue. The duration of that indexation depends on the size of the digital data carrier in question, but this generally takes a considerable amount of time. In those conditions, Commission officials generally make a copy of the data contained on the undertaking's digital data carrier under inspection in order to index the data stored on that carrier." Decision of July 12nd 2018, under the Case T 475/14.

121 Decision of July 12nd, 2018, under the Case T 475/14.

122 Decision No. 53878 of September, 2024 (Procedure No. 13-191521).

found (without the possibility of being altered), classifying it according to its relevance and, if it is useful for the investigation, incorporating it into the corresponding sanctioning file (in the case a sanctioning procedure is initiated). On the other hand, in the case of finding information outside the investigation scope, it will be destroyed or returned, at the discretion of the companies (as specified before).

At the same time, within the framework of their legal powers, the officials of the Technical Secretariat must comply with a strict duty of secrecy and confidentiality regarding the information obtained during the dawn raid, finding themselves prevented from disclosing the information under the risk of being held administrative liable. The foregoing is in accordance with the provisions of the Competition Act, The Powers, Regulations and Organization of Indecopi Act and the LPAG¹²³, as well as the other applicable rules that regulate the duties of public officers.

The Technical Secretariat may even declare by its own initiative the confidentiality of the information related to the privacy of the employee that could be identified, in accordance with the provisions expressly provided in section 35.6 of the Competition Act. In that sense, the fact that this information is eventually under the control of the Technical Secretariat will not imply its availability to third parties or an eventual violation of the rights of the investigated companies¹²⁴.

In turn, as part of the procedure, the inspectors will leave a "mirror copy" of the information collected in the hands of the investigated companies, so they know the documentation that is in possession of the authority and are able to exercise the rights previously analyzed later on.

Subsequently, once the review of the information collected during the dawn raid has been completed, the Technical Secretary will communicate to the manager of the company the information that falls within the scope of the investigation, granting a period to identify and specify the scope of his request for confidentiality¹²⁵.

It may happen that the information expected to be collected is excessively large, making it difficult to copy it in a single day¹²⁶. In these cases, and to prevent the procedure from being prolonged excessively, the Technical Secretariat may go the following day to the premises of the company and complete the reproduction task, recording this circumstance in the dawn raid record.

Exceptionally, as indicated in the dawn raid record, the inspectors may also return the following day to their premises in order to carry out additional procedures that could not be carried out on the initial date of the dawn raid (for example, to continue the reproduction task on a certain computer that has a large volume of information).

123 The Competition Act

Section 35. Confidential information.-

(...) 35.3 In cases in which the Technical Secretariat, the Commission or the Court grant the confidentiality request made, it will take all the necessary measures to guarantee the confidentiality, under liability (...).

The Powers, Regulations and Organization of Indecopi Act

Section 6.- (...) Only the members of the Commission, Office or Tribunal, the Indecopi officials assigned to the procedure and, where appropriate, the members and staff in charge of the Competition and Intellectual Property Tribunal, will have access to the documents and information that has been declared confidential. The officials who undermine the confidentiality of this type of information or in any way fail to comply with the provisions of this Section will be removed and disabled for up to ten years to exercise any public function, regardless of the criminal liability that may arise. The dismissal or disqualification will be imposed by the Board of Directors.

The Codified version of the General Administrative Procedure Act

Section 241. The duties of the entities that conduct dawn raid.-

(...) 241.2 The correspondent authorities have, among others, the following duties when exercising the dawn raid activity: (...)

5. To keep confidentiality over the information obtained during a dawn raid.

124 The CNMC agrees with this, stating that "The alleged assault on the fundamental right to privacy must be examined in light of the doctrine of the Constitutional Court, which, regarding dawn raids by Public Administrations, has established that the access or reading of documents that may contain data that affect the area of private life does not in itself constitute an infringement of the right but a possible future and eventual violation, insofar as these data are revealed or are used fraudulently violating the privacy of the party". Decision of October 3rd, 2008, under the File R/0005/08.

125 According to the Directive No. 001-2008/TRI-INDECOPI on the confidentiality of information in the procedures followed by the functional bodies of Indecopi (and its amendments), the period to specify such request will be seven (7) business days.

126 For example, on the occasion of a series of dawn raids related to the preliminary investigation under the Case No. 015-2014/CLC-IP, the Technical Secretariat obtained a total of 726.90 gigabytes, which is equivalent to approximately 3, 685,774.00 emails and electronic files of the companies. The review of this information was decisive to prove the liability of the companies investigated for the charged infringement, in accordance with the evidence of the procedure under the File No. 011-2015 / CLC.

Therefore, the collection and access of documents within the context of a dawn raid seeks to ensure the effectiveness of the duties of the Technical Secretariat and the fulfillment of the constitutional public purpose of protecting free competition, governed by different parameters that guarantee that these powers are not unrestricted or arbitrary or collide with the rights of the companies.

V.2. Formulation of inquiries and questions

According to the powers provided by the Competition Act, the Technical Secretariat may also ask questions and take the statements of the company's employees who are at the premises during the dawn raid.

During this proceeding, the Technical Secretariat usually reviews or requests as a sworn statement the organization chart of the company, in order to identify those responsible for each area under control (and their computers). Once identified, the inspectors may make inquiries and questions about objective circumstances that they deem relevant for the purposes of the investigation, and may also record them on audio or video.

It is necessary to specify some basic notes related to the content, scope and form in which these questions are asked, so their formulation does not mean a violation of the rights of the companies; specifically, regarding the privilege against self-incrimination, which consists of the right not to accuse or testify against oneself, which has special relevance in the criminal sphere¹²⁷.

Although briefly, section 180 of the LPAG recognizes the exercise of this guarantee in the administrative field, specifying that individuals may refuse to comply with certain requirements in the event of certain circumstances, such as the direct disclosure of facts prosecuted by the authority¹²⁸.

European jurisprudence has ruled on this situation on different occasions. In this regard, the Constitutional Court of Spain highlights the following about the scope of the privilege against self-incrimination¹²⁹:

127 Regarding the application of this right in the administrative field and the possibility of its application to the dawn raid activities, see ALARCÓN, Lucía, "El Adelanto Excepcional a la Inspección Administrativa del Derecho Fundamental a No Declarar Contra Sí Mismo. Casos y Causas", in *La función inspectora. Actas del VIII Congreso de la Asociación de Profesores de Derecho Administrativo*, Coord. DIAZ SÁNCHEZ, J., INAP, 2013, pp. 200-208.

128 The Codified Version of the General Administrative Procedure

Section 180. Evidence requirement to the parties.-

180.1 The authority may require the parties the communication of information, the presentation of documents or assets, the submission to inspections on their assets, as well as their collaboration to execute other means of evidence. For this purpose, the request is made mentioning the date, time limit, form and conditions for its compliance.

180.2 The rejection of the requirement provided in the previous paragraph will be legitimate, when the subsection implies: the violation of professional secrecy, a disclosure prohibited by law, directly implies the disclosure of prosecuted facts carried out by the party, or affects constitutional rights. In no case does this exception cover the distortion of facts or reality.

180.3 The acceptance of this exception will be freely appreciated by the authority according to the circumstances of the case, regardless of the duty of the administrative body to search for the facts or issue the corresponding Decision.

129 Decision 161/1997 of the Constitutional Court of Spain, which addressed the constitutionality in the tax field regarding the taxpayer's duty to deliver the information required by the inspectors, as well as the possibility of sanctioning their refusal to comply such duty.

"The guarantee against self-incrimination refers in this context only to the contributions of the defendant or any who reasonably is in that situation and only to contributions that have a directly incriminating content.

However, this guarantee does not integrate into the right to the presumption of innocence the power to withdraw from the prevention, investigation or evidence proceedings that the accusation proposes or that may be ordered by the judicial or administrative authorities. The generic configuration of a right to refuse to undergo any dawn raid of this type would leave the public powers defenseless in the performance of their legitimate functions of protection of liberty and coexistence, would damage the value of justice and the guarantees of effective judicial protection .

The same effects of procedural imbalance to the detriment of the value of justice and the obstruction to the legitimate functions of the Administration, to the detriment of the public interest, could extend to the power of not contributing to any activity or proceeding regardless of its content or character, or the abandonment of their classification as directly incriminating to the person from whom the contribution is requested" (Underline added).

In regards to the free competition field, the Court of Justice of the European Union has warned in repeated circumstances that there are certain questions whose formulation could be determinant for the companies to be forced to declare or acknowledge their guilt over the facts investigated¹³⁰:

"In the exercise of the powers conferred on it to ensure compliance with the Community competition rules, the Commission is entitled, if necessary by adopting a decision, to compel an undertaking to provide all necessary information concerning such facts as may be known to it but may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove." (Underline added)

Finally, the Supreme Court in Spain states the following about the application scope of the privilege against self-incrimination¹³¹:

"We have reiterated that this last right is not violated when the company is required to deliver to the Administration objective facts about its activity(...) Objective data and information that, in any case, is obliged to provide to the Administration". (Underline added).

In this sense, considering its nature and immediacy, the Technical Secretariat and the Commission consider important to assure that the questions raised by the inspectors do not violate the rights of the employees subject to a dawn raid, so that in the exercise of this power, the inspectors will not ask incriminating, ambiguous or suggested questions that may lead to an admission of guilt by those investigated for a possible anticompetitive conduct.

If these assumptions are verified, the employees of the investigated company will have the right to remain silent and not provide a response to the inspectors. However, within the framework of their duty to collaborate, in any other case the employee will be obliged to transfer the answers and explanations required by the Technical Secretariat; otherwise, such refusal may be subsumed as a possible event of obstruction of the functions of the authority, subject to a sanction.

Taking into account the aforementioned, and considering that dawn raids are usually carried out in an initial phase of an investigation, the inspectors will try to formulate questions related to the organization and operation of the company, as well as its commercial activity in the investigated market, avoiding impertinent or

130 Decision of the Court of Justice of the European Union of January 25th, 2007, under the Case C-407/04 P

131 Decision 2538/2010 of the Supreme Court of Spain.

unrelated issues to these elements. Therefore, the answers provided under these terms –related to objective and general factors– will not qualify as incriminating under any circumstances.

Notwithstanding this, and considering the status of the preliminary investigation, if this is the case, the inspectors may also ask questions about facts, individuals or objective information related to the investigation, always under strict compliance of the privilege against self-incrimination.

Finally, it must be considered that the privilege against self-incrimination only affects the declarations of the employees and does not apply to the requirements for the disclosure of documents or files, as long as such documentation is related to a specific objective information about the commercial activity of the company and the facts investigated.

Under that scenario, the employees investigated cannot justify their refusal to deliver certain documentation based on the privilege against self-incrimination¹³².

V.3 Obtention and application of accidental findings

When conducting a dawn raid, the Technical Secretariat may casually become aware of documents or files that provide information on possible anticompetitive conduct different than the one addressed in the dawn raid decision. This situation leads to determine whether the competition authorities are empowered to collect these elements, investigate these other infringements and use them as evidence in a subsequent sanctioning procedure, which leads to the so-called doctrine of accidental findings¹³³.

In the field of competition law, the Court of Justice of the European Union has repeatedly admitted the application of this doctrine in order to guarantee the effectiveness of the authorities' investigations, in accordance with the following parameters¹³⁴:

"(...) it cannot be concluded that the Commission is barred from initiating an inquiry in order to verify or supplement information which it happened to obtain during a previous investigation if that information indicates the existence of conduct contrary to the competition rules in the Treaty. Such a bar would go beyond what is necessary to protect professional secrecy and the rights of the defense and would thus constitute an unjustified hindrance to the performance by the Commission of its task of ensuring compliance with the competition rules in the common market (...)". (Underline added)

The CNMC shares this position¹³⁵:

132 REBOLLO agrees with this conclusion by stating that "This privilege against self-incriminate is only projected on the declarations but does not affect other types of proceedings, even if they require the collaboration of the defendant, such as the delivery of pre-existing documents, access to them or to places, searches, analysis, sampling, etc." REBOLLO, Manuel, Ob. Cit., P. 98. In turn, ALARCÓN indicates that "What I also share - in fact, this solution seems to be deduced from the CJEU's own jurisprudence - is that the privilege to not testifying against oneself is only projected on the statements - not on any other type of proceedings - so, to the extent that it is anticipated to the dawn raid, I believe that it will not justify the non-compliance or the legal duty to submit to certain expertise - I am thinking, for example, of the alcohol test - or to provide documents, at least those available to the parties before the dawn raid". ALARCÓN, Lucía, Ob. Cit., p. 208.

133 Originated in a criminal court, the theory of accidental findings refers to obtaining information as a result of an investigation related to a certain crime but derives elements that could prove a different crime. For more information, see ÁLVAREZ DE NEYRA, Susana, *Los descubrimientos casuales en el marco de una investigación penal (con especial referencia a las diligencias de entrada y registro en domicilio)*, Revista Internacional de Estudios de Derecho Procesal y Arbitraje No. 2, 2011, pp. 3-4. In the free competition field, accidental findings are understood as "the finding of a document that may be related to a different anticompetitive conduct than the one subject to the dawn raid decision". IGARTÚA, Iñigo, "El hallazgo casual en las inspecciones de competencia, de Dow Benelux a Montesa-Honda: seis preguntas claves", in *Anuario de Derecho de la Competencia 2017. Problemas prácticos y actualidad del Derecho de la Competencia*, RECUERDA, Miguel Ángel, Civitas, Thomson Reuters, p.102.

134 Decision of October 17th, 1989, under the Case 85/87 and the decision of July 18th, 2015, under the Case C 583/13P.a

135 Decision of February 7th, 2011, under the File S/0155/09. To more details, see the Decision of May 4th, 2009 under the File R/0011/09 and the Decision of March 29th, 2010, under the File R/0037/10.

"the report of the State Advocacy of October 16, 2008 on the scope of the dawn raid powers (...) concludes based on extensive national and community jurisprudence and on national and competition regulations, that the information obtained by chance and not premeditated, can be used in another competition procedure (...)". (Underline added)

The affirmation that the CNMC does on the legality of using accidental findings within a sanctioning administrative procedure is supported by the Supreme Court of Spain, by indicating the following requirements for its application¹³⁶:

- i.** The access and collection of information must be authorized in the dawn raid decision (or in the correlative judicial authorization).
- ii.** The dawn raid duties must be carried out in an appropriate and proportionate manner.
- iii.** The material obtained must show evidence of possible illegal conduct.
- iv.** Once the respective sanctioning procedure has been initiated, the affected company must be allowed to exercise its right of defense against these new facts.

The international case law agrees on the fact that, once the review process of the information under a dawn raid is completed, those documents found by chance that show evidence of a possible anticompetitive infringement other than the one initially investigated can be incorporated and used in a subsequent sanctioning procedure. (if there are enough elements to initiate such a procedure). This, in order to ensure compliance with the constitutional purpose of defense of competition and guarantee the effectiveness of these investigations¹³⁷.

In Peru, the validity of the accidental findings in the administrative field does not present much controversy either, since the section 240.2.7 of the LPAG expressly states that the entities that carry out dawn raid activities - as is the case of the Technical Secretariat - may expand or vary the object of the dawn raid if, as a result of these actions, breaches of the law are detected in addition to those established as the objective of the dawn raid¹³⁸.

Consider as an example the case of a municipal dawn raid intended to verify whether a commercial establishment had an operating license, however it is detected during the proceeding that that establishment does not comply with the technical conditions of safety in buildings. Certainly, in such a scenario, the municipal authority will be entitled - if not obliged - to broaden the object of its investigation and adopt the pertinent punitive and corrective measures so that the establishment operator can rectify said omission.

Both the Commission and the Technical Secretariat also consider that the foundation of this power lies in the principle of material truth¹³⁹, which means that the Public Administration is obliged to carry out all the necessary

136 Decision No. 790/2016 of April 6th, 2016. Although this case law is about a dawn raid conducted in a home (a proceeding that requires judicial authorization), its reasoning and conclusions are applicable to dawn raids conducted in commercial premises.

137 Regarding this point, TIRADO specifies that "Denying, or reducing to a minimum, the possibility of unanticipated relevant findings, would mean such an intense restriction to the dawn raid powers that the public purposes associated with them (the defense of the competition) and the extension of its benefits to society, for the case under study) would be affected in a very significant way and, consequently, so unprotected that it is not reasonable to prohibit the use of evidence casually found in a dawn raid which, on the other hand, are practically impossible to avoid". TIRADO, José Antonio, La doctrina del hallazgo casual durante las actuaciones de inspección: un comentario a la reciente jurisprudencia del Tribunal Supremo español, 2020, p. 7.

138 The Codified Version of the General Administrative Procedure Act

Section 240. The powers of the entities that conduct dawn raid activities.-

(...) 240.2 The Public Administration in the exercise of the dawn raid activity is entitled to carry out the following: (...)

7. Extend or vary the objective of the dawn raid action in the cases where as a result of the actions and proceedings made, breaches of law are detected in addition to those expressed initially in the dawn raid objective.

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Section IV. Principles of the administrative procedure

The administrative procedure is fundamentally based on the following principles, regardless of the validity of other general principles in the Administrative Law:

1.11 Principle of material truth.- In the procedure, the competent administrative authority must fully verify the facts that serve as grounds for its decisions, for which it must adopt all the necessary evidentiary measures authorized by law, even when they have not been proposed by the parties or have agreed to exempt them.

acts to verify on its own account the facts that support its decisions, and clarify any type of controversy that falls within its sphere of competence¹⁴⁰. In this sense, in order to effectively fulfill its mission of ensuring free competition in the market, the Technical Secretariat must evaluate any type of information that it has had access to and determine if can infer from it the possible existence of an anticompetitive conduct, being able to expand the object of the investigation in order to collect evidence and pursue such infringement.

The contrary position would lack support and would be unreasonable, since it would not only directly collide with the provisions contained in the LPAG, but would mean the creation of unjustified obstacles for the Technical Secretariat to fulfill the public purpose that the legal system has entrusted to it: defend the constitutional legal asset of free competition. Consequently, and pursuant to the LPAG regulations and comparative experience, if as a result of a dawn raid the Technical Secretariat discovers information that may account for a possible anti-competitive offense other than the one initially investigated, the authority will be empowered to use those elements and adopt the investigation and/or instruction actions that it deems pertinent.

It should be added that the obtaining of these elements will be duly communicated to the companies investigated, informing them about the consequences of these findings. Depending on the particularities of the case, the elements found and the status of the investigation, the Technical Secretariat may: i) extend the preliminary investigation initiated against the economic agent; ii) initiate a new investigation; or, iii) to consider that there are sufficient elements of judgment to initiate a sanctioning procedure against the company, so it can exercise its right of defense once the charges have been notified.

Finally, and to provide more information to the parties, it is a good practice that the dawn raid decision order communicates that the Technical Secretariat may use this power in the event that it discovers and obtains elements that account for possible infringing conduct other than that research subject.

VI. Aftermath of the dawn raid and posterior events

After the visitation, the inspectors will draw up the corresponding dawn raid record, which must collect the results and events of the proceeding. Although the content of these records will vary depending on the facts found and the verification carried out by the inspectors (depending in turn on the scope in which this document is issued and the powers of each authority), there are certain legal elements that must be observed.

According to the provisions of the LPAG, the record must register the facts objectively verified by the inspectors and contain a series of minimum data, such as¹⁴¹:

140 CASSAGNE considers that this principle constitutes a distinctive feature in every administrative action, since the administrative body must comply with the facts under analysis, regardless of the statements or evidence that the parties may or may not have provided. Thus, the authority must assume an active role and refer to different sources of information that support its decisions. CASSAGNE, Juan Carlos, *Derecho Administrativo*, Tomo II, Abeledo-Perrot, Buenos Aires, 2002, p. 527.

141 The Codified Version of the General Administrative Procedure Act

Section 244. Minimum content of the dawn raid record.-

244.1 The dawn raid record or document that plays its role, is the document that records the verifications of the facts objectively verified and contains at least the following data:

1. Name of the natural person or company subject to the dawn raid.
2. Place, date and time of opening and closing of the proceeding.
3. Name and identification of the inspectors.
4. Names and identification of the legal representative of the legal person or its designated representative for this purpose.
5. The facts subject to verification and/or occurrences of the dawn raid.
6. The manifestations or observations of the representatives of the parties and of the inspectors.
7. The signature and ID of the participants. If any of them refuses to sign, the refusal is recorded, without affecting its validity.
8. The refusal of the party to identify itself and subscribe the records.

244.2 The dawn raid records leave proves of the facts verified during the proceeding, unless proven otherwise.

Article 167. Preparation of the records.-

167.1 The declarations of the parties, witnesses and experts are documented in records, whose preparation follows the following rules:

1. The records indicate the place, date, names of the participants, object of the action and other relevant circumstances, and must be formulated, read and signed immediately after the action, by the declarants, the administrative authority and by the participants who wish record its manifestation.
2. When the declarations or actions are recorded, by consensus between the authority and the parties, the records can be concluded within the fifth day of the act, or, if applicable, before the final decision.
3. The parties can leave in the records the observations they deem necessary about what happened during the corresponding proceeding.

167.2 In administrative dawn raids and supervision procedures, the parties may also offer evidence regarding the facts documented in the records.

- i.** Name and ID of the party subject to the dawn raid (whether natural or legal person), as well as the inspectors' in charge of the dawn raid.
- ii.** The circumstances of time and space that allow the dawn raid to be contextualized (date, place and time of the procedure).
- iii.** The facts subject to verification, as well as the information verified or collected and any other relevant circumstance for the proceeding (for example, possible situations of obstruction or additional information requirements), which should be indicated as clearly as possible, in order to reflect everything that happened in the dawn raid.

In order to have a reliable record of the events that occurred during the proceeding, the Technical Secretariat may make audio and/or video recordings when it deems necessary, in accordance with the powers granted by the law.

- iv.** The observations or allegations of the party, clearly exposing its position and being able to submit additional information or documentation it considers appropriate.

Evidently, the dawn raid record will only register the position of the party, without making any value judgment on its veracity or relevance¹⁴².

- v.** The signature of the parties involved in the proceeding (inspectors and representatives of the company). If the party refuses to sign the dawn raid record, that circumstance has to be registered as well. Thus, the purpose of the signature is to prove the participation and receipt of the document by the company (keeping a copy), without meaning a confirmation of its content.

In the competition field, it is especially relevant that the inspectors record the circumstances in which the visitation took place, as well as the requirements or questions formulated and the summary of the information or documentation provided. For example, the records will refer to the collection of emails and electronic files corresponding to the computers subject to a dawn raid, also identifying their respective users. To facilitate their understanding, the records will also include an annex that lists the most important characteristics of this electronic information - for example, the location where the copied emails were located or the size of these files - without necessarily specify each and every one of the elements collected by the inspectors (a fact that would be materially impossible). For its part, the company's representatives will keep a copy of the signed records, as well as the corresponding annexes.

It is necessary to specify that, in the cases in which the dawn raid lasts more than a day, the Technical Secretariat may coordinate, by mutual agreement with the company, the immobilization of those devices still not reviewed, in order to avoid their manipulation. This commitment will be included in the dawn raid record.

Regardless of the aforementioned, in the event of a refusal by the company regarding such proposal (or if there are suspicions of possible manipulation), the Technical Secretariat may request the Commission to impose the immobilization measure provided in the section 15.2 of the Competition Act. Certainly, non-compliance with this immobilization measure will also qualify as an event of obstruction subject to sanction, in accordance with the provisions of these Guidelines.

After that, the information collected will be analyzed at the premises of Indecopi, under confidential nature. In fact, it would not be reasonable for the investigated company to be allowed to access to the information of the preliminary investigation, since there would be a risk of taking different measures to destroy the evidence that

142 In this regard, FERNÁNDEZ indicates that "the records are limited to reflecting the fact of the statement itself, not what such statement refers to". Cfr. FERNÁNDEZ, Severiano, Ob. Cit., p. 452.

may still be in its possession or alert other companies about the state of the investigation¹⁴³. This is also how our legislation understands it, since the Single Ordered Text of Law No. 27806, the Law of Transparency and Access to Public Information establishes as an exception to the right of access of those administrated that information related to investigations in process related to the exercise of the sanctioning power, as is the case of the investigations of the Technical Secretariat¹⁴⁴.

However, within the framework of such documentary analysis (especially in the case of emails), companies may contact the officials of the Technical Secretariat in order to know the status of the evaluation, as well as to obtain copies of that information collected. This is regardless of the fact that, since we are facing a confidential investigation, it is not possible to know information about the other companies involved in the investigation or to access the space where the Indecopi servers - responsible for disaggregating this information - are located. Complementarily, the Technical Secretariat will subsequently communicate to the manager the information that is relevant to the investigation, that the irrelevant documentation will be returned or destroyed.

After evaluating the information collected that was relevant to the investigation, the Technical Secretariat will decide whether or not to initiate an administrative sanction procedure against the investigated company¹⁴⁵. If that procedure is initiated, along with the notification of the charges, all the evidentiary elements that support this decision will be sent, for the companies to know the content and exercise their right of defense, allowing them to access the file when they consider it convenient¹⁴⁶.

In this sense, once a sanctioning procedure has been initiated, the respective procedural guarantees of the companies¹⁴⁷ are activated, allowing the defendants to state their position on the events classified as infringement, to refute the evidentiary material obtained by the inspectors and to present allegations.

Finally, the information collected in the dawn raid will be evaluated by the Commission when determining (or not) the liability of the companies for the alleged anticompetitive practice, always under the framework of the principle of free assessment of the evidence¹⁴⁸ and considering that in the competition field it is required a joint evaluation of all the elements of judgment in the file, whether they are direct, indirect or circumstantial means of evidence¹⁴⁹.

143 As REBOLLO mentions, we are in a field reserved for the Administration, which should limit the possibility of the parties to access that file. REBOLLO, Manuel, Ob. Cit., pp. 90-92.

144 The Transparency and Access to the Public Information Act

Section 17. Exceptions to the exercise of the right: Confidential information.-

The right of access to public information may not be exercised with respect to the following: (...)

3. Information related to pending investigations regarding the exercise of the sanctioning power of the Public Administration (...).

145 It is worth noting that the adoption of alternative measures of culmination different from a sanctioning administrative procedure is not part of the Guidelines.

146 The Competition Act

Section 22. Deadline for submission of releases.

22.1. The defendant may answer the charges in the resolution to initiate the procedure within a term of thirty (30) business days, presenting the arguments they deem appropriate and offering the corresponding evidence (...).

Section 34. Access to the file.-

At any time during the procedure, and until the administrative procedures concludes, only the investigated party, who has filed a complaint by a party or third parties with legitimate interests who have also attended the procedure, have the right to know the status of the processing of the file, access to it and obtain copies of the proceedings, provided that the Commission has not approved their reservation because it constitutes confidential information (...).

147 As FERNÁNDEZ points out, "there is no proper (dawn raid proceeding), so the typical guarantees of the administrative procedure, such as the right to a hearing prior to the resolution or the legal duty to issue a decision in a deadline, precisely because there is no decision in itself". FERNÁNDEZ, Severiano, Ob. Cit., pp. 356-357.

148 In this regard, ALARCÓN affirms that "the requirement, imposed by law, that the assessment of evidence must be rational and reasoned excludes from the administrative sanctioning procedure the existence of limited evidence. In other words, free appraisal is the only system compatible with the guarantees that the presumption of innocence imposes on the assessment of evidence in the sanctioning field". ALARCÓN, Lucía, "Derecho a la presunción de inocencia en el procedimiento administrativo sancionador", in Diccionario de Sanciones administrativas, Dir. LOZANO, Blanca, IUSTEL, Madrid, 2010, p. 264

149 In the matter of evidence of anticompetitive conducts, the European Court has indicated that the probative value of a document "depends on its origin, the circumstances of its elaboration, its addressee, and the reasonable and trustworthy nature of its content". Judgment of June 17th, 2012, relapsed in Case T-439/07.

DAWN RAIDS GUIDELINES

I. INTRODUCTION

According to the Section 15 of the Peruvian Competition Act, the Technical Secretariat is the authority in charge of preliminary investigating and prosecuting anticompetitive behaviors. For that purpose, the Peruvian Competition Act grants the Technical Secretariat several powers of investigation, such as the important prerogative to carry out unannounced dawn raids in the premises of the investigated companies, to examine and copy books and other records, conducting interviews and questions on any employee of the company, taking pictures and footage and, in general, accessing any element considered relevant for the investigation.

The objective of these dawn raids is to collect evidence of alleged anticompetitive practices which could not be obtained otherwise. In fact, the conditions in which these dawn raids take place allow officials to quickly and immediately access to different sources of information, thus reducing the possibility of their alteration or elimination. This is especially relevant regarding cartels, which are not only the most harmful anticompetitive infringements against society, but also have a clandestine nature, since the economic agents involved in this kind of practice tend to adopt different measures to avoid being discovered.

Under this context, and according to national and international experience, dawn raids are one of the main tools the Technical Secretariat has in order to gather further evidence for the development of its investigations, and, ultimately, for the promotion of consumers' welfare and free competition in the market, which is a legal asset of constitutional relevance.

Conversely, these investigation powers imply the execution of different actions that directly affect companies, who are legally obliged to grant access to their business premises, collaborate with the inspectors and submit the information and documents required. The extent and scope of this set of powers determine the rules and principles that the development of the dawn raids must comply with, so that their execution respect the rights of the companies.

Considering this situation, it is necessary to find balance between the rights of the economic agents subject to a dawn raid and the effectiveness that must guide the Technical Secretariat investigation while exercising these dawn raid powers, having always in mind that the promotion of competition qualifies as a Peruvian constitutional principle.

In that sense, and in order to grant greater predictability to the dawn raids carried out by the Technical Secretariat, the following Dawn Raids Guidelines aims to establish clear rules that guide the companies on the scope and development of these proceedings. To achieve this purpose, and considering national regulation and international experience from recognized competition authorities, the Guidelines describe the powers of inspectors appointed by the Technical Secretariat and the manner in which these dawn raids will be conducted, as well as the rights and obligations of the economic agents within a dawn raid and other aspects related to its development and culmination.

II. SCOPE OF APPLICATION

1. These Guidelines are meant to be applied in any investigation of the Technical Secretariat regarding an anticompetitive conduct, in accordance with the Peruvian Competition Act.
2. The decision and execution of the dawn raids carried out by the Technical Secretariat are ruled by the Peruvian Competition Act and the Guidelines (including the principles contained in the Statement of Purpose of the Peruvian Competition Act), as well as the "General Administrative Procedure Act" and other sources of administrative law, as long they are applicable.
3. These Guidelines may be used in the case of international dawn raids in which the Technical Secretariat may intervene, in accordance with the coordination with the international competition authorities or in light of the cooperation agreements signed with those entities.

III. PARAMETERS FOR CONDUCTING DAWN RAIDS

4. Under a preliminary investigation, the dawn raids will be based on the existence of suspicions pointing towards the possible existence of an anticompetitive conduct, which should be aimed at obtaining evidence related to the investigated infringement that allow to corroborate those suspicions.
5. Any element that reasonably points towards the existence of a possible anticompetitive conduct will qualify as a suspicion. These elements can originate from any source of public or private information which the Technical Secretariat has had access to within the scope of its preliminary investigation and markets monitoring labor. These suspicions will be previously assessed by the authority in order to validate its suitability and determine if it is convenient to carry out a dawn raid.
6. Since dawn raids are executed in an early stage of an investigation, in which the Technical Secretariat does not have detailed information regarding any infringement yet, it is not necessary for the suspicions to have a qualified judgement or certainty standard nor prove without any doubt the existence of an infringement.

Considering the reserved nature of these investigations, and in order to ensure its effectiveness and confidentiality, the Technical Secretariat is not obliged to communicate the companies to be inspected all the information or suspicions it has about the alleged infringement.

7. The execution of the dawn raid will be authorized by a written dawn raid decision granted by the Technical Secretary. This dawn raid decision will include, among others, the identification of the investigated company, the business premises to be inspected and the officials empowered to conduct the dawn raid, the date of the dawn raid, the dawn raid powers of the Technical Secretariat, the type of information that will be subject to the dawn raid, the rights and obligations of the company, the object and purpose of the dawn raid and the possible sanctions that may be imposed in case the companies refuse to comply.
8. Since it is not possible for the Technical Secretariat to acknowledge in advance the source or documents in which the relevant information for the investigation may be placed at, the written dawn raid decision will not contain a detailed identification of the elements or devices that will be subject to the dawn raid; regardless of the type of information that can be required within the proceedings.
9. The dawn raid decision must mention the investigated conduct and the affected market in which such investigation is inserted. Given that prior to the dawn raid, the Technical Secretariat does not yet have detailed information of the suspected infringement, the dawn raid decision does not need to provide a

comprehensive level of detail regarding the investigated conduct, nor is necessary to specify the legal aspects of the aforementioned conduct, the level of participation of the companies involved or the temporary scope of the suspected infringement.

The references to the alleged infringement and the affected market will be those strictly necessary to specify the object and scope of the investigation, depending on the information held by the Technical Secretariat and the circumstances of the case. Once further probatory activities have been carried out, the Technical Secretariat would have more information allowing it to precisely define those elements.

IV. BEGINNING OF THE DAWN RAID

- 10.** According to the Peruvian Competition Act, the Technical Secretariat is entitled to conduct announced or unannounced dawn raids in the premises of the economic agents. As a general rule, and in order to protect its effectiveness and usefulness, these dawn raids will be carried out in a surprising fashion, without previous notification.
- 11.** Inspectors will conduct themselves in a reasonable manner during the entire dawn raid and will exercise their powers within the rules set up in the Guidelines, the Peruvian Competition Act and the General Administrative Procedure Act, causing the least possible disturbance to the commercial activities of the companies and framing their activities under the scope of the dawn raid decision.

The aforementioned duty would under no circumstances justify any type of deceptive or negligent behaviors by the companies that may jeopardize the effectiveness of the investigation or suppose a potential obstruction of the dawn raid powers of the Technical Secretariat.

- 12.** The representatives and employees of the companies subject to an dawn raid are legally obliged to directly and immediately collaborate with the inspectors during the whole proceeding, granting access to their premises and assets, giving them adequate rooms to carry out their duties, answering the questions asked and identifying and delivering the information required. To facilitate that duty, inspectors will reach out to the senior management of the company that is currently present in the premises so they can internally coordinate with the rest of the employees the fulfillment of the inspectors' requirements.

The collaboration duty of the economic agents will be framed within the dawn raid decision, following the rules established by these Guidelines and regardless of the obligation of the economic agents to comply the inspectors' requirements.

- 13.** According to the Legislative Decree 807, a dawn raid can be conducted by whoever the Technical Secretariat appoints to do so.
- 14.** The dawn raid will begin with the arrival of the inspectors at the premises of the company under investigation. Upon their arrival, the officials will identify themselves to the reception staff of the company and communicate the beginning of the dawn raid, requesting the presence of a representative of the company to explain the motives of the dawn raid. In order to guarantee the effectiveness of the dawn raid, the concept of representative will be understood in a broad and non-formalist manner, without being necessary to require the presence of a specific person with legal powers to assist this type of dawn raid.
- 15.** The inspectors will carry their credentials and deliver a copy of the dawn raid decision for the review and signature of the economic agent -as evidence of the notification-, informing also about the importance of beginning the dawn raid as soon as possible and the legal consequences that may be imposed in the cases of an obstruction, dilatation or refusal to the dawn raid.

The dawn raid decision given as evidence of the notification must have the name, ID and occupation in the company of the employee that signed this document, as well as the date and hour of signing.

The absence of a specific representative of the company does not constitute a justification for suspending or delaying the dawn raid. It is possible to identify any pertinent person that can represent the company during the proceeding.

- 16.** During the dawn raid, the company may have the assistance of an internal or external legal counsel. However, the presence of such legal counsel is not an essential requirement to begin the dawn raid nor its absence can condition the development of the dawn raid.

Inspectors may grant a reasonable period of time to wait for the arrival of the legal counsel of the company, depending on the circumstances of the case, not being possible to conclude in any case that the awarding of that period of time leads to avoid inspectors to access the premises of the company and begin the development of the dawn raid. Representatives of the companies may contact their legal counsel virtually or by telephone so they can talk with the inspectors and clarify any doubt about the development or purpose of the dawn raid.

V.DEVELOPMENT OF THE DAWN RAID

- 17.** According to the Peruvian Competition Act, during a dawn raid the Technical Secretariat is entitled to:
- a)** Examine books, archives, records and other documents located in the premises under the dawn raid.
 - b)** Take any form of copies from physical, magnetic or electronic archives, and in general, any other document considered pertinent and accessible in the premises of the company, regardless of its storage media or location in a remote source.
 - c)** Take pictures and footage.
 - d)** Interview and ask questions related to the investigation to any employee of the company located in the premise under the dawn raid.
- 18.** Inspectors are entitled to review and obtain copies of any information considered relevant to the investigation, regardless of the storage medium (physical, digital, etc.). For such purposes, they will be able to access any book, document, desktop computers, servers, tablets and any other physical or electronic storage media located at the premise of the company under the dawn raid, including all the emails and electronic files located in the accounts of the representatives and employees of the company, as well as information storage in remote sources.
- 19.** Within its collaboration duty, companies must grant the inspectors access to their premises, computers and information sources considered relevant by the Technical Secretariat for the investigation, providing the passwords required, identifying the individuals whose computers have to be analyzed and guaranteeing the collaboration from those employees. Inspectors will act autonomously while analyzing and copying the evidence found at the premises investigated, regardless of the cooperation that company must provide in order to facilitate those duties. Companies might be present during the collection of this evidence, as long as they don't obstruct or interfere with the functions of the inspectors.
- 20.** The information will be copied using specialized instruments that guarantee the integrity of the documentation. Inspectors will leave a copy of the information gathered.

- 21.** The Technical Secretariat will ensure that its prosecuting activity falls under the scope of the dawn raid decision and the investigated facts, and in accordance with the content and rules set up in these Guidelines. In order to avoid copying or gathering information that is outside the object of the investigation, companies will be allowed to inform about that situation to the inspectors and request that certain documentation of intimate or personal nature, or protected by legal privileges, shall not be collected.

The companies have to actively cooperate with the inspectors to exercise this right, identifying and separating this kind of information. Inspectors will grant a reasonable period of time for this task and, after a brief review (which may be aleatory), will decide whether they accept or refuse that request.

- 22.** The digital documents that were collected during the dawn raid will be analyzed and processed in the premises of Indecopi, using adequate, private and secure IT tools.

Only authorized officers of the Technical Secretariat will have access to the rooms in which the information is processed and gathered.

In order to adjust their activities within the relevant facts of the investigation, the Technical Secretariat will use keyword search tools and specialized forensic software to copy, search and recover the data obtained from the dawn raid.

- 23.** The companies under investigation might request the general confidentiality of all the information gathered by the inspectors, as well as request the individual confidentiality over certain information.

In addition, the Technical Secretariat will adopt different measures to protect and conserve the information obtained during the dawn raid and assure its confidentiality. Under no circumstances the information will be disclosed to third parties, in which case there will be liability.

- 24.** The Technical Secretariat also might interview and formulate questions and consultations to any employee of the company. These questions will rely mainly on information related to the organization and the commercial activity of the company and market subject to the investigation. If convenient, questions could be asked regarding the subjects, facts and objective information related to the investigation, avoiding any matter outside of that scope.

- 25.** The employees and the representatives of the company investigated must truthfully respond to the question asked by the inspectors, in accordance with the terms formulated.

The inspectors will avoid any kind of question that implies a self-incrimination from the company investigated, which will be understood as any ambiguous or suggested questions that may imply an admission of guilt. The company will have the right to keep silence and not to answer a question of incriminatory nature.

- 26.** With the occasion of the dawn raid, the Technical Secretariat might extend or vary the object of the investigation in case it gathers or identifies information related to possible facts or infringements different from those contained in the dawn raid decision. This possibility will be informed to the investigated companies through the dawn raid decision.

VI. AFTERMATH OF THE DAWN RAID

- 27.** After the visitation, the inspectors will issue the dawn raid record, which will register the events that occurred during the proceeding. The dawn raid record must necessarily contain the following information: i) name and address of the investigated company; ii) name and ID number of the inspectors in charge of the proceedings; iii) date and time of arrival of the inspectors at the company's premises; iv) identification of the individuals that met the requirements of the inspectors (name and ID number); v) a general summary of the information obtained and copied (incorporating them as an annex, if applicable); and, vi) the allegations and / or comments that the company wishes to incorporate (for example, its request of generic confidentiality).

In the case of digital files and emails, the name and position of the employee whose computer was searched during the proceedings must be indicated whether in the dawn raid record or the correspondent annex. In the dawn raid record, the Technical Secretariat may also formulate additional information requirements, as well as register the denial of the company to receive or sign the register.

The dawn raid record will be signed by the inspectors appointed by the Technical Secretariat and by a representative of the company, who must receive a copy of the register.

- 28.** In case the collected evidence is excessive, inspectors may return the next day to the company's premises in order to continue the copying of the data, noting this circumstance in the dawn raid record.

The Technical Secretariat can coordinate with the company to adopt measures of non-mobilization of the devices and assets pending to be reviewed. That measure could also be adopted with the previous authorization of the Commission for the Defense of the Free Competition (The Commission).

- 29.** After the dawn raid, companies may communicate with the Technical Secretariat to know the status of the searching information process and will also be able to obtain a copy of the elements gathered during the dawn raid. This right does not extend to the information which has been subject to the investigation or information related to other economic agents involved in the investigation.
- 30.** Once the processing of the documentation obtained during the dawn raid is completed, the Technical Secretariat will communicate the company the information that is deemed relevant to the investigation. The company is able to request the generic confidentiality of such information.

Information initially copied that is not relevant to the investigation will be returned or destroyed, at the choice of the company. The elimination of this information will be carried out through strict security protocols.

- 31.** The information obtained by the Technical Secretariat that is relevant to the investigation will be analyzed in order to determine whether it is appropriate to initiate a sanctioning administrative procedure against the investigated company. If that is the case, this information will be incorporated into the case file and sent through the statement of objections, so that the parties are able to enforce its right of defense and present the exculpatory evidence that they consider relevant.

The probatory material gathered during the dawn raid can be objected by the investigated company in an eventual sanctioning procedure, for that company to timely exercise its right of defense.

- 32.** Acts that suppose any type of obstruction or non-compliance during a dawn raid are susceptible of a sanction with fines up to 1000 Tax Units (UIT)¹⁵⁰. These conducts will be evaluated in the corresponding administrative sanctioning procedure, allowing the company to exercise its right of defense and present the allegations and supporting material they deem appropriate.

Among others, the following conducts qualify as obstruction cases:

- a)** Denying or unreasonably obstructing the access of inspectors to the premises of the company (or to certain sources of information).
- b)** Erroneously identifying those employees responsible for the areas under investigation (or their respective offices), as well as providing inaccurate information about their presence or the location of certain sources of information.
- c)** Not presenting (or doing so incompletely) the goods, documents or files requested by the inspectors.
- d)** Providing false or inaccurate information (either through statements and / or documents), as well as altering, hiding or destroying the items or files under the dawn raid.
- e)** Obstructing the exercise of the functions of the inspectors through violence or threats.
- f)** Denying to answer the questions asked by the inspectors, as long as these do not imply an admission of guilt from the investigated parties.
- g)** Not complying with the measures of non-mobilizations ordered by the Commission.

150 For 2020, the value of a Tax Unit is equivalent to 4300 Peruvian soles (around 1,263 USD). The exchange rate is approximately 1 USD = 3.357 PEN.

ANNEX 1:

Dawn raid powers of the Technical Secretariat

Initiative of the Technical Secretariat (without judicial authorization)

1



Requiring the disclosure of any type of document and request every information referred to the organization, business and structure of the company investigated.

2



Appointing and interrogating the individuals it considers convenient.

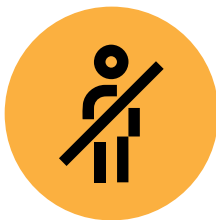
3



Carrying out announce and unannounced inspections, with the possibility to assess the documents found; take photos and footages; take declarations; and, copy the books, registers, emails, archives and physical or electronics documents considered relevant.

With judicial authorization

1



Denying the access to the premises of the investigated company (or if the premises are closed).

2



Denying the copy of the emails.

3



Other forms of lifting the secrecy of the telecommunications.

4



Taking books, archives, emails or original documents from the premises of the investigated company.



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www.indecopi.gob.pe/radio

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