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INVESTIGATIVE POWER IN PRACTICE - Contribution from Peru

- Session IV -

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More documentation related to this discussion can be found at: oe.cd/invpw.

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Investigative Powers in Practice

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1. Introduction

1. The Peruvian Constitution recognizes that the free competition is an essential principle for the development of the market social economy, the regime established from 1993 in Peru. In that sense, the Legislative Decree 1034, the Peruvian Competition Act, states that the Technical Secretariat is a technical and autonomous body and has powers to initiate investigation proceedings of anti-competitive conducts. This faculty is one of the most important tools for detecting and combating conducts that could affect the competitive process.

2. In line with the above mentioned, dawn raids are conducted with or without previous notification, to get information from natural or legal persons. The Peruvian Competition Act authorizes the Technical Secretariat to have immediate access to books, registries, documentation, among others during dawn raids in order to gather information that could reflect anticompetitive conducts.

2. Previous activities to conduct a Dawn Raid

3. The most important step to develop a good dawn raid without previous notification is its elaboration, which starts from the determination of basic aspects such as the conformation of teams responsible for the diligence. Below there are some relevant aspects that have been identified for the preparation of a dawn raid without previous notification:

- Elaborate the letters to be used and delivered during dawn raids. These documents must include important issues as the legal faculties given to the Technical Secretariat, the purpose of the visit, the list of the officials authorized to conduct the dawn raid, the sanctions to be imposed in case of refusal or obstruct the dawn raid or in the case of presenting false information, among other.
- Identify the alleged anticompetitive conducts, the investigated market and the companies involved as well. It is recommended to conduct several dawn raids simultaneously at the same time, depending if the evaluated case involved several companies.
- Appoint an official that will be in charge of the team: the leader. The official must have an appropriate experience to guarantee the development of the dawn raid. A lawyer must join the working group in order to advise about the legal framework, as well as by an IT specialist to ensure the proper use and manipulation of the digital files gathered.
- A keyword list must be prepared to select the information contained in the Emails.
- The day before to conduct the dawn raid, it is important to set up a meeting with the working groups. The purpose of this meeting is to explain main information about the investigation, as the case background, the extent of the inspection and

companies involved, the alleged anticompetitive conduct and the period of the possible infringement.

3. Execution of a dawn raid

4. The first part of the execution of a dawn raid is, perhaps, the most difficult part, because it is the moment where the first approach with the companies is done and depending of this there is a collaboration or obstruction of the diligence.

5. If dawn raids have to be conducted in several companies, it is recommended that working groups carry out dawn raids simultaneously in all the companies' addresses.

6. At the entry of the companies, the leader of the working group must identify himself and the members of his group to the company's representative, explaining the scope of the diligence and the investigated anticompetitive conduct. It is important that the first approach has been developed with the manager of the undertaking or a member of the company that has legal powers of representation.

7. If there is a denial from the company to allow the entrance of the working group, the leader of the group and the group's lawyer have to underline that the Peruvian Competition Act states a sanction in case of denying the access to information. It is important to mention that on September 23rd 2015, the Legislative Decree 1205 was published and had approved a set of amendments and additions to the Peruvian Competition Act. For example, fines for obstruction have been increased. The experience of the Technical Secretariat and the Commission for the Defense of Free Competition has shown that economic agents believe that fines for noncompliance with reporting requirements or obstruction of dawn raids are not sufficiently dissuasive. In this regard, it is preferable and necessary that economic agents comply with the law instead of breaking it. So, with this amendment the fines have increased significantly (up to US\$ 1,238,805, approximately) for unjustified noncompliance with reporting requirements and obstructing the procedures of the Technical Secretariat. Before the amendment the fines were only US\$ 61,940.

4. Copying the information

8. Another important activity during dawn raids is to copy the information using forensic tools. In fact, when the relevant information contained in Email is finished, a screenshot must be taken to guarantee the identification of the files collected and their size. After, the relevant information must be copied in an external device.

9. It must be noted that in each computer inspected, a copy of the collected information is left, so that the economic agents can know and visualize the information collected.

10. This information is processed through forensic tools (forensic software), in order to index and classify the data, recovering information that has been deleted. With the help of this process the important information obtained as a consequence of the dawn raid is assessed through the application of keywords, for the identification of evidence to be used in the investigation.

11. It is also important that the leader of the group inform to the representative of the company that all the information collected will be used only for the administrative proceeding and guarantee the confidentiality of the information as well.

5. Conclusion

12. Dawn raids are useful tools to fight cartels. Thanks to this important tool without previous notification, it is possible to gather evidence of anticompetitive conducts. This mechanism turns out to be dissuasive not only because of the high fine that can be imposed in case of obstruction, but also because of the level of evidence collected that serves to draw up a sanctioning procedure.

13. Dawn raids carried out by the technical secretariat do not require judicial authorization. This power has recently been ratified by the Indecopi Tribunal.

14. It is important to mention that Indecopi needs a judicial warrant when the investigated undertakings deny the access to their business premises. This authorization will be granted by the administrative judge in charge of review the decision of Indecopi, instead of the criminal judge. This amendment introduced into Peruvian Competition Act in 2015 is supported by reasons about specialization and efficiency. Indeed, the administrative judge in charge of reviewing Indecopi's decisions is more able to balance people's rights and the aim of the defense of competition law.

15. To sum up, the success of a dawn raid depends on its preparation of the teams previously to its conduction. For example, how much case information is known, who people are in main positions inside the companies, which computers search and where to put the forensic tools, as well as obtaining confidence from the investigated parties to get their collaboration during the diligence.