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**LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM**

**Session I: Cartels: Estimation of Harm in Public Enforcement Actions**

**-- Contribution from Peru --**

**4-5 April 2017, Managua, Nicaragua**

*The attached document from Peru is circulated to the Latin American and Caribbean Competition Forum FOR DISCUSSION under Session I at its forthcoming meeting to be held on 4-5 April 2017 in Nicaragua.*

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# LATIN AMERICAN AND CARIBBEAN COMPETITION FORUM



15th Latin American and Caribbean Competition Forum  
4-5 APRIL 2017, Managua, Nicaragua

## Session I: Cartels: Estimation of Harm in Public Enforcement Actions

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### -- CONTRIBUTION FROM PERU<sup>1</sup> --

#### 1. General Rules in Fines

1. Anticompetitive conducts constitute violations to the Competition Act<sup>2</sup>. The Commission for the Defence of the Free Competition (hereinafter, the Commission); its investigation body, the Technical Secretariat; and, the Competition Court of Defence of Free Competition (hereinafter, the Court) are the authorities in charge of the enforcement and compliance of the Competition Act in Peru.

2. In this regard, the Competition Act allows the Commission to discourage anticompetitive behaviour with monetary sanctions, that, according to Section 44 of the Competition Act, the criteria to determine them should take into consideration the expected illicit benefit, the probability of detection, the scope of the restriction, the dimension of the affected market, the market share of the offenders, the actual effects of the restriction, the duration of the restriction, recidivism and the procedural behaviour of the undertakings.

3. With such criteria, the Commission establishes a basic fine for infringements to the Competition Act, using the following formula:

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

<sup>1</sup> This contribution was prepared by the Technical Secretariat of the Commission for the Defence of Free Competition at Indecopi. Accordingly, it does not necessarily reflect the views of the Commission or the Court of Indecopi.

<sup>2</sup> The Act for the Repression of Anticompetitive Behaviour was approved by Legislative Decree 1034 (2008) and amended by Legislative Decree 1205 (2015).

4. In this formula, the basic fine takes into consideration i) the expected illicit benefit ( $B_{Exp}$ ), which is determined by the authority as the difference between the anticompetitive price and the competitive price, and will consider the duration of the infringement in order to calculate the sales volume and ii) the probability of detection<sup>3</sup> ( $P_{det}$ ) of the anticompetitive conduct.

5. The Commission takes into account the expected illicit benefit of the undertaking when planning, organizing or executing the infringement to determine the monetary sanctions for anticompetitive behaviours. This criterion is a clear evidence of the dissuasive purpose of the sanctions systems established in the Law. Using the expected illicit benefit as a relevant factor in the determination of fines is intended to discourage undertakings that participated in the infringement and those willing to participate in anticompetitive behaviour in the future, by ripping out any real or potential benefit that infringement may report to them in their economic outcomes.

6. Additionally, the monetary sanctions may consider effects of anticompetitive behaviours in the consumers other than overpricing or reduction of quantities. In this regard, the basic fine can be modified if there are aggravating and mitigating circumstances. For instance, a significant negative effect on the consumers will be considered as aggravating circumstance and will therefore increase the applicable fines. For example, in the Pharmacies case, the Commission imposed aggravating factors due to the fact that the cartel had health-related implications.

7. Finally, the Commission can impose sanctions to all economic agents or market participants, companies or individuals, who have incurred in anticompetitive practices. The fines can reach up to the 12% of the income of the offender or its economic group<sup>4</sup>.

## 2. Damages

8. As it has been pointed out, the Technical Secretariat is the body responsible of investigation of anti-competitive conduct, the indictment and prosecution of companies by starting sanctioning proceedings based on prima facie evidence identified during the investigation phase. Finally, the Commission is responsible for issuing a final decision to the proceedings initiated by the Technical Secretariat.

9. Although enforcement of the Competition Act is carried out by the Technical Secretariat and the Commission through the aforementioned sanctioning proceedings –which are subsequently reviewed by the judiciary–, the imposition of fines and corrective measures may not be sufficient. In this sense, a recent amendment of the Competition Act has introduced new powers for Indecopi in order to protect the rights of consumers damaged by anticompetitive behaviour.

10. Indeed, Legislative Decree 1205<sup>5</sup> has established that Indecopi, as the Peruvian competition authority, may file lawsuits before the courts in defence of the diffuse and collective interests of consumers who have been affected by anti-competitive conduct. In other words, now Indecopi could lead class actions against companies that incurred in an infringement to the Competition Act.

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<sup>3</sup> The probability of detection is determined by the difficulty to detect the investigated offense. If there is a difficulty to uncover an illicit conduct, the probability will proportionally increase the applicable fines.

<sup>4</sup> Relating to all its economic activities in the year previous to the date of the final decision of the competition authority.

<sup>5</sup> Legislative Decree 1205 was published in September 23, 2015. It amended the Peruvian Competition Act (as enacted by means of Legislative Decree 1034, published in June 25, 2008).

11. In order to be able to effectively introduce a claim in the judiciary, it will be necessary for Indecopi to have the agreement of its Board of Directors. In addition, filing lawsuits in defence of diffuse and collective interests of consumers could only be possible if a final and un-appealable decision has been issued determining the existence of infringement causing the alleged damages and the responsibility of the economic agents accused.

12. As the incorporation of these powers has come into force recently, to date INDECOPI has not yet filed class action lawsuits in defence of the diffuse and collective interests of consumers.