



6 December 2019

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Ref. Draft Guidelines to the Inspection Visits (Dawn Raid) Guidelines

Dear Sir,

We have pleasure in enclosing a submission that has been prepared by the Cartels Working Group of the Antitrust Committee of the International Bar Association.

The Co-chairs and representatives of this Working Group of the Antitrust Committee of the IBA would be delighted to discuss the enclosed submission in more detail with the representatives of INDECOPI.

Yours sincerely,

Marc Reysen

Elizabeth Morroni

Co-Chair Antitrust Committee

Co-Chair Antitrust Committee

cc Leonor Cordovil and Mariana Tavares de Araujo



IBA CARTELS WORKING GROUP COMMENTS ON THE PUBLIC CONSULTATION VERSION OF THE DRAFT INDECOPI GUIDELINES ON INSPECTION VISITS (DAWN RAIDS)

I. INTRODUCTION

The International Bar Association (IBA) is the world's leading organization for international legal practitioners, bar associations and law societies. It is interested in the development of international law reform and seeks to shape the future of the legal profession throughout the world by providing assistance to the global legal community.

Bringing together antitrust practitioners and experts among the IBA's 30,000 international lawyers from across the world, the IBA is in a unique position to provide an international and comparative analysis in this area since it unites jurisdictional backgrounds and professional experience spanning all continents. Further information on the IBA is available at <http://ibanet.org>.

The Working Group commends The National Institute for the Defense of Free Competition and the Protection of Intellectual Property ("INDECOPI") for its efforts to provide clear and concise guidance on its draft Inspection Visits (Dawn Raid) Guidelines, and welcomes INDECOPI's reinforced willingness to engage with companies and to provide additional specific advice through the Technical Secretariat. We offer these Comments in the hope that they will assist INDECOPI in further refining the Draft Guidelines ("Guidelines").

II. RESPONSE TO INDECOPI's DRAFT GUIDELINES

Parameters for conducting dawn raids

The Guidelines set out in clear terms the authorization requirements relating to the Secretaría Técnica's ability to carry out inspections, and refer to the possibility of either announced or unannounced inspections. It would be helpful if further guidance could be provided with respect to the circumstances in which the Secretaría Técnica would decide to use one type of inspection rather than other. For example, the European Commission tends to use announced inspections where the company involved is already cooperating with an investigation. The UK Competition and Markets Authority ("CMA") guidance notes the ability to carry out inspections of customers or suppliers of companies suspected of breaching the law, provided it has taken reasonably practical steps to notify them in advance of the inspection.

Secondly, although the introductory paragraphs of the Draft refer to the importance of the dawn raid powers to fight cartels, it seems that Peruvian legislation does not restrict the power to carrying out dawn raids to cartel investigations but make it applicable to investigations related to any potential anticompetitive infringement (unlike other competition legislations as the Chilean, in which dawn raids may only take place in cartel investigations). It would be helpful if further clarification could be provided with respect to that issue.

Additionally, it would be helpful if further guidance could be provided with respect to the circumstances in which the "Secretario Técnico" will grant his authorization to the Secretaría Técnica for carrying out a dawn raid. The draft sets forth that dawn raids "will be based on the existence of suspicions pointing towards the possible existence of an infringement to the Competition Act", adding that "Any element pointing towards a possible anticompetitive conduct will qualify as a suspicion". If considered the broad scope of the powers that the Secretaría Técnica can use when carrying out a dawn raid diligence (i.e. examining and copying books and other records, conducting interviews on any employee of the company, taking pictures and footage and, in general, accessing any element considered relevant for the investigation) and their impact on the activities of the alleged offender, it would be helpful to provide some further clarification on the standard to be met by these "suspicions" and the mechanisms for controlling their entity.

For instance, in Chile, the Competition Act (i) sets forth that dawn raids are reserved to “serious and qualified cases” of investigations with “precise and serious grounds regarding the existence of collusion”, and (ii) requires the Competition Agency (“FNE”) to always obtain a prior double approval by two independent jurisdictional bodies, the Competition Court and a member of the Santiago Court of Appeal (which must verify the existence of precise and serious grounds regarding the existence of collusion practices gathered by the FNE prior to the request for authorization).

Starting the dawn raids

The Guidelines provide at paragraph 6 that undertakings are “legal obliged to directly and immediately” grant access to their premises. At paragraph 9, the Guidelines provide that undertakings “can be assisted by an internal or external legal counsel”. It would be useful to provide further guidance on how these two elements are expected to interact. For example, will the Secretaría Técnica be prepared to wait for a period of time to allow external counsel to arrive on the premises (at least in the case of unannounced inspections)? Both the European Commission and the CMA allow for a short delay in the commencement of the inspection for external counsel to arrive. However, as guidance (and case law) makes clear, refusal to provide access for a long period would be considered obstruction. Additionally, both authorities will generally enter the premises and begin to prepare for the inspection whilst awaiting external counsel. CMA guidance also explicitly provides that the inspection team can take steps during this period to prevent tampering with evidence or warning other businesses about the inspection.

Paragraph 7 provides that the Secretaría Técnica may receive support from law enforcement to carry out the inspection, if necessary. It would be helpful to provide further information on whether this allows the Secretaría Técnica and law enforcement to force entry into business premises and, if so, whether additional judicial authorization is required. For example, in the UK, the CMA can use “such force as is reasonably necessary” to enter premises if they are being prevented from doing so, but must have a court warrant in place before doing so.

Development of the dawn raids

The powers accorded to the inspectors are very similar to those of European Commission and UK CMA. As a practical matter, the digital storage of information can be expected to give rise to technical issues. For example, undertakings may store information in “the cloud” or on servers that are located outside the premises. Do the Guidelines foresee that the

Secretaría Técnica will be able to access such information, regardless of where it is held? If so, will this be confined to information that is normally accessible to individuals at the premises in the normal course of business?

With respect to the identification of information “relevant to the investigation”, it would be useful to provide some guidance on how the Secretaría Técnica intends practically to ensure that non-relevant information or information that is privileged would not be gathered during the course of the inspection. For example, paragraph 14 states that undertakings have the right to inform the inspector and request that certain documentation not be collected, but appears to indicate that the final decision will rest with the inspector and that it will be taken during the course of the inspection. This is in contrast to the “sealed bag” procedure which is used by the European Commission and UK CMA when privilege claims are made over documents, to allow for a resolution at a later stage.

Additionally, the Draft provides at paragraph 9 that undertakings “can be assisted by an internal or external legal counsel”, and paragraph 10 sets forth that when carrying out a dawn raid, the Secretaría Técnica “is empowered to investigate the company’s premises and (...) d) Conduct interviews and ask questions linked to the investigation to any employee located in the premises of the undertaking” (linked to paragraph 17 of the Draft). It would be useful to provide further guidance (i) on how these two elements are expected to interact, and (ii) on how the Secretaría Técnica will use its powers to ask questions and take statements from any undertaking's collaborators who are at the premise where the dawn raid is executed.

With respect to the interview of individuals, the Guidelines do not state whether the individual is entitled to legal representation during an interview. If so, will the Secretaría Técnica be prepared to wait for a period of time for counsel to arrive (as the individual may not wish to be represented by counsel for the undertaking)? Although paragraph 6 of the Draft declares that the presence of a lawyer is not a condition for conducting a dawn raid, nor for conducting interviews, the truth is that entering into a premise for examining and making copies of some documents is not the same that asking questions to and taking statements from the undertakings’ employees or executives, in such terms that the presence and assistance of a lawyer may be more important in the latter cases.

Furthermore, it appears from the Guidelines that no notice is required to be given to an individual. This goes further than the position in the UK, whereby formal notice must be provided before an individual can be compelled to attend an interview. It is unclear from

the guidance whether the questions that can be put to an individual are confined to procedural questions relating to the inspection or whether the Secretaría Técnica can go further and ask substantive questions relating to the subject-matter of the investigation. The ability for an individual to have legal representation at an interview would be all the more important in the latter case. It may be illustrative to also note that in Chile, dawn raids are only aimed to seize and collect information, devices and documents, and that if the FNE needs to interrogate some individuals it will summon them for later dates, which allows the individuals to be more aware of their rights and to obtain legal assistance.

In this context, it seems that the Draft might give rise to some unanswered questions: (i) could the undertakings' collaborators be forced to answering questions and making statements without the attendance of any lawyer? (ii) in the affirmative, how the Secretaría Técnica will ensure the observance of the due process principles and the collaborators' rights when conducting an interrogation? (iii) will those collaborators be aware enough about their right to refuse to respond self-incriminating questions? (the Draft only sets forth that the authority will avoid asking self-incriminating questions, but what happen if the investigators do it anyway?).

Finally, paragraph 18 states that the Secretaría Técnica may extend or vary the object of the investigation. It is unclear how this relates to the authorisation process set out in paragraph 3 of the Draft. Is it expected that the inspector will apply to the Secretaría Técnica for a written authorisation during the course of the inspection? Further, it would be helpful to specify that the amended authorisation will be provided to the undertaking before any additional investigative steps are taken.

Aftermath of the dawn raids

Paragraph 13 states that "inspectors will give a mirror copy of the information gathered to the undertaking", and paragraph 21 sets forth that, after the dawn raid, undertakings may ask the Secretaría Técnica "a copy of the elements gathered during the inspection that have been already processed", pointing out that "this right does not extend to the information which has not yet been processed". Considering that paragraph 13 makes no distinction between "processed" and "not processed" information, it would be useful to provide further guidance on the reasons and the criteria behind the variation in the undertakings' right to obtain copies of the information gathered by the Secretaría Técnica at their premises depending on whether the copies are requested at the moment or after the dawn raid.

Additionally, paragraph 19 provides that “after the visit, the inspectors will issue the minute of inspection”. It would be useful to indicate whether this will be provided to the undertakings before the inspectors leave the premises. This is standard practice for the European Commission and the UK CMA, who meet with the undertaking and its legal counsel to carry out a debrief meeting, agree the list of documents and address any procedural issues that have arisen during the inspection.

Finally, the Draft provides at paragraph 20 for the possibility of the inspection to continue over a second day. This is similar to the situation in the UK and Europe, whereby inspections can proceed over the course of more than one day if needed. In these circumstances, the European Commission or UK CMA will take steps to prevent tampering of evidence, such as affixing seals on doors, cabinets etc. Breaking those seals would amount to obstruction and is punishable by a significant fine. Assuming that the Secretaría Técnica would take similar steps, it would be advisable for this to be noted in the guidance and for the “types of obstruction” at paragraph 24 to specifically include breaking of seals or otherwise interfering with evidence during the course of an inspection.

III. CONCLUDING CONSIDERATIONS

The Working Group appreciates the opportunity provided by INDECOPI to comment on the Draft Guidelines. We would be pleased to respond to any questions the INDECOPI may have regarding these comments, or to provide additional comments or information that may be of assistance to the INDECOPI.