



15 October 2019

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Ref. Draft Guidelines to the Peruvian Antitrust Rewards Program

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

Co-Chair Antitrust Committee

Elizabeth Morroni

Co-Chair Antitrust Committee

cc Leonor Cordovil, Mariana Tavares de Araujo and Julián Pena



IBA CARTELS WORKING GROUP COMMENTS ON THE PUBLIC CONSULTATION VERSION OF THE DRAFT INDECOPI GUIDELINES TO THE ANTITRUST REWARDS PROGRAM

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 Antitrust Rewards Program ("Program"), 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. EXECUTIVE SUMMARY

This submission offers comments and suggestions regarding certain paragraphs and/or sections of the Guidelines, considering approaches adopted by key jurisdictions on relevant aspects of leniency and whistleblower programs. In particular, the Working Group respectfully proposes that INDECOPI considers the following proposed changes to enhance further transparency and legal certainty of the Program:

1. Set forth reasonable deadlines for the authority to assess the evidence presented and to accept the application to the Program, and to assess consultations;
2. Make available a detailed procedure explaining the negotiation phases for granting the reward;
3. Establish which documents will be created as a result of the collaboration;
4. Provide objective criteria for calculating the amount and determining the payment of rewards;
5. Provide additional guidance on technical precautions applicants must take during the collection of evidence; and
6. Set forth detailed rules on confidentiality, especially when it comes to financial records of the paid reward.

III. RESPONSE TO INDECOPI's DRAFT GUIDELINES

Whistleblowing programs have been adopted in several jurisdictions over the past few years with the goal of searching for new ways to enhance anti-cartel enforcement. Indeed, multiple authorities have been considering implementing additional enforcement tools such as screening techniques, complaints and interagency cooperation.

In this context, there has been an increasing support around the world for whistleblower protections, including safeguards against retaliation for reporting a potential antitrust violation. There is no consensus, however, on financial incentives or rewards for whistleblowers. In fact, only a limited number of countries, including the United Kingdom, South Korea, and Pakistan, have antitrust whistleblower rewards programs. Therefore, INDECOPI is without a doubt putting itself at the forefront of these innovative and creative cartel detection tools in Latin America by becoming the first country in the region to implement a similar program.

Given its relative novelty, it is essential that INDECOPI creates clear rules that detail the legal provisions and give confidence and certainty to those interested in the Program, such as the Guidelines. We believe that the success of the Program will depend on the degree to which potential whistleblowers trust the Program based primarily on the transparency and predictability generated by the Guidelines and INDECOPI's implementation of the Program in practice.

INDECOPI has done a commendable job studying whistleblower rewards programs in other jurisdictions and should continue to utilize the experience and lessons learned by the United Kingdom, South Korea, the United States, and others to refine the Guidelines. The Working Group's comments contained herein draw heavily on the experiences of these countries in administering their own programs.

In February 2002, the South Korean competition authority (Korea Fair Trade Commission or "KFTC") established for the first time the possibility of granting a reward to those who reported and provided certain data or evidence for cartel conduct.

Initially, a reward cap of 20 million won (around \$ 17,500, at the time) was established. The

relatively meager rewards, along with concerns related to the confidentiality of the applicant, made the applications less numerous than expected. In November 2003, the system was modified in two ways: (1) the reward ceiling was raised substantially to 100 million won (about \$ 87,300); and (2) the measures to guarantee the confidentiality of the whistleblowers were reinforced, allowing, for example, an agent or adviser of the whistleblower to request the reward on behalf of the whistleblower. After the modifications, the results were swift—the KFTC received significant increases in the number of requests and amount of rewards.

Similarly, in February 2008, the United Kingdom implemented a whistleblower rewards system that had no precedent in Europe—an incentive system that included monetary rewards (bounties), not just incentives limited to granting leniency or reducing the penalties that could have been imposed on the participants in a cartel. The British rewards program has been considered successful by both practitioners and the competition authority.

Outside of the competition context, whistleblower programs in other areas of the law, such as securities and government fraud, have been wildly successful. For example, the U.S. created whistleblower legislation related to government fraud all the way back in 1863, the U.S. Civil False Claims Act (“FCA”). The FCA offers notable rewards to individuals who inform the U.S. Department of Justice (“DOJ”) of certain fraudulent behaviors related to government contracts—whistleblowers can receive up to 15-30% of any recovered damages.

The law allows non-government affiliated individuals to obtain rewards for providing information about fraud against the government. FCA applies to fraud on all types of federally funded contracts or programs, except for tax fraud. It has been particularly effective at rooting out fraud regarding federally funded healthcare programs. Although technically not an enumerated fraud, the FCA has also been used for some behaviors that could also be condemned under the antitrust laws, specifically bid-rigging that could also be categorized as fraud.

Thus, under the FCA, it is possible for whistleblowers to obtain rewards for alerting the U.S. DOJ to bid rigging against the federal government, if that bid rigging also contained fraudulent conduct. The FCA, however, is not a rewards program designed to fight cartels

because it is limited to fraudulent conduct targeting the federal government. The U.S. does not have a specific whistleblower protection or rewards program for antitrust offenses, although legislation is currently pending in Congress that would provide anti-retaliation protections for antitrust whistleblowers, but not a rewards program.

In addition, in the U.S., there are other whistleblower programs related to various other infractions, and there is a general protection granted by the Whistleblower Protection Act for government employees, which dates back to 1989. Under that law, complainants are protected against retaliation for the disclosure of information that the employee or applicant reasonably believes to evidence a violation of any law, rule or regulation, or serious mismanagement, gross waste of funds, abuse of authority or a substantial danger and specific for public health or safety. Anti-retaliation whistleblower protections are paramount to ensuring good-citizenship and incentivizing whistleblowers to come forward.

The Working Group thus urges Peru and INDECOPI to consider including, to the extent possible, a discussion on anti-retaliation whistleblower protections in the Guidelines to further incentivize reporting.

Finally, it seems important that the whistleblower program is harmonized with the Leniency Program in Peru. Incentives for one program should not undermine the incentives for the other and special care should be given to mitigate the risk of false statements, accusations, and defamation.

IV. COMMENTS ON THE GUIDELINES' SECTIONS

With the purpose of contributing for the improvement of the proposed Guidelines, this submission offers comments to the following sections of the Guidelines.

IV.1. Section 2.2 -- Personal Scope

Assistance from a whistleblower who knows of possible antitrust violations can be an importance source of information for INDECOPI. Similar to leniency applicants, through their knowledge of circumstances and individuals involved, whistleblowers can help INDECOPI to quickly identify, and later prove, possible antitrust violations. In order to encourage potential whistleblowers to come forward, the Guidelines must be clear

regarding who is an eligible whistleblower under the Program.

Accordingly, this eligibility section should make it clear that the applicant must “voluntarily” provide INDECOPI with evidence – an individual should be ineligible for the Rewards Program if she is under a legal obligation to report the alleged misconduct at the time of reporting. The Guidelines should clarify this point and define voluntary to mean that the whistleblower, or her representative, such as a lawyer, must provide the information to the Commission prior to receiving any regulatory or law enforcement request, inquiry, or demand that relates to the same subject matter.

Furthermore, an individual should only be eligible to receive a reward if she provided INDECOPI with new and original information. Moreover, the Guidelines should clarify that in order to be eligible for a reward, the individual should also provide information that is lawfully obtained and free from attorney-client, attorney work-product, or other applicable professional privileges. The Program should not encourage lawyers, accountants, or other professionals to break their solemn duty to protect their client’s confidence for personal financial gain. In addition, in order to encourage individuals to come forward, this section should also clarify whether more than one individual is eligible for a reward for voluntarily providing original information regarding the same conduct.

IV.2. Section 3 - Approval or denial of the reward

The draft Guidelines state “[f]ollowing international practice, the decision to grant or deny the reward is a discretionary attribution of the Competition authority, and . . . [the] decision cannot be object of challenge or appeal.” To ensure due process and fundamental fairness to the whistleblower, which in turn may encourage more whistleblowers to come forward, INDECOPI should consider implementing an internal reconsideration review after the initial determination of eligibility and the amount of the award.

For example, the United States Securities and Exchange Commission (“SEC”) has a reconsideration process, whereby the whistleblower may request reconsideration of a preliminary determination by submitting a response within 60 days of the issuance of the preliminary determination.¹ The claims review staff will consider the response and forward its proposed final determination to the Commission. The SEC, however, does not allow appeals when the total amount awarded is between 10% and 30% of the monetary sanctions collected in the action.

Similarly, INDECOPI should consider an internal appeal that allows the whistleblower to make his/her case about eligibility and the amount of the reward. INDECOPI can likewise limit the whistleblower’s ability to appeal internally if the proposed award meets certain monetary thresholds.

About the denial or grant decision, the Guidelines state that the Technical Secretariat’s criteria will take into consideration the scope and impact of the alleged anticompetitive behavior, as well as the information that the Technical Secretariat already has.

Although the decision to approve or deny a reward is discretionary, the Working Group respectfully encourage INDECOPI to provide further information on the criteria that will be considered by the Technical Secretariat when assessing an application, so as to enhance the clarity of the applicable standards and practices and thereby enhance the likelihood that applicants will come forward.

¹ <https://www.sec.gov/whistleblower/frequently-asked-questions#faq-17>

It may be helpful to include examples on what may lead to the denial of an application and what types of information the Technical Secretariat is particularly interested in obtaining. For instance, INDECOPI could state that a cartel case is stronger if based on evidence addressing the “4 Ws” (who, what, when and where) and that an application that may lead to evidence regarding these questions has greater chances of being accepted. Along similar lines, it could be useful to state that direct statements and testimony are more valuable than references to third-party allegations without further independent corroborating evidence.

IV.3. Section 6 - Information to be provided by the applicant

According to the Draft Guidelines, the applicant may approach the Technical Secretariat to provide his/her testimony and the information about the cartel that is available at the time of its application, including the natural or legal persons accountable for its planning, execution, facilitation or concealment. In addition to the applicant’s testimony, he/she can provide additional information that the Technical Secretariat may consider decisive as it is not otherwise publicly available and would help to detect, investigate and prosecute the cartel, including e-mails, instant messaging records, and records of meetings and travel.

The Section propose that INDECOPI considers including the requirement that the information to be provided by the applicant must be necessary either to assist the Technical Secretariat to find an infringement or to give sufficient grounds to allow it to obtain in Court a warrant to carry out a dawn raid.

IV.4. Section 7 - Determination of the reward

The Draft Guidelines set forth the elements to be considered by the Technical Secretariat to determine the amount of a reward: (i) the added value of the information provided for the detection and prosecution of the cartel revealed, meaning the utility of such information; (ii) severity, effects and potential illicit benefits arising from the cartel revealed by the applicant; (iii) direct personal or professional costs borne by the applicant pursuing his/her application, as long as they are duly documented; (iv) the work performed by the applicant to obtain the information provided to the Technical Secretariat and the applicant’s collaboration throughout the investigation process; (v) the time elapsed since the occurrence of the infringement, or since the applicant became aware of it before revealing

it to the authority; and (vi) other relevant factors to be determined by the Technical Secretariat, as long as these are duly verified.

The Section commend INDECOPI for adopting criteria that are in line with similar guidelines in other jurisdictions, including the United Kingdom. The Section respectfully offer the following comments:

- a. The Section agree with INDECOPI that it is indeed important to take into account the costs borne by the applicant, both personal and professional. In practice, however, it may be difficult for the applicant to document all personal costs suffered, such as the stigma associated with whistleblowing and the difficulty associated with finding new employment. The Technical Secretariat could therefore consider detailing the documentation it will require from applicants in this respect, carefully considering the challenges that may be involved in providing such information;
- b. It is appropriate to link the amount of the reward to the “severity, effects and potential illicit benefits arising from the cartel revealed by the applicant.” But this could potentially create a risk that the applicant would delay reporting conduct to wait for the cartel to become more serious, which would in turn increase the risk of destruction of documents or other spoliation of evidence. In this respect, the fact that the amount of the reward will also depend on “the time elapsed since the occurrence of the infringement, or since the applicant became aware of it before revealing it to the authority” is key. The Section therefore suggest clarifying that the Technical Secretariat will grant higher rewards to whistleblowers who come forward as promptly as reasonably possible;
- c. The Section also propose that INDECOPI consider referring in the Draft Guidelines to the efforts invested and the risks taken by the applicant to come forward to the Technical Secretariat instead of the “work performed by the applicant to obtain the information provided to the Technical Secretariat.”

The Draft Guidelines provide that the payment of the reward will be conditioned on corroboration of the information provided. If the Technical Secretariat detects that the information is false, misrepresented or affected by other types of fraud, it may cancel or revoke the payment authorization and, if the payment has already been produced, it would require restitution. In the latter case, the INDECOPI Legal Office may start legal actions to obtain restitution. The Section respectfully suggest that the risk of having the payment of the reward revoked should be a sufficient disincentive to applicants from providing false

information. In practice, to avoid the provision of false information to the Technical Secretariat, it seems appropriate to have a system whereby an official would first engage in a discussion with the applicant to evaluate his/her credibility and motivation. This potentially enables the Technical Secretariat to assess the reliability of the informant at an early stage. INDECOPI could also consider implementing sanctions for whistleblowers that provide false information intentionally, as opposed to those who do so in good faith. Such sanctions may already generally exist in Peru for individuals who provide false information to public authorities.

IV.5. Section 8 - Amount and payment of the reward

The Guidelines also specify that the reward consists of a fixed and a variable amount. Payment of the fixed amount may be made after the Technical Secretariat issues its decision to press administrative charges for the infringement revealed, after the authority has duly verified the information provided by the applicant, according to item 8.2 of the Guidelines. The variable amount, in turn, may be paid once the administrative sanction proceedings are concluded. The Technical Secretariat may approve this additional payment with a cap equal to 5% of the amount effectively paid by the offenders and up to two hundred thousand soles (PEN 2,000,000, approximately USD 59,000), as per item 8.3 of the Guidelines.

First, although there are advantages of the hybrid approach, the Working Group recommends that, if INDECOPI anticipates difficulties in obtaining funds to pay the rewards, it may consider adopting only a variable reward based on the fines paid by offenders, and forego the reward of a fixed amount to be paid from the Technical Secretariat's budget.

In any case, the Guidelines state that both the fixed and the variable amount will be determined by the Technical Secretariat, based on the factors described in item 7.2. However, some of the listed factors are not very objective: most are opened to a broad interpretation by the authorities.

The Working Group opinion is that some upfront specification on these factors may further encourage the applicant to report a cartel.

Likewise, should the Program provide more objective criteria for both granting and calculating the reward, applicants will be encouraged to report a conduct, due to the increase of predictability and the reinforcement of the incentive to cooperate.

Additionally, the U.S. Whistleblower Program differs from the Peruvian Program as it

offers an award that varies from 10 to 30% of the amount of monetary sanctions collected in the FTC's enforcement action of a related conduct. The Working Group understands that the referred percentage range applied to monetary sanctions increases transparency towards the whistleblower, providing predictability for the definition of the reward. Consequently, setting the upfront of a precise percentage range of monetary sanctions collected could provide more predictability to the applicants.

The Brazilian Guidelines for Settlement Agreements² in cartel cases provide a chart laying down objective criteria entailing the extent of the collaboration vis-à-vis their influence in the discount provided to the settling party. Said discount is applied over the expected fine the settling party would receive in the event of guilty decision, giving thus predictability and incentives for parties to settle with the Brazilian Competition Authority. Since it is associated with the level of the discount, this system has a positive impact on both the quality and the extent of the evidence / narrative presented. Rewarding more cooperative whistleblowers with larger rewards makes it possible to extract better cooperation, which is likely to strengthen the evidence against defendants and increase the chances of conviction.

The Program is silent on the possibility of applicants reporting information related to ongoing investigations. From the Working Group point of view, this possibility would be relevant for the authority to gather additional evidence related to the investigated practice, improving the likelihood of a successful prosecution.

Finally, the reward payment will be made through wire transfer, deposit in a bank account or other mechanisms that allow the payment verification, according to item 8.4 of the Program. One issue that arises from this is how INDECOPI will disclose the disbursement of the reward payment in public financial records and guarantee at the same time the confidentiality of the whistleblower identity, without breaching the obligation to uncover public accounts. In this sense, the Working Group opinion is that it is important to include in the Guidelines mechanisms to cope with a circumstance as such.

The Working Group understands that without specific provisions on confidentiality, INDECOPI will ultimately discourage reports, given the lack of protection to the applicant identity, which is critical to ensure the success of the Program.

² http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/guidelines_tcc-1.pdf
- English version. Section I. COOPERATION.

IV.6. Section 9 - Collaboration duties

The applicant must be willing to collaborate with the Technical Secretariat from the moment of the applicant submission, through the investigation stage and all the way to the final administrative decision by the Commission on the cartel revealed and further (if needed).

Important to note that a whistleblower is a third party that did not engage in any unlawful conduct. Although the Technical Secretariat requires full collaboration for elucidating facts, the Working Group respectfully believes that it is not reasonable to demand from one individual the same level of cooperation and availability – especially taking into consideration the availability of financial means to accomplish all obligations – as it is expected from a leniency applicant, for instance.

Consequently, it would be interesting for INDECOPI to clarify whether the Technical Secretariat or the individual is the one responsible for paying expenses associated with the collaboration duties, such as travel, printing and translation³ expenses. In order to mitigate such associated costs, INDECOPI could offer alternatives to facilitate the applicant's collaboration, e.g., arranging video-conferences and dismissing translation of essential documents.

4. 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.

³ Especially if sworn-translations are required by law, as they are usually expensive and would aggravate the burden on the whistleblower.