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Via Email:

Peruvian Competition Authority
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and

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SUBJECT: Comments in Response to the Peruvian Competition Authority’s Request for Public Comments Regarding its Draft Guidelines on Inspection Visits (Dawn Raids)

Dear Sir/Madam:

On behalf of the American Bar Association Antitrust Law Section, I am pleased to submit the attached comments in response to the Peruvian Competition Authority’s request for Public Comments regarding its Draft Guidelines on Inspection Visits (Dawn Raids).

Please note that these views are being presented only on behalf of the Antitrust Law Section. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

If you have any questions after reviewing this report, I will be happy to provide further comments.

Sincerely,

Brian R. Henry
Chair, Antitrust Law Section

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The Antitrust Law Section of the American Bar Association (“the Section”) welcomes the opportunity to participate in the discussion regarding the draft Inspection Visit (Dawn Raid) Guidelines (“the Guidelines”) issued by The National Institute for the Defense of Free Competition and the Protection of Intellectual Property (“Indecopi”) on October 14, 2019.¹

The following comments reflect the experience and expertise of the members of the Section with competition law in the United States and other jurisdictions, including as retained counsel, in-house counsel, and/or government enforcers. The Section’s comments begin with some general, overarching considerations that reflect themes identified throughout the Guidelines. With respect to specific provisions within the Guidelines, the Section’s comments largely focus on Sections II (Parameters for conducting inspections) and IV (Development of the inspection), and also discuss points Indecopi may wish to consider with respect to Section V (Aftermath of the inspection).

The Section is available to provide additional comments or to engage in further consultation with Indecopi as appropriate.

I. GENERAL COMMENTS

On-site inspections, often known as “dawn raids,” have been recognized by many international competition enforcers as a necessary and important investigative tool.² However, dawn raids can also be very disruptive to a company’s business operations, and have the potential

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¹ INDECOPI, GUIDELINES ON INSPECTION VISITS [DRAFT] (Oct. 2019), available in Spanish at https://www.indecopi.gob.pe/documents/51771/2962929/Lineamientos+de+Visitas+de+Inspecci%C3%B3n/.
to intrude on sensitive proprietary and commercial information, and the privacy of individuals. The Guidelines acknowledge that actions, such as raids, undertaken to carry out Indecopi’s investigative powers, “directly affect” the companies subject to those actions and state that “it is necessary to find the appropriate balance between the rights of the undertakings subject to an inspection and the effectiveness of the investigation….” The Section agrees with and supports the Guidelines’ recognition of the importance of instituting clear rules for the execution of dawn raids.

The Section encourages Indecopi to establish a narrow set of conditions for the authorization of dawn raids. In particular, we emphasize that, in order to ensure the appropriate balance between the effectiveness of investigations and avoiding unnecessary disruption of legitimate business activities, dawn raids should be conducted only after a determination has been made that necessary evidence cannot be obtained and safeguarded by less intrusive means. In the United States, for example, a search warrant can be issued only where a judge finds probable cause to believe that a crime has been committed, that evidence of the crime exists or very likely exists, and that such evidence is likely to be at the premises to be searched. Such a search warrant is necessary before the government may enter private property to conduct a search and seize material. These criteria – probable cause and judicial authorization - seek to balance the government’s interest in and need to obtain the information with the significant intrusion and disruption that a raid inflicts on a business and the constitutional protections afforded to persons and entities investigated by the government. These criteria also serve to standardize the process for authorizing a raid and help to ensure consistent and even-handed application of the underlying legal principles, so that such actions may be free from partisan influence or executive overreach.

The Section agrees with the Guidelines statement that the government and public’s interests underlying dawn raids are “especially relevant in cartel cases” given the potential harm to society and the difficulty of obtaining evidence due to the often clandestine nature of cartel conduct. The Section urges Indecopi to more specifically and definitively limit the proposed guidelines to cartel cases, and to non-cartels in which the difficulty of obtaining evidence or the possibility of destruction of evidence is particularly acute. For instance, in the United States, search warrants are available as an investigatory tool only in antitrust investigations with a criminal component, namely, cartel cases.  

II. COMMENTS REGARDING SPECIFIC SECTIONS OF THE DRAFT GUIDELINES

A. Parameters for Conducting Inspections

Section II (Parameters for conducting inspections) lays out the requirements to be established before a raid may be executed and discusses what information must be provided to the target company upon commencement of the raid.

1. Legal Standard

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3 We recognize that no antitrust violations are considered to be criminal conduct in Peru.
The Section respectfully submits that the legal standard for justifying a raid should be clarified. In Paragraph 1 of this Section, the Guidelines state that inspections “will be based on the existence of suspicions pointing towards the possible existence of an infringement” of the Competition Act. The “suspicions” may be from a public or private source and the source need not be identified to the subject of the raid. In the United States, a dawn raid requires probable cause to believe that a crime has been committed, that documents or other items evidencing the crime exist, and that such items to be seized are at the premises to be searched.\(^4\) The elements of probable cause are the same for an antitrust crime as for other crimes.\(^5\)

The Guidelines state that dawn raid inspections will be authorized by a written decision of the Technical Secretariat, but do not specify the standard by which the Technical Secretariat will evaluate whether a raid is both necessary and appropriate in any given situation. For example, the Guidelines are silent as to whether and to what extent the Technical Secretariat must consider the source of the “suspicion” underlying the request for an inspection, and the credibility of such source(s). A raid that is authorized based solely on a tip from a competitor of the company to be raided, without corroborating evidence or sworn affidavit, could result in an unjustifiable raid if the purpose of the tip was to induce a raid merely to disrupt the competitor company’s business and without a sufficient basis.

Similarly, a raid prompted solely by an unsubstantiated tip from the general public could unnecessarily inflict significant harm to the business and reputation of the company subjected to inspection. In the United States, when a judge is asked to approve a search warrant authorizing a raid, the reliability of the evidence, including the credibility of the source of the information, is a key consideration.\(^6\) The Section therefore recommends that Indecopi consider clarifying the standard under which a raid would be warranted.

2. **Particularity of the Search and Inspection**

The Guidelines state that the Technical Secretariat’s written decision will include:

- identification of the company to be raided;
- identification of the officials authorized to conduct the inspection;
- the date of the inspection;
- the legal basis underlying the inspectors’ authority;
- the rights and obligations of the company being raided;
- the object, scope, and purpose of the inspection; and
- the possible sanctions that may be imposed if the company fails to comply with the inspection.

\(^4\) The probable cause standard requires the issuer of a search warrant to make a “practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the ‘veracity’ and ‘basis of knowledge’ of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.” Illinois v. Gates, 462 U.S. 213, 238 (1983).


\(^6\) *Id.*
The decision to authorize a raid also must indicate the alleged violation being investigated and the market(s) potentially affected by the alleged conduct. Consistent with recognizing the important balance between the government’s interest in effective investigation of unlawful conduct on the one hand, and the subject company’s rights on the other hand, it is critical that inspections be narrowly tailored. In the United States, it is necessary to describe with specificity the property to be seized and the places on the premises to be searched.\(^7\) We encourage Indecopi to consider requiring more specificity in an inspection application, and in the final written decision, regarding the scope of the inspection and search, including the types of evidence to be inspected and collected (e.g., hard copy documents, electronic data).

3. **Judicial or Neutral Oversight**

The Section recommends that Indecopi consider revising the Guidelines to require that the authority to conduct a dawn raid be granted or supervised by a judge or designated neutral administrative official. In the United States, the decision about whether to issue a search warrant authorizing a raid is made by a judge, based on an ex parte application by the government. Judicial oversight (or oversight by a neutral party) means that the party seeking the inspection and conducting the investigation is not also the entity authorizing the raid. In addition to removing bias from the decision-making process, involvement by a judicial official or neutral administrative official helps to ensure that the standards for authorizing a raid are applied as evenly as possible across various investigations and defendants. While the Section recognizes that many competition authorities do not require this step, the United States experience has not shown it to interfere with appropriate collection of evidence in competition matters.

Moreover, even though violations of the Competition Act are subject to civil/administrative, and not criminal, enforcement in Peru, criminal consequences may flow from a raid. Employees and companies that do not comply with the raid to the inspectors’ satisfaction may face charges for obstruction of justice, or other sanctions. The intrusive nature of the raid and the possibility of sanctions for failure to comply in a raid merit greater due process in authorizing the inspection.

**B. Development of the Inspection**

Section IV of the Guidelines (Development of the Inspection) sets forth the parameters for conducting the raid, inspection, and seizure.

1. **Compulsory Interviews**

Paragraphs 10(d) and 17 discuss compulsory interviews. Under the Guidelines, employees and representatives of the company must truthfully answer questions asked by inspectors during the raid. The Section recognizes the value of witness interviews; however, given the personal liability for individuals, we urge Indecopi to reconsider this requirement.

The Section understands the Guidelines to state that individuals have the right to remain silent only if the inspectors’ questions are ambiguous or may suppose an admission of guilt.

\(^7\) *Id.*
Otherwise, employees and corporate representatives questioned by the inspection officials are obliged to answer and provide inspectors with the information they seek. This requirement seems to be at odds with protections against self-incrimination and seems difficult to apply in practice. The right against self-incrimination is part of the due process that must be afforded even in an administrative or civil proceeding and should be applied in the context of antitrust investigations, since non-lawyers should not assume the burden of determining whether an answer might admit guilt (especially during the conduct of a dawn raid). The Section suggests that the duty of employees and representatives of the company to answer questions during the raid should be limited to non-substantive and organizational matters (such where documents are filed, where keys to locked rooms are located, what employees report to what managers, and how a company is structured) and that all other responses should be considered voluntary. During voluntary interviews, employees and company representatives should have the ability to be accompanied by legal counsel, as well as the right to name the time and place of any government interview.

In the U.S. context, law enforcement agents may conduct voluntary interviews of individuals during the execution of a search warrant and raid. While there may be a duty to cooperate with inspection officials in terms of providing access to the specific locations to be searched or identifying information and data covered by the written decision authorizing the raid, such cooperation should not extend to substantive matters unless the individual knowingly waives their right to counsel.

Relatedly, Paragraph 12 states that the company must “guarantee … the collaboration” of employees whose computers and files are to be inspected and seized. The Section encourages Indecopi to clarify this requirement. While it may be proper to require the company to provide access to individuals’ electronic and hard copy files (which are company property), the company should not be required to force individuals to cooperate with the government inspection, where doing so may go against an individual’s legal rights, as there may be a conflict between the rights and interests of the company and the rights and interests of the employee. The scope of the required “collaboration” should be clarified.

2. Privilege Concerns

The Guidelines do not address attorney-client and other privilege issues or provide a mechanism for safeguarding privileged information from government inspection. While there are some general statements in the Guidelines about inspecting seized materials within a reasonable amount of time, these statements are vague and appear to be discretionary. In the United States, the government’s power to search premises and inspect information is constrained by various legal privileges. The attorney-client and work-product privileges, for example, limit the admissibility and evidentiary use of privileged materials. In the United States, if material seized by the government for inspection is subject to a claim of privilege, there are well-defined procedures for
identifying and culling privileged information so that the government does not inadvertently access privileged communications and data.\(^8\)

In U.S. antitrust investigations, counsel for the target company often is provided with a copy of the seized material and allowed to conduct a privilege review before the government commences its own review. Company counsel then identifies materials that should be returned to the company as privileged, or at least not reviewed by the investigators until privilege claims are resolved. Other procedures include *in camera* review by a court, appointment of a neutral party or “special master,” or the assignment of a “privilege team” or “filter team” of attorneys, who are not involved in the underlying investigation, to review documents to make sure the case team does not access privileged material.\(^9\) The Section recommends that Indecopi consider implementing one or more of these approaches to prevent the significant harm associated with investigatory access to privileged material.

Similarly, Paragraph 14 contemplates that non-responsive, irrelevant, or personal information not pertinent to the investigation may also be culled from the seized material before government review (or not collected at all). These provisions also are vague and discretionary (in that inspectors do not appear to be bound by them in every instance) and would benefit from additional context and explanation.

3. Electronic Evidence

The Guidelines do not discuss in detail how digital evidence will be collected or reviewed. As an initial matter, while each situation may be different such that a defined set of parameters governing all inspection raids are not feasible, the Section suggests that Indecopi consider adding to Section II (parameters for conducting the inspection) a definite instruction that the written decision authorizing the raid should set forth clear steps regarding retrieval and review of electronic data. With respect to the collection and inspection of such evidence, we note that the seizure of electronic data raises a variety of issues that Indecopi might consider addressing in the Guidelines, such as:

- Whether the searched party must provide passwords for access to electronic sources of digital data;
- Whether data that exists on off-site servers (and is reasonably accessible) may be pulled for inspection or copying;
- Whether inspectors may remove hard drives, servers, and other media housing electronic data from the premises to be searched, or whether such data, to the extent it is accessible, should be imaged on-site (or removed, imaged, and promptly returned within a certain period of time); and

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\(^9\) Id.
• Whether personally-owned devices, such as laptops, cell phones, tablets, etc. can be seized.

As noted above, the Section recommends that procedures and parameters for electronic collection be detailed in the written decision authorizing the inspection.

4. List of Off-limits Documents and Data

The Section encourages Indecopi to consider including in the Guidelines a list of the specific types or categories of information that may not be accessed by agency inspectors. For example, Indecopi could clarify that inspectors may not inspect evidence that:

• Is of a private (i.e., non-business) nature;
• Is covered by legal professional privilege; or
• Is irrelevant to the subject matter and purpose of the investigation (as set forth in the written decision authorizing the raid).

C. Aftermath of the Inspection

Section V of the Guidelines sets forth procedures to be followed after the raid has been completed. The Section agrees with the requirement that the inspectors must issue a record of the inspection, listing not only the events that occurred during the raid, but also memorializing all of the evidence, data, documents, and materials seized by the government during the raid. This description should be more detailed than the summary required by the draft Guidelines so that the company can identify exactly what was seized.10

When documents are seized, the company may not have any other copies, in which case both the company’s ability to defend itself or perform its own internal investigation, and its ordinary business operations, may be adversely affected. Therefore, the Section also recommends that the target company be permitted to make or be provided a copy of all documents, materials and data that were seized. The company’s ability to obtain a copy of the seized material should not depend on whether Indecopi has yet processed the material. Determining the manner in which the seized material will be provided to the party - whether in original form or as a copy made by Indecopi - may also impact the way in which the privilege review, discussed above, should proceed.

10 See, e.g., FED. R. CRIM. P. 41(f)(1)(B)-(C) (“Inventory. An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. . . . Receipt. The officer executing the warrant must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken or leave a copy of the warrant and receipt at the place where the officer took the property.”).
III. ADDITIONAL CONSIDERATIONS

A. Obstruction and Non-Compliance

Paragraph 24 sets forth the possible sanctions and fines for obstructing or failing to comply during the course of an inspection. The Section agrees with the Guidelines’ approach of allowing a company accused of obstruction or non-compliance to defend itself against the charges and present evidence in support of that defense. In the United States, obstruction of the investigation (whether with respect to the raid specifically, or at other times, such as the destruction of evidence before or after a raid) is considered in the context of the greater investigation and may be used as an aggravating factor for determining penalties or charged as a separate offense from the anticompetitive conduct.

B. Cooperation with Other Enforcers

The draft Guidelines do not address how the Secretariat will respond to requests from other antitrust enforcers to coordinate dawn raids on a global basis or to jointly participate in such a raid in Peru. The Guidelines also do not address whether and how the Secretariat would pose similar requests to other enforcement agencies with which Indecopi wishes to collaborate in a given investigation. The Section recommends that Indecopi consider including such provisions, either within these Guidelines, or set out in a separate policy focused on inter-agency and global collaboration.11

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The Section appreciates the opportunity provided by Indecopi to comment on the Guidelines and would be pleased to answer questions or to provide any other form of assistance that Indecopi would deem appropriate.

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