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Via Email:
Peruvian Competition Authority
Ivo Gagliuffi Piercechi
President of INDECOPI
Calle de la Prosa 104 – San Borja, Lima 41, Perú
ivogag3010@indecopi.gob.pe

and

Jesús Espinoza Lozada
Technical Secretary of the
Commission for the Defense of Free Competition of INDECOPI
Calle de la Prosa 104 – San Borja, Lima 41
jespinozal@indecopi.gob.pe

SUBJECT: Comments in Response to the Peruvian Competition Authority’s Request for Public Comments Regarding its Draft Guidelines on Antitrust Rewards Program

Dear Sirs:

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 Antitrust Rewards Program.

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

Attachment

The following comments reflect the experience and expertise of the members of the Section with competition law in the United States and other jurisdictions. The Section is available to provide additional comments or to engage in any further consultation with the Ministry as appropriate.

I. EXECUTIVE SUMMARY

For the reasons set forth in detail below, the Section respectfully recommends that INDECOPI revise its Draft Guidelines as follows:

1. **Section 2:** Make clear that the applicant must voluntarily provide INDECOPI with evidence and define voluntary to mean that the whistleblower, or her representative, such as a lawyer, must provide the information to INDECOPI prior to receiving any regulatory or law enforcement request, inquiry, or demand that relates to the same subject matter. Provide that an individual should only be eligible to receive a reward for the provision to INDECOPI of new and original information, and that such individual should also provide information that is lawfully obtained and free from attorney-client, attorney work-product, or other applicable professional privileges. Consider limiting the eligibility for the program to employees from companies without compliance programs, or from
companies that have a compliance program in force; require the applicant to provide evidence of having first reported the violation through an existing channel, and/or proof that the applicant has a reasonable expectation that reporting through channels within the corporate compliance program may not be effective.

2. **Section 3:** 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 to utilize the whistleblower program. Consider implementing an internal reconsideration review after the initial determination of eligibility and the amount of the award.

3. **Section 4:** Provide a direct channel and direct contact details for the consultation process to prevent information leakage and disclosure of the matter to agency personnel that should not have contact with the information at this stage. Clearly state whether such consultation ensures priority of the consultant over future applicants and how the Technical Secretariat could control this. Introduce a Marker System.

4. **Section 6:** Clarify that the evidence provided by the informant must be indispensable for the Technical Secretariat, i.e., that it must either help the Secretariat find an infringement or give sufficient grounds to the Secretariat to carry out a dawn raid (or obtain a warrant to do so).

5. **Section 7:** Detail the documentation the Secretariat will require on personal and professional costs borne by the applicant, carefully considering the challenges that may be involved in providing such information. Clarify that higher rewards will be granted to whistleblowers that come forward as promptly as reasonably possible. 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.” Introduce a system whereby an official would first engage in a discussion with the applicant to evaluate his/her credibility and motivation, and assess the reliability of the informant at an early stage. Adopt sanctions for whistleblowers that provide false information intentionally, as opposed to those who do so in good faith.

6. **Section 8:** 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, if anticipated that it will be challenging to obtain funds to pay the rewards, and possibly raise the maximum percentage and amount of the variable portion of the reward. Revise the timing of the payment, providing a small token fee to be paid within a short time after the informant first provides
meaningful information, and then a larger reward after the Technical Secretariat has closed the case.

7. **Section 9:** Specify who will pay for any expenses incurred by the applicant when cooperating with the authority.

II. INTRODUCTION

Whistleblowing programs have been adopted in several jurisdictions over the past few years. These programs are intended to find new ways to detect cartel behavior and increase anti-cartel enforcement. Indeed, multiple authorities have been considering implementing additional tools aimed at improving their enforcement efficiency. Among other tools, such as screening techniques, third-party complaints reporting violations, and interagency cooperation, whistleblowing programs have been playing an increasing role in the attempt to improve both the detection and the deterrence of cartels.

A whistleblower is generally an “employee who is aware that his/her employer is a member of the cartel, but was not personally involved”¹ and who decides to provide information to the antitrust authorities, usually expecting legal protection from retaliation. In addition, authorities may adopt financial rewards in order to stimulate whistleblowing and to protect the whistleblower from adverse consequences, including dismissal, suspension, demotion and/or denial of promotion.

While there are many advantages to the adoption of whistleblowing programs, especially if pursued in combination with other methods of cartel detection, there are challenges as well. It is important for enforcement authorities to communicate effectively with whistleblowers to ensure that reports of wrongdoing contain more than general allegations. Finally, it is important to develop effective mechanisms to protect whistleblowers, lest fear of retaliation undermines trust in the authority and thereby prevents development of an effective whistleblower program.

There is widespread support among the world’s antitrust enforcement agencies for the concept of whistleblower protections, including safeguards against retaliation for reporting possible antitrust violations. There is no consensus, however, on the appropriate financial incentives or rewards for whistleblowers or even whether such incentives are appropriate at all. In fact, only a few countries, including Canada, the United Kingdom, South Korea and Pakistan, have implemented antitrust whistleblower protections.

rewards programs. INDECOPI would become the first antitrust agency in Latin America to implement a whistleblower rewards program.

Given its relative novelty, it is essential that INDECOPI create clear rules and detailed legal provisions to give confidence and certainty to those interested in its Antitrust Rewards Program. The Section believes that successful implementation 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.

As previously noted, a few countries have already implemented whistleblower rewards for competition matters, and there is also significant experience in the use of whistleblower rewards in other areas of the law, such as government fraud, tax fraud, and securities violations, mainly in the United States. INDECOPI has been effective in studying existing whistleblower rewards programs and should continue to utilize the experience and lessons learned by such jurisdictions and others to refine the Draft Guidelines. The following comments draw primarily 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 report and provide certain data or evidence of cartel conduct. Initially, a reward cap of 20 million won (around US$ 17,500, at the time) was established. The relatively meager rewards, along with concerns related to the confidentiality of the applicant, resulted in the receipt of fewer applications than expected. In November 2003, the system was modified in two ways: (1) the reward ceiling was raised substantially to 100 million won (about US$ 87,300); and (2) measures to guarantee the confidentiality of 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 saw a significant increase in the number of whistleblower reports and rewards paid. In fact, the KFTC paid rewards in 15 cases in 2016 alone for whistleblowing collaboration.

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 is considered successful by both practitioners and the competition authority.²

Whistleblower programs in other areas of the law, such as securities and government fraud, have been very successful. For example, the United States created whistleblower legislation related to government fraud as early as 1863 through the False Claims Act (“FCA”). The FCA allows private individuals to obtain rewards for providing information about fraud against the government. The FCA applies to fraud on all types of federally funded contracts or programs, except for tax fraud. Whistleblowers can receive up to 30% of any damages recovered as a result of certain fraudulent behavior related to government contracts.

The FCA 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 conduct that could also be condemned under the antitrust laws, specifically forms of bid-rigging that could also be categorized as fraud³.

Thus, under the FCA, it is possible for whistleblowers to obtain rewards for alerting the U.S. Department of Justice to bid rigging against the federal government, if that bid rigging also involved 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 United States does not have a specific whistleblower protection or reward 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 United States, most states protect employees from discharge for reporting unlawful conduct.⁵ Anti-retaliation whistleblower protections are critical to ensuring that whistleblowers will be willing to cooperate with enforcement authorities.

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Accordingly, the Section respectfully urges Peru and INDECOPI to consider including anti-retaliation whistleblower protections in the Draft Guidelines to incentivize reporting.

Finally, it is 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.

III. COMMENTS ON THE PROPOSED RULES

The Section respectfully offers the following specific comments on the Draft Guidelines in the hope that they will contribute to the effectiveness of the Draft Guidelines.

III.1. Section 2

According to the Draft Guidelines, to benefit from INDECOPI’s Antitrust Rewards Program (“Rewards Program”), the applicant must provide relevant information for INDECOPI to effectively detect, investigate and prosecute a cartel. Rewards will be accessible only to natural persons. The following persons are unable to access the Rewards Program: (i) legal persons; (ii) natural persons that, as economic agents, participate in cartel behavior, as long as the reported infringement refers to the same facts for which access to rewards is intended; (iii) natural persons that, acting in representation, management or direction of other natural or legal person, including professional associations, trade associations, or others, have participated in the planning or execution of the infringement, as long as the reported infringement refers to the same facts for which access to rewards is intended; (iv) natural persons who might serve as planners, intermediaries or facilitators of the cartel, as long as the reported infringement refers to the same facts for which access to rewards is intended; (v) natural persons who have been disqualified for submitting false information or for repeatedly applying to the Rewards Program providing irrelevant information; (vi) INDECOPI officials, their spouses and relatives up to the fourth degree of consanguinity and second of affinity; (vii) public officials or government employees who, in exercising their functions, obtained information that might be useful for the detection and prosecution of a cartel.

In cases listed from (i) to (iv), INDECOPI may want to suggest that the applicant apply to Peru’s Leniency Program instead.
Assistance and information from a whistleblower who knows of possible antitrust violations can be an important source of information for INDECOPI. Similar to leniency applicants, through their knowledge of the circumstances and individuals involved, whistleblowers can help INDECOPI quickly identify, and later prove, possible antitrust violations. Accordingly, this eligibility section should also make clear that the applicant must voluntarily provide INDECOPI with evidence. In other words, an individual should be ineligible for the Rewards Program if under a legal obligation to report the alleged misconduct at the time of reporting. The Draft 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 INDECOPI prior to receiving any regulatory or law enforcement request, inquiry, or demand that relates to the same subject matter.

On a related point, the Section respectfully suggests that an individual should only be eligible to receive a reward for the provision to INDECOPI of new and original information. Moreover, the Section proposes that INDECOPI consider clarifying in the Draft Guidelines that, 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 Rewards Program should not encourage lawyers, accountants, or other professionals to break their professional duty to protect client confidences by providing a personal financial incentive to do so. In addition, 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.

More broadly, the proposed rules should avoid potentially discouraging employees from internally reporting suspected improper conduct through corporate compliance programs or other established channels. This would likely jeopardize the ability of compliance officers and/or corporate counsel to obtain information from employees in confidence and carry out internal remediation efforts, and can also interfere with the operation of the leniency program.

The Section therefore encourages INDECOPI to consider limiting the eligibility for the program to employees from companies without compliance programs, or from companies that have a compliance program in force, require the applicant to provide evidence of having first reported the violation through an existing channel, and/or proof that the applicant has a reasonable expectation that reporting through channels within the corporate compliance program may not be effective.
III.2. Section 3

The Draft Guidelines state that the Technical Secretariat has discretionary powers to grant a reward to the applicant as long as the applicant provides decisive information, or to deny a reward when the information provided cannot be corroborated, is irrelevant for its investigations, or does not add significant value to its work. The 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 Section respectfully encourages 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 to utilize the whistleblower program.

It may be helpful to include examples of 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. Conversely, it may also be useful to clarify that applications that report and/or provide evidence relating to conduct that is subject to potential limitations to prosecution (e.g., facts regarding violations for which prosecution is time-barred) may also result in the denial of the award.

On a separate note, to ensure due process and fundamental fairness to the whistleblower, which in turn may encourage more whistleblowers to come forward, the Section encourages INDECOPI to consider implementing an internal reconsideration review after the initial determination of eligibility and the amount of the award. For example, the U.S. 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. The claims review staff will consider the response and forward its proposed final determination to the Commission. The SEC, however, does not allow

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appeals when the total amount awarded is between 10% and 30% of the monetary sanctions collected in the action.

Similarly, INDECOPI may wish to consider an internal appeal that allows the whistleblower to advocate regarding 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.

### III.3. Section 4

This section of the Draft Guidelines establishes a consultation proceeding before the Technical Secretariat to verify whether an application qualifies for the Rewards Program and whether information supplied by the applicant is of interest. However, the Draft Guidelines do not detail to whom the query should be submitted within the structure of the Technical Secretariat, nor do they establish a safe channel that allows the interested party to directly address the decisionmaker. Providing such a direct channel and clear direct contact details prevents information leakage, limits access within the agency on a need-to-know basis, avoiding disclosure of the matter to agency personnel that should not have contact with the information at this stage, and also helps establish trust.

Finally, the Draft Guidelines do not clearly state whether the consultation ensures priority of the consultant over future applicants (or if the formal application described in Section 5 is needed to ensure priority) and how this could be controlled by the Technical Secretariat. The Section respectfully suggests that it would be advisable to introduce a marker system (similar to those adopted for leniency programs) ensuring that the party receives information (in writing if the party so prefers) on the date and time of the consultation, a very brief summary of what it intends to report and on any requirements to maintain the applicants’ priority over other possible applicants providing information on the same course of conduct (e.g., submitting evidence or a more detailed report within a given time of the approval of the request, in case it is accepted).

### III.4. Section 6

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 Sections proposes that INDECOPI consider 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.

III.5. Section 7

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

a. The Section agrees 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

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7 See Supra Note 2.
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 suggests clarifying that the Technical Secretariat will grant higher rewards to whistleblowers who come forward as promptly as reasonably possible;

c. The Section also proposes 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 suggests 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.

III.6. Section 8

The Draft Guidelines provide that the reward will consist of a fixed amount and a variable amount. Payment of the fixed amount may be made after the Technical Secretariat issues its decision to present administrative charges for the infringement revealed, provided the authority has verified the information provided by the applicant.

The Section shares INDECOPI’s view that there are advantages in the hybrid approach adopted in the Draft Guidelines, i.e., a reward composed of a fixed amount and
a variable amount based on the amount paid by the offenders. Having said so, the Section respectfully suggests that it would be important to make sure that the Technical Secretariat will have the budget to pay rewards to informants before a final decision in favor of a hybrid system is made. 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.

The Draft Guidelines state “Taking as reference the GDP per capita of [other countries] offering rewards under their antitrust laws, the maximum reward under the Peruvian Program is below the ratio of countries that offer quite high rewards such as Taiwan and Korea but above this ratio for the rest of the countries.” Nevertheless, the Section perceives that this amount might not be sufficient given the personal and professional costs borne by whistleblowers. Several articles\(^8\) have noted that rewards available in some jurisdictions, e.g., United Kingdom, Ukraine, and Pakistan, do not sufficiently incentivize applicants to come forward. It seems that the variable portion of the reward may be a more important incentive for potential informants. The Sections therefore respectfully suggest that INDECOPI consider whether it would be feasible to raise the maximum percentage and amount of the variable portion of the reward.

Last, regarding the timing of payment, the Section respectfully suggests that INDECOPI consider providing a small token fee to be paid within a short time after the informant first provides meaningful information, and then a larger reward at a later stage. Moreover, instead of paying such a larger reward when it “issues its decision to present administrative charges for the infringement revealed,” INDECOPI could consider providing the payment after the Technical Secretariat has closed the case. These measures would enable the Technical Secretariat to have a more thorough understanding of the ultimate value of the information provided by the whistleblower before deciding on the final amount of the reward.

III.7. Section 9

The applicant is required under the Draft Guidelines to cooperate with the Technical Secretariat from the moment the application is filed throughout the investigation, and until a final administrative decision is issued by the Commission, and further (if needed). Cooperation duties include: refraining from denying or in some other manner questioning or challenging the facts reported in her application and subsequent collaboration actions.

The Section commends INDECOPI for once again adopting approaches that are in line with those successfully adopted in other jurisdictions, and propose as an additional refinement that the Draft Guidelines make clear who will pay for any expenses incurred by the applicant when cooperating with the authority.

IV. CONCLUSION

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