

## Template pursuant to Section 3 (a) of the ICN Framework on Competition Agency Procedures

### INDECOPI, PERU

The following template is submitted by **INDECOPI, Peru** pursuant to Section 3(a) of the ICN Framework on Competition Agency Procedures (“CAP”).

#### I. Introduction

The National Institute for the Defense of Free Competition and the Protection of Intellectual Property (Indecopi) was founded in November 1992 through Executive Order 25868.

Its function is to promote the market and protect the rights of consumers. It also encourages in the Peruvian economy a culture of fair and honest competition, holding harmless all forms of intellectual property — from trademarks and author’s copyright to patents and biotechnology.

Indecopi is a specialized public agency attached to the Office of the Prime Minister, with independent legal status of internal public law. As such, it enjoys functional, technical, economic, budgetary and administrative autonomy (Executive Order 1033).

As a result of its work in promoting the standards of fair and honest competition among the agents of the Peruvian economy, Indecopi is perceived today as a service institution with a strong concern in fostering a culture of equality in order to achieve full satisfaction among its customers — citizens, entrepreneurs and the State.

[www.indecopi.gob.pe](http://www.indecopi.gob.pe)

#### II. Laws, Regulations, and Policies relevant for the implementation of the CAP

*For each CAP Principle below, please explain how your competition law investigation and enforcement procedures meet the Principle. Please highlight important features relevant for the implementation of the CAP and explain limitations, if applicable. Feel free to include links or other references to related materials such as relevant legislation, implementing rules and regulations, and guidelines where helpful and appropriate.*

*Please update your Template reflecting significant changes as they relate to the CAP, as needed.*

##### b) Non-Discrimination

*Each Participant will ensure that its investigation and enforcement policies and Procedural Rules afford Persons of another jurisdiction treatment no less favorable than Persons of its jurisdiction in like circumstances.*

The Peruvian competition law that regulates the investigation and enforcement procedures is applied to any person who perform a conduct that produce o may produce an anticompetitive effect in the country, even if the conduct has this origin in foreign.

The law doesn't establish a different treatment based on the nationality of the Persons who performed the anticompetitive conduct.

**c) Transparency and Predictability**

- i. Each Participant will ensure that Competition Laws and regulations that apply to Investigations and Enforcement Proceedings in its jurisdiction are publicly available.*
- ii. Each Participant with the authority to adopt Procedural Rules will have in place such rules applicable to Investigations and Enforcement Proceedings in its jurisdiction.*
- iii. Each Participant will ensure that Procedural Rules that apply to Investigations and Enforcement Proceedings in its jurisdiction are publicly available.*
- iv. Each Participant will follow applicable Procedural Rules in conducting Investigations and in participating in Enforcement Proceedings in its jurisdiction.*
- v. Each Participant is encouraged to have publicly available guidance or other statements, clarifying or explaining its Investigations and Enforcement Proceedings, as appropriate.*

The Peruvian competition law establishes the procedural rules that apply to investigations and enforcement proceedings. This law is available in the web page of Indecopi and of Ministry of Justice, access in both pages is public and free.

The CAP has developed guidelines to clarify some procedural rules that apply to investigations and enforcement proceedings. E.g. the leniency program guidelines and the guide to fight bid-rigging in public procurement are available on the web page of Indecopi, both provide more specific scopes to guide anyone on CAP's investigations and enforcement proceedings.

The guide to fight bid-rigging in public procurement (available in Spanish):  
<https://www.indecopi.gob.pe/documents/51771/2961200/Gu%C3%ADa+de+Libre+Competencia+en+Compras+P%C3%BAblicas/>

The guide to fight bid-rigging in public procurement (available in English):

[https://www.indecopi.gob.pe/documents/51771/2961200/Gu%C3%ADa+de+Libre+Competencia+en+Compras+P%C3%BAblicas+\(versi%C3%B3n+en+Ingl%C3%A9s\)/](https://www.indecopi.gob.pe/documents/51771/2961200/Gu%C3%ADa+de+Libre+Competencia+en+Compras+P%C3%BAblicas+(versi%C3%B3n+en+Ingl%C3%A9s)/)

The leniency program guidelines (available in Spanish):

<https://www.indecopi.gob.pe/documents/20182/438150/Gu%C3%ADa+del+Programa+de+Clemencia/bacfcc6a-4637-6581-e9fd-de2271646a5c>

The leniency program guidelines (available in English):  
<https://www.indecopi.gob.pe/documents/51771/1981946/Leniency+Program+Guidelines+%E2%80%93+Peru+Indecopi/f2f8506a-90d0-3657-56b2-b3e6799ec274>

#### **d) Investigative Process**

- i. Participants will inform any Person that is the subject of an Investigation as soon as practical and legally permissible of that Investigation, according to the status and specific needs (e.g., forensic considerations) of the Investigation. This information will include the legal basis for the Investigation and the conduct or action under Investigation.*
- ii. Participants will provide any Person that has been informed that it is the subject of an Investigation, or that has notified a merger or other transaction or conduct, with reasonable opportunities for meaningful and timely engagement on significant and relevant factual, legal, economic, and procedural issues, according to the status and specific needs of the Investigation.*
- iii. Participants will focus investigative requests on information that they deem may be relevant to the competition issues under review as part of the Investigation. Participants will provide reasonable time for Persons to respond to requests during Investigations, considering the needs to conduct informed Investigations and avoid unnecessary delay.*

In addition to the Peruvian competition law, the investigations and procedures of the CAP are ruled by the law of administrative procedures (Law 27444) that includes rules to provide information to subjects of investigations. This law also indicates the CAP should only investigate conducts that constitute infractions of the law.

However, if the Authority decides to initiate a procedure, the subject will be notified with a resolution detailing the charges against it, the legal basis of the investigation and the procedure and information that has been gathered during the investigation. Likewise, the subject will be granted a period of time to present his disclaimers.

#### **e) Timing of Investigations and Enforcement Proceedings**

*Each Participant will endeavor to conclude its Investigations and aspects of Enforcement Proceedings under its control within a reasonable time period, taking into account the nature and complexity of the case.*

The Peruvian competition law establishes what conducts can be investigated, considered its antiquity. In addition, the competition law includes the time periods of each stage of the procedure. Also, the law of administrative procedures states the procedure concludes immediately when the maximum term of the competition law is exceeded.

However, the time period for the law does not consider that each case has a different difficulty and complexity, in some cases it is may be a disadvantage.

## **f) Confidentiality**

- i. Each Participant will have publicly available rules, policies, or guidance regarding the identification and treatment of confidential information.*
- ii. Each Participant will protect from unlawful disclosure all confidential information obtained or used by the Participant during Investigations and Enforcement Proceedings.*
- iii. Each Participant will take into consideration both the interests of the Persons concerned and of the public in fair, effective, and transparent enforcement regarding the disclosure of confidential information during an Enforcement Proceeding.*

The Peruvian CAP determined rules for confidential information treatment, these rules are established in the competition law that regulate the investigation and enforcement procedures, the Directive about confidentiality of the information on the procedure follow for the functional organs of INDECOPI and the guidelines about confidentiality. Those documents are available in the web page of Indecopi and the web page of the Ministry of Justice, access in both pages is public and free.

The persons concerned request the confidentiality of the information follow the requirements that the regulations had established.

It is important to remark that the law includes the obligation that the Authority will not release the confidential information from the persons involved in the investigation even when the procedure concludes.

Finally, this regulation also establishes that the information that is used for the Authority to determine the responsibility for the prohibit conduct cannot qualify as confidential. The main reason is to preserve the right of defense of the persons involved.

Directiva 001-2008-TRI (available in Spanish):

<http://spijlibre.minjus.gob.pe/CLP/contenidos.dll/CLPlegcargen/coleccion000000.htm/tomo00447.htm/a%C3%B1o274293.htm/mes280006.htm/dia280922.htm/sector280990.htm/sumilla280992.htm>

Lineamientos sobre confidencialidad de la Comisión de Libre Competencia (available in Spanish):

<https://www.indecopi.gob.pe/documents/51771/196578/LineamientosConfidencialidadCLC.pdf/a27f7699-1ccf-489a-892f-1f81515a3acf>

## **g) Conflicts of Interest**

*Officials, including decision makers, of the Participants will be objective and impartial and will not have material personal or financial conflicts of interest in the Investigations and Enforcement Proceedings in which they participate or oversee. Each Participant is*

*encouraged to have rules, policies, or guidelines regarding the identification and prevention or handling of such conflicts.*

All the officials of the Technical Secretariat of the Commission for the Defense of Free Competition of INDECOPI follow actively the principle of impartiality. The aforementioned principle can be found in the General Administrative Procedure Act, Law 27444 and sets the following:

**1.5. Principle of impartiality.** - Administrative authorities act without any discrimination between the administered, granting them equal treatment and guardianship against the procedure, ruling in accordance with the legal order and with attention to the general interest. (free translation)

Particularly, when an official is found in a conflict of interest dilemma, he can request an abstention to the procedure in order to guarantee the impartiality of the process. Peruvian legislation regulates specific abstention causals. Those causals are expressly noted in article 99 of the General Administrative Procedure Act, that defines the causals that can be consider conflicts of interests, such as: family ties, previous opinion issued as advisor or authority, personal interests (such as friendship or manifest enmity), previous service or subordination relationship with any of the stakeholders, decorum, etc. It is important to mention that there is a directive that determines the abstention procedure specifically for Indecopi's officials. For example, in the Vehicular Natural Gas case for having participated in the cartel in Lima and Callao, between July 2011 and May 2015, Mr. Jean Paul Calle, Commissionaire, could not participate in this case, due to maintain an impeachment clause.

#### **h) Notice and Opportunity to Defend**

- i. Each Participant will provide Persons subject to an Enforcement Proceeding timely notice of the alleged violations or claims against them, if not otherwise notified by another governmental entity. To allow for the preparation of an adequate defense, parties should be informed of facts and relevant legal and economic reasoning relied upon by the Participant to support such allegations or claims.*
- ii. Each Participant will provide Persons subject to a contested Enforcement Proceeding with reasonable and timely access to the information related to the matter in the Participant's possession that is necessary to prepare an adequate defense, in accordance with the requirements of applicable administrative, civil, or criminal procedures and subject to applicable legal exceptions.*
- iii. Each Participant will provide Persons subject to an Administrative Proceeding with reasonable opportunities to defend, including the opportunity to be heard and to present, respond to, and challenge evidence.*

The Technical Secretariat of the Commission for the Defense of Free Competition respects the principles established in the General Administrative Procedure Act when conducting a proceeding. Two of the main principles are the following: the principle of due process and the principle of permanent access.

In one hand, the principle of due process gives guarantees to the Persons subject in the proceeding, such as the right to be timely notice, the right to be informed, the right to defend

and to respond to the proceeding, etc. This principle can be found in the preliminary title of the General Procedure Act and states the following:

**1.2. Principle of due process.** - The managed ones enjoy the rights and guarantees implicit to due process of the administrative procedure. Such rights and guarantees include, but are not limited to, the rights to be notified; access to the file; rebuttal of the charges charged; to make arguments and to make supplementary arguments; to offer and produce evidence; to request the floor, where appropriate; to obtain a reasoned decision, based on law, issued by the competent authority, and within a reasonable time; and to challenge the decisions that affect them. (free translation)

On the other hand, the principle of permanent access allows the Persons subject to access the information and to participate well-informed in all of the stages of the procedures. This principle states the following:

**1.19. Principle of permanent access.** - Authority administrative assistance is required to provide information to those who are parties to a procedure administrative before them, so that at any time in the said procedure they can know their procedural status and to access and obtain copies of the documents contained in that procedure, without prejudice to the right of access to the information exercised in accordance with the law of matter. (free translation)

In addition, the article 22.1 of the Legislative Decree 1034, the Peruvian Competition Act, establishes the term for the Persons subject to respond, giving them the right to defend themselves and to challenge evidences. The aforementioned article states the following:

22.1. The complainant or complainants may respond charges indicted in the decision to start the thirty (30) working days, making the arguments you deem appropriate and offering the relevant evidence. (free translation)

#### **i) Representation by Counsel and Privilege**

- i. No Participant will deny, without due cause, the request of a Person to be represented by qualified legal counsel of its choosing.*
- ii. Each Participant will provide a Person a reasonable opportunity to present views regarding substantive and procedural issues via counsel in accordance with applicable law. Notwithstanding the foregoing, Persons may be required to provide direct evidence.*
- iii. Each Participant will recognize applicable privileges in accordance with legal norms in its jurisdiction governing legal privileges, including privileges for lawful confidential communications between Persons and their legal counsel relating to the solicitation or rendering of legal advice. Each Participant is encouraged to have rules, policies, or guidelines on the treatment of privileged information.*

There is no specific article on our Competition Act that mentions the right to be represented by a qualified legal counsel of its choosing. However, the Peruvian constitution in it's article 139 states the right of defense in every state of a process.

In addition, the General Administrative Procedure Act contemplates a principle that refers to the right of participation in the proceeding of the administrators and their representatives. This principle states the following:

**1.12. Principle of participation.-** Entities must provide the necessary conditions to all managers to access information administered, without expression of cause, except those affecting personal privacy, those linked to national security or those expressly excluded by law; and to extend the possibilities of participation of the administrators and their representatives, in those public decisions that may affect them, through any system that allows dissemination, the service of access to information and the presentation of opinion. (free translation)

## **j) Decisions in Writing**

- i. Each Participant in charge of issuing decisions or orders will issue in writing its final decisions or orders in which it finds a violation of, or imposes a prohibition, remedy, or sanction under applicable Competition Laws. Such final decisions or orders will set out the findings of fact and conclusions of law on which they are based, as well as describe any remedies or sanctions. Each Participant will ensure that all final decisions are publicly available, subject to confidentiality rules and applicable legal exceptions.*
- ii. Each Participant will ensure that all commitments it accepts to resolve competition concerns are in writing. Subject to confidentiality rules and applicable legal exceptions, each Participant will (i) make public the commitments it accepts, and (1) describe the basis for the competition concerns or (2) reference public materials in which those concerns are expressed, or (ii) provide a summary explanation of the commitments and the reasons for them.*

Decisions in writing are established in the formal requirements of administrative acts. This statement is established in article 4 of the General Administrative Procedure Act, which considers a formal requirement the following:

### **Article 4.-** Form of administrative acts

4.1 Administrative acts shall be expressed written, except that by the nature and circumstances of the legal system has provided for another form, provided that it allows us to be aware of its existence. (free translation)

This formal requirement of the law guarantees the access of Persons subject to the information of the process. The fact that is written in paper makes the information accessible and publicly available.

## **k) Independent Review**

*No Participant will impose on a Person a prohibition, remedy, or sanction in a contested Enforcement Proceeding for violation of applicable Competition Laws unless there is an opportunity for the Person to seek review by an independent, impartial adjudicative body (e.g. court, tribunal, or appellate body).*

All decisions rendered by Indecopi can be appealed to the judiciary through a special administrative procedure, “proceso contencioso administrativo”. If the second instance Tribunal upholds the Commission’s decision and the sanctioned party appeals this decision, the Legal Department of Indecopi is in charge of defending the decision before the Judiciary.

The right to appeal into another instance (Tribunall) is established in article 220 of the General Administrative Procedure Act and states the following:

**Article 220.- Appeal**

The appeal will be brought when the challenge is based on different interpretation of the evidence produced or in the case of matters of pure right and must be addressed to the same authority which issued the act which is challenged in order to elevate the act to the hierarchical superior. (free translation)

In addition, the article 40 of the Competition Act contemplates the right to appeal and establishes the responsible authority for this process:

**Article 40.- appeal**

40.1. The Commission's final ruling is appealable by the accused, by the person who has lodged the complaint of a party and by the third parties with legitimate interest who have taken the proceedings, before the Tribunal, within fifteen (15) working days. The Technical Secretariat may appeal the decision exculpating those investigated, as well as the fine imposed. (free translation)