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Inspection visits (Dawn Raid) Guidelines

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On July 31th, 2020, the National Institute for the Defense of Free Competition and the Protection of Intellectual Property (“INDECOPI”) published the guidelines for inspection visits (the “Guidelines”) approved by the Commission for the Defense of Free Competition (the “Commission”).

The Guidelines provide orientation on the scope and development of said proceedings, describing the powers of the inspectors of the Technical Secretariat of the Commission (the “TS”) and the rights and obligations of the investigated company.

Below is a summary of the Guidelines’ principal aspects:

1. Scope of application

The Guidelines are applicable to any preliminary investigation by the TS against all anti-competitive conducts described in the Unique Ordered Text of the Law for the Repression of Anticompetitive Behavior (*Texto Único Ordenado de la Ley de Represión de Conductas Anticompetitivas*).

2. Parameters for conducting inspections

Every inspection visit must meet the following requirements to be conducted:

i) Suspicious about a possible infraction: Existence of reasonable indications of the possible commission of an anticompetitive offense (low certainty standard due to the investigation stage). The “suspicious” may be from a public or private source and the source need not be identified to the subject of the raid.

ii) Inspection order: Authorization signed by the TS which includes the identification of the investigated company, the premises visited, the start date of the visit, the inspectors in charge, the inspection powers,

the type of information to be collected, the duties and obligations of those administered (including penalties for obstruction), as well as the object and purpose of the inspection (including basic features of the conduct investigated and the relevant market).

3. Development of the inspection visit

3.1 Starting the Dawn Raids:

- The dawn raids can be carried out with or without prior notification to the investigated company, the latter being the general rule.
- A copy of the inspection order will be provided to the company's representative (it is not necessary for said worker to have formal powers to attend inspections). Officials should cause the least possible disruption to business activities.
- The investigated company must collaborate with officials, facilitating access to the premises and property and provide adequate space for the development of their functions.
- The assistance of legal advisers of the investigated company is allowed, granting a prudent term for their arrival (without disturbing the object of the investigation).

3.2 Development of the Dawns Raids:

- Inspectors may access and copy all documentation relevant to the investigation, including the complete content of email accounts, without requiring judicial authorization.¹ They may also take photographs and film at the investigation site.
- If information outside the object of the investigation is accessed (documentation of an intimate or personal nature or protected by legal privileges), it will not be collected after perfunctory review by the TS.
- The inspectors may question and gather statements from any employee of the company (avoiding incriminating content questions). Employees should answer the questions asked and may reserve the right to remain silent and not provide answers to incriminating questions.
- Employees may request that all the information collected be treated as reserved information.
- The TS may extend or vary the scope of the investigation in the event that, due to the dawn raid, they obtain or identify information on infractions other than those provided for in the inspection order; and the TS must inform the economic agents of this matter.²

3.3 Aftermath of the Dawn Raids:

- After the visit, an inspection report will be drawn up detailing the events and results of the procedure, which must be signed

¹ INDECOPI maintains the institutional position that it does not require judicial authorization to access private correspondence contained in physical or electronic files, notwithstanding the express provisions of article 15.3 of the Law for the Repression of Anticompetitive Behavior and article 2 numeral 10 of Peru's Constitution.

² The form and timing of the extension or variation of the object of research is a subject that could be debatable.

by both parties. The inspection report must contain, among others, the allegations, observations, or questions raised by the investigated company, as well as a list of the information provided. A copy of the minutes will be delivered to the investigated company.

- The TS may coordinate with the investigated company on the adoption of immobilization measures for equipment or devices pending review. Such equipment may also be immobilized, with prior authorization from the Commission.
- The investigated company may obtain a copy of the elements obtained in the dawn raids.
- The TS will inform the investigated company on the relevant and irrelevant information acquired in the investigation. In the latter case, said data will be returned or destroyed at the request of the investigated company.

4. Sanctions

The investigated company must allow the dawn raid to be carried out and facilitate the tasks that the inspectors will carry out. Failure to comply with this duty may result in a sanction with a fine of up to 1,000 Tax Units (USD 1,300,000 approximately). This may occur when, among others, the investigated company does the following:

- Denies or unreasonably hinders the inspectors from accessing the company's facilities or certain sources of information.
- Presents false or inaccurate information or alters, hides, or destroys the items or files subject to inspection.
- Refuses to answer questions from the inspectors (if responses do not imply an admission of guilt of the investigated company).
- Fails to comply with immobilization measures ordered by the Commission.

Note: This article is intended to be a general summary of the Guidelines. However, it does not constitute legal advice. You should consult with counsel to determine applicable legal requirements in a specific situation.

About Payet, Rey, Cauvi, Pérez Abogados

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Our full-service practice covers all areas of business law, including mergers & acquisitions, banking and finance, capital markets, project financing, real estate, foreign investments and privatizations, competition & antitrust, natural resources, environment, administrative and regulatory law, intellectual property, tax law, labor law, dispute resolution and economic criminal law.