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Anti-Competitive Agreements Among Companies in Labor Markets

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On June 26th, 2020, the National Institute for the Defense of Free Competition and the Protection of Intellectual Property (*Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual* - “INDECOPI”) published the Informational Guidelines for Anticompetitive Agreements among Companies in Labor Markets (the “Guidelines”).

The Guidelines provide orientation to companies, employers and human resources professionals on problems associated with anticompetitive agreements or practices among companies that could harm the competition in labor markets; specifically regarding the recruitment of employees and fixing remunerations or other benefits.

A summary of the Guideline’s principal aspects is featured below:

I. Competition and Labor Markets

INDECOPI has recognized that the Unique Ordered Text of the Law for the Repression of Anticompetitive Behavior (*Texto Único Ordenado de la Ley de Represión de Conductas Anticompetitivas*), approved by Supreme Decree N° 030-2019-PCM, applies regardless of whether the companies make the same products or compete to provide the same services. Therefore, it is understood that even if the companies involved are in different industries they compete for the recruitment of employees, which could make any type of agreement between them a horizontal prohibited behavior.

Therefore, employers act as the demand of the services provided by employees, who in turn are the supply of the aforementioned workforce. As a consequence, the employment policy and working conditions offered to employees are considered as relevant and sensible competitive factors.

II. Prohibited Behavior: Anticompetitive Agreements among Employers

The Guidelines identify two (2) types of behavior that qualify as horizontal practices: (i) agreements not to compete for each other's employees ("No Poach Agreements") and (ii) agreements to limit wages or other employee's benefits ("Wage-Fixing Agreements"). These practices are considered hard core cartels and therefore are subjected to the *per se* rule, meaning that they are punishable for their sole realization and it will not be necessary to consider their effects on the market.

- "No Poach Agreements": The companies involved agree not to contact, solicit or hire the employees of the subjected competing companies.
- "Wage-Fixing Agreements": The companies involved agree to fix the employee's wage (e.g. through a fixed or maximum price) or other employee's benefits.

III. Sanctions and Consequences

INDECOPI is authorized to apply sanctions to any company that performs this type of behavior with fines that will not exceed twelve percent (12%) of sales or gross income earned by the offender or its economic group without prejudice to other corrective measures that may be applied (e.g. ordering the cease of the infringing activity, nullify the anticompetitive clauses or implementing competition law compliance programs).

Additionally, INDECOPI could apply a fine of up to one hundred (100) UIT to any natural person involved in the direction, administration or representation of these companies, to the extent of their involvement and responsibility on the anticompetitive agreement (e.g. a human resources manager that initiated or managed the agreement between competitors to not hire the employees of the involved companies)¹.

Finally, INDECOPI's declaration of the infringement will not preclude the civil actions claims for damages in favor of those people who have been affected by such agreement.

IV. Clemency and Rewards Programs

INDECOPI has reiterated that natural persons or companies that have participated in a cartel are able to apply for the Clemency Program and the leniency or reduction of a possible sanction against them. They must provide relevant information to the investigation that verifies the aforementioned illicit conduct and/or identifies the other participants of the agreement.

¹ 1 UIT is equal to S/. 4,300.00 (USD 1,300.00 approximately).

Likewise, natural persons that have not participated in a cartel can apply for the Rewards Program and receive a financial reward of up to S/ 400,000.00 (USD 120,000.00 approximately) if they provide decisive information to detect and sanction a cartel.

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For any clarification or additional information regarding the content of this memorandum, please contact Mr. Carlos Patrón (cap@prcp.com.pe), Mr. David Kuroiwa (dkh@prcp.com.pe), or Mr. Giancarlo Baella (gbp@prcp.com.pe). To obtain a copy of the Guide (in Spanish), please contact Mr. Paul Manrique at pmb@prcp.com.pe.

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

Founded in 1996, Payet, Rey, Cauvi, Pérez Abogados is one of the preeminent law firms in Peru, with extensive experience in providing high value-added services for all types of business activities.

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.