Informational Guidelines about

ANTICOMPETITIVE AGREEMENTS AMONG COMPANIES IN LABOR MARKETS

Indecopi

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INFORMATIONAL GUIDELINES ABOUT ANTICOMPETITIVE AGREEMENTS AMONG COMPANIES IN LABOR MARKETS

I. Executive Summary

The purpose of these Guidelines is to orientate companies, employers and human resources professionals on the main scope and enforcement of competition regulations in labor markets; these regulations are contained mainly in the Act for the Repression of Anticompetitive Behavior ("the Competition Act").

In the same line with other guidelines issued by international authorities, this document focuses on competition in labor markets. Just as companies compete to offer goods or services to consumers, they also compete in the labor market to hire or retain employees (particularly those with a high degree of specialization or experience), consequently in both scenarios they must observe the rules and prohibitions contained in the Competition Act.

On the basis of this premise, these Guidelines will alert the problems associated with the implementation of agreements or practices among companies that restrict competition in labor markets; specifically, regarding the recruitment of employees and the fixing of their remuneration or other employment benefits. In addition, and in order to facilitate the understanding of the characteristics of these agreements, a number of cases in which foreign competition authorities have investigated and sanctioned these infringements will be mentioned.

Finally, these Guidelines will list the sanctions that can be imposed to the companies or persons that incur in such anticompetitive behaviors, as well as the existent mechanisms to report such infringements to the National Institute for the Defense of the Competition and the Protection of the Intellectual Property ("Indecopi" for its initials in Spanish, the Peruvian Competition Agency).

It should be noted that these Guidelines do not have the object or effect of limiting or restricting the power of companies to individually determine and implement the labor policies they deem relevant to their needs, within the limits established by labor law. Far from this, this document aims to inform of the risks of non-compliance with the Competition Act that may occur when agreeing anticompetitive conditions with other employers or exchanging sensitive information associated with labor policies. These Guidelines also do not regulate or limit the rights of the employees under the respective legislation.

This document is applicable both under normal conditions and in extraordinary situations in the markets, regardless of their causes (e.g. health emergencies or natural disasters). Indeed, the health emergency caused by the expansion of Covid-19 could encourage the unlawful adoption of business policies that harm or impair competition in the labor market[1].

In this sense, these Guidelines only develop an analysis from the perspective of the competition regulation, without in any way disregarding the special particularities of employment relations or the employee protection regulations contained in labor law. It also seeks to make employers and their respective human resources areas aware of the benefits generated by observing the competition regulating when planning and implementing their labor policies.

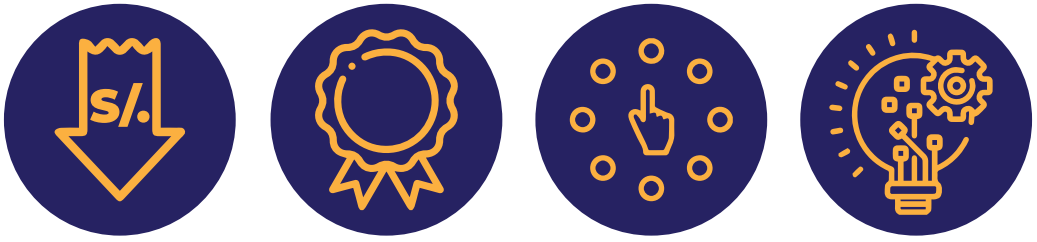
1 Situation recognized by the Antitrust Division of the Department of Justice and the United States Federal Trade Commission, warning of the possible implementation of anticompetitive behaviors in labor markets, in connection with the spread of the pandemic. In this regard, this pronouncement may be reviewed at this link: https://www.ftc.gov/system/files/documents/advocacy_documents/joint-statement-bureau-competition-federal-trade-commission-antitrust-division-department-justice/statement_on_coronavirus_and_labor_competition_04132020_final.pdf.

Through this initiative, Indecopi reaffirms its commitment to strengthen compliance with the Competition Act, ensure the proper functioning of the market and foster a culture of respect for businesses, consumers and the society at large.

II. Importance of competition

As it is known, competition consists of the struggle between rival companies to capture consumer preference and thus have greater market share. Competition promotes the emergence of multiple benefits to consumers, such as the access to better quality goods (and in greater quantity), lowering prices, encouragement of technological innovation and new and varied products, among others.

What are the benefits of Competition?



In this sense, the protection of competition is based on the different advantages generated in society as a result of the efficient functioning of the market. That is why competition rules aim to prohibit and punish anticompetitive behavior that restricts or distort this competitive process.

In order to achieve this objective, the Competition Act is mandatory for all companies, their executives, trade associations and professional associations, among others:

Who does the Competition Act applies to?

For this purpose, Indecopi – through the Commission and the Technical Secretariat of the Commission for the Defense of Free Competition ("the Commission" and "the Technical Secretariat") – is empowered to monitor all sectors of the economy[2], investigating and sanctioning anticompetitive behavior in order to promote economic efficiency for the well-being of consumers.

2 Except for the public telecommunications service market, in which case the competent authority is the Supervisory Authority for Private Investment in Telecommunications – Osiptel.

III. Competition and labor markets

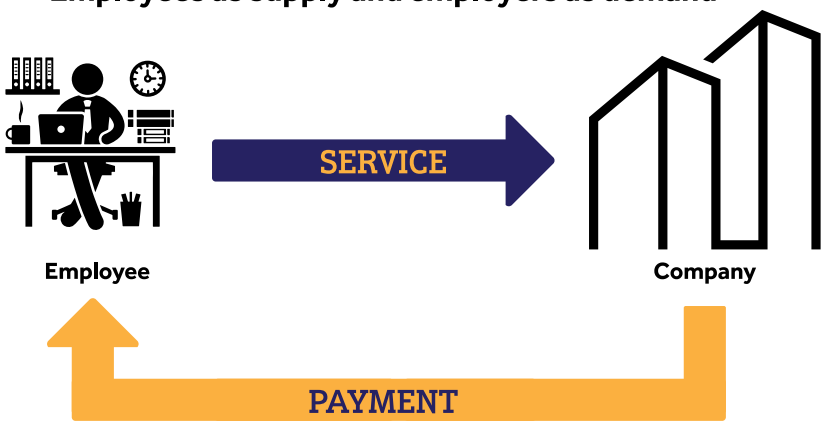
Since most anticompetitive behavior investigations are concentrated in markets of goods or services for intermediate or final consumers, it might be thought that the application of competition regulation would be restricted only to these markets. Consider an anticompetitive agreement between competing companies in the food sector to raise the prices of their products (e.g. by setting an identical retail price).

However, the Competition Act is enforceable in all markets (whether or not we are dealing with final consumers), taking effect in all sectors of the economy without exception, including the labor market.

Indeed, as Indecopi has acknowledged[3], despite having a number of special characteristics, the labor market is under the scope of the Competition Act. From the perspective of the economy, the role that employees play in the labor market can be identified, carrying out an activity consisting in the offering of a service (labor force or manpower) in favor of companies (employers), in exchange for an economic consideration or "price" (remuneration and labor benefits).

In this regard, employers act as ***demand*** of the service offered by the employees, who in turn exercise the role of ***supply*** of that workforce.

Employees as supply and employers as demand



In that context, and without calling into question the particularities of labor law or special laws in this field, it can be mentioned that competition regulations apply both when companies compete to offer goods and services to consumers and when, as employers, they compete to recruit and maintain their employees[4]. It is therefore essential to ensure that competition regulations are also enforced in the labor market, thereby rigorously combating anticompetitive behaviors that may impair its proper functioning.

It should be noted that until this date, there is a clear international trend that highlights the importance of timely implementation of competition regulations in labor markets. Thus, in 2016, the Antitrust Division of the Department of Justice and Federal Trade Commission of the United States jointly issued guidelines describing anticompetitive behaviors that may materialize in labor sectors and the measures that must be taken to avoid such infringements[5].

3 In this regard, review Resolution No. 0479-2014/SDC-INDECOPI, which sanctioned a port union and several of its members for preventing the recruitment of employees outside that group. Furthermore, regarding the application of competition regulations in labor markets, Indecopi has also had the opportunity to sanction a professional college which engaged in an anticompetitive behavior consisting in setting the minimum wage of its members – both under dependency and over those providing services independently – thereby limiting its freedom of choice. Cfr. Resolution No. 0229-97-TDC/INDECOPI.

4 On this point, review the report of the United States Department of Justice (Antitrust Division) called ***No-Poach Approach, Division update spring 2019***, available at the following link: https://www.justice.gov/atr/division-operations/division-update-spring-2019/no-poach-approach

5 In this regard, review the ***Antitrust Guidance for Human Resource Professionals***, which can be accessed through the following link: https://www.justice.gov/atr/file/903511/download.

Through the aforementioned document, these authorities conclude that "firms that compete to hire or retain employees are competitors in the employment marketplace, regardless of whether the firms make the same products or compete to provide the same services"[6], emphasizing the need to take several actions to investigate and punish – even criminally – agreements prohibiting the recruitment of employees or limiting their conditions of remuneration (conduct to be addressed in the next chapter)[7].

It can be seen that competition in labor markets brings multiple benefits to employees and allows them to access greater (and better) job opportunities, either through the increasing of their wage or by providing other benefits. This is why companies seek to obtain the services of the most suitable employees in order to strengthen their market position, for which they will try to contact them and formulate proposals with advantageous working conditions in order to capture the best human capital and receive their services.

This efficient competition can even lead for employees that have favorable working conditions towards being motivated to work in the best possible way, thus also benefiting the company's performance in the market and thus favoring the consumers themselves, who could access to better services.

Benefits of competitive labor markets

On the contrary, implementing anticompetitive behaviors in labor markets involves agreeing not to compete for hiring or retaining such employees, directly and substantially distorting the demand for their services, and reducing the recruitment offers and conditions that could exist with effective competition. In addition, limiting the recruitment of employees within a certain sector may also impede the entry of new companies, who would be unable to recruit the staff required to carry out their duties properly.

It follows that the hiring policies and working conditions applicable to the employees qualify as relevant and sensitive competitive factors. In this sense, while companies are empowered to individually develop and implement such policies (in accordance with labor regulations and standards), agreements between employers that involve not competing in the labor market – whether agreeing not to hire workers or setting their wage conditions or other labor benefits – are prohibited by the Competition Act and are eligible for sanctions, as it will be developed below.

6 On this point, review the ***Antitrust Guidance for Human Resource Professionals***, p. 3.

7 A similar initiative can be found in Japan, whose competition authority reaffirms that the labor market must be evaluated like any other market, with competition regulations applied. On this point, review the ***Report of the Study Group on Human Resource and Competition Policy*** document, available at the following link: https://www.jftc.go.jp/en/pressreleases/yearly-2018/February/180215.html.

IV. Prohibited Behavior: Anticompetitive Agreements among Employers

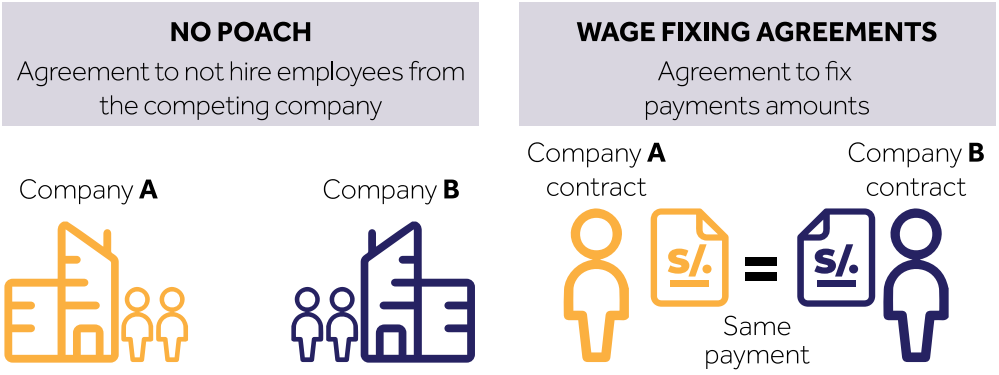
Among other infringements, the Competition Act prohibits collusive practices, which consist of agreements or coordination that limit competition and may occur vertically or horizontally: while vertical collusions are set up between companies operating at different market levels (e.g. a producer and a distributor), horizontal behavior concerns the coordination of competing companies.

Given the gravity and the notoriety of the restrictions they cause on competition, certain horizontal collusive practices referred to as "hardcore cartels" are punishable *per se* without having to verify the actual effects they might have on the market (i.e. subject to an "absolute" ban)[8].

It should be noted that Indecopi is empowered to sanction all types of anticompetitive behaviors regardless of the form they take, which may consist of formal written agreements, verbal coordination or anticompetitive negotiations through the use of virtual or digital mechanisms (among others).

With regard to the labor market, international experience has identified two main types of collusive practices that can be materialized between competing companies:

Summary of "No Poach" and "Wage Fixing" Agreements



a) Agreements to refuse to solicit or hire the other company's employees ("*No Poach Agreements*")

These are anticompetitive agreements where a company promises to refuse to make contact, solicit or hire the employees of the other companies part of the agreement. This behavior underlies the reciprocal idea of "not to steal or take away" employees among themselves, which constitutes a restriction of the competition that impacts the conditions of recruiting and retaining employees.

As an example, imagine the case of a group of retail department store chains that decide to enter aggressively into the e-commerce, and as a result, they hire more specialized employees in that area: online platform programmers, graphic designers, community managers, publicists, sales executives, etc. In such scenario, they agree not to "steal" their specialized personnel among themselves, in order to retain them in their respective companies.

8 Under the Competition Act, conducts implemented by competitors consisting of price-fixing (or other commercial conditions), the limitation of production or sales, the allocation of customers, suppliers or geographical areas and bid rigging in public procurement, qualify as hardcore cartels. For such purposes, such conducts should not be complementary or ancillary to other lawful agreements.

At an international level, we can mention an investigation that is currently being carried out in Mexico regarding the possible existence of an anticompetitive behavior in the transfer market of professional soccer players: according to the Federal Commission of Economic Competition, different soccer clubs allegedly agreed to prohibit players that are in the last season of their contract from negotiating with another club, unless the team of origin declares its consent or receives compensation[9].

In a similar fashion, the competition authority of Portugal recently initiated an investigation against the Professional Soccer League of that country due to the existence of an agreement under which their first and second division clubs could not hire soccer players that did not have a club before the end of the soccer season of 2019-2020[10]. The competition authority even ordered to suspend provisionally these agreements for the entire investigation procedure, remarking the serious and harmful competition effects of that kind of agreement.

Likewise, in Spain eight road freight transport companies were sanctioned for incurring in anticompetitive practices that, among others, prohibited hiring the other companies' employees without having the previous consent from these companies[11]. In a similar way, in the Netherlands different hospitals were sanctioned for agreeing that, in the case one of their anesthesiologists decided to stop working for them, this latter would have to wait at least one year to work for other hospital[12].

In addition, in the US several investigations were initiated against different companies that provide digital and technological services, which agreed to refuse to solicit and hire employees among themselves (specifically, specialized software engineers and web designers)[13].

As it can be seen, these infringements in the labor markets eliminate the competition to recruit or retain employees, depriving workers the possibility of obtaining or negotiating better positions or working conditions. At the same time, although as a general rule these agreements usually affect the recruitment of personnel that work in specialized sectors, nothing prevents the possibility of sanctioning the restrictions that may happen among companies that do not produce the same goods or services, since in the labor market they could be competitors of specially qualified executive or administrative personnel.

Thus, apart from the fact that certain companies are in different areas and do not compete on the goods or serviced they offer in the market, it can be seen that these companies do compete in the recruitment and capturing of workers that carry out identical or similar functions.

Therefore, behaviors as the described above qualify as agreements among competitors to limit the supply and to allocate suppliers (in this case, employees), which constitutes a collusive horizontal practice prohibited by the Competition Act.

b) Agreements to fix wages or working conditions ("*Wage-Fixing Agreements*")

Through these agreements, two or more companies jointly agree to fix or eliminate the wage or other working conditions of their employees, whether imposing a specific wage amount or refusing to exceed certain ranges. Similarly to the previous case, this competition restriction harms workers on a variable as relevant as the value of their wages or other elements of the employment relationship, preventing them from accessing to labor benefits they could have if there were competition conditions.

9 This procedure is currently in progress. For more information, see the following link: https://www.cofece.mx/cofece-investiga-posibles-practicas-monopolicas-absolutas-en-el-mercado-de-fichaje-de-jugadores-de-futbol/

10 In this regard, see the following press release published by the competition authority of Portugal: http://www.concorrencia.pt/vEN/News_Events/Comunicados/Pages/PressRelease_202008.aspx

11 For more information, review the Resolution of July 31st of 2010 of the then National Competition Commission, under the File S/0120/08.

12 In this regard, see the resolution at the following link of the competition authority of Netherlands: https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHSHE:2010:BM3366

13 In this regard, see https://www.justice.gov/opa/pr/justice-department-requires-six-high-tech-companies-stop-entering-anticompetitive-employee and https://www.justice.gov/atr/case-document/final-judgment-0.

An example of such infringements can be found in the previously mentioned Dutch case, where the hospitals also agreed to fix the overtime wage for certain employees. Other example is the US case where judicial actions were initiated against the Arizona Hospital, whose members established a unified program of rates for the payment of their nurses[14].

As previously indicated, these behaviors are not limited to agreements on wages; they may include other benefits or labor concepts. Consider, for example, the case of two competing companies that agree to terminate the gym membership that they offer to their employees: since this membership is part of the labor benefits granted to the employees, an agreement to restrict this membership would be anticompetitive.

Given that under normal conditions of competition it would be the employer´s responsibility to independently determine wages and working conditions, agreements such as those described correspond to anticompetitive agreements to fix prices or commercial conditions (in this case, wages or other working conditions), for which they will receive a similar treatment, qualifying as a horizontal collusive practice.

It is important to specify that, considering their classification as hardcore cartels, both the agreements to refuse to hire employees among themselves (analyzed in the preceding paragraph) and the agreements to fix wages are prohibited regardless of their purpose or objective (for example, the intention to reduce costs), being sanctionable for its mere implementation because of their harmful impact on competition (in these cases, in the labor markets).

Imagine a case of an association of shopping center management companies that, due to the crisis caused by the unfortunate expansion of Covid-19 in the country, promotes among its members to carry out agreements in order to symmetrically reduce the wages of certain workers in order to decrease their costs, a commitment that two of these companies subsequently execute.

Based on the aforementioned, this hypothetical agreement would qualify as an anticompetitive labor conduct consisting in wage fixing, since the alleged intention to reduce costs would not be a valid argument to justify such an agreement. As a result, both the companies involved in the agreement and the association itself would be responsible for committing this collusive practice.

Consequently, and according to the international experience, the conclusion is that agreements among competing companies in the labor market with the purpose to refuse to hire employees from each other or fix wages or other working conditions eliminate or restrict competition in the same way as those anticompetitive agreements to fix of prices or allocate suppliers. In this sense, these conducts will legally qualify as horizontal collusive practices carried out in the labor markets, subject to an absolute prohibition and to investigation and sanction according to the section 11 of the Competition Act.

14 In this regard, see: https://www.justice.gov/atr/case/us-and-state-arizona-v-arizona-hospital-and-healthcare-association-and-azhha-service-corp

V. Sanctions and consequences

An infringement of the Competition Act may cause serious consequences for both companies and individuals who directly or indirectly participate in such violations. In this regard, this Act entitles Indecopi to impose fines according to the following parameters:

Scale of fines

	Fine (depending on the severity of the infringement)	Maximum
Companies	Minor infringement up to 500 UIT	8% of the gross income of the offender's economic group
	Severe infringement up to 1000 UIT	10% of the gross income of the offender's economic group
	Very severe infringement up to 12% of the profits or gross income of the offender's economic group	
Executives	Up to 100 UIT	
Trade and professionals associations	Up to 1000 UIT	

UIT: Tax Units. For 2020, the value of a Tax Unit is equivalent to 4 300 Peruvian soles.

As it can be seen, depending on the severity of the prohibited behavior, the fine to be imposed may exceed 1000 UIT, with a cap to be set based on the gross income received by the offender company in the previous year (or its economic group, if that is the case). Additionally, individuals who exercise the direction, management or representation of those companies may be sanctioned with a fine up to 100 UIT, to the extent that their responsibility for such anticompetitive behavior is determined. Consider, for example, the case of a Human Resources Manager who initiated or managed contacts with competing companies to jointly agree to refuse hiring employees from each other.

The Competition Act also allows the imposition of fines up to 1000 UIT to the trade associations, professional associations or unions that have played the role of facilitators or mediators of the implementation of anticompetitive behaviors (coordination, decisions or recommendations). These sanctions are imposed regardless of the fines that could be imposed to their members, so it is extremely important that both the associations and their members respect the competition rules[15].

In addition to the fine, Indecopi can issue injunctions, such as the cessation of the infringing activity, to leave without effect the anticompetitive clauses or the implementation of training and compliance programs regarding competition rules, among others. Finally, the declaration of the infringement by Indecopi may lead to file civil actions for damages in favor of those people who have been affected by such infringement.

15 For more information, see the Guidelines on Trade Associations and Competition issued by the Commission, which are available at the following link: http://www.indecopi.gob.pe/documents/1902049/3761587/Guidelines+on+Trade+Associations+and+Competition.pdf/682f9c46-6950-7301-cc62-20d2a8600dad

VI. Contact Indecopi

In addition to the investigation duties and market monitoring carried out by Indecopi, it is important to remember that citizens have the following reporting channels in case they identify anticompetitive behaviors:

Complaints, Leniency Program and Rewards Programs

Individuals or companies that have participated in a cartel may apply to the Leniency Program in order to seek an exoneration from the expected sanction to be imposed against them, for which they must provide relevant information that allows to prove such anticompetitive conduct and to identify other participants in the infringement.

It is necessary to remember that only those who submit their leniency application prior to the start of an investigation may benefit from the total exoneration from the sanction; however, the Commission may reduce the fine applicable to those applications submitted later, as long as these applicants offer evidence with significant added value for the investigation. At the same time, if several applicants appear, only the first one will be granted a full exoneration, establishing percentages of reduction of the fine for the following applicants, according to the parameters regulated by the Competition Act and the Leniency Program Guidelines[16].

Furthermore, currently the Technical Secretariat has been offering financial rewards up to USD 120 000.00 to individuals who provide decisive information to detect and sanction a cartel (as long as they have not participated in the reported infringement, contrary to the Leniency Program), and comply with the conditions established by the Rewards Program Guidelines [17]. In order to verify the compliance with these requirements, collaborators may make prior and anonymous consultations with officials of the Technical Secretariat.

Finally, it is worth adding that Indecopi will adopt all the necessary measures to maintain the confidentiality to protect the identity of the whistleblower that applies to the Leniency Program or the Rewards Program.

For more information, consider reaching out to the Technical Secretariat through the following channels:

Contact the Technical Secretariat
Email : st-clc@indecopi.com.pe
Telephone: (51-1) 2247800 – Extension 3101

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16 Available at the following link:
https://www.indecopi.gob.pe/documents/1902049/3761587/Leniency+Program+Guidelines+%E2%80%93+Peru+Indecopi.pdf/e76d0139-ec6f-88c7-062f-0923677f1874

17 Available at the following link:
https://www.indecopi.gob.pe/documents/51771/4402954/Peruvian+Antitrust+Rewards+Guidelines/

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