
LENIENCY PROGRAM GUIDELINES

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- EXPLANATORY NOTES -

I. The importance of introducing a Leniency Program

According to Section 1 of the Peruvian Competition Act¹, the main objective of the Commission for the Defense of Free Competition (hereinafter, the Commission) and its Technical Secretariat is to investigate, prosecute and sanction anticompetitive behavior, promoting economic efficiency and consumer's welfare.

In recent years, the prosecution of agreements among competitors deemed per se illegal (cartels, subject to an absolute prohibition) has been a priority for the Commission, due to the fact that cartels are the most damaging infringement among anticompetitive practices².

In this sense, with the amendments introduced by Legislative Decree 1205 to the Peruvian Competition Act, several provisions were reinforced, aiming the strengthening the power to detect and punish cartels. In comparison to the old provisions, the amendments established clearer rules regarding the processing of applications for immunity or reduction of sanctions with the main goal of having a regulatory framework strong enough to implement an efficient leniency program, complementing and strengthening the efforts of Indecopi in its fight against cartels.

In this regard, a lack of clarity about the real extension of these benefits, the stages of the leniency or the level of cooperation that must be accomplished will restrict the incentives for potential applicants to inquire about the availability of a marker or to file an application for benefits. Even though, the existence of clearer rules could be insufficient for potential applicants if it fails to generate an appreciable degree of predictability regarding the benefits resulting from their maximum efforts to fulfill the requirements of the Leniency Program.

According to Section 26.7 of the Peruvian Competition Act³, the following Guidelines establish terms, rules, conditions and restrictions, so the Leniency Program can achieve predictable, transparent and effective rules. The objective of these Guidelines is to maximize the incentives for the economic agents involved in cartels to apply for benefits under the Leniency Program, strengthening the fight against cartels. With the same objective, essential aspects of the Leniency Program are explained hereunder.

1 Peruvian Competition Act

Section 1 – Purpose of the present law. -

This Act prohibits and penalizes the anticompetitive behavior aiming at promoting economic efficiency in the markets for the welfare of consumers.

- 2** *The Organisation for Economic Co-operation and Development underlined «hard core cartels are the most egregious violations of competition law and that they injure consumers in many countries by raising prices and restricting supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others. Available at: <http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=193>*

In the same vein, the International Competition Network has mentioned «Secret cartel agreements are a direct assault on the principles of competition and are universally recognized as the most harmful of all types of anticompetitive conduct. Any debate as to whether cartel conduct should be prohibited has been resolved, as the prohibition against cartels is now an almost universal component of competition laws». ICN Working Group on Cartels, Defining Hard Core Cartel Conduct. Effective Institutions. Effective Penalties, Building Blocks for Effective Anti-Cartel Regimes vol. 1, ICN 4th Annual Conference, Bonn, 2005, p. 5. Available at: <http://www.internationalcompetitionnetwork.org/uploads/library/doc346.pdf>

3 Peruvian Competition Act

Section 26.- Immunity from sanctions.-

26.7. The Commission may issue guidelines setting terms, rules and particular conditions or restrictions for the best application of this Section.

It should be noted that, in developing of the Guidelines, the Technical Secretariat has analyzed the best international practices related to leniency programs. Likewise, many recommendations by the World Bank within the Advisory Services Agreement signed in October 2014 between World Bank and INDECOPI have been considered.

II. The Leniency Program is exclusively aimed to cartels

The international experience has shown that effective Competition Policies prioritize the detection, prosecution and repression of anticompetitive behavior that have the most serious impact in consumer welfare: the hard-core cartels (here simply referred to as «cartels»).

Accordingly, in 1998, the Organisation for Economic Co-operation and Development (OECD) recommended its members to develop effective action against cartels, due to the undisputed negative economic impact of such offenses, in contrast to other types of anticompetitive behavior⁴. The implementation reports of this recommendation show the progressive importance that Leniency Programs were achieving as one of the main tools used against cartels⁵.

Considering that a main goal of the Peruvian Competition Act is to fight and deter the formation and development of cartels, the present Leniency Guidelines develop the rules and benefits available only for applications concerning cartels i.e. horizontal agreements⁶ that according to their nature are subject to an absolute «per se» prohibition⁷.

The connection between the Leniency Program and the success in the fight against cartels, besides having strong support in economic theory that analyzes the incentives for betrayal among the co-conspirators in such infringements⁸, is consistent with the best international practices. In fact, as early as 2000, the Department of Justice of United States (DOJ) explained how the Leniency Program was a key tool for detecting and punishing cartels:

⁴ Indeed, policies introduced to inhibit anticompetitive practices benefit society by counteracting the damaging effects of cartels on prices and production levels, considering that cartels are generally recognized among anticompetitive behavior as the most harmful to society. OECD, Recommendation of the Council concerning Effective Action against Hard Core Cartels, C(98)35/FINAL (1998).

Policies to inhibit anticompetitive behavior also avoid long-term harmful effects, as explained by Gunnar NIELS et al., i.e. the losses in technological innovation and the reduced competitiveness in sectors related to the market directly affected, including long-term effects. Economics for Competition Lawyers (2011).

⁵ For example: OECD, Report on Hard Core Cartels, (2000); Fighting Hard Core Cartels: Harm, Effective Sanctions and Leniency Programmes (2002) y Hard Core Cartels: Third Report on the Implementation of the 1998 Recommendation (2005).

⁶ The Office of Fair Trading, now Competition and Markets Authority - CMA, stated, «Leniency in relation to vertical arrangements is limited to price fixing (for example, resale price maintenance cases). The OFT's leniency policy does not cover other stand-alone vertical restrictions of competition as these tend to be (at least to an extent) visible on the market and therefore over time self detecting». Available at:
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284417/OFT1495.pdf

⁷ Peruvian Competition Act

Section 8. - Absolute Prohibition. -

In cases of absolute prohibition, to verify the existence of an administrative offense, it is sufficient for the competition authority to prove the existence of the conduct.

Section 11. - Horizontal collusive practices. -

11.2. Inter-brand horizontal agreements are subject to an absolute prohibition unless they are complementary or accessories to other lawful agreements, when their object is:

a) To fix prices or other terms of trade or service;
b) To limit the production or sales, in particular by means of quotas (shares);
c) To allocate customers, suppliers or geographical areas; or,
d) To rig bids or abstentions in tenders, contests or other forms of recruitment or public procurement under the relevant legislation, as well as at public and private auctions.

⁸ See, Christopher R. LESLIE, Antitrust Amnesty, Game Theory, and Cartel Stability, Journal of Corporation Law, Vol. 31, 2006, 453ff
Available at: <http://ssrn.com/abstract=924376>

The Amnesty Program has been largely responsible for uncovering the majority of the large international cartels that we have recently prosecuted. Its success has already led a number of countries -- such as Canada, the United Kingdom, Germany, and France -- as well as the European Union to develop their own programs with still other countries considering whether to follow. From our perspective, the Amnesty Program is unquestionably the most important investigative tool available for detecting and cracking cartel activity. The success of the Amnesty Program also provides an appropriate lesson on deterrence, the second topic on the agenda. That is because the bedrock principles that apply to effectively preventing cartels are also at the core of implementing a successful amnesty program for detecting cartel activity once it does occur⁹.

In the same way, the European Union has adopted rules for its Leniency Program that are applicable exclusively for cartel investigation. Indeed, in issuing the Commission Notice on immunity from fines and reduction of fines in cartel cases¹⁰, the Competition Commission has established:

This notice sets out the framework for rewarding cooperation in the Commission investigation by undertakings, which are or have been party to secret cartels affecting the Community. Cartels are agreements and/or concerted practices between two or more competitors aimed at coordinating their competitive behavior on the market and/or influencing the relevant parameters of competition through practices such as the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets including bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other competitors.

Similarly, the European Competition Network (ECN) restricts the scope of its model leniency programme to «secret cartels» involving pricing fixing, establishment of sales quotas, production or market sharing, including bid rigging¹¹.

Aside from cases of minimum resale prices maintenance (vertical restraints that subject to a prohibition similar to price fixing cartels), the United Kingdom excludes of its leniency program the infringements different from cartels. Thus, according to its leniency guidelines, the Office of Fair Trading (now Competition and Markets Authority - CMA) specified that the leniency program only applies for cartels under the Article 101 of the Treaty on the Functioning of the European Union involving price fixing, restricting supply or market sharing¹².

Like other jurisdictions in Latin America, Mexico has recently developed its Leniency Program exclusively for detection and punishment of cartels, considered as absolute monopolistic practices.

⁹ Scott HAMMOND (DOJ – Antitrust Division), Fighting Cartels - Why And How?, Lessons Common To Detecting And Deterring Cartel Activity, The 3rd Nordic Competition Policy Conference, September 12, 2000.

¹⁰ Commission Notice on Immunity from fines and reduction of fines in cartel cases 2006/C298/11, issued in December 8 2006.

¹¹ ECN Model Leniency Program
«Scope of the programme. The ECN Model Programme concerns secret cartels, in particular agreements and/or concerted practices between two or more competitors aimed at restricting competition through, for example, the fixing of purchase or selling prices, the allocation of production or sales quotas or the sharing of markets including bid-rigging.». The model is available at: http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf

¹² «Cartel activity. 2.1. Leniency is available to undertakings and individuals who have participated in cartel activity. 2.2. Cartel activity defined for the purposes of the OFT's leniency policy for undertakings as agreements and/or concerted practices which infringe Article 101 of the TFEU and/or the Chapter I prohibition and involve price-fixing (including resale price maintenance), bid-rigging (collusive tendering), the establishment of output restrictions or quotas and/or market sharing or market-dividing». OFT Guidelines, Leniency and no-action applications in cartel cases (2013). Guidelines are available at: <https://www.gov.uk/government/publications/leniency-and-no-action-applications-in-cartel-cases>

In this regard, consistently with the Economic Competition Federal Act¹³, the Immunity Program and Sanctions Reduction Guidelines (2015) established that:

The Immunity Program and Reduction of Sanctions of the COFECE allows an economic agent to receive a reduction of sanctions that would be imposed in the case of being a member of an absolute monopolistic practice¹⁴.

As shown, leniency programs around the world have historically focused especially on detection and prosecution of cartels, agreements that are almost universally considered illegal. The illegal nature of this kind of behavior is generally unquestioned and is not subject to further analysis of eventual efficiencies, unlike other offenses that are subject to a relative prohibition (rule of reason).

In the case of agreements among competitors subject to a relative prohibition, it is not possible for the competition authority nor for economic agents to determine in a prima facie manner the illegality of the conduct carried out without a comprehensive evaluation of its potential or real impact. In fact, the uncertainty for the authority regarding the illegality of an anticompetitive practice subject to a relative prohibition prevents it from providing enough certainty about the potential benefits available for eventual applicant under the Leniency Program.

Therefore, eventual requests for benefits with respect of anticompetitive conducts subject to a relative prohibition imply an analysis of incentives and applicable rules beyond the scope of these Guidelines. Considering the need to implement effective tools to maximize the fight against cartels, and consistent with to Section 26.7 of the Peruvian Competition Act, the rules in these Guidelines will exclusively consider leniency applications related to agreements among competitors that are subject to an absolute prohibition.

III. Increasing incentives in the «race for the first place»

The goal of the Leniency Program is to create incentives for cartel participants to spontaneously reveal the cartel existence to the authority, helping with its detection and contributing with its effective prosecution.

As international experience shows, the success of Leniency Programs depends on their capability to generate attractive benefits to a potential first applicant. This allows the authority to increase the probability of detecting cartels and get important evidence before they are detected and investigated. Furthermore, the higher the benefits to the first beneficiary -in contrast to the benefits to potential subsequent applicants-, the more intense will be the «race» among the members of the cartel to obtain the benefits and so the destabilizing effect over cartels will be increased¹⁵.

¹³ «Section 53.-Absolute Monopolistic Practices. Absolute monopolistic practices comprises contracts, agreements and arrangements between competitors (...).». Available at: https://www.cofece.mx/cofece/images/cofece/slider/aRT_CARRUSEL/DOF_Ley_Federal_de_Competencia_Economica.pdf

¹⁴ Free translation of the following text:
«El Programa de Inmunidad y Reducción de Sanciones de la COFECE permite que un Agente económico reciba una reducción de las sanciones que recibiría en caso de ser participe de una Práctica monopólica absoluta».

¹⁵ As HAMMOND points out:
«The "winner-take-all" race dynamic leads to tension and mistrust among the cartel members. (...) Each member of that cartel knows that any of its co-conspirators can be the first to come forward in exchange for total amnesty and seal the fate of the rest. Imagine the vulnerability of being in that position and asking yourself, "Can I really trust my competitors?"». Scott HAMMOND, Fighting Cartels - Why And How?, Lessons Common To Detecting And Deterring Cartel Activity, The 3rd Nordic Competition Policy Conference, September 12, 2000.

Complementarily see: HARRINGTON, Joseph. Optimal Corporate Leniency Programs (2005) p.3.

In this sense, the higher benefits will be given to an applicant who spontaneously goes to the competition authority to reveal their participation in a cartel which the authority had no knowledge or suspicion, allowing its timely detection and contributing to its effective disruption.

Once the competition authority has already get notice or is investigating a cartel, the applicable benefits are partially reduced because the cooperation of a potential applicant could have not allowed the initial detection of the cartel. Although, the possible benefits for a potential collaborator remains sufficiently attractive to encourage its participation in the leniency program. The granting of benefits even in such a scenario is justified by the fact that the collaboration could be useful to gather relevant elements of judgement to prove the infringement, for example:

When a dawn raid does not provide enough evidence about the cartel (e.g. participants, duration, geographical scope, products involved and details of coordination among its members).

When the evidence in possession of the authority dates back to former periods (including under statute of limitation periods) or when it is not possible to «decrypt» the wording of communications.

In this regard, in order to encourage applications for benefits before the start of an investigation by the authority and in exercise of the power established in the Section 26.7 of the Peruvian Competition Act, the Guidelines have clarified the scope of benefits arising from applications filed before or after the beginning of investigation actions by the Technical Secretariat.

In this regard, if the request for benefits is filed before the Technical Secretariat has any evidence of the existence of the cartel or if it has carried out dawn raids or other measures for this purpose, the first applicant will be eligible for the conditional benefit of total exoneration from the sanction (Leniency Type A), complying with the requirements established in the Peruvian Competition Act and in these Guidelines.

An application for immunity of sanctions after the Technical Secretariat already has evidence of the existence of the cartel or has carried out dawn raids or other investigation actions for the purpose of obtaining evidence (Leniency Type B), the applicable benefits for the first applicant to obtain a conditional exemption would be up to one hundred percent (100%) of the applicable fine, as long as the Technical Secretariat considers, in exercise of a discretionary power, that the collaborator is able to provide additional information that adds value to the investigation, contributing significantly to the opening of an administrative sanctioning procedure.

With the same objective, i.e. to maximize the effectiveness of the Leniency Program by strengthening incentives to submit request for immunity or reduction of sanctions before the Technical Secretariat has materialized any research activity (Leniency Type A) - the non-imposition of corrective restitution measures against the beneficiary has been incorporated into this benefit.

As can be deduced, the essential reason for this treatment is the need to maximize the incentives for the submission of a first application to enable the authority to detect and prove the existence of a cartel, and to prosecute those responsible. In this regard, it is worth considering that despite not having punitive but restorative nature; the corrective measures could represent significant cost to potential applicants¹⁶.

¹⁶ Moreover, under certain circumstances, corrective measures could be as or more burdensome than the possible fines to be imposed, for example, because these are subject to the income limit for the offender or his economic group.

Therefore, considering the need to strengthen the incentives for the first applicant in order to develop a more effective Leniency Program, the Guidelines incorporates, as part of the benefit of exoneration of sanction (Leniency Type A), the non-imposition of corrective measures of restitution. Nevertheless, in order to obtain this benefit, the first applicant must waive the confidentiality of his identity as a collaborator in order to enable the Commission motivate the decision to not apply corrective measures of restitution and to justify differentiated treatment from other economic agents to whom such measures would be imposed.

It is important to mention that the non-imposition of corrective measures of restitution does not imply an exoneration or limitation regarding the liability for the damages caused by the infringer. It just means that the obligation to repair the damaging effects of the infringement will not be required by the Commission at the moment of its final decision in the administrative procedure.

The agents harmed by the unlawful conduct will still have the opportunity to fulfill a lawsuit before the courts, according to the Section 49 of the Peruvian Competition Act¹⁷. An opposite rule would outrightly contravene what has been expressly established in the Section 26.6 of the Peruvian Competition Act¹⁸.

Finally, the adoption of these rules is carried out in application of the powers expressly established by Sections 26.7 and 46.4 of the Peruvian Competition Act¹⁹, which allows the Commission to establish conditions, terms or restrictions to maximize the effectiveness of the Leniency Program and, with that, to guarantee the objectives pursued by the Peruvian Competition Act.

17 Peruvian Competition Act
Section 49. -Damages.-

Once the administrative procedure has ended, any person who has suffered damages as a result of conduct declared to be anticompetitive by the Commission or by the Tribunal, even if it has not been a party to the proceedings before INDECOPI, always that can show a causal link with the declared anti-competitive behavior, may sue for civil damages in the Judiciary.

18 Peruvian Competition Act
Section 26. - Immunity from sanctions.-

26.6. The immunity or reduction of the applicable penalty does not eliminate or limit the civil liability of the accused for the damages caused, if applicable.

19 Peruvian Competition Act
Section 26. - Immunity from sanctions.-

26.7. The Commission may issue guidelines setting terms, rules and particular conditions or restrictions for the best application of this Section.

Peruvian Competition Act
Section 46.- Corrective Measures.-
(...)

46.4. The Commission could issue guidelines in order to define the scope of this article for the better application.



LENIENCY PROGRAM GUIDELINES

I. Introduction

In order to deter economic agents from participating in cartels, restoring the competitive process and reversing the effects caused by such infringements, the Commission for the Defense of Free Competition (hereinafter, the Commission) and the Tribunal for the Defense of Competition and Intellectual Property of Indecopi (hereinafter, the Tribunal) have the power to impose fines and corrective measures.

In case of very serious infringements, the Commission and the Tribunal can impose to economic agents involve in cartel activities fines higher than 1000 Tax Units - UIT (1 UIT equals to PEN²⁰ 4050 or about USD 1230) and up to the 12% of the income of the economic agent or its economic group, involving all its economic activities in the year previous to the date of the final decision of the Commission²¹.

Apart from the sanctions, the Commission and the Tribunal have the power to issue binding corrective measures to economic agents, in accordance with Section 46 of the Peruvian Competition Act²². There are two kinds of corrective measures, those that are aimed at restoring the competitive process (corrective measures for restoration of competitive process) and, on the other hand, those aimed at reversing the effects that the infringing conduct may have caused (corrective measures for restitution).

In summary, the mechanisms that Indecopi may use in the fight against cartels are:

Sanctions	Correctives Measures	
Fines higher than 1000 UIT with a limit of 12% of the gross income of the infringing party or its economic group.	For restoration of competitive process Aimed at preventing the continuation or recidivism of the infringement.	For restitution Aimed at reversing the harmful effects arising from the infringement.

Despite of these mechanisms, a system exclusively based on the sanction of conducts is not enough to fight down the cartels, due to the fact that it is limited by the ability of the agency to detect clandestine behavior and to overcome the difficulties in terms in gathering evidence once they are detected.

²⁰ The Peruvian «Sol» (PEN) is the local currency. In 2017, one USD equals to 3.3 PEN approximately.

²¹ In the case of professional guilds or trade associations, the fine shall not exceed a thousand (1000) UIT. In addition, the Commission may impose a fine up to a hundred (100) UIT to each of the legal representatives or to the persons in the management or administrative bodies of the legal persons involved in the infringement.

²² Peruvian Competition Act

Section 46.- Corrective Measures.-

46.1. In addition to the fine to be imposed for the violation of this Act, the Commission may issue corrective measures aimed at restoring the competitive process (...)

46.3. The Court has the same powers conferred to the Commission for issuing corrective measures.

The experience of Indecopi and of other competition agencies have shown that it is necessary to complement enforcement with other mechanisms to maximize the detection of cartels and in order to improve the activities carried out by the Technical Secretariat and the Commission. The most important of these mechanisms is the Leniency Program.

In line with provisions adopted by other jurisdictions, Section 26 of the Peruvian Competition Act²³ establishes that any person may ask to the Technical Secretariat for immunity from sanctions in exchange of evidence that could help the authority to identify and prove the existence of an illegal practice and punish the offenders.

Accordingly, the Leniency Program aims at facilitating the detection of cartels, using as incentive an eventual immunity or reduction from sanctions that might be otherwise imposed to the offenders, in exchange of a continuing and complete cooperation with the Technical Secretariat and the Commission. Consequently, the Leniency Program is a tool mainly aimed at destabilizing cartels and deter the emerging of new restrictive agreements.

However, it is clear for the authority that the success of the program depends on the formulation of clear rules, effective procedures and predictable results that truly promote an active and effective collaboration of the applicants in the prosecution of the cartels, in exchange of attractive benefits.

In this regard, in accordance to Section 26 of the Peruvian Competition Act²⁴, the Commission issues these Guidelines setting terms, rules and conditions or restrictions for the sake of the effectiveness of the Leniency Program, the Commission issues these as an orientating tool for the citizens and companies in their eventual applications for benefits.

Therefore, in line with international best practices on leniency programs, the following paragraphs develop the requirements that economic agents must fulfill in order to request for immunity or reduction of fines for its participation in a hard-core cartel, as well as the procedure applicable to such applicants.

23 Peruvian Competition Act

Section 26.- Immunity.**26.1. Before the start of a disciplinary administrative procedure, any person may request the Technical Secretariat to be exonerated from sanctions in exchange of providing evidence to help to detect and prove the existence of a cartel and to punish the responsible.**

24 Peruvian Competition Act

Section 26.- Immunity from sanctions.-

26.7. The Commission may issue guidelines setting terms, rules and particular conditions or restrictions for the best application of this Section.

II. Glossary

For the purpose of these Guidelines, the following terms will be used according to the meaning described as follows:

TERM	MEANING
Benefit	The immunity or reduction of sanctions, according to the Section III of these Guidelines.
Cartel	An anticompetitive horizontal agreement subject to an absolute «per se» prohibition, according to Section 11.2 of the Peruvian Competition Act. Cartels are also known in other jurisdictions as hard-core cartel.
Coercion	It refers to actions that imply violence, threat of violence as well as the threat or materialization of economic reprisals that have determined the participation in cartel activity of other economic agents that in the beginning would have been reluctant to get involved, according to Section 3.4 of these Guidelines.
Commission	It refers to the Commission for the Defense of Free Competition of Indecopi.
Conditional Agreement of Immunity or Reduction of Sanctions (Conditional Agreement)	<p>It is an agreement signed by the Technical Secretariat and the Collaborator that contains the conditions in which the Collaborator receives the conditional benefits of immunity or reduction of sanction as a consequence of revealing the infringement.</p> <p>The Agreement describes the Cooperation Duty of the Collaborator and Confidentiality Duty of the Technical Secretariat. A Conditional Agreement is binding for the Commission.</p>
Confidentiality Duty	The obligation of the Technical Secretariat and the Commission to keep undisclosed the identity of the Collaborator, as well as the documents contained in the confidential file in which the application for benefits is processed, in accordance to Section VII of these Guidelines.
Cooperation Duty	<p>The set of obligations that materialize the best effort of the Collaborator to provide the fullest and most active collaboration with the investigative and instructional actions of the authority, with the aim of helping them to prove the infringement, in accordance with the provisions of the Section IV.</p> <p>The specific terms and scope of the cooperation duty shall be determined by the signing of the Conditional Agreement of each benefit application, according to Section 6.6 of this Guidelines.</p>

Corrective measures	<p>For restoration of competitive process: Mandates for preventing the continuation or recidivism of the infringement as provided in Section 46.1 of the Peruvian Competition Act.</p> <p>For restitution: Mandates for reversing the harmful effects of the infringing conduct, in accordance with Section 46.2 of the Peruvian Competition Act.</p> <p>Corrective measures have no punitive purpose.</p>
Economic Agent, Applicant, Collaborator, Beneficiary	<p>Economic Agent: Every person defined as such by the Section 2 of the Peruvian Competition Act.</p> <p>Applicant: Every person that applies for one of the benefits under Section 26 of the Peruvian Competition Act. In case of a legal person, the application could include companies of its economic group, officials and former employees that assume the Cooperation Duty.</p> <p>An Applicant also comprises the natural or legal person, subject to the Section 2.4 of the Peruvian Competition Act (Cartel facilitators) that request some of the benefits under Section 26 of the Peruvian Competition Act.</p> <p>Collaborator: The applicant who receives a conditional benefit by the subscription of a Conditional Agreement of immunity or reduction of sanctions, committing to comply with the provisions therein. In the case of legal persons, the cooperation includes companies of its economic group, officials and former employees that assume the Cooperation Duty.</p> <p>Beneficiary: The Collaborator that receives a definitive benefit under the Section 26 of the Peruvian Competition Act.</p>
Effective result	<p>The conclusion of the administrative procedure by establishing the existence of an infringement and imposing sanctions to those responsible.</p>
Eligibility	<p>Condition of the Applicant of being eligible to sign the Conditional Agreement of immunity or reduction of sanctions, having fulfilled the conditions set out in Section III of these Guidelines.</p> <p>The Applicant has the burden of proving its eligibility.</p>
Indecopi	<p>The National Institute for the Defense of Competition and the Protection of Intellectual Property.</p>

Investigation	Actions carried out by the Technical Secretariat in order to obtain evidence related to an alleged infringement, before the starting of the administrative procedure (preliminary investigation), or in the prosecution stage (administrative procedure). It also involves additional actions required by the Commission before issuing its decision.
Leniency Program Guidelines	This document.
Marker	Confirmation of the priority order in which an application presented will be assessed with respect to other possible applications, according to Section 26 of the Peruvian Competition Act.
Corporate Official	Any natural person who, regardless of his contractual relationship, performs functions on behalf and at the request of legal persons, giving rise to liability in their acts, without the conditions of civil representation being required for this purpose. This definition includes - but is not limited to - people in post of confidence, directors, managers, executives and employees.
Peruvian Competition Act	The act for the Repression of Anticompetitive Conducts approved by means of Legislative Decree 1034 (2008) and amended by means of Legislative Decree 1205 (2015).
Preliminary evidence	Evidence that allows the Technical Secretariat to prove, at a preliminary level, the existence of an infringement. These indications of an infringement support the beginning of an administrative procedure against the offenders.
Sanctions	Punitive and pecuniary instruments (fines), established as a negative incentive, imposed by the Commission to those who infringed the provisions of the Peruvian Competition Act. The purpose of the sanctions is to discourage the future realization of anti-competitive conducts.
Significant added value	It is the necessary condition of the cooperation provided by an Applicant in order to obtain the benefit of reduction of sanctions, according to Section 3.3 of these Guidelines.
Technical Secretariat	The Technical Secretariat of the Commission for the Defense of Free Competition of Indecopi.
Tribunal	The Chamber specialized in the Defense of Competition of the Tribunal of Indecopi.

III. Available benefits

3.1. Immunity (Leniency Type A and Type B)

In accordance with the provisions in Section 26.2 of the Peruvian Competition Act, the submission of an application for immunity may be made before the initiation of an administrative sanction procedure, whether or not the Technical Secretariat has started an investigation or it has carried out a dawn raid. Nevertheless, the more advanced the investigation is, the person interested in obtaining benefits should pass a higher threshold. Therefore, the standard for the applicant and the benefits to which he may have access will be different, depending on the stage of the Technical Secretariat's investigation:

• **Leniency Type A**

The Technical Secretariat will grant a conditional benefit consisting in the immunity (reduction of 100%) from fines that could be otherwise imposed to the applicant as a consequence of the infringement. This benefit also implies that corrective measures of restitution will not be imposed to the beneficiary, provided that the following conditions are fulfilled:

- a. To be the first to submit an Application to the Technical Secretariat, accomplishing the minimum information requirements and obtaining the appropriate marker, before the Technical Secretariat has evidence of the existence of the cartel through the exercise of its powers such as dawn raids, receipt of complaints, among others.
- b. To provide all available information about the investigated cartel, helping the Technical Secretariat to start an administrative procedure against the alleged infringers.
- c. To commit to strictly comply, during the investigation and the administrative procedure, with its Cooperation Duties contained in the Conditional Agreement of Immunity of Sanction, helping the authority to obtain an effective result.
- d. To take immediate and conclusive actions to terminate its participation in the investigated cartel, unless otherwise specified by the Technical Secretariat.
- e. Fulfilling its Confidentiality Duty, not being able to reveal to third parties their identity as Collaborator or the presentation or processing of its application for benefits until the start of an administrative procedure. After initiating the administrative procedure, a disclosure of its identity as a collaborator and its application for benefits may be possible, after coordinating it with the Technical Secretariat.
- f. The Applicant shall not have coerced other economic agents into participating in the investigated cartel.

In a Leniency Type A, the beneficiary of immunity may additionally benefit from the non-imposition of corrective restitution measures, provided that he waives the confidentiality of his identity as a Collaborator, waives that will become effective with the Technical Secretariat's initial decision.

Finally, the benefit of immunity (Leniency Type A) implies that the Technical Secretariat, the

Commission, or any other administrative authority, may not initiate or follow any procedures to the Beneficiary for an infringement of the competition rules in relation to the conduct that is the subject matter of the benefit. In order to guarantee the effectiveness of this benefit, the Technical Secretariat may, at the request of the Collaborator or Beneficiary, explain to any national authority the scope of the benefit and the applicable legal framework.

• **Leniency Type B**

In case the Technical Secretariat already has evidence about the cartel, it will grant a conditional benefit consisting on the reduction of fifty to one hundred percent (50-100%) of the applicable sanction for the infringement, not being enforceable the part of the fine for the proportion in which the benefit is granted, provided that the following conditions are met:

- a. To be the first to submit an Application, accomplishing the minimum information requirements and obtaining the appropriate marker. At the time of filing the Application, no administrative sanctioning procedure should have been initiated against the revealed cartel.
- b. To provide all available information about the investigated cartel, helping the Technical Secretariat to start an administrative procedure against the suspected offenders.
- c. To commit to strictly comply, during the investigation and the administrative procedure, with its Cooperation Duties contained in the Conditional Agreement of Immunity of Sanction, helping the authority to obtain an effective result.
- d. To take immediate and conclusive actions to terminate its participation in the investigated cartel.
- e. Fulfilling its Confidentiality Duty, not being able to reveal to third parties their identity as Collaborator or the presentation or processing of its application for benefits until the start of an administrative procedure. After initiating the administrative procedure, a disclosure of its identity as a collaborator and its application for benefits may be possible, after coordinating it with the Technical Secretariat.
- f. The Applicant shall not have coerced other economic agents into participating in the investigated cartel.

The Technical Secretariat will determine the conditional benefit corresponding to the applicant shall be determined by the Technical Secretariat based on the value of the information that the Applicant may provide with respect to the information held by the Technical Secretariat at the time of submission of the Application for benefits and its effectiveness in contributing to the start of an administrative procedure for the conduct under investigation.

3.2. Reduction of sanction (Leniency Type C)

In accordance with Section 26.3 of the Peruvian Competition Act, if there is a first applicant for benefits whose application has been admitted or there is an administrative procedure in process, the

Technical Secretariat will grant a conditional benefit consisting of a reduction of up to fifty percent (50%) of the applicable sanction for the infringement committed, being non-imposable the fine in the proportion in which the benefit is granted, provided that the following conditions are met:

- a. The Applicant shall provide additional information to the already submitted by an Applicant with priority in the processing of an application or any other information contained in the Case File, and which gives significant added value to the investigative, instructional and sanction activities of the Technical Secretariat and the Commission, in accordance with Section 3.3.
- b. To commit to strictly comply, during the investigation and the administrative procedure, with its Cooperation Duties contained in the Conditional Agreement of Immunity of Sanction, helping the authority to obtain an effective result.
- c. To take immediate and conclusive actions to terminate its participation in the investigated cartel.
- d. Fulfilling its Confidentiality Duty, not being able to reveal to third parties their identity as Collaborator or the presentation or processing of its application for benefits until the start of an administrative procedure. After initiating the administrative procedure, a disclosure of its identity as a collaborator and its application for benefits may be possible, after coordinating it with the Technical Secretariat.

The determination of conditional benefits by the Technical Secretariat is discretionary of and will depend on to the significant added value of the information presented by the Applicant, with respect to the information presented by a previous leniency applicant or any other information contained in the Case File resulting from the investigation carried out by the Technical Secretariat. The ranges of the applicable reduction of fines are as follows:

First beneficiary of a reduction	: From 30 up to 50%
Second beneficiary of a reduction	: From 20 up to 30%
Third and following beneficiaries of a reduction	: Up to 20%

The deadline for submitting a request to reduce the sanctions shall expire within thirty (30) working days from the notification of the decision to initiate the administrative sanction procedure.

The Peruvian Competition Act allows the Technical Secretariat to reject applications for reduction of sanctions submitted after the initiation of an administrative procedure. However, this power shall be exercised only after careful consideration of the value of the evidence produced by the Applicant. An opportunity to reinforce the original request shall be given to the applicant. In the event of rejection of Application, the Technical Secretariat shall proceed in accordance with section 6.3 of these Guidelines.

3.3. Significant added value

The significant added value refers to information (in any format or support) that represents direct evidence about the illegality of the investigated cartel or information that does not need to be confirmed or supported by additional sources, as well as other physical documents (e.g. minutes or notes) or electronic data (e.g. e-mail communications) or any other type of information, regardless

of the support, that can allow the authority to strengthen its decision to start an administrative procedure or substantially increase its chances to prove the existence of the investigated infringement and to impose fines or remedies on those responsible.

For example, if the authority counts on certain information about the infringement due to actions carried out ex officio or as a result of the cooperation of other applicants, (e.g. evidence of contact between competitors, evidence of an unusual price behavior or suspicious communications), significant added value will arise from information that allows the authority to directly verify the infringement (e.g. electronic communications between competitors evidencing the terms of the anti-competitive agreements, records of meetings that prove the involvement of infringers or notes explaining the meaning of the illegal agreements).

Also, the information may be considered as providing significant added value if it strengthens the initial decision of the Technical Secretariat to start administrative procedures by allowing to extend the period under investigation, to implicate other offenders or to expand the extent of the market investigated.

The nature of the evidence or their level of detail shall be taken into account. In this assessment, documentary evidence dating from the period in which the events occurred will generally be given more value than evidence about subsequent periods. Finally, the degree of corroboration from other sources that is necessary to allow the use of evidence submitted against other cartel participants will be taken into account.

3.4. Determination of the existence of coercion

In accordance with the Section 26.5 of the Peruvian Competition Act, the qualification of a collaborator as a «coercer» will disqualify him from receiving the benefit of immunity (Leniency Type A or B).

If, prior to the signing of a conditional benefit agreement, the Technical Secretariat considers that there are elements of judgment that would evidence that the Applicant exercised coercion, it will inform to the Applicant that the subscribing of the Conditional Agreement of immunity of sanction (Leniency Type A or B) will not be possible, allowing him to choose to either withdraw the application (in which case the documentation provided to the Case file will be returned to the applicant), or to sign an Conditional Agreement of reduction (Leniency Type C).

If, despite the signing of a Conditional Agreement of Immunity of Sanction (Leniency Type A or B); as a result of the information introduced in the administrative procedure, the Technical Secretariat considers that there are new elements of judgment that would evidence that the Collaborator exercised coercion, the Technical Secretariat will indicate this situation to the Commission at the time when it must formulate its recommendation regarding the granting of definitive benefits. Even if the Collaborator decides to withdraw his application at this stage, it will not be possible to return any documentation that has been submitted to the Case File in which the administrative procedure is processed.

For the corresponding analysis, the authority will consider as coercion the performance of actions that imply violence or threat of physical violence, as well as the threat or materialization of economic reprisals that have ostensibly determined the participation of economic agents that initially would have been reluctant to get involved in a cartel.

In order to provide to possible collaborators with an adequate degree of certainty and predictability regarding their application for benefits of immunity or reduction of sanction, the Technical Secretariat and the Commission will apply a rigorous threshold when analyzing the possible existence of coercion by a collaborator, developing their evaluation based on the facts established in the procedure. In case of doubt about the existence of coercion, the Technical Secretariat will recommend to the Commission to ratify the benefit of immunity conditionally granted.

In this regard, as an example, the following actions will not be considered as actions that reveal the existence of coercion: (i) actions or threats that do not make it possible to evidence a real risk of exit from the market, even though it may imply a reduction in the profit margins of the affected party; (ii) simple mechanisms agreed between the cartel members to monitor and punish non-compliance with their agreements; (iii) adopting a leading position within the cartel; and (iv) mutual punishments or threats between cartel members with similar size or market power.

IV. Cooperation Duty

The Cooperation Duty is the set of obligations that materialize the best effort of the Collaborator to offer the fullest and most active collaboration with the investigative and instructional activities of the Technical Secretariat and the Commission, with the objective of allowing them to prove the revealed infringement. The scope of the Cooperation Duty shall be determined, in accordance with the particularities of each case, in the Conditional Agreement of Immunity or Reduction of Sanction.

However, the obligation of the Applicant or Collaborator to comply with the Cooperation Duty starts since an application for benefits is submitted to the Technical Secretariat. Although the full scope of the Cooperation Duty is set out in the Conditional Agreement of Immunity or Reduction of Sanction, the following is an illustrative but not limited description of the main obligations under the Cooperation Duty:

- a.** To cooperate fully, continuously and diligently, since the investigation of the Technical Secretariat until the end of the administrative procedure by the Commission, allowing the authority to obtain an effective result in relation to the infringements considered in its Application or Conditional commitment of benefits.
- b.** Fulfilling its Confidentiality Duty, not being able to reveal to third parties their identity as Collaborator or the presentation or processing of its application for benefits until the start of an administrative procedure. After initiating the administrative procedure, a disclosure of its identity as a collaborator and its application for benefits may be possible, after coordinating it with the Technical Secretariat.
- c.** To participate actively, providing all information and evidence in their possession, custody or control, allowing to prove the anticompetitive conduct under the scope of the Application or Conditional Agreement; and also allow the authority to sanction those responsible for planning, developing or execute the cartel.
- d.** Refrain from destroying, altering or concealing information or evidence, or any other conduct that affects the investigative, instructional or sanction functions of the Technical Secretariat and the Commission, with regards to anti-competitive conduct that is the subject matter of its Application or Conditional Agreement.

- e. Within the framework of the investigation carried out and even after the beginning of the corresponding administrative procedure, abstain from disclosing to any third party, directly or indirectly, the presentation and content of the Application for immunity, the evidence presented, and the manner in which it is collaborating with the Technical Secretariat, unless it has the previous written authorization of the Technical Secretariat.
- f. Refrain, during the investigation of the administrative procedure, from act in a procedural behavior incompatible with the agreement assumed. Not exhaustively, the Applicant may not contest the facts acknowledged in its application for benefits or the legal qualification made by the Technical Secretariat on such facts, in particular those relating to the type of infringement, the duration of the cartel, the agents involved or its geographical extent.

The aforementioned obligations do not restrict the right of the Collaborator to access, confidential to the technical and legal advice he deems appropriate to safeguard the rights that may assist him in the processing of his application for benefits or in the administrative procedure, provided that the exercise of such rights is in accordance with the provisions of these Guidelines and the Conditional Agreement. The Collaborator also has the right to initiate similar proceedings before competition authorities in other jurisdictions, informing the Technical Secretariat in due course.

V. Limits to the benefits of the Leniency Program

The benefits of immunity or reduction of sanctions do not prevent the imposition of corrective measures to restore the competitive process nor do they limit the civil liability of economic agents for damages caused as a result of the infringement committed, in accordance with the provisions of Section 26.6 of the Peruvian Competition Act.

VI. Procedure for processing applications for benefits

For the proper development of the Leniency Program it is essential to establish clear rules, effective procedures and predictable results in order to create enough incentives on potential applicants for their cooperation with the Technical Secretariat. The steps described below (and summarized in the attached chart) will guide the Technical Secretariat, the Commission and the Collaborator in the processing of its application for benefits:

6.1. Querying

Economic agents may consult the Technical Secretariat on the general rules of the Leniency Program, as well as on the availability of markers for processing an Immunity of Sanction Application.

• About the general rules

This type of querying is intended to enable economic agents to make an informed decision, obtaining relevant information about the general procedure to be followed in order to obtain the benefits of the Leniency Program, as well as to provide guidance and to resolve any doubts that may arise about the Program that are not contemplated in these Guidelines.

Any person may consult on the rules and criteria applicable to the processing of any application and no identification will be required.

• About the availability of the markers:

The purpose of this type of querying is that potential applicants to the Leniency Program may have knowledge about the availability of a marker in order to be able to access the Immunity of sanction benefit before initiating an administrative procedure.

Properly identified, the representatives or designated solicitors of economic agents may consult on the availability of markers, and the identification of the economic agent will not be necessary at this stage. In this regard, inquiries regarding the availability of markers may be raised anonymously and hypothetically. By itself, a query about the availability of markers will not be considered as acknowledgement of an infringement or acceptance of any liability.

In order to obtain information on the availability of markers, a general description of the discovered cartel is required because this info is indispensable for the Technical Secretariat to ensure the availability of the marker. In this regard, the Technical Secretariat will demand approximate information on the product or service concerned, the type of infringement, the geographic scope and approximate period. The level of detail may vary on a case-by-case basis; however, information on the product or service concerned and the type of infringement will be required as a general rule.

If a marker is available for immunity, the economic agent may apply for immunity. It should be noted that the Technical Secretariat's confirmation of the availability of a marker does not grant any right or priority order in favor of the consulting person. The only way to reserve a priority order is by filing an application for benefits and obtaining a marker in accordance with Section 6.2.

Finally, if after three (3) business days an application for benefits has not been formalized by the person who made the consultation, the Technical Secretariat may take actions as it deems appropriate to investigate such market, in exercise of its powers and without any priority or right of any nature being effective.

6.2. Submission of an application for benefits

The Application for benefits must be submitted in writing at the reception desk of any office of Indecopi. The application must be signed by a duly identified representative or designated solicitor, enclosing a confidential sealed envelope containing the minimum required information to process the application for benefits.

The minimum information referred in the paragraph above must be sufficient to answer the following questions in relation to the alleged cartel and corresponds to the «Five W»:

- **W**hat type of cartel has been carried out? (e.g. price fixing, market sharing, output restriction, bid rigging.)
- **W**hat product or service was affected by the cartel?
- **W**ho are the persons, corporate officials, economic agents or facilitators that have participated in the cartel?
- **W**hich period, approximately, encompasses the cartel?
- **W**hat has been the geographical extension of the cartel?

The above information aims at revealing to the Technical Secretariat the existence of a specific cartel, as well as enabling the Applicant to obtain a marker that guarantees a priority order of its Appli-

cation for benefits. The information that the Applicant submit as «Five W» should not necessarily be accompanied by supporting documents or evidentiary elements. These may be introduced in the next stage of the procedure.

If the Technical Secretariat considers that the information provided by the Applicant is not enough to determine the existence of anticompetitive behavior, the Applicant will have five (5) working days to correct his application. If corrected, the Technical Secretariat shall admit the Application.

Considering the possibility that the data provided in an Application for benefits respond to an approximate or initial information available to the Applicant at the time of the application, any modification of such data will not affect the assessment made by the Technical Secretariat regarding the collaboration of the Applicant, insofar as it responds to a legitimate compliance with its Cooperation Duty and not the deliberate attempt to limit the access of the Technical Secretariat to information possessed by the Collaborator.

In this regard, as an example, a marker may be extended to cover a longer period of conduct or a wider geographical area, as well as a larger number of partners in the infringement. However, the Technical Secretariat shall not grant an extension of the Application to independent infringements or those related to different markets. In these cases, the person concerned may submit a new Application for benefits, which will be processed by the Technical Secretariat according to its time of presentation and the fulfilment of the applicable requirements.

An Application for Benefits could be submitted as an individual or a corporate application, in accordance with the following:

Individual Application: In the case of natural persons, the application shall correspond to the liability which is individually attributable to them for their participation as economic agents, as members of representation bodies, directing or managing infringing companies (corporate officials), or as facilitators of a cartel.

Corporate Application: In the case of legal persons, the Application shall correspond to the responsibility attributable to the Collaborator for his participation as an economic agent or facilitator of a cartel. The Application must correspond to a corporate decision made by a top level officer or a management board of the company with enough powers to acquiesce to an eventual administrative procedure and to ensure the full cooperation of the company with the competition agency.

In this case, the Application may benefit, by extension, other companies of the applicant's economic group, or employees and former employees of the Collaborator, with the applicable benefits being subject to the timely fulfilment of the Cooperation Duty by those to whom the Application is extended. The Collaborator shall make every effort needed to ensure compliance with the Cooperation Duty of former employees and other legal persons of the economic group.

The application for benefits and disclosure of the infringement, as well as the signing of the Conditional Agreement of immunity or reduction of sanction (and the compliance with its terms) must be genuine corporate actions: they must be the consequence to a decision taken by the company as a whole, from its management and management bodies, as well as from its officers and employees, in contrast to the isolated behavior of any of them.

The failure to comply with the Cooperation Duty of corporate officials, employees, former em-

employees or other companies in the economic group will not necessarily imply failure to comply with the Collaborator's duty to cooperate nor will it automatically result in the loss of the benefit of immunity or reduction of sanctions. The Technical Secretariat will analyze each case in detail, with the objective of determining whether non-compliance with the Cooperation Duty by employees, former employees or other companies of the economic group constitutes non-compliance with the Cooperation Duty of the Collaborator.

The applicant must apply for benefits independently. Accordingly, joint applications from two or more operators involved in the infringement will not be accepted.

If an Application for benefits is admitted, the Technical Secretariat will grant the respective marker to the Applicant, notifying it within five (5) working days after the request has been submitted or corrected.

6.3. Rejection of an application for benefits

If an Application for benefits is not accepted, the Technical Secretariat will return the documentation provided by the Applicant entirely and will eliminate any copies under its possession. The Technical Secretariat shall proceed in the same manner when an investigation initiated as a result of an application for benefits is filed, removing any marker granted.

The Technical Secretariat may carry out investigation activities in the market that was the subject of the rejected application and may use any information gathered in the exercise of its powers, including information obtained through other collaborators.

6.4. Submission of information and investigation activities of the Technical Secretariat

Once the application is admitted, the Technical Secretariat will arrange a meeting with the Applicant within ten (10) working days to coordinate a schedule for submission of the information related to the infringement revealed.

In the meeting, the Technical Secretariat will designate the officials responsible of coordination with the Applicant, also responsible of processing the Application, protect the information provided by the Applicant, monitoring the schedule and supervising the Cooperation Duty. While the Application is being processed, the Applicant will be able to check the status of the Application.

The Technical Secretariat will grant thirty (30) working days, since the coordination meeting, for the Applicant to provide all the relevant information he could obtain or already has in his power about the cartel revealed and details of the participation of the co-conspirators. To comply with the obligation, the Collaborator shall act diligently, directing his efforts to reinforce the effectiveness of the investigative, prosecutorial and sanctioning actions of the Technical Secretariat and the Commission.

The information referred to in the preceding paragraph includes, but is not limited to, the provision of documents, declarations and audiovisual records; access to databases, e-mails, as well as physical and electronic archives; interviews with employees and former employees related to anti-competitive behavior linked to the Agreement; among others.

The documents submitted by the Applicant should be, as far as possible, original. The Applicant may

submit copies of the above-mentioned documents, provided that they give reasons for the circumstances that would have prevented the submission of the original documentation.

The period granted by the Technical Secretariat may be extended by an equivalent of thirty (30) additional working days when the complexity of the investigation determines the need for more time to obtain information relevant to the initiation of an administrative procedure or to generate significant added value to the prosecutorial and sanctioning activities of the authority.

During and after the process of the submission of information by the Applicant and where applicable, the Technical Secretariat, in coordination with the Applicant, may take additional steps as it deems necessary to maximize the effectiveness of the investigation in relation to the revealed cartel, particularly aiming at replicating the documentation provided by the Applicant with other sources.

The Technical Secretariat would perform all the complementary actions needed to prove, at a preliminary level, the facts alleged in the application and also achieves to obtain the relevant evidence within a period of ninety (90) working days from the submission of the information provided by the Applicant. The complexity or the dimension of the investigation and evidence gathered will determine an extension of the initial period.

6.5. Preliminary evaluation of the Application

The evidence provided by the Applicant and the additional evidence that has been obtained by the Technical Secretariat by its investigation activities will be evaluated to establish if it is sufficient to start an administrative procedure or, when applicable, whether the information provides data with significant added value for the investigation activities of the Technical Secretariat.

When the additional investigation activities conclude, the Technical Secretariat will contact the Applicant to set up a meeting within the following fifteen (15) working days. At the meeting, the Technical Secretariat will expose to the Applicant its conclusions and the conditional benefit to be granted by the subscription of the Conditional Agreement.

After the presentation of the Technical Secretariat, the Applicant may express his conformity with the conclusions and the applicable benefits or, on the contrary, he may reserve his decision for no longer than five (5) working days. If the Applicant decides to withdraw the application, the Technical Secretariat will return the information submitted by the Applicant to support his application.

The withdraw of the Application would impede the Technical Secretariat to use the documents provided by the Applicant in its investigations or administrative procedures. However, the Technical Secretariat will be able to continue with the investigations in the market affected by the uncovered infringement and to use all the information obtained by the exercise of its powers.

6.6. Signing of the Conditional Agreement of Immunity or Reduction of Sanctions

If the Applicant expresses his conformity with the conclusions of the Technical Secretariat and with the conditional benefit to be granted, the terms of the conditional of benefits agreement will be defined within fifteen (15) working days. To this end, the Technical Secretariat has full negotiation powers to establish the terms of the Agreement.

The Agreement has the purpose of establish the scope of the Cooperation Duty by the Applicant

and the Confidentiality Duty by the Technical Secretariat and the Commission. Essential aspects of the Conditional Agreement of Immunity or Reduction of Sanction are the following:

- a. The admission of the Collaborator of its participation in the investigated cartel, according to the findings of the Technical Secretariat.
- b. The condition of «Collaborator» by the Applicant for the following stages of the investigation and prosecution in the administrative procedure.
- c. The essential content of the Cooperation Duty to be fulfilled by the Collaborator during the following stages investigation and prosecution in the administrative procedure.
- d. The extension of the benefits to other companies in its economic group or to actual and former corporate officials of the Collaborator, subject to a strict compliance with the Cooperation Duty by each of them.
- e. The waiver of the confidentiality of the evidence provided that could not be replicated but that is necessary for initiating an administrative procedure.

Once the Conditional Agreement of Immunity or Reduction of Sanction have been subscribed, the withdrawal of a request for benefits by the Collaborator or the non-ratification of the Conditional Agreement of Immunity or Reduction of Sanction by the Commission shall not mean or imply that the subsequent Collaborator will be able to access the benefits granted to the Collaborator who was in a prior order. The benefits conditionally granted shall be maintained unaltered until the end of the administrative procedure, as long as they are confirmed by the Commission.

6.7. Compliance with the Conditional Agreement

The compliance of the Cooperation Duty is essential for obtaining the definitive granting of the benefits conditionally granted with the subscription of the Conditional Agreement of Immunity or Reduction of Sanction. The Cooperation Duty allows the Technical Secretariat to access information that otherwise could not have been obtained or that will generate significant savings in time and resources for the authority, thus fulfilling the objectives of the Peruvian Competition Act in relation to the investigated cartel.

A breach of the Cooperation Duty is an exceptional situation that should be timely noticed by the Technical Secretariat who must give the Collaborator an opportunity to remedy this breach.

When the actions or inaction of the Collaborator would be considered by the Commission as a breach of the Cooperation Duty, the Technical Secretariat will inform him this situation, giving a reasonable period to remedy his default, under warning to consider that the Agreement has been breached and to recommend to the Commission that the conditional benefit obtained should not be ratified.

If the Collaborator corrects the breach noticed, the Technical Secretariat will communicate this situation and discard the warning.

If the Collaborator does not remedy in a timely manner its non-compliance, the Technical Secretariat could report his breach to the Commission, explaining the alleged breach not rectified and recommending them to withdraw the conditional benefit granted due to the breach of a fundamental

duty of the Conditional Agreement.

In case the Technical Secretariat determines that the Collaborator has deliberately removed, destroyed or withheld information that constitutes evidence of the reported infringement for the purposes of the administrative procedure, this situation will be communicated to the Commission with the Technical Secretariat's recommendation not to ratify the conditional benefit. The removal or destruction of evidence cannot be amended by the Collaborator.

6.8. Definitive granting of benefits

The Commission is responsible for ratifying the conditional benefit granted by the Technical Secretariat, once an effective result has been obtained in the administrative procedure by issuing a resolution determining the existence of an infringement and sanctioning those responsible.

The Commission may only refuse the definitive nature of the benefit if the Technical Secretariat has reported a breach to the Cooperation Duty by the Collaborator - in the case of the immunity benefit (Leniency Type A or B) - if the Technical Secretariat has indicated that the Collaborator could be deemed as coercer, according to the Section 26.5 of the Peruvian Competition Act.

If the Technical Secretariat does not report an infringement of the Conditional Agreement of Immunity or Reduction of Sanction or the existence of a coercion, the Commission will assume that the Collaborator has complied with its commitments and, therefore, will grant the benefits definitively.

The Commission will issue a decision granting the benefit of immunity or reduction of sanctions that will be enforceable against any instance of Indecopi. This decision in favor of the Collaborator is independent from the decision in the administrative procedure and is confidential.

VII. Confidentiality Rules

The Guide has among its pillars the confidentiality of the Collaborator's identity and the information provided to the confidential file in which the application for benefits is processed. Confidentiality is intended to protect the Collaborator from possible reprisals for collaborating with the Technical Secretariat and the Commission, as well as to prevent the information provided as part of their collaboration from being used in a way that exposes them to worse conditions than a scenario in which they would not have collaborated.

The Technical Secretariat and the Commission shall comply with their obligation to maintain in reserve the identity of the Collaborator and the information provided by him in the confidential file in which the Application for Benefits is processed. The main Confidentiality Rules are the following:

- **Independent file:**

Each Request for Benefits will be processed in a confidential file different from the file of the preliminary investigation or the one in which the administrative procedure is processed. The Technical Secretariat will keep a high degree of diligence in handling the information delivered by the Collaborator.

• Responsible of the file:

The Technical Secretariat will appoint an official and a team to be responsible of evaluating the Application. The person in charge and the team, in addition to the Technical Secretary and the members of the Commission -at the appropriate stage- will be the only officials who can have access to the confidential information provided by the Collaborator.

Failure to comply with the obligation to keep information disclosed shall give rise to the administrative and criminal responsibilities applicable to the cases of breach of confidentiality of information declared reserved by the Commission.

• Confidentiality Duty of the Technical Secretariat and Commission:

The obligation of the Technical Secretariat and the Commission to keep the identity of the collaborator undisclosed, as well as the confidentiality of the documents contained in the confidential file in which the application for benefits is processed. The Confidentiality Duty includes the following documents: (i) the content of the application for benefits, (ii) the Conditional Agreement of Immunity or Reduction of Sanction, (iii) the content of other documents submitted in the processing of the immunity or reduction of sanction application, and (iv) the documents (original and copies), declarations, audio-visual records, databases, mailings, interviews and, in general, any document or element of evidence submitted to the file by the Collaborator.

The Confidentiality Duty does not apply to the information contained in the file in which the administrative procedure is processed, nor to that information made public by the Collaborator himself.

The Technical Secretariat will make reasonable efforts to replicate the information given by the Collaborator. For this purpose, the Technical Secretariat may perform dawn raids, request information and also make interviews and any other actions authorized by the Peruvian Competition Act that is relevant and feasible in the circumstances of the conduct under investigation.

If, despite of its reasonable efforts, the Technical Secretariat could not replicate the information submitted with other sources, the Collaborator must waive the confidentiality of information that is essential for starting an administrative procedure, due to the fact that it constitutes incriminating evidence against others involved in the infringement. In this case, the Technical Secretariat and the Collaborator may coordinate the preparation of public versions of the documentation, giving priority in all circumstances to the evidentiary purpose of the information provided for the investigation of the revealed cartel.

• Collaboration with competition authorities of other jurisdictions

The Collaborator shall indicate in which other countries has filed an application for benefits in relation to the revealed cartel. Nonetheless, only with the prior written authorization of the Collaborator, the Technical Secretariat and the Commission may share with competition authorities in other jurisdictions the evidence that the Collaborator has provided and that has not been transferred to the file in which the administrative procedure is processed.

Sharing of information between competition authorities shall have the only purpose of assisting and coordinating investigative actions with other jurisdictions. The Collaborator may

refuse to sign such authorization, without his refusal being considered as a breach of the Cooperation Duty.

• **Confidential information and claims for damages**

The information provided by the beneficiary contained in the confidential file as a result of an application for benefits shall not, under any circumstances, be transferred by the Technical Secretariat and the Commission to be used against the beneficiary in a possible claim for damages. This limitation does not apply to the information contained in the Case File in which the administrative procedure is processed, nor to information that may have been made public by the Collaborator himself.

VIII. Effectiveness

Once these Guidelines has been adopted, the time limits, conditions, restrictions and other provisions set forth herein shall become effective on the day following their publication.

IX. Contact information

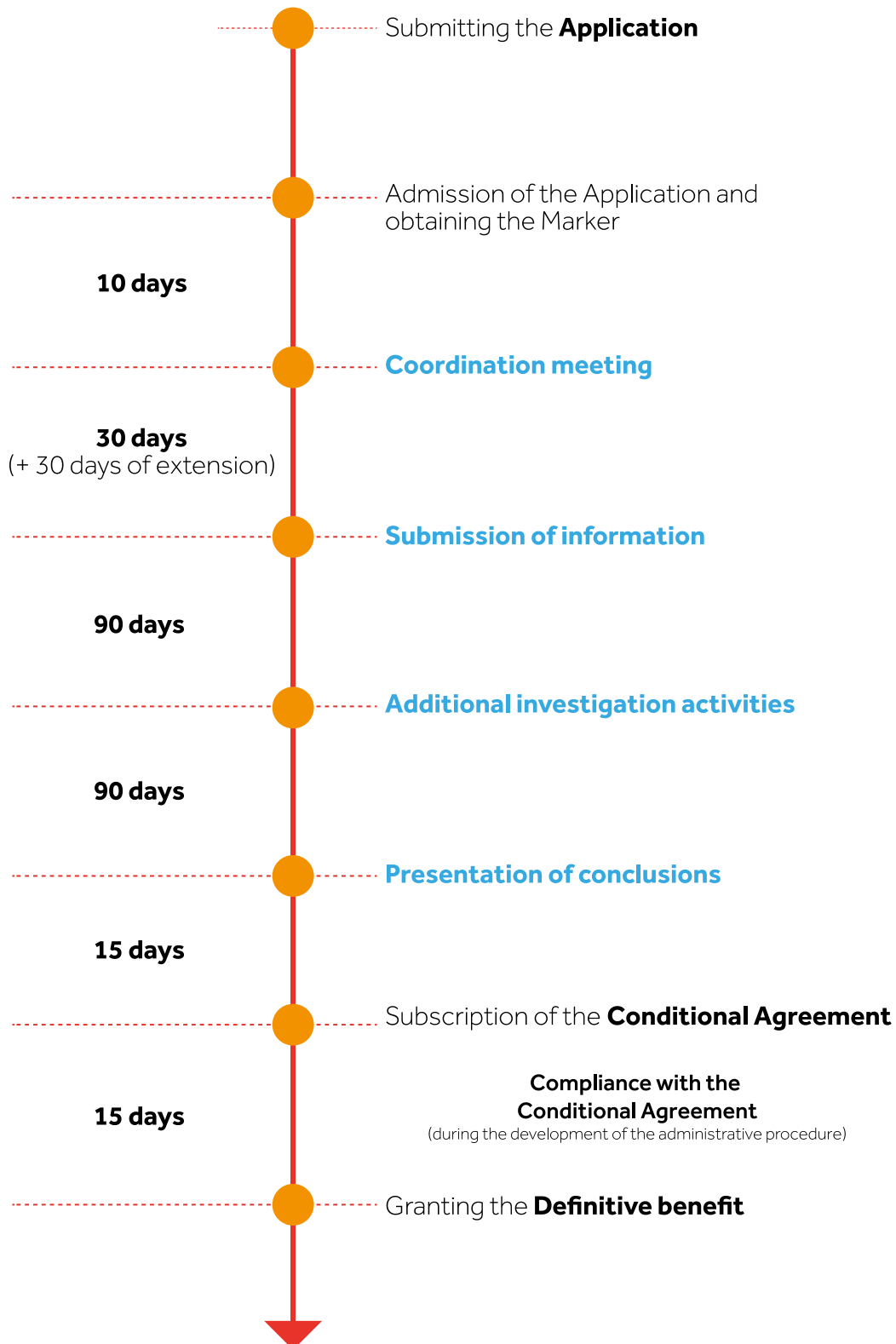
For inquiries about the Leniency Program, please contact the Technical Secretariat from Monday through Friday, 8:30 a.m. to 5:30 p.m., at:

**Technical Secretariat of the Commission for
the Defense of Free Competition**

(511) 2247800, extension 3101
clemencia@indecopi.gob.pe

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Flowchart: Processing of an application for benefits





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