

# The "new" crime of Abuse of Dominant Position in the Market and the importance of compliance programs

On Saturday, August 29, 2020, Law No. 31040 was published in the Official Gazette "El Peruano", promulgated by the President of the Congress of the Republic of Peru according to the mechanism of insistence, provided for in Article 108 of the Constitution, in view of the refusal expressed by the President of the Republic of Peru. This legal regulation, among other aspects, in force since the day after its publication, reinserts in the criminal law -with certain nuances- the former "crime of abuse of economic power", decriminalized in July 2008 with the entry into force of the Law for the Repression of Anti-Competitive Conduct (Legislative Decree No. 1034).

After 12 years of remaining as an infringement of eminently administrative nature, which investigation and sanction was exclusively in charge of the National Institute for the Defense of Competition and Protection of Intellectual Property (INDECOPI), the practices of abuse of dominant position in the market and participation in restrictive agreements of the productive, commercial

and service activity, is now sanctioned again in Article 232 of the Criminal Code, with penalties of imprisonment in the range of 2 to 6 years and disqualification to operate commercially, as long as they have the purpose of preventing, restricting or distorting free competition.

In order to respect the principle of subsidiarity (*ultima ratio*) of the economic criminal law, it is advisable that, prior to the decision to formalize criminal charges, the Public Prosecutor's Office insists on the specialized participation of the agencies that supervise free competition (*i.e.*, INDECOPI or OSIPTTEL), to determine whether the attributed practice may be qualified as an unjustified refusal to contract, abusive imposition of binding clauses, market sharing, or concerted price fixing, among others, or if in the specific case the position held by the agent in the market may be qualified as "dominant".

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Thus, for example, a person or company is considered to be in a dominant position when its sole decision may substantially restrict, affect or distort the conditions of supply or demand in a specific market. In this way, the qualification of an economic agent as dominant implies the evaluation not only of legal aspects, but also of economic aspects related to the level of concentration of the market by the agent and its participation in the market.

On the preventive plan, it is worth mentioning the guidelines prepared by INDECOPI on the design of Compliance Programs with regard to Free Competition, which necessary implementation is now reinforced to mitigate and properly manage risks which materialization exceeds the administrative scope to transcend the field of criminal consequences.

While it is recognized that companies have the power to define the scope of their Compliance Programs with regard to Free Competition according to their particular characteristics, INDECOPI considers the following essential components: (i) real commitment to comply from the top management; (ii) identification and management of current and potential risks; (iii) internal procedures and protocols; (iv) training for workers; (v) constant updating and monitoring; (vi) audits; (vii) procedures for consultations and complaints; and, (viii) appointment of a Compliance Officer or Committee.

Certainly, the experience gained during this time by the *Compliance* divisions in the implementation of Anti-Corruption and Money Laundering Prevention Programs under the standards of Law No. 30424 and its Regulations must be used to integrate into the prevention model the management of risks associated with anti-competitive practices, with the nuances of the specialization of the subject matter.

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# Relevant news

On August 29, 2020, Law No. 31040 was published, which introduces the following amendments to the Criminal Code: (i) it again typifies -after 12 years- as a criminal figure the practices of abuse of dominant position in the market; (ii) it re-incorporates the crime of hoarding; and, (iii) it modifies the typification of the crimes of speculation and adulteration.

Source: El Peruano



By means of the publication of SBS Resolution No. 1982-2020 on August 12, 2020, Article 3 of Resolution No. 3949-2019 was amended, establishing as a valid means the notification via electronic mail of the documents issued within the framework of the functions and powers of supervision and sanction of the FIU-Peru, with respect to the obliged subjects under its supervision.

Source: El Peruano



On August 14, 2020, the United States Department of Justice ("DOJ") issued its first opinion statement on the application of the Foreign Corrupt Practices Act ("FCPA"), after six (6) years.

Source: United States Department of Justice



In early September, the U.S. Securities and Exchange Commission ("SEC") shall vote on controversial amendments to the whistleblower reward program after two (2) years of debate.

Source: Hedge Week



On August 14, 2020, the French government issued two Ministerial Orders, aimed at ensuring the implementation of the reinforced anti-gratuity restrictions in the health sector, applicable as of October 1, 2020, in accordance with the Decree of June 15, 2020.

Source: Clifford Chance LLP



Herbalife Nutrition Ltd. agreed to pay the Department of Justice and the U.S. Securities and Exchange Commission ("SEC") \$123 million dollars to resolve violations of the Foreign Corrupt Practices Act ("FCPA") in China.

Source: U.S. Securities and Exchange Commission



## Resources

At the Thirty-Ninth Plenary Meeting of Representatives of the Financial Action Task Force on Latin America (GAFILAT), the preparation of the second update of the "Analysis of Regional Threats in the Area of Money Laundering" was approved, two years having passed since the previous diagnosis.



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The United States Federal Communications Commission ("FCC") provides tools to prevent consumers from becoming victims of scams during the pandemic.



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The Superintendence of Banking and Insurance (SBS), through the Intelligence Unit (UIF-Peru), with the support of the German Cooperation for Development, implemented by Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, has published a guide for the management of risks of money laundering and financing of terrorism in the activity of buying and selling currencies.



## Statistics

According to the study "Political Culture of Democracy in Peru and the Americas, 2018/19: Taking the Pulse of Democracy", 36% of Peruvians interviewed perceive corruption as the main problem in Peru, which, as explained, also reflects a significant change compared to 2006, when only 7% identified it as a problem.





# Contact



**José Reaño**  
Partner  
jreano@estudiorodrigo.com

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**José Luis Medina**  
Associate  
jmedina@estudiorodrigo.com

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**Sebastián Elías**  
Associate  
selias@estudiorodrigo.com

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**Micaela Torres**  
Associate  
mtorres@estudiorodrigo.com

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**Laura Zúñiga**  
Associate  
lzuniga@estudiorodrigo.com

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