

OECD-IDB PEER REVIEWS OF COMPETITION LAW AND POLICY: PERU 2018

HIGHLIGHTS • WWW.OECD.ORG/DAF/COMPETITION

Highlights from the report on the implementation of previous recommendations

Peru has recently implemented a large number of reforms to its competition framework: evidence of the ambitious efforts by Indecopi and the Peruvian government to improve the effectiveness of competition enforcement and to make markets work better. To add impetus to these reform efforts, Peru requested a review by the OECD of its competition law and policy. This review was undertaken under the auspices of the OECD/Inter-American Development Bank Latin American and Caribbean Competition Forum.

This review finds that Peru's competition regime is active and broadly in line with internationally recognised standards and practices, with certain exceptions. Peru lacks a merger control regime. Furthermore, of particular concern, is that the legal framework poses a number of risks to the autonomy and independence of Indecopi and of its decision-making bodies. Implementation of this Review's recommendations will require commitment and action from both the government of Peru and Indecopi.

Institutional Design and Resources

Agency independence is a prerequisite for the effective enforcement of competition rules. Independence enables competition authorities to take decisions based solely on legal and economic grounds rather than on political considerations.

Indecopi has an independent legal status of internal public law and seems to have been immune from political pressures. Its competition bodies enjoy full autonomy regarding which cases to investigate and how to decide them.

However, Indecopi's current legal framework creates risks to its independence and its decision-making bodies, which could be mitigated by the adoption of formal mechanisms. These mechanisms will become more important should Indecopi take on powers that are more likely to elicit attempts to direct or control its decisions, as is the case with merger control. Such measures include:

- ✓ Appointment to all positions in Indecopi should be the subject of an open procedure that sets out transparent criteria for the selection of people for each position.
- ✓ The appointment of Board, Tribunal members and Commissioners taken by a qualified majority approval; and/or by a constitutionally autonomous body, and not by the government of the day
- ✓ Stagger the appointment Board members, Commissions and Tribunals to ensure that a single government / legislature / presidential administration appoint not all members and to avoid a loss of continuity should departures occur at the same time.
- ✓ Reinforce legally the positions of the technical staff and Commissioners, for example, they should be protected from the possibility of removal as a result of an administrative decision by the Board, which is politically appointed.

Every authority needs a sufficient number of well-qualified and experienced staff to implement its mandate effectively.

Indecopi is large and benefits from a stable and autonomous source of funding. Its dedicated leadership and staff have led to increased competition enforcement with significant positive results. Nonetheless, Indecopi's competition bodies have little more than 50 people including the part-time Commissioners and

Members of the Tribunal. The Competition Branch would benefit from a large number of employees, which are an absolute need if Indecopi is granted merger review duties in the future. Understaffing of the Competition Branch must be considered in conjunction with complaints about the length of competition proceedings, and about the Competition Commission, whose members work part-time for very little pay, being overly dependent on the Technical Secretariat. This alleged dependence is said to lead to a blurring of the distinction between investigative and decision-making roles.

The unattractive average salaries paid to Indecopi employees undermines its ability to attract and retain high quality staff. Discrepancies between public and private sector salaries are common around the world. The existence of a civil service pay-cap that applies to Indecopi and other regulators – but not to comparable specialist bodies, such as the Central Bank or the Financial Regulator – creates a larger discrepancy between public and private sector salaries in competition related activities than would otherwise be the case, and poses significant problems in terms of retention of qualified staff.

Investigation and Enforcement Powers

Merger control contributes in several ways to safeguarding the competitive structure of markets. It can help to identify mergers that might cause consumer harm by reducing competition among rival firms and/or foreclose competitors. Without merger control, competitors can circumvent the prohibition against anticompetitive agreements by merging – with effects potentially similar to those of a cartel immune from antitrust scrutiny. These anticompetitive effects can be difficult to tackle effectively with other tools. Most jurisdictions have a mandatory prior notification system in place: transactions that meet certain minimum thresholds may only be completed after clearance has been granted by the respective competition authority. Prior notification systems act on the assumption that it is much easier to prevent than to fix a competition problem arising from a structural transaction. In contrast to international norms, Peru lacks a merger control regime, except in the markets for generation, transmission and distribution of electricity that meet some market share thresholds. More than a hundred jurisdictions have merger control regimes as part of their competition laws. This number includes all OECD member countries except Luxembourg, which is in any event subject to the EU merger control regime.

Peru has focused mainly on prosecuting cartels, which has led to unquestionable success. Nonetheless, enforcement should also be directed at other horizontal and vertical anticompetitive agreements and at abuses of a dominant position – particularly when, as is the case in Peru, there is no merger control regime. Enforcement against bid rigging in Peru is very scarce, and there is a lack of co-ordination between Indecopi and the relevant public procurement bodies. Fighting bid rigging is crucial for economic development. It is a challenge that affects government procurement around the world and costs OECD taxpayers billions of dollars. Experiences in OECD countries show that when companies collude and form a cartel, the cost of goods and services can increase by 20% or more. Given the impact of bid rigging on the public purse and taxpayers, it is important that Indecopi pursues a more aggressive enforcement against bid rigging, and that co-ordination between competition and public procurement authorities increases.

Peru's leniency programme has taken off in recent years following legal reforms after years of abeyance. These developments need to be protected, in particular, by preserving the programme's integrity and ensuring the confidentiality of submitted information.

When calculating the amount of a fine, Peru relies heavily on the illicit benefit that the offender is supposed to have obtained as a result of its anticompetitive conduct. It is extremely challenging to calculate illicit benefit accurately and increases the cost of proceedings as well as of successful judicial challenges. As such, most jurisdictions often rely on a simple proxy like amount of sales or turnover in the relevant market.

Concerns regarding the length of proceedings are compounded by a recent rule that sets a maximum time limit for investigations, which if exceeded leads to proceedings being terminated. Investigations risk being rushed or not closed on time given this trifecta of the complexity of competition proceedings, staffing limitations and hard deadlines. The Commission risks focusing on infringements that are easier to prove rather than the most serious ones, undermining the quality of Indecopi's enforcement.

Recent legal reforms have sought to promote the adoption of settlement and commitment procedures. Notwithstanding the increase in number of settlement and commitment procedures since then, proceedings seem to lack predictability and certainty. Observers claim that it would be possible to encourage more

settlements and commitments, in a way that would benefit competition enforcement and rationalize administrative resources, by increasing the transparency and predictability of settlement and commitment procedures. Regarding settlements, – since commitments will not often be appropriate for cartels – care should be taken to ensure that such measures are not so favourable to infringing parties as to risk undermining their incentives to apply for leniency.

Advocacy

Indecopi has been a driving force in developing Peru's competition culture and increasing awareness of competition across Peruvian society. It has implemented an impressive assortment of competition advocacy initiatives. Indecopi's School is a particularly notable example of how agencies can promote competition law, create awareness of the importance of competition, and engage with relevant stakeholders – public and private,

national and foreign. Indecopi's mandate includes the assessment of bureaucratic barriers in public entities focusing on their illegality or unreasonableness. Indecopi's recommendations are binding on all public entities, which must remove such barriers if Indecopi indicates. It seems that Indecopi does not provide similar opinions on primary legislation unless asked to do so. Indecopi could play an important role in promoting competition if it could take the initiative to comment on legislation, particularly when it considers that they are particularly detrimental to competition.

While it has the power to undertake market studies, the limited number of staff available to the Competition Commission restricts the number of advocacy studies it can pursue in any given year, as well as the number of analysts assigned to the studies. Indecopi should continue to add to its limited amount of competition-related guidance and bring them to the attention of relevant stakeholders.

Key Recommendations

1. **Enhance Indecopi's independence and autonomy** by adopting formal mechanisms regarding the appointment of Commissioners, Board, and Tribunal members.
2. **Ensure adequate resources to competition-related activities**, sufficient number of staff, appointing full-time decision-makers at the Competition Commission and Tribunal and raising staff salaries.
3. **Implement a strategic approach to enforcement**, streamline decision-making, enhance specialisation, capitalise on synergies across Indecopi.
4. **Adopt a merger control review** aligning Peru with international best practices.
5. **Pursue competition enforcement against all types of anticompetitive conduct**, including fighting bid rigging in public procurement.
6. **Strengthen the leniency programme**, protect confidentiality agreements.
7. **Promote private enforcement** which is currently lacking.
8. **Strengthen settlement and commitment procedures** through better transparency and predictability: adopt regulation or guidelines on the details of settlement and commitment procedures.
9. **Reinforce due process and transparency**, issue guidelines on substantive aspects of competition law, ensure decision-making is autonomous from investigations, publish yearly self-assessments
10. **Simplify and streamline the calculation fines** basing them on readily identifiable data.
11. **Expand scope and intensity of judicial review** to control substantive elements of decisions and ensure due process, in particular by increasing specialisation of judges.
12. **Position Indecopi as a competition advocate within government** empowering it to review legislation, and existing or proposed public policies

Peer Reviews of Competition Law and Policy

OECD peer reviews have proved to be a valuable tool for countries to reform and strengthen their competition frameworks.

The mechanisms of peer reviews vary, but they are founded upon the willingness of a country to submit its laws and policies to substantive questioning by other peers.

The process provides valuable insights into the country under study, getting to the heart of ways in which each country deals with competition and regulatory issues, from the soundness of its competition laws to the structure and effectiveness of its competition institutions.

Furthermore, these reviews incorporate recommendations for changes in government policy.

Many of the OECD peer reviews undertaken in Latin America are carried out in co-operation with the Inter-American Development Bank.

Argentina (2006)

Brazil (2010, 2005)

Chile (2004)

Colombia (2009)

Costa Rica (2014)

Czech Republic (2008)

Denmark (2015)

El Salvador (2008)

European Union (2005)

Greece (2018)

Honduras (2011)

Kazakhstan (2016)

**Latin America
(2006, 2007, 2012)**

Mexico (2004)

Panama (2010)

Peru (2004)

Romania (2014)

Russia (2004)

South Africa (2003)

**Chinese Taipei
(2006)**

Turkey (2005)

Ukraine (2008)

Vietnam (2018)

Access all reviews at www.oecd.org/daf/competition