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**CENTRE FOR CO-OPERATION WITH NON-MEMBERS
DIRECTORATE FOR FINANCIAL, FISCAL AND ENTERPRISE AFFAIRS**

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OECD Global Forum on Competition

CONTRIBUTION FROM PERU

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I. – COMPETITION LAW AND POLICY IN PERU

This report summarizes Indecopi's (Peruvian competition authority) experience, with emphasis on the description of recent cases. The following section, presents the organizational structure of Indecopi; the third, describes the administrative procedures for competition policy cases; and the fourth presents briefly two cases of restraining practices solved by the Commission of Competition Policy during the year 2000. Finally, the report presents some important new issues faced by the Commission during 2001.

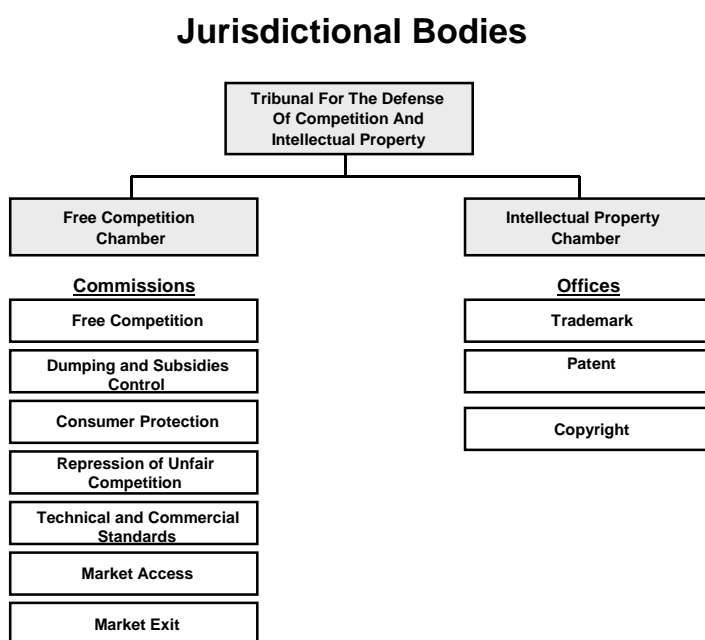
1. Organizational Structure

In the last years Peru has been undergoing major changes which have had a significant impact on the country's development. Many of the most significant changes involve the institution of a market economy system.

In this context, the National Institute for the Defense of Competition and Protection of Intellectual Property (Indecopi), was created in November of 1992 (Decree Law N°25868 and Supreme Decree N°025-93-ITINCI), but it opened its doors in March 1993. It is charged with being both arbiter and promoter of Peru's free market economy, focusing on two critical institutions that undergird it: market competition and intellectual property.

In broadest terms, Indecopi is divided into two parts, jurisdictional area and administration; and guided by a board of directors, represented on a day-to-day basis by the President of the Board. The jurisdictional area, in turn, is divided into two chambers: free competition and intellectual property. Both chambers are comprised of several different jurisdictional bodies, either commissions or offices.

The jurisdictional area is composed of seven commissions and three offices:



Besides these commissions and offices, the Jurisdictional Area also contains a judicial body of the second instance: the Tribunal. In fact, the Tribunal hears all appeals of cases decided at the first instance by Indecopi's commissions and offices. Tribunal members are insulated from the first instance and removable only "for cause". Their decisions are appealable directly to Peru's Supreme Court.

Regarding the implementation of competition laws, on the one hand, the Free Competition Commission is in charge of ascertaining full compliance with antitrust, controlled and restrictive laws in protection of free competition, according to the provisions of Legislative Decree N° 701. This legislation restricts all acts or behavior that constitute an abuse of dominant position within a market as well as any restraining practices against free competition.

Therefore, the Free Competition Commission has the following duties:

- a) To resolve proceedings, in the first instance;
- b) To adopt the necessary corrective measures;
- c) To impose the corresponding sanctions;
- d) To require individuals or firms to submit any documentation including books of account, receipts for payment, business correspondence and computerized records; and to seek information relating to the organization, business, shareholders and ownership structure of firms;
- e) To summon persons to the investigation or their representatives, employees, officers, advisors or third persons, by whatever means necessary, for questioning by designated officials;
- f) To conduct inspections, with or without prior notice, on the premises of individuals and companies and to examine their books, records, documents and properties. During such inspections, copies of physical and computerized files and records, and photographs or films of the scene can be taken. Police might be called for assistance in gaining entry, and may make forced entry to locked premises with a prior court warrant;
- g) To authorize the Technical Secretariat to seize the documents of any person or firm under investigation, for a period of up to two working days, that can be extended to two additional days;
- h) To bring criminal charges where it considers that the provisions of Legislative Decree 701 have been fraudulently violated and that the resulting injury is of serious consequence to public interest;
- i) To request police support as necessary in the performance of its duties.

The Free Competition Commission's work is supported by a Technical Secretariat endowed with the faculty to follow up administrative proceedings *ex officio* or at the request of interested parties. These proceedings aim to determine the existence of any illegal practice that breaks the law whose compliance has been charged to the Commission. The Secretariat has the following duties: a) To render opinions in cases involving violations of this law; b) To conduct inquiries and investigations on its own initiative or in response to a complaint, using the facilities and competence of the Commission on Free Competition as previously described in d), e) and f); c) In exceptional cases, and with prior consent of the Commission, it

can seize for up to two working days, or up to two additional working days, the books, files, documents, correspondence, and general records of the person or firm investigated, being able also to make copies of them. In similar circumstances, it can remove them from the place where they are located for up to six working days, provided it has a court order to do so. The request to remove records must be justified and ruled upon within 24 hours by the judge of the first instance, without transfer to the other party; d) Prepare draft regulations and adopt directives; and e) Issue injunctions, ex-officio or at the initiative of parties involved with the procedure.

On the other hand, the antitrust chamber of the Tribunal has the second and final administrative jurisdiction for cases involving violations of Decree 701. This body has the following functions:

1. Hear appeals against decisions of the Free Competition Commission.
2. Rule on appeals regarding the adoption of corrective measures and the imposition of sanctions.
3. Recommend actions necessary before the competent authorities towards the adoption of legal or regulatory measures needed to ensure free competition.
4. Request police assistance to enforce its decisions.

2. Administrative Procedures

The procedure may be initiated on its own initiative by the Technical Secretariat or at the request of a third party. Actions against infractions of Legislative Decree 701 shall prescribe after five years of the date of the infractions.

The Secretariat, if it believes there are reasonable signs of violation of Legislative Decree 701, shall notify the party presumed responsible for the investigated actions and inform it of the facts. Replies to the charges must be submitted within 15 working days, and any evidence deemed necessary may be offered; other parties with a legitimate interest may become a party to the proceedings during this period.

Within the reply period, the accused party or parties may offer a commitment to cease or modify the investigated events. This proposal is evaluated by the Secretariat and, if considered appropriate, submitted to the Commission with proposed relevant measures to guarantee fulfillment of the commitment. The Free Competition Commission shall approve or reject the proposal. Upon expiration of the accusation reply period, the evidentiary period begins, which consists of 30 working days. Upon expiration of the evidentiary period, the Technical Secretariat issues a report on the amount demanded in the accusation and suggests any measures and sanctions to be adopted.

After receipt of the Secretariat's report, the Free Competition Commission shall have 5 working days to issue its ruling. The Commission's decisions are appealable to the Competition Defense Chamber of the Competition and Intellectual Property Protection Tribunal.

Tribunal's rulings may be challenged judicially (administrative law) before the Civil Division of the Supreme Court of Justice. The Court's decision may in turn be appealed to the Constitutional and Social Law Division of the Supreme Court.

3. Recent experience

During the last year, the Competition Policy Commission initiated six proceedings about dominant position within a market and restraining practices against free competition. Five of them were initiated at a party's request and one was initiated ex officio.

In the same period, the Commission solved six cases, which are described in the following table:

Table 1 : Restraining practices against free competition and abuse of dominant position within a market in Peru: year 2000 (Legislative Decree 701)

	Type of Procedure	Number of Resolution	Type of conduct		First instance Decision	Sanctions
Tabacalera Nacional S.A. against British American Tobacco (South America) Limited – Perú	Party's request	002-2000/CLC	Abuse of dominant position	Predatory pricing	Accusation was retrieved	None
Taxi Tel, Trans Fox White, Kallpay y otros	Ex officio	003-2000/CLC	Restraining Practices	Collusive price fixing	Against the defendant	Cease of practice and 1 UIT to Kallpay
Asa Alimentos S.A. against Enaco S.A.	Party's request	010-2000/CLC	Abuse of dominant position	Art.5° 1 st paragraph	Accusation was retrieved	None
Cab Cable against Electrocentro	Party's request	011-2000/CLC	Abuse of dominant position	Refusal to deal	Against the defendant	20 UIT and cease of practice
Municipalidad Provincial de Arequipa against Empresas de Transporte CASA, CETUAR y otros.	Party's request	016-2000/CLC	Restraining Practices	Collusive price fixing and refusal to deal	Found no grounds for accusation	None
Electro Sur Este S.A. against Inti E.I.R.L., Percy Esquivel y Quiroga CG S.R.L.	Party's request	017-2000/CLC	Restraining Practices	Bid rigging	Found no grounds for accusation	2 UIT for each firm and cease of practice

Source: Technical Secretariat of the Free Competition Commission.

As shown in Table 1, three of the cases were accusations about abuse of dominant position. One of them was an accusation from a Peruvian company (Tabacalera Nacional S.A.) against British American Tobacco (South America) Limited – Peru, on predatory pricing in the Peruvian market of cigarettes. However, Tabacalera Nacional S.A. retrieved the accusation.

Similarly, the second accusation of abuse of dominant position was requested by Asa Alimentos S.A. a food processing company against Empresa Nacional de la Coca (Enaco), a public enterprise which has the legal monopoly of trading coca leaves in Peru. However, both parties achieved an agreement and Asa Alimentos S.A. retrieved the accusation.

The third proceeding of abuse of dominant position was at request of, Cab Cable, a TV Cable firm, against Electrocentro, an electric power distribution firm. The accusation was about the refusal to provide access to the infrastructure used by Electrocentro for the distribution service, to Cab Cable. The

case was solved against the defendant and the Commission imposed a fine of 20 tax units to Electrocentro and ordered the cease of the practice. This decision has been appealed to the Tribunal.

The first case of restraining practices was initiated ex officio against three “moto taxi” transportation service firms, located in Huanta, a city located at the south-east of Lima. The firms accused were Taxi Tours, Asociación de Choferes de Mototaxis de Huanta, Empresa Kallpay, Asociación de Mototaxis “Andino, Empresa “Fox White”, Empresa “Taxi Tel”. The details of this case are presented in the next sections.

A second case of restraining practices was requested by a public local authority, Municipalidad Provincial de Arequipa, against a group of transportation companies, Empresas de Transporte CASA, CETUAR, among others. The accusation was collusive price fixing and the joint refusal to deal implemented by these companies. The Commission declared the accusation had no grounds.

Finally, the third case of restraining practices was requested by Electro Sur Este S.A. against a group of building and construction firms, including Inti E.I.R.L., Percy E. Esquivel and Quiroga Constructores Generales S.R.L. about bid rigging. The details of this case are presented in the next sections.

With respect to restraining practices, during 2000, the Commission solved three cases, two of them about collusive price fixing and one about bid rigging.

3.1 Restraining practices: Electro Sur Este S.A. against Inti E.I.R.L., Percy E. Esquivel and Quiroga Constructores Generales S.R.L.

On December, 16th, 1997, Empresa Regional de Servicio Público de Electricidad Sur Este S.A. (Electro Sur Este), an electric power distribution company, accused Inti E.I.R.L., Percy E. Esquivel and Quiroga Constructores Generales S.R.L., two building and construction service companies, about bid rigging. The accusation referred to a practice implemented during a call for bids (“Renovación de Redes de Distribución Secundaria de la Zona Céntrica de Puerto Maldonado S.S.E.E. N°211,405, 305 and 311”) made by Electro Sur Este, for the construction of a secondary electricity net in Puerto Maldonado, a city located at the east of Peru, in the region called Madre de Dios.

Background

On November, 1997, Electro Sur Este call for bids for the construction of a secondary electricity net in Puerto Maldonado City¹. Three companies were invited to make their economic and technical proposals: Into E.I.R.L., Percy Enríquez Esquivel – Ingeniero Contratista and Quiroga Contratistas Generales. The three companies sent their proposals. The winner was Inti E.I.R.L.

On December, 1999, Electro Sur Este accused Inti E.I.R.L. and Percy Enríquez Esquivel – Ingeniero Contratista and Quiroga Contratistas Generales; of bid rigging.

Electro Sur Este based its claims on evidence from three type of documents presented by the three aforementioned bidders:

- Summary of economic proposal and time of construction

1. Adjudicación directa N°G-RM-001-97

- Dimensions and budget²
- General expenditures and dimensions³

These documents registered the same redaction and the same font. Moreover, the documents presented the same orthographic errors. Besides, the proposals presented the same time of construction proposal and the price bid presented by the three competitors was almost the same.

Table 2
Economic Proposals
(nuevos soles)

Company	Direct Cost	General Expenditures	Profits
INTI E.I.R.L	328,541.33	9,404.11	15,673.51
Quiroga Contratistas Generales	329,211.41	9,483.77	15,806.29
Percy Enriquez Esquivel- Ingeniero Contratista **	384,595.96	9,481.60	15,602.51

Fuente: Proofs offered by Electro Sur Este.

Elaboración: Technical Secretariat of the Competition Policy Commission

As Table 2 shows, the economic proposals of the three bidders were very similar.

Evaluation criteria

In order to prove that a group of companies were guilty of bid rigging, the Commission considered that additional indirect evidence was necessary. In particular, parallelism or similarity in economical and technical proposals must be complemented with indirect evidence indicating that such a parallelism is a result of previous agreements among competitors seeking to improve their joint profit.

In this sense, the Commission considered as indirect evidence the following “plus factors”:

1. The implementation of conducts contrary to self interest of competitors but convenient to the group;
2. Radical changes with respect to common practices implemented by the firms;
3. Transaction costs involved in the implementation of the agreement;
4. Explicit or implicit claims of competitors seeking an agreement;
5. Opportunities for collusive price fixing (for example, meetings of managers previous to a significative increase in prices)

2. “Metrado y Presupuesto”

3. “Disgregado de gastos generales y metrado”

According to the representatives of Electro Sur Este, the evidence of bid rigging practices among the three above mentioned companies were:

- The coincidence of the economic proposals among the bidders
- The coincidence in the format and redaction of the three economic proposals
- The coincidence in the moment of acquisition of the three bases of the contest.

These facts were investigated and confirmed by the Technical Secretariat. Based on this indirect evidence and the absence of other reasonable explanation justifying these coincidences, different from a bid rigging practice, the Competition Policy Commission declared in favor of the prosecution.

Sanctions imposed

According to the criteria developed in the past by the Commission, restraining practices must be considered per se illegal. In this sense, bid rigging was considered illegal independently of the effects of the practice on resource allocation.

However in order to establish the type and amount of sanctions, the authority had to evaluate the negative effects of the practices on competition. Legislative Decree 701⁴, defines six criteria for the determination of sanctions:

- a) the type and scope of the restriction on competition.
- b) the size of the market being affected.
- c) the market share of the involved company.
- d) the effect of such restriction on the potential or existing competitors, other agents of the economic process and the consumers and users.
- e) the duration of the restriction on competition.
- f) the repetition of a forbidden conduct.

In this case, the Commission considered that bid rigging implemented by the three companies did not restrain or impede the participation of other companies in the call for bids, because Electro Sur Este invited to the bid only those three companies.

On the other hand, the Commission considered the effects of the practice in terms of time and resources spent by Electro Sur Este directly or indirectly as a result of the bid rigging.

Finally, the Commission considered that this was the first time that these three companies violated Legislative Decree 701.

4. Article 23°.

As a result of this evaluation, the Commission ordered Inti E.I.R.L., Percy Enríquez Esquivel – Ingeniero Contratista and Quiroga Contratistas Generales the cease of the practice and imposed a fine of two (2) tax units⁵ to each of the companies.

3.2 Restraining practices: Taxi Tours, Asociación de Choferes de Mototaxis de Huanta, Empresa Kallpay and others

On January, 2000, the Competition Policy Commission opened a case against the following “mototaxi” transportation companies: Empresa Taxi Tours, Empresa “Kallpay”, Asociación de Mototaxis “Andino”, Empresa “Fox White”, Empresa “Taxi Tel” and Asociación de Choferes de Mototaxis de Huanta, (a union of companies of the sector). The accusation was about restraining practices against free competition, in particular, collusive price fixing. All the companies involved operated in Huanta, a city located at the south-east of Lima, in the region of Ayacucho.

Background

On December, 1999, the above mentioned companies which are members of the Union of Mototaxi Drivers communicated local authorities⁶ their agreement to increase the prices of mototaxi transportation services. The communication stated:

“..(..) we agreed to increase the cost of tickets in the urban zone of our province to S/. 70, which will be applied since next Sunday, January, 9 ..”

On January, 2000, the local authorities from Huanta accused the companies of restraining practices to free competition. The proofs presented were copies of the documents communicating about the price increase of mototaxi transportation services and a copy of the general assembly of the Union deciding to increase the price of tickets.

Evaluation criteria

Article 6° a) of Legislative Decree 701 defines a restraining practice to free competition as follows:

“...fixing by previous agreement among competitors, directly or indirectly, prices or other business or service conditions”⁷

The objective of the investigation was to establish if the companies and the members of the union that requested the price increase to the local authorities of Huanta; violated article 5° of Legislative Decree 701. The investigation did not refer to the reasonability of that increment, the analysis of cost variables, among others; but if the increment in prices originated in a previous agreement among competitors.

5. Unidad Impositiva Tributaria (UIT) equivalent to nearly US\$850

6. *Alcalde de la Municipalidad Provincial de Huanta.*

7. Amended by the Article 11° of Legislative Decree N° 807.

Sanctions imposed

As a result of the investigation, it was proven that all the companies involved, participated in the agreement of fixing jointly the price of transportation service. The Technical Secretariat visited the companies in order to explain the scope of Legislative Decree 701, in particular, those articles referred to practices that restrain competition. In that visit, the representatives of the mototaxi transportation service companies recognized that the agreement was broken and committed not to make any similar agreement among them.

The companies signed a formal document in which they expressed their commitment to cease the acts prohibited by Legislative Decree N°701. Only one company, Kallpay, didn't sign the document. This company was sanctioned with a fine of one (1) Tax Unit.

4. New issues during 2001: subsidiarity of public companies

On April, 7th 2001, the Peruvian Government enacted Supreme Decree 034-2001-PCM establishing a procedure for evaluating the activities of public enterprises in the peruvian market. In particular, this Decree develops the concept of subsidiarity of public companies, mentioned in the Peruvian Political Constitution of 1993.⁸

Subsidiarity is defined by this Decree as the intervention of public companies in markets where private firms can not satisfy the demand at the same prices and quantities than public ones. According to Peruvian Political Constitution of 1993 a public enterprise shall satisfy three conditions to intervene in the market:

- i) Legal authorization by the Congress;
- ii) Subsidiarity;
- iii) Public interest.

The criteria defined by Decree 034-2001-PCM for evaluating the subsidiary character of public companies activities relates with:

- Competition in the market;
- Private supply characteristics;
- Public interest considerations; and,
- Other ways of Government intervention in the market

8. The Article 60 of Peruvian Political Constitution of 1993 establish that only authorized by law the state can get involved in entrepreneurial activities. Such activities shall be subsidiary to private companies activities and shall be justified by public interest.

The institution in charge of administering this procedure is Fonafe (National Fund for the Financing of Public Entrepreneurial Activities). Fonafe may request a technical report to Indecopi in order to evaluate competition in the market and private characteristics.

During this year, the Free Competition Commission with the technical support of the Economic Analysis Division of Indecopi, elaborated four reports about the activities of the following state owned enterprises:

- Serpost, a public postal service company;
- Editora Perú, a public company in charge of editing laws and decrees enacted by authorities;
- Sima Peru, a public company in charge of construction of boats among other activities
- Sima Iquitos, a public company in charge of construction of boats among other activities in Iquitos, a city located in the eastern zone of the country, in the Loreto region.
- Tans, a state owned air transportation company.

These reports were sent recently to Fonafe. This institution will make a decision on the need of these public enterprises' intervention in peruvian markets.

II. – DESCRIPTION OF CASE

INDECOPI'S ANTITRUST COMMISSION VS. POULTRY SECTOR FIRMS

THE CASE OF PRICE FIXING IN THE LIVE POULTRY MARKET ADMINISTRATIVE ACTION PROSECUTED BY INDECOPI'S ANTITRUST COMMISSION

1. Background

On September 13th, 1996, the Antitrust Commission under the recommendation of its Technical Secretariat, resolved to start an investigation on the presumption of price-fixing, volume control, restraint of trade, and conspiracy to establish entry barriers and development of anti-competitive mechanisms to suppress and eliminate competitors, in the market of live chicken in Metropolitan Lima and Callao, between May 1995 and July 1996. The investigation involved several entities from the Poultry sector like the Peruvian Association of Aviculture (PAA) and 19 firms of the following economic groups: Ikeda, Bellido, Vidal Quevedo, Soto, and Choi Kay⁹.

a) Case History

- Starting 1996, the Secretariat developed various actions in order to get a complete knowledge of the way the poultry sector was functioning.
- With that purpose, the Secretariat requested the PAA, the Center of Gathering and Distribution of Live Poultry (CADA), and other related businesses, information relevant to its market research (behavior of prices, output, traded quantities, characteristics of the trading system, etc.)
- At the same time, the Secretariat requested information and documentation from government entities: Customs, the National Institute for Statistics and Information (INEI), the Ministry of Agriculture, etc. and reviewed several technical reports from private consultants regarding the situation in the poultry sector.

9. The firms under investigation were the following:

- Ikeda Group: Avícola San Fernando S.A. and Molinos Mayo S.A.
- Bellido Group: Corporación Ganadera S.A.
- Vidal Group: Molinera San Martín S.A. and Agropecuaria Villa Victoria S.A.
- Quevedo Group: Avícola del Norte S.A. and Avícola el Rocío S.A.
- Soto Group: Agropecuaria Contán S.A., Granjas de Reproducciones El Hatillo S.A., and Haidarliz S.A.
- Choi Kay Group: El Palomar E.I.R.L and Agropecuaria del Pilar S.A.

Other firms investigated that do not belong to a particular group were: Redondos S.A., Alimentos Protina S.A., Avícola Galeb S.C.R.L, Avícola Rosmar S.A., Avícolas Asociadas S.A. and F. Car S.A.

- The Secretariat also visited the premises of various poultry firms and associations, finding circumstantial evidence of possible price fixing –farm prices— conspiracy to restrain trading conditions and to generate entry barriers to suppress competition, in the live chicken market of Lima..
- The representatives of the Antitrust Commission Technical Secretariat found documents (proceedings of the PAA sessions) proving that once poultry producers knew about overproduction of chickens (baby chickens), they developed actions to face that problem.
- Evidence was found that producers formed a “Statistics Committee”, in charge of presenting alternative solutions to that problem. The alternatives presented implied concertation within firms for its implementation. The alternatives were slaughtering and selling the excess supply of live chicken, slaughtering baby chickens, elimination of fertile eggs and the excess of reproducing hens, export of slaughtered chickens, etc.
- The producers also decided to create a firm to implement a program for freezing surplus production in order to avoid price decreases.
- Evidence found shows that within October and December 1995, the agreements and actions of these poultry firms continued: standardization of average weight, allocation of production quotas, joint elimination of surplus. Circumstantial evidence was found of anti-competitive conduct coming from a smaller group of firms (those with a high share of the market) which formed the “Poultry Strategic Alliance” (PSA)¹⁰, having as goal to eliminate competition among its members and to strengthen the group in front of external competition.
- Evidence was found of price-fixing through output controls (volume and average weight fixing), for the period January – July 1996, and for the period April-July 1996 these output measures were complemented with an advertising campaign financed by the poultry sector aiming to increase demand and maintain the prices of live chicken.
- We would like to highlight that there is a tradition of collusive conduct in the poultry sector. During the investigation several proceedings from the PAA (Peruvian Association of Aviculture) and CADA sessions dated 1992 and 1993, stated that collusive actions were taken, either price-fixing or quantity control to avoid price decreases.

b) *Legal Context of the Accusation*

The accusation fits within the third article of Decree No. 70 1, that establishes that “every act and conduct related to economic activities..... limiting, restraining or distorting free competition in such a way as to generate damages to the general economic interest in the national territory” are prohibited and ought to be sanctioned.

Moreover, according to article 6, of the same Decree, the practices restricting free competition are: “a) direct or indirect agreement among competitors to fix prices or other commercial conditions or services. (...) c) The allocation of production quotas. d) Agreement on the quality of products, as long as

10. “Alianza Estratègica Avícola”

they do not correspond to national or international standards and have a negative effect on the consumer. (...) h) Agreement to limit or control production, distribution, innovations and technical development. j) Other cases of similar effect.”

Conspiring on production volumes is a practice sanctioned and prohibited by the Decree Law No. 701, article 6 a), since it was understood that every agreement on volume contains implicitly the determination of price. The amendments introduced afterwards by Decree No. 807, state precisely in article 6 h), that the agreement to limit or to control production volumes is an anti-competitive practice.

Within our national antitrust law, anti-competitive business practices that aim to or have the effect of, price-fixing, are “*per se*” illegal. Included are practices or conducts that affect prices indirectly or that affect aspects related to production, distribution, price or costs information..

In that sense, the evaluation of anti-competitive conducts is limited to verifying the existence of conspiracy on anti-competitive agreements, independently of the effect they could have on the sector or on the national economy.

One argument highlighted by the attorneys of poultry producers in front of The Tribunal for the Defense of Competition and Protection of Intellectual Property (The Tribunal), was that price-fixing and output controls should be evaluated by the “rule of reason”.

As it is mentioned in the Resolution of the Tribunal, Decree No.701 establishes (beyond any doubt) in its third article that anti-competitive business practices that generate or could generate the effect of restricting or hindering competition, ought to be sanctioned. When the term “could generate” is introduced, we implicitly assume that we sanction equally the practices that have an effect as well as those who do not, since what is punishable is the anti-competitive conduct.

On the other hand, the conspiracy to implement entry barriers constitutes also an illegal and punishable practice, according to articles 3 and 6 of Decree No. 701.

2. PROCEDURAL ASPECTS

- Before the procedure started, the Secretariat visited the premises of various entities and firms of the poultry sector, gathering and reviewing various documents.
- The conspiracy accusation was initially made against the following firms: The Peruvian Association of Aviculture (PAA), The Committee of Meat-Poultry Producers (CPPC-PAA), Agropecuaria Contàn S.A., Alimentos Protina S.A., and the Poultry Breeders, El Rocio S.A., Galeb S.C.R.L., Rosmar S.A., San Fernando S.A., Avicolas Asociadas S.A., Corporacion Ganadera S.A., El Palomar E.I.R.L., F. Car S.A., Granjas Avivet, Integracion Avicola German Orbezo Suarez, Molinera San Martin de Porres S.A., Molinos Mayo S.A. and Redondos S.A.
- Afterward, some other firms were added to the procedure due to their economic relationship with the aforementioned firms and based on the evidence found. The firms added to the investigation were: Agropecuaria del Pilar S.A., Agropecuaria Villa Victoria S.A., Avicola del Norte S.A., Granjas de Reproductores El Hatillo S.A. and Haidarliz S.A.

- The Antitrust Commission declared confidentiality of the information gathered since its disclosure could have affected the interests of the firms under investigation, and ordered to make the evidence of the charges placed available to the accused firms.
- When the procedure started, the Antitrust Secretariat continued visiting entities and firms related to the sector in order to gather some additional information. At the same time, some interviews were made to representatives of the firms under investigation aiming to clarify some aspects of the information gathered during the preliminary investigation. The information requested by the Secretariat was mainly data regarding production, prices, financial statements, etc. that would let to a better knowledge of the structure and functioning of the market.
- The Secretariat also gathered information from institutions and people related to the sector but who were not under investigation and whose identity was kept secret.
- Finally, the Antitrust Commission signed its Resolution charging the accused firms with conspiracy and establishing fines for each one. Poultry producers appealed and the case passed to second instance: The Tribunal for the Defense of Competition and the Protection of Intellectual Property. Thus, according to the terms and conditions established, public audiences between poultry producers and the Technical Secretariat, took place.

3. MARKET CHARACTERISTICS

- The chicken-meat production process is complex and takes a long period (451 days) until it reaches the consumer.
- The grandparents of different genetic line produce reproductive birds of the meat and eggs line respectively. From the reproductive birds of the meat line, fertile eggs of Baby Chicken of the meat line are obtained, and after their incubation –for 21 days- a Baby Chicken-Meat is obtained which will be sent to the farms for its fattening and growing. After seven or eight weeks, the chicken reaches its ideal selling weight. After that period the conversion food-weight factor diminishes significantly.
- Some firms have the process vertically integrated¹¹, and hence have an easier management of their business and a better position within the market. An alternative to vertical integration is the “integrated system”, by which some companies give a BB Chicken, food and technical assistance to the farms so that they do the whole growing process.
- Along the different stages of the production process there exists a competitive environment due to the presence of foreign competition.
- In Peru, there are two sub-markets of chicken-meat: the first is the market of live chicken and the other the market of slaughtered chicken, each one with defined market segments¹², different distribution chains, and distinct levels of foreign competition.

11. “Vertical Integration” describes the property or control of one company of the different stages of the production process.

12. Consumption of live chicken is higher in the medium and lower income levels of the peruvian population.

- 80% of total chicken production in Peru is traded live, and 20% is slaughtered chicken, be it fresh or refrigerated (mainly sold through supermarkets), or frozen (used for institutional consumption and sold mainly in the southern highlands of Peru).
- In the live chicken business there are about 240 wholesalers and 8000 retailers. The wholesalers buy from the farms and distribute to the retailers. (See Annex A.1.)
- The trading process is made basically through CADA, due to the fact that when operating with registered and authorized wholesalers, producers reduce the probability of fraud and so their transaction costs. Trading of chickens outside CADA is possible but implies higher financial risks.
- At the live chicken trading level, foreign competition does not exist, due to the high costs its import would involve. However, in the frozen market, there is both national and foreign production.
- With regards to producers, the poultry sector is characterized by having big producing firms located in the northern and central coast of the country. At the moment the conspiracy accusation was made, 57.82% of chicken-meat production at the national level was concentrated in 10 firms under investigation. At the same time, within the Lima market, those same 10 firms concentrated 78.29% of the market.

4. MARKET EVOLUTION

During 1995, the supply of live chicken grew substantially due to an excess production whose only effect was to force prices down, while during 1996 there was an important reduction of supply that brought price increases.

Starting the last week of August 1995, chicken prices suffered a severe reduction (Graph 1), however, in September 1995, 1188 MT of chicken were driven out of the market, that volume represented approximately 16.35% of the amount sold through CADA during the previous month. During the months of October through December, 570 MT of nationally produced chicken were frozen and placed in the refrigerated chambers of Lima and Callao, implying that at least 570 MT were withdrawn from the market. Coincidentally, by the end of October the price of chicken reached its highest level within 1995.

At the same time, during the months of October and November 1995, the average weight of live chickens traded, suffered a noticeable reduction, changing from 2.43 Kg. in September to 2.28 Kg. and 2.29 Kg. respectively, in October and November.

From November to December the market turned more stable, the average weight increased and reached the highest level of 1995, 2.44 Kg. per chicken.

From January to March 1996, prices were more stable, showing very little changes (see Graph 2). During the period May-June 1996, prices went down, showing very low dispersion levels within the prices of various firms (see Graph 3).

5. COMPETITION ANALYSIS

Throughout the procedure the key issue was whether a price arrangement in fact took place, which according to Decree No. 701, was considered *per se* a punishable anti-competitive conduct.

Even though, according to the Law, that practice was punishable *per se*, the Antitrust Secretariat decided to deepen its investigation and analyze the competition conditions in that market in order to determine if they facilitated or not the generation of anti-competitive conducts.

a) *Relevant Market Definition*

Product Substitutability

- Chicken is the meat with the highest demand among domestic consumers. Chicken prices are lower than beef and than most fish which makes chicken an affordable product for most domestic consumers. (See Graph 4)
- Long term trends on per capita consumption of meat products show that chicken consumption is rising and consumption of the remainder meats has remained constant.
- The consumption data pertaining to the period 1970-1995, shows that whenever the consumption of chicken increased the consumption of fish decreased, implying some degree of substitution between chicken and fish (see Graph No 5).
- However, according to the price elasticities calculated by the Secretariat and by the National Institute of Statistics (INEI), live chicken does not seem to have any close substitute. Direct and crossed price elasticities of demand with products that could be considered possible substitutes (like jack fish, giblets, tripe, green peas, noodles, etc) show non-significant values, indicating that the demand for live chicken would not change dramatically when its price changes¹³.
- 80% of total chicken production in Peru is traded live, and 20% is traded as slaughtered or frozen chicken.
- This peculiarity of the peruvian chicken market was confirmed by direct testimony of the poultry producers, who in the public audiences held in second instance, said that consumers had a preference for live chicken (slaughtered just few moments before being sold).

13. The calculus of Direct and Crossed Prices elasticities is:

According to Velarde: price elasticity of demand (-0.75), demand elasticity with respect to the price of fish (0.15), income elasticity (0.60).

According to the Technical Secretariat: price elasticity of demand (-0.75), demand elasticity with respect to the price of jack fish (0.22), income elasticity (0.59).

According to the National Institute for Statistics:

Upper Income Level: Price Elasticity (-0.66), elasticity with respect to beef (0.51)

Medium Income Level: Price Elasticity (-0.32), elasticity with respect to the price of jack fish (0.22), elasticity with respect to the price of noodles (0.32), elasticity with respect to the price of green pea (0.13).

Lower Income Level: Price Elasticity (-0.65), elasticity with respect to carrots (0.28).

Peruvian consumer preferences have originated a tendency in the poultry market to trade mainly live chicken, this jointly with the low substitutability found with other kinds of meat, led us to define the relevant market from the point of view of the product, as live chicken.

Geographic Scope

- Delimiting geographically the relevant market is the same as establishing the alternative sources to which the consumer could go if the price of the good rises in a small but significant amount.
- From the national production of chicken-meat, 65% is traded in Metropolitan Lima and Callao, while 35% is traded in the rest of the country.
- In the live chicken market, CADA accounts for almost all its trading. Competitors do not exist, since the alternative of trading chicken outside CADA (through non-accredited wholesalers) even though is possible is more expensive, implying higher financial costs and risks, higher transportation costs, etc.
- The complexity and high costs involved in live chicken imports, has limited the international trading of chicken to refrigerated or frozen chicken, which is mainly traded in the southern part of the country.
- With regards to trading of slaughtered chicken (fresh, refrigerated or frozen) the supply comes from national competitors and external competitors (Chile, Bolivia, U.S.A.), through trading channels completely different to those used for live chicken. Demand for frozen and refrigerated chicken comes mainly from the southern highlands of Peru, and from institutional consumers (hospitals, the Army, etc.) while the demand for fresh chicken comes mainly from supermarkets in the most important peruvian cities.

The strong concentration of the trading process of chicken in Lima and Callao, and the non-existence of foreign competition in that market, lead us to conclude that the relevant market in which competition conditions should be analyzed, is the market of live chicken in Metropolitan Lima and Callao.

b) Evidence Found During the Investigation

Since collusion is considered an illegal practice *per se*, the Antitrust Technical Secretariat searched for evidence on agreements established by the firms involved in the case, having as target to restrict free competition in the chicken market.

The facts found were the following:

- Since there was an obvious oversupply for 1995, producers got together –at least once every week- in its association headquarters to evaluate the market behavior and to reach and agreement on how to face the problem.
- In a session that took place in May 1995, a project was made to freeze chicken as a mechanism to avoid a price reduction in the market of live chicken in Metropolitan Lima and Callao. This project generated an agreement to trade the frozen chicken basically in the market of the southern zone of the country (Cuzco, Arequipa and Puno) in order to stop

entry of imported chicken coming from Chile and Bolivia –by means of predatory pricing-- to that market and to Lima and Callao markets. In this way, barriers to entry to potential foreign competitors were created.

- During a PAA session in July 1995, a program of slaughtering and freezing of 160,000 chickens was discussed and approved. That program established the schedule for freezing and the amount assigned to each firm.
- In their discharges, some firms recognized that the freezing program had the target to force the Bolivian and Chilean chicken out of the southern zone market arguing that it was due to the sanitary problems those products were presenting. However none of these firms presented evidence to back up that argument, which in fact is almost not probable taking into account the characteristics of the product –frozen chicken- and the sanitary controls made by the Ministry of Agriculture.
- During May 1996, the firms within PAA agreed on a temporary reduction in the price of chicken and its further increase. An strategy was designed inside the PAA to allow the increase of chicken consumption, eliminating the surplus generated by a decrease in demand and the increase in the levels of breeding registered during March; with that in mind the firms agreed to decrease prices and to start an advertising campaign “Chicken with Prize” to encourage its consumption.
- Evidence found during the investigation shows clearly the intention of chicken producers to control market prices.

Main Evidence Found During the Investigation

1. - May-June 1995: Avoiding Price Reductions

Overproduction : Detecting the Problem

“Projection of Baby-Chicken Production for the period April 1995-September 1995“, and the graph “Real and Theoretical Production of Baby Chickens April-September 1995”, documents found in the files of the CPPC (Chicken-Producers Committee) and in some firms under investigation, which were distributed and discussed in the CPPC session of April 13, 1995.

Proposing Alternative Solutions

“Crisis Due to Overproduction of Baby-Chickens (Appraisal of Alternative Solutions)”, document presented by the “Statistics Committee”, discussed in the CPPC session of April 19, 1995.

Restricting Production

Sessions of May 3 and 4, 1995, where an agreement was reached to keep prices stable by restricting production and by jointly handling the surplus.

Proceedings of Alimentos Protina S.A.. Board of Directors session, dated June 12, 1995, where in order to maintain prices, the effects of overproduction on the market and the need to produce chickens with an adequate color and weight between 2.3 and 2.4 kgs. were discussed.

Implementing the Agreement

Proceedings from Alimentos Protina S.A.. Board of Directors session, dated June 12 1995, where Mr. Raul Ramos..... Document proving the agreement to standarize chicken weight to 2.2 kg.
CPPC-PAA session of July 5, 1995, in which an agreement was reached to slaughtering 160,000 chickens. Two documents found “Daily Freezing Program” (from July 10 to 17) and “Stock of Frozen Chicken”.

Document dated May 3, 1995, found in Avicola El Rocio S.A., regarding the same issues of a CPPC session that took place the same date. Within the issues discussed we found the proposal of Mr. Fabres, to reduce reproducing hen imports and to suppress baby chicken and fertile egg imports and buy them in the peruvian market.

2. - September-December 1995: Price-Fixing

Colluding to Reduce Prices

Document found in the premises of CADA-LMC "Circular N 01" dated September 21, 1995, establishing that according to evaluations made in the Lima and Callao markets, the price of chicken is S/. 4.25 per Kg., suggesting not to pay a higher price.

Raising Prices

Memo No. 506/95 dated October 12, 1995, found in Avicola El Rocio S.A. from Mr. Italo Marchand, to Mr. Rafael Quevedo, informing the issues dealt in the October 11, 1995 CPPC meeting. It is clearly understood in this document the willingness of CPPC-PAA firms, to reduce quantities supplied of live chicken, by means of reducing average selling weight to 2.2 kg. or less.

CPPC meetings that took place October 13th, 15th, and 18th. It is worth mentioning that in less than a week the CPPC-PAA met four times in search of an agreement to raise prices by restricting production.

Stabilizing Prices

Document found in the premises of Corporacion Ganadera S.A. summarizing the issues dealt in a meeting held at least before December 19, 1995. It was written 1) the surplus level for January 1996 will be 1'500,000 units, 2) Crisis similar to that of 1976 3) Probable decrease in price to S/.1.50 per kg. 4) the new agreed upon price is S/.2.40 per kg. (referring to a previous agreement).

3. - January- March 1996 : Conspiracy to Raise Prices

Conspiracy to raise farm prices

Four CPPC-PAA meetings in December, three took place in very close dates (13th, 14th, and 18th) which is in fact an unusual situation. During these meetings, and basically in the meeting held the 18th an agreement was reached to restrict the breeding of baby chickens.

Report dated March 14, 1996, sent from Mr. Mario Romero Loly to Mr. Jorge Belevan, Trade Manager of Molinos Mayo S.A., where the conduct of several firms in response to the agreed upon price is evaluated.

4. - April-July 1996: "Chicken with Prize"

Joint Advertising/Promotional Campaign and Price-Fixing

Chicken Prices Falling Down : Alternative Solutions

CPPC-PAA meeting held April 24, 1996, in which, Mr. Hector Bellido's proposal to reactivate advertising campaigns encouraging chicken consumption, was accepted. During that meeting, the CADA-LMC Report "Weekly Supply Report: April 16-22, 96", was discussed. A copy of the report was found in Avicola Rosmar S.A. files.

Proceedings of the CPPC-PAA session dated May 3, 1996, indicating a definitive agreement to make an advertising and promotional campaign to encourage chicken consumption.

Implementation of the agreement: Advertising Campaign and Price-Fixing

The advertising campaign needed to be financed and controlled, for that purpose a system was established to exchange information through CADA. Confirmed by Mr. Rafael Quevedo's testimony: "each of us had to say how much was going to sell, in order to have a quantity of coupons assigned".

June 19th session of CPPC-PAA, in which the "Weekly Supply Report: June 11-17, 96" was analyzed. A copy of this document was found in Avicola Rosmar S.A. with written notes from which we can conclude that the mechanisms agreed to raise sales and eliminate oversupply were: 1) agreed upon price reduction 2) promotional campaign

Coincidentally, two days after the June 26, 1996 CPPC-PAA meeting and once their goal was reached, a process of accelerated price rise started, being stopped only in July 17, 1996.

Annex B, includes evidence that proves the conspiracy to fix prices in the live chicken market.=

c) *Poultry-Breeders Strategic Alliance (PSA) or Attempt of Poultry-Breeder's Fusion (APF)*

- In 1995 a group of firms that accounted for 56% of total trading of live chicken in Metropolitan Lima and Callao¹⁴ adopted agreements on production, trading, input buying levels, and created the “Alianza Estrategica Avicola (AEA) which in English would be “Poultry-Breeders Strategic Alliance” (PSA), whose name was modified afterwards to “Intento de Fusion Avicola (IFA)”, which translated to English would be “Attempt of Poultry-Breeder's Fusion” (APF).
- During the procedure those firms were not able to prove that their fusion implied a permanent change in their structures. However, it was proved that those firms adopted several agreements aiming at coordinating their market behavior, restricting or eliminating competition among the group members and imposing barriers to entry into the market to third parties.
- For that purpose members of the PSA agreed on using mechanisms such as buying up (hoarding) the productive capacity of the farms or incubation plants of firms that were not part of PSA, aiming at avoiding their use by third parties; the lobby made both with bankers and government authorities was aimed at limiting the access of potential competitors to funding and the establishment of legal conditions or requirements that will stop entry of potential competitors.
- Another fact against the fusion argument of the above mentioned firms, is that even though there was a long period of time since the fusion negotiations initiated the alleged objective was not reached –which does not sound reasonable considering that much more complicated fusions have taken place in much shorter periods-- besides, no advancement in the tasks required by a fusion (like assets appraisal) was demonstrated.
- The report made by the Secretariat determined with respect to the agreements and practices developed by the firms integrating the PSA or APF, that since it was not proved that they were linked to a fusion process, they should be evaluated under articles 3 and 6 of Decree No. 701, that establishes the prohibition of any agreement, decision or practice aiming at or having the effect of, restricting or misleading the competitors within an specific market.
- However, the Tribunal's Resolution concluded that there was not sufficient evidence that the firms integrating the PSA have created market entry barriers. Besides, it was considered that even if some agreement restricting competition was reached within the PSA or APF, it would have been overlapped by the agreements reached and behavior generated within the frame of a bigger conspiracy made by the rest of the firms in the sector. In this sense, the Tribunal considered that it had no sense to consider this particular conspiracy as an independent practice and to punish it. In any case what this could be considered is an agreement to present a coordinated and stronger position in the bigger conspiracy negotiations.

14. Those were the firms of the Ikeda Group, Molinera San Martin de Porres S.A., Corporacion Ganadera S.A., Alimentos Protina S.A. and Granjas Avi Vet Integracion Avicola German Orbezo Suarez.

6. CASE CONCLUSIONS

a) *Case Resolution*

The conspiracy accusation presented by the Technical Secretariat against 21 firms for the charges of restricting competition through price-fixing, was declared FUNDADO by the Antitrust Commission in January 15, 1997. Even though at the beginning the procedure included the investigation process for fixing of production volumes, conspiracy to create entry barriers to the market, the investigation was finally centered in the analysis of price-fixing.

The Commission ordered the firms to stop the anti-competitive practices immediately and sanctioned them with fines that were set according to the type and scope of competition restriction, and to the degree of participation of each firm in the formulation, adoption and implementation of the anti-competitive agreements.

The Tribunal in second instance, reconfirmed partially first instance Resolution, in the portion referred to the infringement of Legislative Decree No. 701 for price and volume fixing. However, declared INFUNDADA the process against some firms¹⁵ and reduced the fines imposed by the first instance.

b) *Fines*

The procedure proved that during the period of investigation the firms involved infringed in a continuously Decree No. 701, both before and after the passing of Decree No. 807 that increased the fine scale. In that context, it was considered in first instance that the fines to be applied were those in force at the moment the infringement took place, and so the fines applied were the ones of Decree No. 807.

The fines were imposed taking into account the degree of infringement¹⁶, and the amounts were not higher than 10% of their sales through the Distribution Centers between May 1995 and July 1996. On the other hand, for economically related firms, in which one or several of them did not participate directly in trading of chickens, fines were calculated on the basis of sales made by the firm that did trade through the Distribution Centers and were afterwards divided between the economically related firms. With regards to PSA or APF a higher fine was applied due to the fact that the Commission considered that the agreements adopted by them were a major restriction of competition.

However in second instance The Tribunal considered that although the first instance did right when applying fines given the degree of their faults, it did not take into account an attenuating factor when calculating the fines, and it was that within the months of May 1995 and April 1996, the ruling law had a maximum fine of 50 Taxing Units for infringements to Decree No. 701¹⁷. According to the Tribunal, since much of the infringements to the law were made during that period, to be fair the previous fine scale has to be applied. So the amount of fines was recalculated taking into account the following:

15. The firms were Granjas Reproductoras El Hatillo S.A., y Haidarliz, Granja Los Huertos S.A., Agropecuaria Villavictoria S.A. y Avicola del Norte S.A.

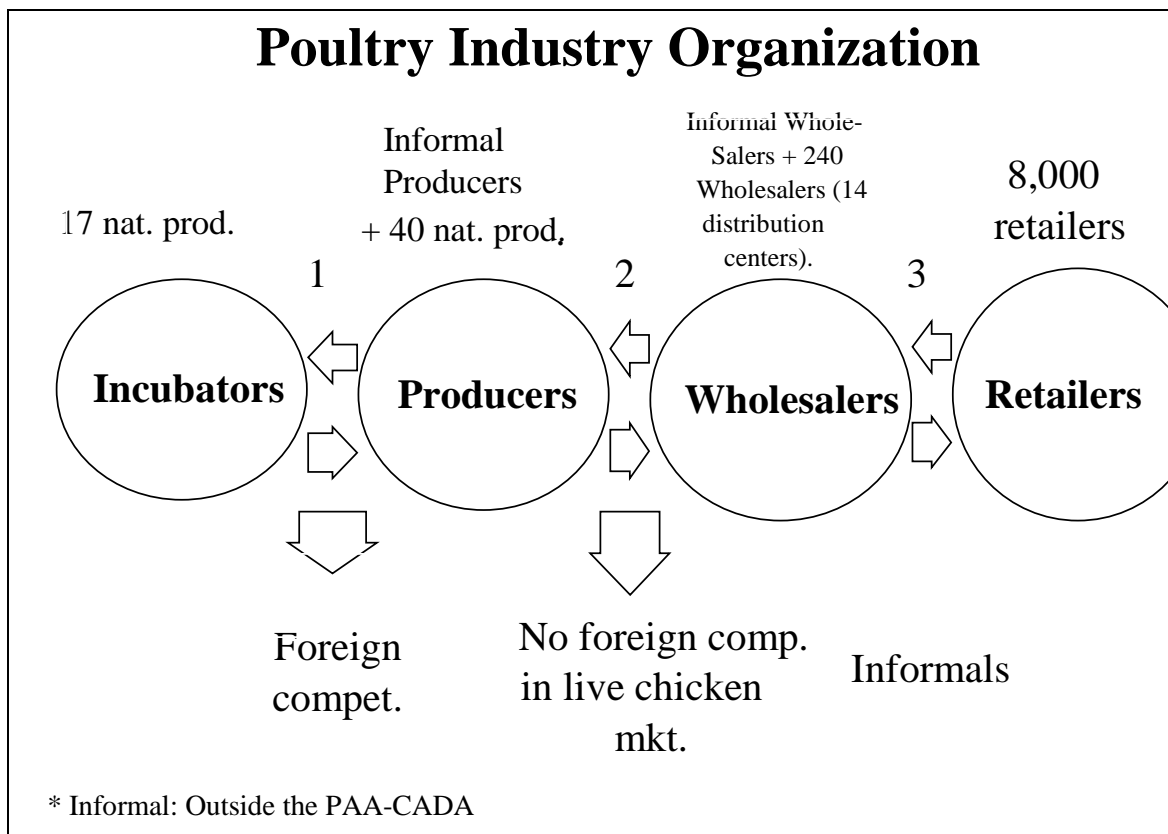
16. The degrees considered were, important, very important, extremely important

17. According to the amendment made to the law, by the Legislative Decree No. 807, the maximum fine is 1000 Taxing Units. A Taxing Unit is the basis used for calculating taxes, fines and other charges made by the public sector. It is changed at the beginning of each calendar year and its amount is fixed by the Ministry of Economy. One taxing unit is equivalent to approximately US\$900 to US\$1000, depending on the exchange rate.

- The ruling fine scale during the period the practice took place.
- There were charges for the development of the advertising campaign “Chicken with Prize”.
- If any anti-competitive practice done by a member of the PSA or APF existed the Tribunal considered they were overrode by the practices established by the rest of the firms. Besides, there was no evidence to back up the celebration of agreements to create barriers of entry to the market by members of the PSA.
- The fact that Antitrust law in Peru was relatively new.

ANNEX - A

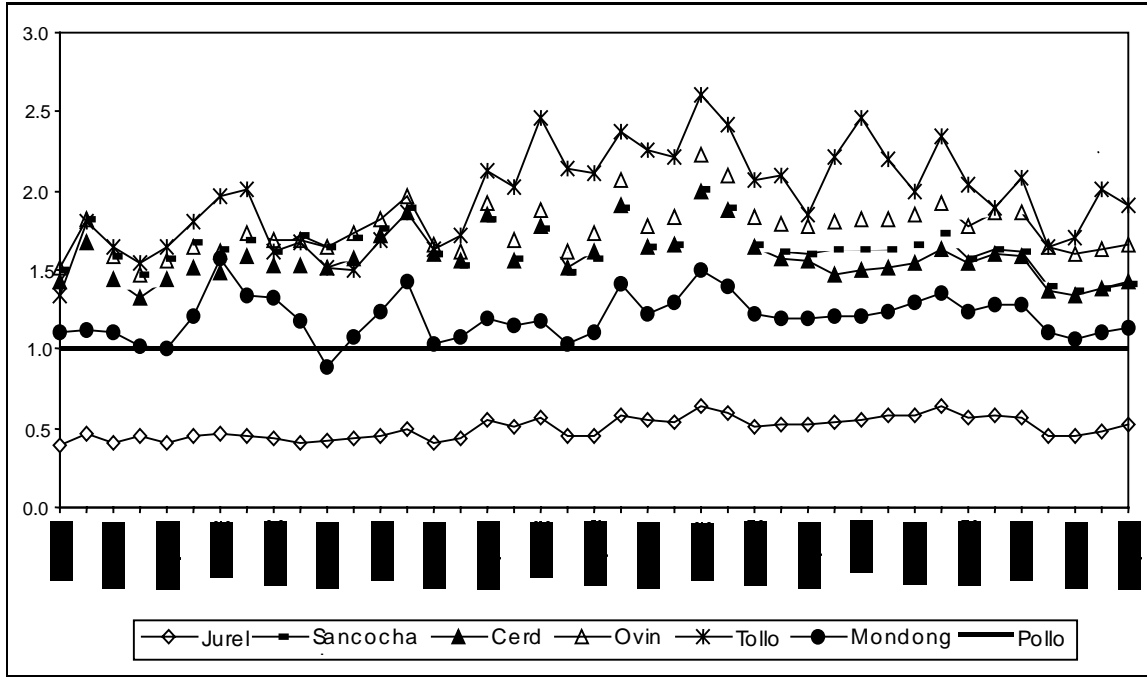
A.1. Organisational Scheme of the Poultry Sector



(Graphs 1 to 3 not available in black and white)

A.5. Relative Prices of other kinds of meat with respect to chicken.

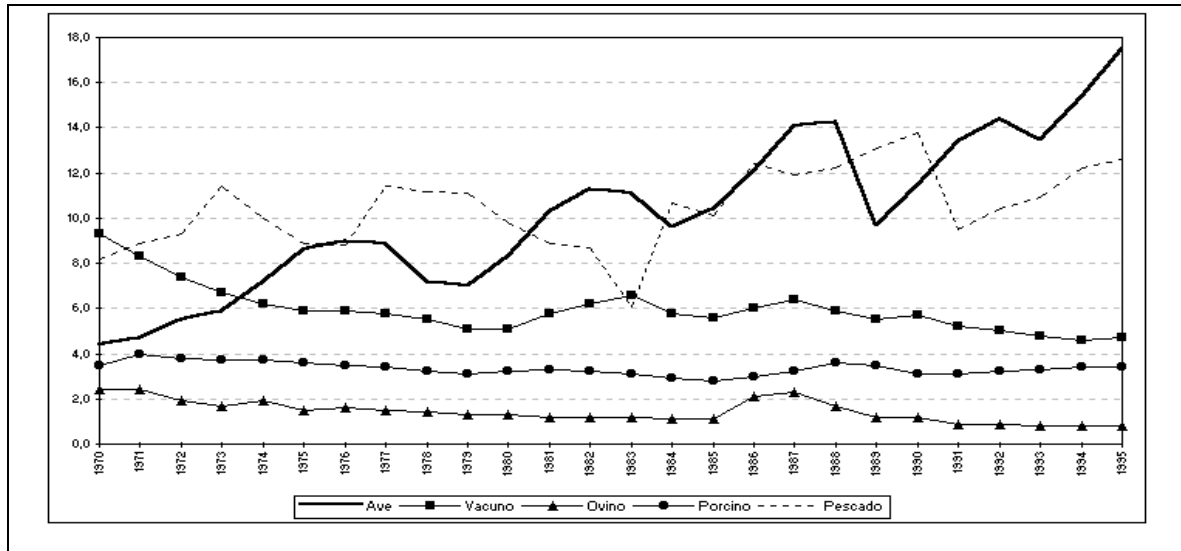
Graph 4
 Relative Prices of other kinds of meat with respect to chicken
 (January 1993 – May 1996)



Source: Ministry of Agriculture Elaboration: Technical Secretariat, Free Competition Commission - INDECOPI

A.6. Per head consumption of meat.

Graph 5
Per head consumption of meat.
 1970 – 1995



Source: Ministry of Agriculture

Elaboration: Technical Secretariat, Free Competition Commission - INDECOPI

III. – QUESTIONNAIRE ON ANTI-CARTEL ACTIONS

1. Please provide a citation and as much of the following information as possible for each case since January 1, 2000 in which your economy challenged a hard core cartel –i.e., an anticompetitive agreement among competitors to fix prices, restrict output, rig bids, or divide or share markets

During 2000, the Competition Policy Commission of Indecopi solved two cases related with hard core cartels.

– **Bid rigging: Electro Sur Este S.A. against Inti E.I.R.L., Percy E. Esquivel and Quiroga Constructores Generales S.R.L.**

- (a) Each respondent's name, the covered product or service and geographic area, and the approximate beginning and ending dates of the cartel

Respondent names: Electro Sur Este S.A., Inti E.I.R.L., Percy E. Esquivel and Quiroga Constructores Generales S.R.L.

Product or service: building and construction services

Geographic area: Puerto Maldonado, a city located at eastern zone of the country, in Madre de Dios region

Approximate beginning and ending dates of the cartel: Was proved that bid rigging occurred one time, in December 1997.

- (b) Whether the evidence of collusion was direct (written or testimonial) or indirect; the nature of any indirect evidence

Nature of evidence: Indirect evidence, based in similarities of documents presented by accused firms

- (c) Amount of commerce: The contract value was S/ 353 618,94, approximately US\$ 100,000.

- (d) Sanctions

According to the criteria developed in the past by the Commission, restraining practices must be considered per se illegal. In this sense, the bid rigging must be considered illegal independently of the effects of this practice on resource allocation.

However in order to establish the type and amount of the sanctions, the authority shall evaluate the negative effects of these practices on competition. Legislative Decree 701¹⁸, defines six criteria for the determination of sanctions:

- a) the type and scope of the restriction on competition.
- b) the size of the market being affected.

18. Article 23°.

- c) the market share of the involved company.
- d) the effect of such restriction on the potential or existing competitors, other agents of the economic process and the consumers and users.
- e) the duration of the restriction on the competition.
- f) the repetition of a forbidden conduct.

In this case, the Commission considered that the bid rigging implemented by the three companies doesn't restrain or impede the participation of other companies, because Electro Sur Este called for bids only to these three companies.

On the other hand, the Commission considered the effects of the practice in terms of time and resources spent by Electro Sur Este directly or indirectly as a result of the bid rigging.

Finally, the Commission considered that this was the first time that these three companies violated Legislative Decree 701.

As a result of this evaluation, the Commission ordered Inti E.I.R.L., Percy Enríquez Esquivel – Ingeniero Contratista and Quiroga Contratistas Generales the cease of the practice and imposed a fine of two (2) tax units¹⁹ to each of these companies.

- **Collusive price fixing: Municipalidad Provincial de Huana against Taxi Tours, Asociación de Choferes de Mototaxis de Huanta, Empresa Kallpay, empresa Fox White, empresa Taxitel**

Product or service: "Mototaxi" transportation service

Geographic area: Huanta, a city located at the south-east from Lima, in the region of Ayacucho

Approximate beginning and ending dates of the cartel: Was proved that agreement was achieved on January, 2000, during a General Assembly of the Union Mototaxi Drivers of Huanta.

- (b) Whether the evidence of collusion was direct (written or testimonial) or indirect; the nature of any indirect evidence

Nature of evidence: Direct, testimonies from mototaxi drivers

- (c) Amount of commerce: Not disposable
- (d) Sanctions

As a result of the investigation, was proved that all the companies involved, participated in the agreement of fixing jointly the price of transportation service. The Technical

19. Unidad Impositiva Tributaria (UIT) equivalent to nearly US\$850

Secretariat visited the companies in order to explain the scope of Legislative Decree 701, in particular, those articles referred to practices that restrain competition. In that visit, the representatives of the mototaxi transportation service companies recognized that the agreement was broken and committed not to make any similar agreement among them.

The companies signed a formal document in which they expressed their commitment to cease the acts prohibited by Legislative Decree N°701. Only one company, Kallpay, didn't sign the document. This company was sanctioned with a fine of one (1) Tax Unit.

2. From all these cases, please consider when the facts most clearly illustrated the harmfulness of cartels and/or the knowledge of cartel members that the conduct was illegal and/or harmful

(a) Please supply quotations (preferably) or descriptions of cartel members' oral or written statements concerning the cartel's actual or intended effect on price

In the case, Municipalidad Provincial de Huana against Taxi Tours, Asociación de Choferes de Mototaxis de Huanta, Empresa Kallpay, empresa Fox White, empresa Taxitel the main prove of the anticompetitive agreement was a letter sent by the Union of Mototaxi Drivers communicating their decision of increase prices. This letter said:

"..(..) we agreed to increase the cost of tickets in the urban zone of our province to S/. 70, which will be applied since next Sunday, January, 9 .."

(b) Please describe evidence concerning changes in price or output when the cartel was formed or when it ceased; other harmful effects of the cartel –e.g., on quality, entry, innovation, or efficiency; changes in firms profits when the cartel was formed or when it ceased; excess profits during the cartel

In the case, Municipalidad Provincial de Huanta against Taxi Tours, Asociación de Choferes de Mototaxis de Huanta, Empresa Kallpay, empresa Fox White, empresa Taxitel the intended increase in prices was from S/. 0.5 the ticket to S/. 0.8 - 1.0 (an increase of 60-100%).

"Mototaxi" is the most popular transportation service used by population of Huanta. In this sense, the effects of the increase of tickets on regional economy would be very important. However, is difficult to quantify the economic impact of the intervention.

(c) Please describe or quote the most colourful statements by cartel members revealing their intent, their lack of justification, their awareness of the illegality of their conduct, etc.

In the case, Municipalidad Provincial de Huanta against Taxi Tours, Asociación de Choferes de Mototaxis de Huanta, Empresa Kallpay, empresa Fox White, empresa Taxitel, a communication sent by the Union of Mototaxi Drivers to the Competition Policy Commission, said:

"...Our total ignorance about such an infraction lead us to establish the agreement"²⁰

20. File N°005-200/CLC, page 25.

3. General Information on Sanctions

3. Please indicate the applicable standard of proof and the available sanctions for competition enforcement in your economy, responding separately for each different type of enforcement (administrative, civil, or criminal) that is used.

Legislative Decree 701 established three types of enforcement: administrative, civil and criminal:

- i) **Administrative enforcement.** Legislative Decree 701 includes administrative sanctions that apply to violations to articles, 3°, 5° and 6°, such as fines and cease of practice.

Article 23° of Legislative Decree 701 is as follows:

“Article 23°.- Imposition and grading of sanctions. The Commission on Free Competition will impose the following fines on violators of Articles 3°, 5° and 6°:

- a) *If the violation is graded as light or serious, a fine up to a thousand (1,000) UITs provided that it does not exceed 10% of gross sales or income received by the violator for the immediate fiscal year previous to the Commission’s decision.*
- b) *If the violation is graded as very serious, a fine exceeding a thousand (1,000) UITs provided that it does not exceed 10% of gross sales or income received by the violator for the immediate fiscal year previous to the Commission’s decision.*

In case that the organization or individual being penalized does not develop any economic, industrial or business activity, or it/he has just initiated such activity after January 01 for the previous fiscal year, the fine shall exceed in no case a thousand (1,000) UITs.

In addition to the sanction that, at the Commission’s discretion, shall be imposed on the violator, when a company or organization is dealt with, a fine up to a hundred (100) UITs shall be imposed on each of its legal representatives or persons forming part of the executive bodies according to their liability for the violations.

- ii) **Civil enforcement.** Article 25 of Legislative Decree 701 establish:

“Article 25°.- *Civil action. Any party adversely affected by the agreements, contracts or practices prohibited by this Law will have the right to bring a civil action for damages and losses.*

Those who have been falsely accused will have also the right to bring such action.”

- iii) **Criminal enforcement.** Article 232° of Peruvian Criminal Code establish sanctions until six years of prison for violations to Legislative Decree 701

4. Please supply or describe any general schedule or set of principles use in your economy for calculating fines and other sanctions for (a) economic law violations or crimes in general, (b)

“Segundo. Nuestro total desconocimiento en materia legal, conjuntamente con nuestra exposición anteriormente detallada, mno sempujó a incurrir en la infracción materia del presente descargo”.

competition law violations, and (c) procurement fraud, tax fraud, securities fraud, and other comparable offences. Please provide also the maximum penalties with respect to the above

Article 23° of Legislative Decree 701 establish the following criteria for grading the administrative sanction:

“...To determine the seriousness of the violation and impose the corresponding fines, the following criteria shall be considered by the Commission:

- a) the type and scope of the restriction on the competition.
- b) the size of the market being affected.
- c) the market share of the involved company.
- d) the effect of such restriction on the potential or existing competitors, other agents of the economic process and the consumers and users.
- e) the duration of the restriction on the competition.
- f) the repetition of a forbidden conduct.

In case of recidivism, the Commission will double the imposed fines and increase them successively and unlimitedly. To estimate the amount of fines imposed according to this Legislative Decree, UIT in force at the date of payment or the coercive collection of the fine shall be used (Amended by the Article 11° of Legislative Decree No. 807).”

Article 46° of the Peruvian Criminal Code establish, among others, the following criteria for grading the criminal sanction:

- i) Characteristics of the action
- ii) Damage and hazard as consequence of the action
- iii) Circumstances as time, place and type of action
- iv) Objective of the action
- v) The attitude of the defendant