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ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN PERU

-- 2012 --

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Executive Summary

- 1. The present report contains information about the development of the Peruvian Competition Policy throughout 2012, according to the experience of the Peruvian Competition Authority, Indecopi¹.
- 2. No normative changes on the Act for the Repression of Anticompetitive Behavior² (hereinafter, the Competition Act) have taken place, but a modification in the Public Procurement Act³ has made further emphasis on the prohibition of anticompetitive practices in such context. However, in 2012 a heated debate took place around the possible enacting of the first Peruvian Merger Act for the markets in general⁴. This proposal had received the strong collaboration of Indecopi and the support of the OECD and UNCTAD. Additionally, the Judicial Branch has created 3 new first instance courts and an appeal court with jurisdiction in matters related to the activities of Indecopi.
- 3. In 2012, the Technical Secretary of the Competition Commission of Indecopi (hereinafter, the Technical Secretary⁵) had been focused on closing pending investigations, overcoming the great deal of caseload accumulated over years. Considering this increase in the investigation activities and the caseload, a drop in the number of fines imposed cases can be seen in comparison with the 2011.
- 4. Nevertheless, some important criteria had been developed by the caselaw of the Commission for the Defense of Free Competition of Indecopi (hereinafter, the Competition Commission⁶) and the Tribunal for the Defense of Competition and Intellectual Property of Indecopi (hereinafter, the Tribunal⁷). Specifically, the Competition Commission has established criteria regarding union activities in the labor markets and the burden of proof in cases about unilateral exclusionary behavior.
- 5. Though the budget, assets and human resources of the branches in Indecopi related to competition enforcement and market assessment have not suffer a significant variation. However, the ever

Legislative Decree 1017, published on Jun 4th, 2008, modified by Act 29873, published on Jun 1st, 2012.

The Technical Secretary acts as the prosecutor of anticompetitive behavior, having broad power to investigate, request and gather information about market conditions and agents, to initiate administrative sanctioning proceedings and to issue recommendations to the Competition Commission for the imposition of fines and corrective measures for the commission of anticompetitive practices. The Technical Secretary can also elaborate reports on market conditions and recommend the adoption of guidelines regarding proceedings and competition enforcement.

The Competition Commission is the first instance decision-making body for competition infringements. It has the power to impose fines up to 12% of defendant's gross revenue and up to USD 130 000 (aprox.) to the defendant's directives, corrective measures (behavior remedies), approve guidelines and recommend advocacy measures to the Presidency of Indecopi.

The Tribunal is the second and final decision-making body for competition infringements. The Tribunal reviews the decisions of the Competition Commission on appeal and has the same sanctioning powers. Its decisions could be reviewd by the Judicial Branch.

Indecopi is the acronym of Instituto de Defensa de la Competencia y de la Protección de la Propiedad Intelectual (Spanish for Institute for the Defense of Competition and the Protection of Intellectual Property), an independent public body created in 1992 for the supervision of the sound development of free markets. It is necessary to mention that the competition authority for the telecommunication markets is the Organismo Supervisor de Inversión Pivada en Telecomunicaciones – Osiptel [Spanish for Supervisory Agency of Private Investment in Telecommunications].

Legislative Decree 1034, published on Jun 25th, 2008.

In Peru, there are currently merger control provisions only for the electricity sector.

present pressure of society for results and the continuously increasing market dynamism generates an expectative for an increase in the current budget in order to meet such constraints, for the benefit of society.

1. Changes to competition laws and policies, proposed or adopted

1.1 Summary of new legal provisions of competition law and related legislation

- 6. Laws and policies adopted: No new legal provisions on competition law or competition policies have been adopted. However, a minor modification of the Public Procurement Act has been enacted, including the prohibition of any agreement that could affect effective competition in the procurement processes. This enactment is consistent with the prohibitions already included in the Competition Act and strengthens such prohibitions with possible additional sanctions under the public procurement regulations.
- 7. Additionally, on October 24th, 2012⁸, the Executive Counsel of the Peruvian Judicial Branch created 3 first instance courts and an appeals court in order to meet the caseload on issues related to the enforcement activities of Indecopi in matters related to competition, consumer protection and intellectual property, which has constantly increased in the past years.

1.2 Other relevant measures, including new guidelines

8. The Technical Secretary is to issue its Confidentiality Guidelines draft for Commission's approval in 2013. These Guidelines will be issued in order to provide guidance to persons and companies about confidentiality of information being submitted to the Commission in its investigation and enforcement activities.

1.3 Government proposals for new legislation

- 9. Laws and policies proposed: The most important competition law proposal, currently under discussion, is the Merger Control Act Draft⁹, aimed at establishing a merger control system for markets in general (Peru currently has a merger control system only for the electricity market). It's worth to mention that this proposal had received the strong collaboration of Indecopi, to the point that the first draft was modified according to the suggestions of Indecopi. Also, the bill has received strong support from OECD members and UNCTAD. The bill draft was approved by Congress' Consumers Protection and Regulation Commission and is to be discussed and ultimately adopted in Congress plenary.
- 10. There is also a legislative proposal for the criminalization of vertical agreements, with an aggravating factor for the primary education market¹⁰. Indecopi –through the Technical Secretary– has issued a report against the proposed law considering that administrative fines are dissuasive enough to deal with vertical restraints and therefore imprisonment is not recommendable. The report also considers the need to establish and maintain uniform criteria in the interpretation of law and in the policy enforcement. Also, it must be take into account that no other anticompetitive practice is subject to imprisonment or other criminal penalties, and that vertical agreements are analyzed under a relative prohibition (rule of reason).
- 11. Finally, there is a legislative proposal for the modification of Peruvian Telecommunications Act, aimed at updating telecommunications legislation related to operators' obligations under antitrust policy.

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By means of Administrative Resolution 206-2012-CE-PJ.

⁹ Bill 972/2011-CR.

¹⁰ Bill 1061/2011-CR.

Indecopi –through the Technical Secretary– has issued a report suggesting several modifications in the draft in order to harmonize it with the Competition Act.

2. Enforcement of competition laws and policies

2.1 Action against anticompetitive practices, including agreements and abuses of dominant positions

- 2.1.1 Summary of activities of competition authority
- 12. In 2012, activities of the Technical Secretary and the Competition Commission had been focused on closing pending investigations, overcoming the great deal of caseload accumulated over years. The majority of those investigations where related to alleged price fixing and bid rigging cartels. Considering this increase in the investigation activities and in the caseload, a drop in the number of fines imposed cases can be seen in comparison with the 2011. In spite of this scenario, some important criteria had been developed by the Commission caselaw.

2.1.2 Description of significant cases

- Below we summarize the three most significant cases in 2012: (a) the case of Salaverry Dockers, (b) the case of Milk Distributors and (c) the case of Bed Mattresses.
 - In the case of Salaverry Dockers, a Maritime Agency challenged several practices of the dockers unions in Salaverry Port (in the north of Peru). The evidence showed that the workers in those unions engaged in several agreements to manipulate the conditions of labor supply and to obstruct the entry of new dockers to Salaverry Port.
 - Following the opinion of the Technical Secretary, the Competition Commission found that, although in Peruvian legislation there is no explicit exemption from antitrust laws in favor of dockers or unions, the restrictions among workers that are (i) directly aimed at benefit them and (ii) not damaging third workers (such as collective negotiation of salaries, schedules and other working conditions); are exempted from Competition Act, for such conduct is a consequence of the rights granted by labor relations and collective bargaining legislation (in other words, such exemption is implicit but essential to fulfill such legislation legitimate objectives). On the other hand, restrictions among workers that are directly aimed at damaging third workers (such as concerted boycotts) are not exempted from Competition Act, and can therefore be subject to antitrust scrutiny (under the rule of reason according to Peruvian Competition Act). Consequently, among the challenged agreements, the Competition Commission found that only the dockers agreement to boycott entrants was punishable according to Competition Act¹¹.
 - In the case of Milk Distributors, a milk distributor filed a complaint against its milk supplier alleging an abuse of dominant position (an exclusionary practice). The evidence showed that the milk supplier (who was related to a milk distributor downstream) had indeed refused to further dealing with the plaintiff. The evidence also showed that cutting is relations in that manner had affected consumers inasmuch as the prices offered by the supplier's related milk distributor where higher than those charged by the plaintiff. The defendant did not presented evidence regarding the justification of its behavior or the enhancement of competition following the restriction.

Please fin the commented decision in the following link (in Spanish): http://www.indecopi.gob.pe/RepositorioAPS/0/2/par/RES_052_2012_CLC/Res052-2012.pdf

Following the opinion of the Technical Secretary, the Competition Commission recognized that, in cases related to exclusionary abuse of a dominant position, once it has been showed (i) that the challenged exclusionary behavior actually occurred, and (ii) that it probably had a negative impact on consumers; then the burden of proof regarding any possible justification for the challenged behavior (e.g. showing that it enhanced economic efficiency) was on the defendant. Consequently, considering that in the case under analysis the milk supplier did not present any justification for its conduct, the Competition Commission found the milk supplier liable under Competition Act¹².

• In the case of Bed Mattresses, a bed mattresses retailer filed a complaint against one of the biggest bed mattresses producer in Peru for an alleged abuse of dominant position by refusing to deal. The investigation showed (i) that the defendant presumably had a dominant position in the market of a specific type of mattresses, (ii) that there was a refusal to deal, (iii) that the refusal could have been motivated by the plaintiff commercial behavior, and (iv) that no significant impact on competition was proved.

Considering that no significant impact on competition arisen from the challenged refusal was shown, specifically, that the conduct had not the object or effect to significantly enhance, maintain or strengthen the dominant position of the defendant, the Technical Secretary decided not to initiate sanction proceedings against such defendant. In appeal, the Tribunal of Indecopi confirmed Technical Secretary's decision¹³.

2.2 Mergers and acquisitions

14. In Peru, a merger control system doesn't exist, other than for the electricity sector. Accordingly, requests to the Competition Commission to approve a merger operation are infrequent. In 2012, no merger approval was requested to the Competition Commission¹⁴.

3. Resources of competition authorities

3.1 Resources overall:

3.1.1 Annual budget

15. As can be seen below, the overall annual budget for the branches related to competition activities (market assessment and enforcement) had been slightly increased (Δ 1.2%). It is expected that this budget could be increased in the following years in order to meet the persistent society demands and the ever growing market dynamics.

Please fin the commented decision in the following link (in Spanish): http://www.indecopi.gob.pe/RepositorioAPS/0/2/par/RES 051 2012 CLC/Res051-2012.pdf

Please fin the commented decision in the following link (in Spanish): http://sistemas.indecopi.gob.pe/sdc_Jurisprudencia/documentos/1-93/2012/Re1025 Versi%F3n P%FAblica.pdf

Act 26876, published on Nov 11th, 1997.

Chart 1. Annual budget of branches of Indecopi related to competition activities [2011 – 2012]

Branches	2011	2012
Technical Secretary and Competition	1 674 248 PEN	1 758 560 PEN
Commission	607 776 USD	666 577 USD
Tribunal ⁽¹⁾	2 474 656 PEN	2 385 910 PEN
	898 337 USD	904 373 USD
Economics Research Department ⁽²⁾	1 355 840 PEN	1 427 145 PEN
	513 928 USD	540 956 USD
Indecopi Total	5 504 744 PEN	5 571 615 PEN
-	2 020 040 USD	2 111 906 USD

PEN = Peruvian Nuevos Soles (local currency)

Notes

- (1) The chart presents the total budget of the Tribunal of Indecopi, though only a part of its resources are focused of competition activities (other activities include reviewing proceedings on advertisement, consumer protection, bankruptcy and intellectual property).
- (2) The chart presents the total budget of the Economics Research Department, though only a part of its resources are focused of market assessment activities (other activities include reviewing quality of management and support to other areas of Indecopi).

3.1.2 Number of employees (person-years)

16. Similarly to the budget, the number of employees focused on competition activities has been increased very slightly (Δ 1 economist). It is also expected that the number of employees will increase as the enforcement and assessment activities increase.

Chart 2. Employees of Indecopi related to competition activities [2011 – 2012]

Employees	2011	2012
Economists	23	24
Lawyers	15	15
Support staff	3	3
Indecopi Total	41	42

Note: The chart includes information of employees from Technical Secretary, Competition Commission, the Economics Research Department, the Legal Department and the Tribunal of Indecopi.

3.2 Human resources applied to:

Chart 3. Employees of Indecopi related to competition activities by application [2011 – 2012]

Employees ⁽¹⁾	2011	2012
Enforcement ⁽²⁾ and Advocacy	24	25
Market assessment ⁽³⁾	14	14
Indecopi Total	46 / 38	48 / 39

Note:

- (1) This chart includes information of employees from the Technical Secretary, the Competition Commission, the Economics Research Department, the Legal Department and the Tribunal of Indecopi.
- (2) Considering that in Peru, a merger control system for markets doesn't exist, other than related to the electricity sector, the human resources are not differentiated by the type of enforcement (ex ante or ex post) they are applied to.
- (3) Tough enforcers usually are engaged in market assessment; this section shows only the number of employees at Economics Research Department.

4. Summaries of or references to new reports and studies on competition policy issues

- 17. In the context of the activities of the OECD Competition Committee, Indecopi has issued several reports regarding its advances in several competition topics.
- 18. For instance, a report on recent development in market definition explained that Indecopi had the opportunity to enrich its analysis and introduce new concepts in it decisions, most remarkably, in finding an infringement where a shopping center allegedly agreed with a fast food restaurant chain to deny its facilities to a latter's competitor, the Commission based its decision on the two sided markets theory. In other reports, where the Technical Secretary evaluates the existence of competition in the provision of different port services, it has frequently been used the concept of «bundled services» in order to better understand and explain the competitive constraints that are placed on companies that offer port services¹⁵.
- 19. Another important report was prepared for the OECD Competition Committee about the relations between competition policy and poverty. The report showed that, although Competition Act treats all markets as equal and that Peruvian Constitution and Fair Competition Act¹⁶ limits public participation in the direct provision of goods and services, however, the poor could be benefit by the persistent investigation activities of Indecopi in the markets for essential goods and the Government actions in the context of other policies. However, further assessment will be needed to measure the actual impact of competition policy in consumers' welfare¹⁷.
- 20. Outside the context of the activities of the OECD Competition Committee, Indecopi has issued studies regarding competition conditions in several markets in Peru. Most remarkably, in 2012 Indecopi issued a report «Market Watcher» regarding competition conditions in the air flights market. After a comprehensive evaluation of the numerous economic and legal factors defining the market, Indecopi concluded that despite its growing trend, the market remains highly concentrated with somewhat significant barriers to entry. However, the data showed that, in the assessed routes, the prices of flights have remained stable, showing no correlation with the market concentration¹⁸.

Please fin the paper in the following link: http://www.oecd.org/daf/competition/Marketdefinition2012.pdf

Legislative Decree 1044, published on Jun 26th, 2008.

Please fin the paper in the following link: http://procompetencia.gov.do/assets/files/flc/DAF-COMP-LACF(2012)13-Contribution-from-Peru-%20EN.pdf

Please fin the paper in the following link: http://www.indecopi.gob.pe/repositorioaps/0/0/jer/publicacionesqs/ObservatorioMercados-2012.pdf