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More documents related to this discussion can be found at  
<http://www.oecd.org/daf/competition/independent-sector-regulators.htm>

Please contact Mr Chris PIKE if you have any questions about this document  
[Email: [Chris.Pike@oecd.org](mailto:Chris.Pike@oecd.org)]

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## Peru

### 1. Introduction

1. Economic regulators were conceived at the beginning of the nineties. As part of the implementation of several economic structural reforms focused on macroeconomic stabilization, markets liberalization, economic growth and private investment. These agencies were created to promote competitiveness and competition, as well as to enhance productivity in key economic sectors. They were established with the aim to supervise the performance and the development of markets, which would be opened for private investment in transport, telecommunications, energy, and water sanitation.

2. At the same time, INDECOPI (Institute for the Defence of Competition and Intellectual Property)<sup>1</sup> was created with the aim to prevent and to sanction anticompetitive behaviour, and to promote economic efficiency, to the benefit of consumers. Such an objective is related to INDECOPI's mandate and competences, which allow it to establish the existence of anti-competitive behaviours and to apply the corresponding sanctions. It is worth mentioning that both INDECOPI and economic regulators are perceived by major stakeholders, and civil society as technical, trusted, and independent bodies.

3. As part of its mutual interest in the promotion of competitiveness and competition, these institutions have signed memorandums of understanding to facilitate the exchange of information and communication. For instance, the regulatory agency in port infrastructure asks INDECOPI's opinion on the competition conditions in the port services under concession before deciding on implementing the regulation of its tariffs. In the same vein, INDECOPI receives regular information of the hydrocarbon sector from the energy regulator that helps the competition authority to monitor and potentially identify anticompetitive practices in this regulated sector.

### 2. Economic regulators and its objectives<sup>2</sup>

4. Four regulatory agencies were created in Peru during the nineties. They were OSIPTEL (1991), SUNASS (1992), OSINERGMIN (1996), and OSITRAN (1998).<sup>3</sup> According to Law No. 29158, the regulatory agencies are considered as Specialized Public

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<sup>1</sup> Within INDECOPI, there are several functional bodies responsible for competition enforcement, consumer protection and IP law enforcement, among others. Among these bodies, the Commission for the Defence of Free Competition is responsible for ensuring compliance with Legislative Decree No. 1034 and Law No. 26876 (Anti-Monopoly and Anti-Oligopoly in the Electricity Sector Act).

<sup>2</sup> The information presented here is in part taken from OECD (2016), Regulatory Policy in Peru: Assembling the Framework for Regulatory Quality, OECD Reviews of Regulatory Reform, OECD Publishing, Paris. Chapter 7: The governance of regulators in Peru. Available at: <<http://dx.doi.org/10.1787/9789264260054-en>>.

<sup>3</sup> It is important to note that the emergence of the regulators of public services in Peru took place within the stage of changing role of the State in the economy, previously characterized by its high presence in the provision of goods and services, which determined the liberalization of broad market sectors, the transfer to the private sector of the property of numerous state-owned companies and the granting of public service concessions and public infrastructure works.

Organism (SPO) that are decentralised bodies of the executive branch with nationwide competencies and assigned to the Presidency of the Council of Ministers. Amongst other implications, this formal linkage entails that any organisational, institutional or functional change in this economic regulator requires approval by the Council of Ministers. The SPO has the independence to perform their duties under their Act creation. Down below, a brief description of each regulator is presented.

## 2.1. Supervisory Agency for Private Investment in Telecommunications - OSIPTEL

5. The Supervisory Agency for Private Investment in Telecommunications (OSIPTEL)<sup>4</sup>, is responsible for regulating and supervising telecommunications in Peru. OSIPTEL also enforces and resolves disputes between actors, participants and consumers in the sector. Additionally, it is the competition agency on telecommunications' markets. The agency has the authority to fix tariffs for certain telecommunication services, as well as to define and impose sanctions and corrective measures to firms or individuals participating in the sector due to non-compliance of legal or technical obligations set under concession contracts and regulation.

6. Its general objective is to regulate, standardize, supervise and inspect within the scope of its competence, the development of the telecommunications public services market and the conduct of the operating companies with the other companies and the users; guaranteeing the quality and efficiency of the service; regulating rate balance and providing the market with an efficient use of telecommunications public services. In order:

- To increase competition in the telecommunications markets.
- To improve user satisfaction with telecommunications services.
- To improve institutional management while striving for excellence levels.

## 2.2. National Superintendence of Sanitation Services - SUNASS

7. The National Superintendence of Sanitation Services (SUNASS)<sup>5</sup> is responsible for regulating, supervising and monitoring the provision of drinking water and sewage service in urban areas. SUNASS oversees and enforces legal and contractual obligations of sanitation utilities. Since August 2016, SUNASS regulates the groundwater monitoring and management service in some urban areas for non-agricultural groundwater users. SUNASS also oversees the quality and nationwide coverage of these utilities and is in charge of settling customer complaints.

8. It also regulates tariffs for the provision of drinking water and sewage. It evaluates and sets tariff structure, tariff levels, and its readjustments. SUNASS also establishes targets for utilities' coverage and quality of sanitation, among other activities. Furthermore, it is responsible for supervising that contracts signed by firms in the water and sewage market are carried out and their obligations met.

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<sup>4</sup> By its acronym in Spanish, Organismo Supervisor de Inversión Privada en Telecomunicaciones. OSIPTEL was created by the Legislative Decree No. 702 on 8 November 1991.

<sup>5</sup> By its acronym in Spanish, Superintendencia Nacional de Servicios de Saneamiento. SUNASS was created by the Law Decree No. 25965 on 19 December 1992.

### 2.3. Supervisory Agency for Investment in Energy and Mining – OSINERGMIN

9. The Supervisory Agency for Investment in Energy and Mining (OSINERGMIN)<sup>6</sup> is responsible for regulating and supervising the national compliance of legal and technical obligations related to electricity, hydrocarbon and mining sectors. The agency seeks timely, sufficient, reliable accessible, quality, and nationwide coverage in energy services. As part of its objectives, OSINERGMING provides a regulatory, supervisory and control framework, with clear and predictable rules and processes that allow for an appropriate return and that encourage greater investment.

### 2.4. Supervisory Agency for Investment in Public Transport Infrastructure – OSITRAN

10. The Supervisory Agency for Investment in Public Transport Infrastructure (OSITRAN)<sup>7</sup> is responsible to supervise and regulate the investment in public transport infrastructure (air services, seaport services, railways, highways). The agency guarantees access, quality and continuity of transport infrastructure. Additionally, it oversees the fulfilment of public transport infrastructure concession contracts while safeguarding the interests of the State, investors and users. OSITRAN design and implement the economic regulation related to transport infrastructure, including, among others, the establishment of tariffs, charges and access to public transport infrastructure.

11. It is worth mentioning that the creation of new regulators depends on the Executive Branch, and so far, INDECOPI or its Commission for the Defense of Free Competition has not suggested the creation of a new sectorial regulator. The recommendations from the Commission has focused on the promotion of competition, suggesting modifications in the existing legal framework of those sectors where the law may be creating obstacles to competition. This was the case of the market study in Notary services, where the agency recommended an amendment of the Notary Act to include an economic criterion to establish new notaries seats, besides to repeal the power of the incumbent notaries to control the access of new members and to allow informative advertising.<sup>8</sup>

## 3. INDECOPI relationship with economic regulators<sup>9</sup>

12. In Peru, competition laws are supplementary – or ‘subsidiary’ - to sectoral regulation. Consequently, in any market where there is sectoral regulation – e.g. water and sanitation, transport, energy or telecommunications – competition rules can only be applied

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<sup>6</sup> By its acronym in Spanish, Organismo Supervisor de la Inversión en Energía y Minería. OSINERGMIN was created by Law No. 26734 on 31 December 1996.

<sup>7</sup> By its acronym in Spanish, Organismo Supervisor de la Inversión en Infraestructura de Transporte de Uso Público. OSITRAN was created by Law No. 26917 on 23 January 1998.

<sup>8</sup> More detailed information of the market study is available (in Spanish) at:

<[https://www.indecopi.gob.pe/documents/51771/818229/ABOGACIA\\_1-2014.pdf/9335d863-ec07-44ec-b627-a8275da86122](https://www.indecopi.gob.pe/documents/51771/818229/ABOGACIA_1-2014.pdf/9335d863-ec07-44ec-b627-a8275da86122)>.

<sup>9</sup> Based on the information provided in OECD (2018), OECD-IDB Peer Reviews of Competition Law and Policy: Peru. Available at: <<https://www.oecd.org/daf/competition/PERU-Peer-Reviews-of-Competition-Law-and-Policy-2018.pdf>>.

when a particular situation or market is not already subject to sectoral regulation. INDECOPI may start administrative proceedings against regulated firms – regardless of whether they are privately or state-owned – only regarding business conduct falling outside the scope of regulated conduct.<sup>10</sup>

13. INDECOPI has the power to apply the Competition Act in regulated sectors, except for the telecommunications sector where OSIPTEL enforces the law. However, only in energy sector regulation (Law No. 26734), it is clearly stated that INDECOPI is competent, as a member of the Supervisor System of Investment in Energy, to ensure free competition in the electricity and hydrocarbons subsectors by enforcing the Competition Act and its amendments. In the other two regulated sectors, water and sanitation, and transport infrastructure, there is no specific provision in the regulatory framework relating to the enforcement of competition law. In that sense, as it was mentioned above, INDECOPI can bring enforcement actions for the infringement of competition law regarding business conduct of regulated firms that fall outside the scope of regulated conduct.

14. Regulators in Peru enjoy full decision-making independence, having clear and detailed functions stated in its laws that allow them to operate with technical, administrative and financial independence from the central government – as INDECOPI does.<sup>11</sup> However, they still have formal dependence from the Presidency of the Council of Ministers.<sup>12</sup> All sectoral regulators are partially charged with promoting competition in their sectors.<sup>13</sup> Nonetheless, their ability to do so is limited by the fact that Ministries retain the power to issue licenses or grant concessions and make other critical decisions.

15. The Competition Commission co-ordinates with each regulatory agency. INDECOPI and all the regulatory agencies have agreements facilitating the exchange of information. For instance, in the proceedings of merger control in the electricity sector, the Commission typically requires reports from the regulatory agency in the energy sector (OSINERGMIN) regarding market shares, operation, coverage and investment deployed by the regulated firms that have decided to merge (see Box 1).

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<sup>10</sup> In the last five years, INDECOPI has pursued an important number of antitrust cases in regulated markets, prosecuting cartels in the energy, maritime transport, and public ground transportation sectors. For instance, in 2017, the Commission adopted the following measures against cartels in regulated sectors: (a) the Commission imposed fines for USD 27 282.90 for a horizontal agreement in the public transport market in Islay (Arequipa, a Peruvian region); (b) the Commission imposed fines of USD 22 889 913.56 in the liquefied petroleum gas (LPG) market for a horizontal agreement to fix the price of LPG gas in bulk and packaged presentations; (c) the Commission imposed fines of USD 3 002 054.70 and USD 3 688 720.03 in two cases in the market for LPG gas for the use of vehicles in Chiclayo and Chimbote (two Peruvian regions).

<sup>11</sup> Regulators have adopted a commission model, in which there are five directors (with the exemption of OSINERGMIN that consists of six). This model help preventing regulatory capture from public, government and regulated entities, as the probability of capturing the board is lower than the probability of capturing a single administrator. The main strength in this respect is the appointment by public competitive selection of candidates, who must demonstrate relevant experience and formal training.

<sup>12</sup> For instance, any reorganisation or institutional change needs to be approved by the Ministers' Council, as well as their regulation of organisation and functions.

<sup>13</sup> Framework Law on Regulatory Agencies for Private Investment in Public Utilities (Law No. 27332) gives sectoral regulators exclusive jurisdiction over all access issues concerning public infrastructure.

16. In the hydrocarbon sector, the information provided by the regulator has been especially helpful to effectively evaluate and measure the scope of anticompetitive practices. For instance, in the price-fixing case of vehicle liquefied petroleum gas (LPG) in the city of Chimbote where the Commission, determined the liability of sixteen (16) fuel stations for having agreed on increasing the sale price of vehicular LPG, between June 2012 and February 2014. In this case, OSINERGMIN provided important data, which allowed the Commission to evaluate and sanction effectively the anticompetitive practice. Another important case that had the collaboration of the regulator was the Vehicular Natural Gas (GNV) case in Metropolitan Lima and Callao. However, it is important to mention that the reports made by the regulator are not binding for the competition authority.

#### **Box 1. Merger review in the electricity sector**

In the electricity sector, the Antitrust and Antioligopoly Act of the Electricity Sector (Law No. 26876), established a mechanism for merger control in the electricity sector. Therefore, all mergers involving companies engaged in electricity generation and/or distribution activities that exceed the notification threshold are subject to prior evaluation by the Commission. The Regulation under Law No. 26876 establishes that INDECOPI may request a report from OSINERGMIN on the technical aspects of the services and/or products linked to the merging parties, as well as information and data of the respective markets, that are subject to evaluation. It should be noted that, whenever the competition authority has required a report from the OSINERGMIN, the regulator has always answer to the request.

17. In the transportation sector, the Commission provides support to the regulator of public transportation infrastructure (OSITRAN) when this regulator sets port tariffs. In addition, OSITRAN is required to consult INDECOPI on the competitive conditions in the market if it wishes to set rates in concession contracts, and any other service not included in the original concession (see Box 2).

18. As already mentioned, the regulatory agency in the telecommunications sector is also the competition authority for this sector. OSIPTEL's regulatory responsibilities include resolving interconnection issues, setting quality standards and establishing maximum tariffs when no effective competition exists. OSIPTEL also monitors telecommunications markets to identify potential anticompetitive infringements. OSIPTEL has investigative and sanctioning powers and carries out market studies and advocacy initiatives as well. The agency has issued formal guidelines explaining its approach to competition and unfair competition enforcement. The competition guidelines cover some of the same subjects as those covered by decisions issued by INDECOPI's Competition Division of the Tribunal, but they also explain the criteria by which OSIPTEL defines markets and assesses whether a firm is dominant.

#### **Box 2. INDECOPI participation in the process of ports regulation**

Regarding to responsibilities linked to a regulated sector, the Commission assesses the competition conditions in port services under the National Port System Act (Law No. 27943) and certain concession contracts of determined port terminals, specifically three (3)

port terminals: the Multipurpose North Terminal and the Mineral Concentrate Terminal at Callao Port Terminal, and the Yurimaguas Port Terminal\*.

In its assessment, if Commission determines that there are no competition conditions in the port service market analyzed, OSITRAN begins its tariff fixing process; on the contrary if INDECOPI determines that there are competition conditions in the port service market analyzed, prices are freely determined. In this interaction, INDECOPI's participation is an essential guarantee for the efficient functioning of the maritime transport market, as it only regulates port services lacking competition.

In line with the above, between 2010 and 2019, the Commission has issued 54 pronouncements in relation to the competition conditions of certain port services.

*Note* : \* Port terminals: Terminal Norte Multipropósito y Terminal de Concentrado de Minerales en el Terminal Portuario del Callao y el Terminal Portuario de Yurimaguas. (In Spanish)

19. It is worth mentioning that INDECOPI has co-operation agreements and MOUs with several regulatory and enforcement bodies in Peru, to strengthen co-operation and the effectiveness of its activities. Under this framework, the Commission has established communication with all economic regulators, highlighting regular communication with OSINERGMIN. Specifically, they provide INDECOPI with monthly information on the fuel market, for the Commission to monitor the occurrence of anticompetitive practices in that market.

20. Finally, about the interactions with self-regulating professions, services or trades, recently the Commission has issued a document named “*Guidelines on Trade Associations and Competition*”.<sup>14</sup> In these Guidelines the Commission seeks to reinforce and contribute to the role of associations in channelling the legitimate interests of their members and promoting the free and competitive performance of the sectors in which they operate; moreover, by minimizing the exposure of associations to undesired actions taken by their members. Besides, the Commission has highlighted the commitment to promote competition in the context of Associations and has emphasised the contact information with the competition authority to establish better communications with trade associations.

#### 4. Conclusion

21. INDECOPI and the four economic regulators share a common objective, the promotion of competitiveness and competition in the market. An objective addressed from two different angles. Firstly, the economic regulators as ex-ante controller of market power, and then, INDECOPI as ex-post controller of it. Our experience shows that both competition authority and economic regulators not only share a common objective but also common characteristics such as its administrative and technical independence, which is acknowledged by stakeholders and civil society. To INDECOPI, regulators play an important role in the promotion of competition. The regular communication and exchange of information with them contribute to monitor, identify and sanction anticompetitive behaviours in their respective sector which is valued by INDECOPI.

<sup>14</sup> Guideline available at: <<https://www.indecopi.gob.pe/documents/51771/3752033/Guidelines+on+Trade+Associations+and+Competition/>>.