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(*) The opinions expressed in the documents are those of the authors and do not necessarily reflect the views of their institutions.
Dear readers,

The OECD Regional Center for Competition (RCC) in Latin America completed its two-year anniversary last November 2021. We could not be more proud of how much we have accomplished in such a short period: more than 600 civil servants from 26 jurisdictions of the region have benefited from the RCC trainings during these two years!

This was only possible with the support of competition authorities from the region and the active engagement of case handlers in the RCC activities. So thank you very much for another successful year! We do hope to celebrate many other anniversaries together and to strengthen international cooperation at the regional level.

This Newsletter is divided in the same way as the past editions: Section 1 presents a summary of the last RCC workshops and initiatives to promote further exchanges across Latin America and the Caribbean.

Please feel free to contact us for any suggestions or assistance concerning the RCC activities. We hope you enjoy your reading!

With our very best regards,

(*) This Newsletter benefited from the careful review and assistance from Arturo Chumbe (INDECOPI) and Thaiane Abreu (OECD).
WORKSHOP ON MERGER CONTROL IN TIMES OF CRISIS
15 - 17 September 2021

The OECD Regional Centre for Competition (RCC) in Latin America together with INDECOPI hosted the Workshop “Merger Control in Times of Crisis” during 15-17 September 2021. The event gathered 100 competition officials from 17 jurisdictions in Latin America and the Caribbean (Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Curacao, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, and Trinidad Tobago). The Workshop covered the main challenges related to the enforcement of merger control in times of Crisis. The pandemic raised several substantive issues that competition authorities have been needing to deal with, including how to (re)define relevant markets, assess market power, analyse competitive effects, imposition of remedies, in addition to the role of failing firm defense during a time of uncertainty.

On the first day, after welcoming remarks of Hania Perez (INDECOPI) and Paulo Burnier (OECD), Ruben Maximiano (OECD) discussed the challenges that competition authorities face given the uncertainty in times of crisis, especially in failing firm cases. Professor Maximo Motta (Universitat Pompeu Fabra) shared an academic approach to issues related to merger control in times of Crisis, inciting a discussion on how COVID affected many sectors differently. Motta emphasized the OECD’s key role in providing guidelines to competition authorities in these times. Different national experiences on dealing with the topic were illustrated by Carolina Lliévano, (SIC Colombia), Lizeth Nagore (COFECE Mexico) and Carlos Beraluín, (INDECOPI Peru).

The failing firm defense was the topic of the Workshop’s second day. Paulo Burnier (OECD) introduced the concept of such defense, by indicating that it is invoked by merging parties in some exceptional situations of economic difficulties. Alexandre Cordeiro (President of CADE Brazil) highlighted that there was a fear at the beginning of the COVID-19 pandemic that the analysis of such defense should be less strict than before, since there was an expectation of a high number of companies declaring bankruptcy. However, such scenario did not happen and CADE is experiencing more mergers during COVID times than before. The panel also had the participation of two other participants, Sangwon Stuart Lee (Comp Bureau Canada) and Francisca Levin (FNE Chile), sharing the experiences of their national competition authorities on examining the failing firm defense.

On the last day of Workshop, the OECD conducted a hypothetical case exercise involving a merger case in the education sector. The participants had to think on strategies to examine such merger from the perspective of the merging parties and of the competition authority, enabling further interactions amongst the attendees. In the end, the event counted with closing remarks from Vania Cruz (INDECOPI Peru) and Paulo Burnier (OECD).

WORKSHOP ON FIGHTING BID RIGGING
11 y 12 November 2021

The Workshop gathered 106 participants from 14 jurisdictions (Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, Honduras, Mexico, Panama, Paraguay, Peru, Suriname, and Trinidad Tobago). The workshop covered recent developments related to the fight against bid riggings in Latin America and the Caribbean. It brought discussion of cases and advocacy issues, such as OECD projects related to public procurement in the region.
The next workshops will focus on the following topics:

1. March 2022: Workshop on “Competition in the Energy Sector”: it will cover competition issues in this sector including enforcement and advocacy actions, in addition to cooperation with regulators. The audience will include competition enforcers and civil servants from the sector regulators, mainly from senior level.

2. May 2022: Workshop on “Advocacy and Competition Assessment”: it will explore the OECD Competition Assessment Toolkit, which has been used to push pro-competitive reforms in several countries including Mexico, Colombia and Brazil. It would target staff from economic and advocacy departments from competition authorities of the region.

3. July 2022: Workshop on “Judicial Review of Cartel Enforcement”: it will address judicial review issues, with focus on the standard of proof in cartel cases, and it may include judges in the training sessions.

4. November 2022: Workshop on “Competition in Digital Platforms”: it will provide a general framework of the topic and promote exchanges of cases and practices on the topic in the region. It would target more mature competition authorities from the region.

5. December 2022: Open Conference on “OECD Competition Trends in Latin America”: it will share the results of the OECD Competition Trends database related to Latin America and the Caribbean. This event is expected to be shorter (i.e. two hours) and open to the wide public.

The workshops will be hosted by INDECOPI in Lima or virtually depending on how the Covid-19 situation evolves. The open conference will be held virtually in order to reach a greater audience and benefit from an open discussion with the antitrust community.
The OECD is committed to supporting governments to design public procurement procedures that promote competition and reduce the risk of rigging bids, and training the public sector in detecting bidding cartels. The OECD has been working closely with governments and public bodies to encourage and facilitate the implementation of the OECD Recommendation on Fighting Bid Rigging in Public Procurement. In Latin America, Argentina, Brazil, Colombia, Mexico and Peru have sought the OECD’s support to improve their procurement practices and step up their fight against bid rigging. Concerning the project in Peru, the OECD published a report in October 2021 assessing the public procurement framework applicable to its Social Health Insurance Agency (EsSalud) and making specific recommendations for reform. The OECD team also drafted a co-operation agreement between EsSalud and Indecopi on law enforcement and advocacy, and trained public sector officials on deterring and identifying procurement collusion. The project’s webpage is available in English and Spanish aqui: https://www.oecd.org/fr/daf/concurrence/fighting-bid-rigging-in-the-health-sector-in-peru-a-review-of-public-procurement-at-essalud.htm

Colombia also requested the support of the OECD to conduct a competition assessment of the laws and regulations in the transportation sector including ports and civil aviation sub-sectors. The project started in January 2021 and is expected to last for around 18 months. The team is composed of competition experts, economists and lawyers from the OECD and the Brazilian Competition Authority (CADE). In April 2021, OECD and CADE officially launched the Project in a public presentation. Between April and September 2021, the Phase 2 of the project was concluded with the screening of all the relevant legal texts in both sectors using the OECD Competition Assessment Toolkit and the identification of all legal provisions that could be potentially constitute a regulatory barrier. Currently, an in-depth assessment is being made of all the potential regulatory barriers to competition identified in the previous stage and checking whether the policy objective of the legal provisions is proportional with the restriction. On 25 November 2021, the project team also conducted a workshop on the methodology of competition assessment and how to carry out the in-depth review of legal provisions. The workshop was open to staff from CADE, and officials from the sector regulators and the Ministry of Infrastructure.

Colombia requested the support of the OECD for a competition assessment project, which started in August 2021 and is expected to end in June 2022. The Colombian National Department of Planning (Departamento Nacional de Planeación, DNP) leads the project and the OECD provides technical support, including advisory calls, feedback on the outputs produced, and capacity-building workshops for DNP and other public bodies. DNP has chosen to focus on the beverages sector and, over the second semester of 2021, has identified the relevant legislation and started screening it for potential barriers to competition. The project will result in a report including specific recommendations to make the legislation in the beverages sector more competitive. In addition, the project aims to prepare Colombian officials, particularly those of DNP, to conduct competition assessments in other sectors autonomously.

Similar exercises have been done in Mexico, Portugal, Iceland and Greece, amongst other countries. For further information here: https://www.oecd.org/daf/competition/oecdrecommendationoncompetitionassessment.htm. They review the existing legislation and regulation in the selected sectors, and propose pro-competitive reforms, in line with the OECD Recommendation on Competition Assessment (2009).
Ecuador has volunteered to be peer reviewed by the OECD. The examination phase was held during the LACCF meeting in September 2020, and a final report with recommendations was published by the OECD on 31 March 2021. The key recommendations given by OECD relates to the increase of the Ecuadorian Competition Authority (SCPM)’s budget, the extension of deadline for merger notification, and to ensure that fines have sufficient deterrent effects (and, if necessary, impose higher fines). A webpage containing the report in Spanish and in English can be accessed here: www.oecd.org/daf/competition/oecd-idb-peer-reviews-of-competition-law-and-policy-ecuador-2021.htm.

The 2021 OECD-IDB Latin American and Caribbean Competition Forum (LACCF) took place virtually over two days during 20-21 September 2021. The 2021 LACCF addressed the following topics (i) compliance programmes in antitrust enforcement, (ii) efficiency analysis in vertical restraints and (iii) competition and payment card interchange fees. For further information: https://www.oecd.org/competition/latinamerica.

The next LACCF is expected to take place in September 2022. It will be hosted by CADE in Rio de Janeiro, Brazil. It will be a very special edition since the LACCF will celebrate its 20th anniversary.
ROLANDO DÍAZ

President of CONACOM, the Competition Authority in Paraguay since July 2021. He is a lawyer with experience in the private sector, working in law firms, director of companies in the industry and construction sectors, and as executive secretary of the National Council of Export Maquiladora Industries. He holds a law degree from the Universidad Católica Nuestra Señora de la Asunción. In addition, he did postgraduate studies in the Doctoral Program on Fundamental Aspects of Private International Law at the Universidad de Alcalá de Henares, Spain.

**Paulo:** The antitrust law was approved in 2013 and Conacom created in 2015. What were the main achievements of Conacom in its first six years of life?

**Rolando:** The Commission’s first achievement was to exist. CONACOM is an institution that had to be created from scratch. In Paraguay, there are some institutions that were created firstly under the supervision of another public institution. As an example, we could mention the consumer defense authority, which was part of the Ministry of Industry and Commerce and, after the promulgation of the consumer protection law, there was a detachment of the Ministry of Industry and Commerce, later becoming the consumer defence authority.

However, before CONACOM, which was created in 2013, there was no institution or department in charge of the defense and promotion of competition; therefore, nothing could serve as a base on which to build the new institution. This is the reason why its conformation process was not immediate and involved, rather, a gradual process of conformation and growth.

Thus, it was not until July 2015 that the first Board of Directors was composed, with which, from this date, the process of shaping the institution really began. And, it was not until 2016 that the first Investigation Director was appointed, the competent individual that must initiate investigations of anti-competitive practices and analyse mergers. As we did not have a waiting period by law, the transactions were notified immediately. In a first phase, CONACOM used all its resources only for the analysis of mergers.

In the following years, officials from different areas were added. On the one hand, there are officials from the administrative areas that serve as support for the entire traditional structure of a public institution, such as budget, personnel, and accounting. On the other hand, in mission terms, we were incorporating personnel to support the Research Director and to have a Legal and Economic Advisory Area and finally, since 2021, an Advocacy Area.

All this institutional consolidation work required a relevant effort. As CONACOM gradually grow, so does the scope and impact of our work. In the last year, we increased the efficiency in the analysis of mergers and the number of mergers assessed.

**Paulo:** How many mergers are we talking about?

**Rolando:** Until last year, 24 transactions. However, this year we have already analyzed about five mergers and we have seven more in progress. So we can see a significant growth in the number of mergers.

Another important detail is that CONACOM began this year to carry out procedures concerning the mergers that CONACOM was aware but were not notified before the authority. A proactive activity of CONACOM is already shown here.

**Paulo:** In your presidency of the Board of Directors of Conacom (since 08/01/21 for two years), what are the main challenges and objectives?

**Rolando:** First, it should be emphasized that we are an institution that is still overcoming its childhood. Just like children, we admit some situations typical of a growth process. CONACOM is entering now the critical period of adolescence, on the way to adulthood and maturity that leads to a recognition, by agents and society as a whole, of its institutional role based on its independence and technical rigor.

The priority, therefore, is to continue with the process of gradual growth and maturation that allows us to continue fulfilling our institutional mission with greater impact.

In this framework, we recently redefined our priorities in the institutional strategic plan for the next five years. I can refer to these priorities by way of four objectives.

The first objective is the effective application of the Law for the Defense of Competition. In this sense, we want to intensify our action within the framework of concentration controls; not only improve our analysis times, but also begin to analyze restrictive competition practices, focusing on sectors determined as priorities; avoid, correct or punish acts contrary to the freedom of competition.

In this context, one of the challenges for the institution is to use the always scarce resources at its disposal to focus its efforts on analysing and investigating possible abuses of a dominant position and prohibited agreements.

One of these priority sectors is public procurement and we want to direct our attention to collusive bids, offering tools to public institutions to detect signs in their bidding processes and report their suspicions to CONACOM.

We also want to direct efforts to implement a Leniency Program in Paraguay in order to provide the institution with an effective tool for the detection, prosecution and punishment of cartels. This will...
guarantee competition and will build confidence in the Paraguayan market. We have already started working on this, because we know that this program has had good results in the international community.

Regarding the second objective, which is the promotion of free competition, we will continue with training activities aimed at different sectors of society to disseminate good practices and facilitate compliance with the law. We believe that these activities help to strengthen our relationship with the different agents and with society in general.

We have also set as a task in this period the development of a guide for the drafting of compliance programs on competition issues for the private sector, which we are convinced will contribute to the implementation of good practices in terms of concentration operations and prevention of anti-competitive conduct.

Turning to the third objective, which is the evaluation of market structures and anti-competitive legal frameworks, we anticipate the conclusion of the institution’s first market studies, which will allow us to offer the population a clear X-ray of certain economic sectors. We will also strengthen our regulatory control activities by promoting joint activities with regulatory entities for the transfer of knowledge and experiences, promoting the elimination of regulatory barriers.

Regarding the fourth objective, which is institutional strengthening and transparency, we want to strengthen the work team, not only with new incorporations of people, but also with the continuous training of capacities that are relevant to the institutional day-to-day, administratively and in the missional.

Paulo: The plan you have in mind is interesting and I congratulate you. The OECD Latin America Regional Center offers technical training to officials of the competition authorities in the region. In fact, the next one we will do will be on public contracts. In your vision, what are the most important issues for Conacom for training its officials?

Rolando: Without a doubt, we will attend the next workshop on public procurement, since this is one of the sectors that we have defined as a priority. This is very relevant for us, considering the scarcity of state resources.

Considering the gradual growth of CONACOM’s actions, the most important issues would be those that refer to:

- The techniques and good practices for the preparation of market studies. We at CONACOM do not have experience in this matter, which is natural, since we are still beginning;
- Evidence detection and investigation of collusive tenders, as we have already mentioned, being a priority sector for us;
- We are also interested in training on compliance programs;
- Finally, on leniency programs.

Paulo: Thank you very much, Rolando. It is very important for us to obtain this type of feedback from the beneficiary countries of the Regional Competition Center. Based on the experience you have had in Paraguay, what advice can you give to the competition authorities that, as well as CONACOM, are starting their work?

Rolando: If we could give any advice, the main one would be to gain time. I understand that a new authority cannot be compared to more experienced authorities. These authorities have had a long time to develop. On the contrary, the young authorities no longer have that time, because society needs us.

For this reason, CONACOM is happy to have the support of several international organizations such as the OECD, UNCTAD and the IDB that are betting on contributing in terms of technical capacity.

It should be noted that CONACOM has had in recent years the collaboration of the competition authorities of Chile, Peru, Spain, Mexico, Costa Rica, Brazil, Colombia, the Dominican Republic and Ecuador, whose actions may be small for them, but they have had a significant impact for us either in the activities to promote competition or in the training of the institution’s officials.

For this reason, I believe that young authorities should make the most of international cooperation, since it is a highly effective tool for acquiring and strengthening capacities for the fulfilment of institutional objectives.

Another recommendation is full transparency of the actions of the competition authority.

When a competition authority is born, many doubts arise on the part of the citizens, to know what the usefulness of such entity will be. I understand that total transparency contributes a lot so that society understands the role of authority and also so that it can demand the fulfilment of these functions.

In Paraguay, we have some legal obligations in this regard. But we have decided to go further and implement, through a communication protocol, the publication of a large number of technical documents produced in the institution, in such a way that they are available to society, to other public agents, to professionals who they work in this sector, for academics. In addition, it allows other authorities in other countries to see what we are doing as well, in addition to allowing criticism so that we can strengthen our capacities.

I believe that publishing our documents also facilitates citizen participation. Through our portal, we have held consultations and public hearings that helped enrich the development of our guides. This allows us to democratize our activity and above all to make the public understand a little better what we do.

Paulo: Many thanks for agreeing to do this interview. We wish success to CONACOM and to you.
In 2020, the Fiscalía Nacional Económica ("FNE") analyzed and accepted, for the first time, a fully-fledged failing firm defense ("FFD") invoked within a merger control investigation. The case involved an assets acquisition of an unbranded gasoline station by the dominant retailer conglomerate in Chile.

The substantive evaluation of the case and the FFD raised many challenges, both in the investigative proceeding and in the substantive analysis of the defense. This document aims to provide a glance, from a practical perspective, to the challenges raised by an agency in the assessment of a FFD—which substantive requirements are quite standard throughout antitrust jurisdictions—invoked within the investigation of a merger transaction.

Failing Firm Defense (FFD) was not expressly recognized in the Mergers and Acquisitions subpart of the Chilean Antitrust Law ("Law"), which contemplates that the legal test is to evaluate whether the merger transaction would "substantially lessen competition". The FFD is not expressly recognized in the Law, but it is provided in the FNE’s Horizontal Merger Guidelines ("Merger Guidelines"). The Merger Guidelines contemplates three standard requirements, that must be fulfilled for a fully-fledged FFD to be accepted, namely:

(i) Market exit − The allegedly failing firm, as a consequence of its financial struggles, will be forced to exit the market in the near future, unless it is acquired by another entity;

(ii) Assets exit − The firm’s critical financial scenario will make inevitable the exit from the market of the undertaking’s assets, both tangible and intangible; and (iii) No less anticompetitive scenario − There is no alternative option that can be less harmful to competition than the merger transaction, even though good faith efforts have been deployed to find alternatives.

The Merger Guidelines provides the FFD as a countervailing argument that can be submitted by the parties against the antitrust concerns raised by the transaction. This is relevant from a legal perspective, since the failing firm argument is not considered within

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**Case N° FNE216-2019 “Inmobiliaria y Administradora CGL Limitada assets acquisition by Compañía de Petróleos de Chile Copec S.A.”**


The merger control regime in Chile contemplates two stages or "phases", a Phase I (which may last up to 30 business days), and an eventual Phase II (which may last up to 90 additional business days if the concentration preliminary raises competition concerns).

Recently, the FNE modified its Merger Guidelines, publishing a new draft ("2021 Guidelines") that was opened to public consultation until a few weeks ago, and that is going to be published in its final version very soon. However, in both guidelines these three requisites are exactly the same.

As a general rule, the analysis of the transaction will seek to compare the expected competitive outcomes if the notified concentration is concluded, with those that would be expected absent the transaction (the counterfactual scenario). The prevailing competitive situation prior to the conclusion of a concentration is usually a good indicator of that market’s competitive situation, thus, in certain circumstances (such as when is possible to predict a firm’s exit), the agency will consider the changes that would be reasonably foreseeable if the concentration does not take pace. OECD, Merger Control in the time of Covid-19. Available at: [https://www.oecd.org/daf/competition/Merger-control-in-the-time-of-COVID-19.pdf](https://www.oecd.org/daf/competition/Merger-control-in-the-time-of-COVID-19.pdf)

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1. Case N° FNE216-2019 “Inmobiliaria y Administradora CGL Limitada assets acquisition by Compañía de Petróleos de Chile Copec S.A.”


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the antitrust analysis, but only after the agency is able to conclude –on the basis of the investigative docket and on the results of the economic analysis– that the merger would be anticompetitive. This approach is similar throughout the majority of OECD jurisdictions.

THE TRANSACTION: ASSETS-ACQUISITION IN THE RETAIL GASOLINE INDUSTRY

The transaction consisted in an assets acquisition of a regional gasoline station by Copec ("Acquirer"), the main gasoline retailer conglomerate in Chile (Copec/CGL). Preliminary, the transaction raised both coordinated and non-coordinated concerns, in a market that is very price sensitive. The FNE extended the investigation into Phase II, so as to execute an in-depth assessment of the transaction and, the competition impact of the acquisition.

Competitive assessment

The economic assessment in Copec/CGL considered the different type of gasolines sold by retail stations as a relevant product market, not defining any specific segmentation by type of gasoline, type of client or type of fuel station. In addition, the geographic relevant market was defined considering catchment areas of both 3 km and 5 km.

Under any of these definitions, the acquisition was expected to result in a variation of the Herfindahl-Hirschman index that would fall above the safe harbor thresholds specified in the Merger Guidelines, for the assessment of horizontal mergers.

In terms of the assessment of the potential impact of the acquisition on retail prices, two types of assessment were implemented: (i) First, a "direct" assessment, in which Upward Pricing Pressure and Gross Upward Pricing Pressure ("GUPPI") indexes were computed using information from the Acquirer’s internal documents in order to build proxies for diversion ratios. Results of this analysis suggested a GUPPI index within the range of [0%-5%]; and (ii) second, an "indirect" econometric assessment was conducted, using historical data of retail gasoline prices in order to estimate the impact of entry of unbranded or independent gas stations on the average prices of large retailers. Results of this exercise suggested that the presence of an additional unbranded station generated a significant reduction of retail prices, by a magnitude of about [CL$3.2, CL$5.0] Chilean pesos (or equivalently, a magnitude of [0.44%, 0.73%] of the average retail price).

A qualitative assessment was also employed in order to measure the degree of closeness of competition between the parties, considering different dimensions, and mainly: (i) geographic locations, (ii) vehicle traffic flows, and (iii) pricing behaviors. This assessment concluded that the parties were indeed very close competitors. In addition, the investigation showed that the market was protected by entry barriers, being particularly hard for unbranded fuel stations to enter.

Regarding coordinated effects, the merger scrutiny concluded that the acquisition could eventually raise concerns. Indeed, provided that the acquired gas station had a lower market share and a low-cost business model, it relied mostly on a strategy of offering lower prices to attract customers. For this reason, the acquisition would remove a competitor with low incentives to coordinate in supra-competitive prices and high incentives to deviate from a coordination strategy of this type.

These elements supported the FNE’s conclusion that the acquisition could result in a substantial lessening of competition. In evaluating the substantiality of the projected damage to competition, the quantitative assessment resulted in price effects that seemed to be moderate in magnitude. However, the projected price increases met the legal standard since this market was of particular relevance for Chilean households, as expenditures in gasoline represent a significant fraction of their income.

As to the timing of the assessment, there is no legal impediment that the FFD could be invoked by the parties at the outset of the merger investigation, or even jointly with the merger filing. However, being provided as a countervailing argument, it is natural that the defense is raised only after the FNE has a thorough understanding that the transaction may impact competition negatively. This would only occur after an investigation (i.e. by the end of a Phase I or through Phase II). It is only then when the FNE could, and evaluate in depth the FFD against the concerns (as any efficiency defense raised by the parties).

In addition, an alternative definition proposed by the Parties was considered as well, which included catchment areas of 3 km plus a group of competing gas stations located outside this area.
Contributions from Experts

The FFD assessment

Worldwide, there are few examples of successful FFDs. Particularly in current times of Covid-19 crisis, there is a sort of common understanding among competition authorities to be cautious regarding FFD claims, and to take the traditional, long-term approach when accepting the defense. There is a call for the transition of the merger control system to reflect the reality of the market, and to consider the lasting structural market changes resulting from mergers. This would imply to be aware that the relaxation of the FFD standards could imply an alteration of market structures in the long term, which once the pandemic is over, would be difficult to remedy ex-post.

In light of the above, when a FFD is raised “and mostly during these times of crisis”, it is common for an agency to evaluate, at the outset, whether the defense could be merely rhetorical — and the parties could be only raising an argument of transitory bad economic results — or on the contrary, whether there may be a truly financial distress of a target that would inevitably leave the market despite the merger. This latter scenario would enable to alter the counterfactual and clear an otherwise anticompetitive merger. It is therefore critical for the agency’s scrutiny of the defense that the parties’ claim is duly substantiated in facts and heavily supported in data.

The parties formally invoked the FFD late into Phase II investigation (day 59). They claimed that the target was in a deep financial crisis, carried through several years, and that the target’s business group was under financial struggle. The holding companies were financially supporting the target, but they were unable to provide such support any longer. Finally, they raised that the Covid-19 pandemic was an event that deepened the target’s crisis and would eventually trigger the exit of the assets from the market.

Considering the burden of proving the defense lies on the merging parties, when it was formally invoked, the parties submitted certain corporate and financial documents —data on taxes, financial statements, a complete status of the legal proceedings involving the assets and the target’s accounting books and debts statements—. Further, the FNE decided to use its investigative powers to seek evidence and requested for third-parties information —i.e. data regarding their willingness to acquire the gasoline station and its assets, and evidence of any negotiation engaged with the target—. This information was crucial to complement the parties’ FFD submission, and finally to prove that the defense was supported in facts and could be legally accepted on this case.

As to the first requirement of FFD —the firm’s exit in a near future— the accounting documents evidenced that the target was in financial distress, having no reasonable expectation of future profitability, neither a possibility for a debt restructuring. In addition, it was concluded that the holding companies (which provided ongoing financing to the target) were ceasing to continue supporting the target and that no third party would be willing to acquire the firm’s assets, leading the FNE to conclude that if the target was going to exit the market in the near future, the assets were going to follow the same scenario.

On the third limb the FNE reviewed whether there was or not a less harmful alternative to competition than the acquisition, and whether the facts supported the existence of an alternative purchaser to the gasoline station rather than the Acquirer. The evidence gathered in the investigation was conclusive enough to prove that, despite being alternative interested parties in a premature stage of the process, the negotiations failed and that there was no other interested purchaser but the Acquirer.

Finally, once each of the FFD requirements were evidenced, the FNE contrasted the scenario where it would clear the concentration, to the one where it would prohibit the transaction. In this exercise, the FNE was able to conclude that the firm’s assets would exit the market imminently, regardless the transaction. Since the parties were close competitors, if the target left the market, the gasoline station consumers would eventually divert to the acquirer anyway. Second, it was possible to evaluate that whether the merger was closed (and the target remained in the market) or prohibited (and the target left the market) was not neutral. The gasoline station’s exit scenario would even imply a greater damage to competition than the transaction since the customers would otherwise lose a source of supply in a catchment area with very few other gas stations available.

Therefore, a fully-fledged defense was accepted for the first time in Chilean merger control, and the acquisition was cleared unconditionally by the FNE.

14 The FNE concluded, based on several data (tax losses statements, debts with providers, etc.), that despite the target was not legally declared in bankruptcy, it was probable that the target would leave the market in the short term due to financial problems. / The investigation showed they and were unable to support ongoing debts, even facing execution orders, and that the target’s incomes were insufficient to pay for basic inputs (i.e. such as the lease of the real estate where the fuel station was located, and that it was even unable to purchase the fuel to operate). / On how to evaluate the relation between the fact that the FNE was not legally able to support to a failing target we were quite inspired by Olympic Aegean, a European Commission landmark case on FFD. / The FNE reviewed in depth the negotiation process that led to the proposed merger transaction and requested internal documents and held several depostions and interviews with every undertaking that would have been interested in acquiring the gasoline station.
This project represented the first technical assistance in public procurement from the OECD to a public entity in Peru. Previously, the OECD has developed similar projects in Mexico, Argentina, Colombia, and Brazil. The recommendations will undoubtedly contribute to the design of more competitive public procurement in EsSalud and, with it, to the improvement in the provision of health services of this entity.

November 2019 represents the start date of the project between Peru’s Social Security body (EsSalud) and the OECD. As part of this collaboration, OECD’s experts in public procurement carried out an analysis of EsSalud’s public-procurement regulatory framework and practices. Resulting in recommendations to help prevent and detect bid rigging in public procurement at EsSalud’s.

EsSalud is Peru’s health insurer and health-provider body for salaried formal-sector employees, independent professionals, and domestic workers and their families, covering nearly 12 million persons. EsSalud’s procurement expenditures for its healthcare networks during the years 2017 to 2020 reached a total of PEN 6 484 million (USD 1 574 million), were 61% was explained by procurement of medicines, 37% by medical material, and the remaining 2% by food supplies.

Three units in EsSalud are involved in public procurements. The Logistics Department, in charge of planning the organisation’s procurement of goods, works and services; and to issue the Annual Procurement Plan (PAC). The Strategic Goods Supply Office (CEABE), in charge with reviewing and evaluating the needs of different areas and determining needs for strategic goods. The third unit are the specialised medical centres in Lima and Callao and nationwide supplier networks. These all
have their own supply bodies and can carry out their own procurement processes, if these have been included in the PAC.

The Public Procurement Law of Peru (PPL) sets out the criteria for public procurement; these include the object of a public procurement (goods, services or works) and the estimated or reference value of the contract. According to the PPL, there are seven main types of procurement procedures, where the public bidding and public contest processes stand out, which are procedures, where the public bidding and comprehensive database with past and ongoing procurement among others.

Regarding the participation of competitive bidders, recommendations focus on the assessment of bidder participation in tenders and barriers to bidding; reasons for direct awards, allow joint bids and subcontracting when justified and pro-competitive, simplify Peru’s system of consolidation and centralization for healthcare procurement, among others.

As part of the project, a detailed analysis of the legislation and practices that apply to EsSalud’s purchases, interviews with the main economic agents related to public procurement to collect facts and insights about the design and process of tenders in Peru was carried out by the OECD. As a result of this assessment, a set of recommendations to promote more competition in public procurement of EsSalud has been proposed, based on international good practices on procurement.

The OECD’s recommendations the report focus on five areas: participation, contracting terms, transparency and in the rigging. Recommendation in procurement procedures is the of market research, an early with potential suppliers, and comprehensive database with past and ongoing procurement among others.

One of the risks in public procurement are the agreements of bidders or potential bidders to distort competition with the aim of increasing their profits and reducing benefits for the public sector. Thus, because of bid rigging, buyers pay higher prices and receive lower-quality goods or services. Therefore, it is important to keep procurement collusion-free and effective through pro-competitive tender design and the detection and punishment of cases of bid rigging.

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Finally, bidder qualification is conducted in most cases, after the bid with the best score is designated, and compliance with requirements established in the tender documentation is checked for the two highest-ranking bids, being the price the main criterion for awarding a contract.

RECOMMENDATIONS TO PROMOTE COMPETITION AND PREVENT BID RIGGING SCHEMES

To quote the OECD, the primary objective of procurement is to achieve value for money either through lower prices or better-quality products. Remembering that public procurement can only be considered successful when bidders genuinely compete and set their prices and terms independently.

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Finally, bidder qualification is conducted in most cases, after the bid with the best score is designated, and compliance with requirements established in the tender documentation is checked for the two highest-ranking bids, being the price the main criterion for awarding a contract.
The problem here is that the competition commissions have had difficulty getting agreement on cooperation from procurement officers. This may be simply that government procurement departments are as old as the state or even the pre independence colony while competition commissions are the new kids on the block. The Jamaican and Barbadian Fair Trading Commissions have made repeated overtures to the respective procurement departments in their governments for collaboration, with little success so far. In the case of Guyana, the CCAC is still in the embryonic stage of institution building and has not as yet approached the procurement department. Trinidad and Tobago Fair Trading Commission has had preliminary talks with the Office of Procurement Regulation (a new body), but this is at a very early stage (more on that later). So, while bid rigging is the most obvious area for enforcement against cartels by commissions in the region because detection is more possible, cooperation is needed for competition commissions to be alerted to possible collusion and have access to bid documents. It also needs training of procurement officers to detect signs of bid rigging and alert competition officers.

It is interesting to note that there are no cartel cases undertaken by competition authorities in CARICOM (except one investigated by the Guyana Competition and Consumer Affairs Commission (CCAC) that was challenged in court by the investigated firms and the commission lost the case). The problem is the difficulty in detecting cartels, given the small size of the business community, and their close relationship and family ties. It is difficult to use circumstantial evidence such as rivals meeting since they always socialize amongst themselves. And, their loyalty is to the group, so no one would whistle blow. However, the same constraints do not apply to detecting cartels engaged in bid rigging in public procurement because the tools available to procurement officers and competition commissions do not depend on whistleblowing, or circumstantial evidence. The evidence can be in plain sight in the bids submitted by firms. Yet, there are no bid rigging cases.
The experiences in Trinidad and Tobago give insights into how crucial it is for the authorities to enforce against corruption and bid rigging.

**CORRUPTION AND BID RIGGING IN TRINIDAD AND TOBAGO**

It is an unfortunate truth that corruption is endemic in the society of Trinidad and Tobago (T&T). The country currently ranks no. 40 on the Global Corruption Barometer, along with Timor-Leste, Morocco, Burkina Faso, Benin, India, and Guyana. Public procurement presents a feeding trough for corrupt businessmen, high level technocrats, and politicians to steal from the public purse. Indeed, T&T has been cursed by its oil riches because once oil rents began to flood the national treasury in the mid-1970s, theft and corruption followed. It was in protest of this blatant corruption that the population ousted the entrenched government (since the 1950s) and voted in a coalition government in 1986. There was a lull during the period of the coalition government, with oil prices down and a more honest government in government; but once this government was replaced and oil prices went up, the price of oil. The new government came in just as the price of oil went up, and so monies flowed into the Treasury once more, and with it, the theft and corruption followed. The government did not want to be constrained by the burdensome prospect of big spending. The government did not want to be constrained by the burdensome bureaucracy and inefficiency of the Central Tenders Board, and so they created Special Purposes Companies (SPCs) to manage the tendering, grant of contracts, and management of large new projects. The principal function of the SPCs was to undertake projects on behalf of specific government agencies and ministries via contracts, and the companies were paid management fee out of project funds.

One such project was undertaken by the SPC, the Urban Development Corporation of T&T. The project was the building of a housing complex in a poor neighborhood. Poor decision making led to flood the national treasury in the mid-1970s, theft and corruption followed. It was in protest of this blatant corruption that the population ousted the entrenched government (since the 1950s) and voted in a coalition government in 1986. There was a lull during the period of the coalition government, with oil prices down and a more honest government in government; but once this government was replaced and oil prices went up, the price of oil. The new government came in just as the price of oil went up, and so monies flowed into the Treasury once more, and with it, the theft and corruption followed. The government did not want to be constrained by the burdensome prospect of big spending. The government did not want to be constrained by the burdensome bureaucracy and inefficiency of the Central Tenders Board, and so they created Special Purposes Companies (SPCs) to manage the tendering, grant of contracts, and management of large new projects. The principal function of the SPCs was to undertake projects on behalf of specific government agencies and ministries via contracts, and the companies were paid management fee out of project funds.

From 2005 the government initiated huge projects, with many unneeded buildings and massive cost over-runs became a signal feature of that regime. One such project was undertaken by the SPC, the Urban Development Corporation of T&T. The project was the building of a housing complex in a poor neighborhood. Poor decision making led to two multi-storey units falling apart soon after construction, and the $28 million towers were earmarked for demolition. They were part of a larger project, which was originally budgeted at $67 million and then rose to $90 million. The CEO of UDeCOTT, Calder Hart (a Canadian Citizen) ruled the roost at the company, and no one could challenge him (finding of the Commission of Enquiry 2010). He was subsequently held responsible for the poor choice of site for the construction, even though he was warned that the land was prone to slippage. Dr Keith Rowley (the present PM) gained prominence as one of the strongest critics of those lapses, and that led to his removal from the Cabinet in April 2008. Calder Hart resigned and left with his family for...
Contributions from Experts

The Report of a Commission of Enquiry into the construction sector (2010) was damning. It revealed that each SPC practiced own procurement rules, there was no consistency. Procedures lacked transparency, there was excessive and unfair use of sole selective tendering powers, misuse or manipulation of tender and tender review procedures leading to inappropriate and potentially corrupt award of contracts, and serious issues regarding financial administration of one project (but this was true of many) which are ‘nothing short of scandalous’. There was poor project management leading to waste and huge cost overruns on virtually all projects & unfinished projects, with no accountability/penalty for delays, no feasibility studies were done for all but one project and there was no rationale for the projects. Finally, audited accounts were not published (The Securities Commission fined the Housing Development Co. for failure to publish accounts 2 years in a row). Yet, the corruption continued unabated.

Another example is a case currently in court brought by the Anti-Corruption Investigation Bureau against a former Minister of Government, four contractors, and senior employees of the SPC, Estate Management and Business Development (EMBD), for a fraudulent scheme in awarding contracts and payments, collusion amongst five contractors, fraudulent payments, and other corrupt acts including bid-rigging and cartel-like behavior (2015). Court documents revealed that road repair projects were concocted without justification, awarded through selective tendering, and the line Minister’s close acquaintances invited to bid. Further, evidence found on the computer of one of the companies showed that bidding companies colluded with each other to predetermine who would win which road project. The companies submitted fraudulent claims for materials not used or work not done. The timing is also instructive, that this project was concocted six weeks before the general election in 2015 and the Minister got Cabinet approval for a sum of $330,375,000. Claims were submitted to the Ministry of Finance and payouts were made before the election; then the amount was arbitrarily inflated by a senior official of the state company to $416,340,445 with no justification. The party lost the election and the opposition came to power and the cycle of investigations of the other party resumed. According to the forensic investigation, a paper trail revealed that “about $50m of unexplained payments has been identified to companies or individuals that appear to have no commercial connection to the companies.” Paper trail of kickbacks lead to a high level employee of EMBD and the Minister is implicated but this is still in court.

A third example is even more alarming (because it involved criminal gangs), involving a Sports project by the Sports Company of T&T, another SPC. According to the Prime Minister (2014), this programme was conceptualized and formulated as part of a comprehensive programme to try to roll back the tide against criminals and criminality in our country. It was specifically focused on saving the lives of young men who needed to be protected from the criminals who routinely preyed on them and helping to shape positive futures for these young people. Following concerns about alleged criminal infiltration into and irregularities in Life Sport, the Prime Minister ordered an audit, removed Life Sport from the Minister’s portfolio and placing it under the National Security Ministry.

The 54-page audit report from the Finance Ministry’s central audit team concluded there was poor monitoring and control of the programme by the Sport Ministry, there may have been breaches of the Proceeds of Crime Act—and police information suggested criminal elements may have supervised and co-ordinated Life Sport. The auditors’ report noted widespread breaches of proper procurement practices, that Cabinet approval was not strictly adhered to and that people at the coordinating level may have been involved in criminal activity. Also noted were several instances of fraudulent activity by suppliers to the programme, that there may have been widespread theft of equipment, and that exorbitant and questionable payments were made in several instances. The Audit Committee also raised questions regarding possible complicity by officers of the ministry, given the widespread nature of the breaches.

Because of this level of corruption and mismanagement that siphoned monies out of the Treasury, a civil society group was formed which included the following: The Joint Consultative Council for the Construction Industry; The T&T Chamber of Industry and Commerce; The Manufacturing Association; The T&T Transparency Institute; The American Chamber of Commerce; the Federation of Independent Trade Unions and NGOs. The group worked on producing a draft procurement bill to reform the institutional structure and procedures governing public procurement. The government refused to entertain the draft bill and so the group took it to the opposition party which subsequently won...
the election in 2011. The bill was finally taken to parliament and passed in December 2014 (Act No. 1 of 2015). The key changes contained in this Public Procurement and Disposal of Public Property Act was the creation of an Office of Procurement Regulation (OPR) to provide independent oversight of all government contracts and investigating complaints brought to them, or initiating investigations based on public outcry. The Regulator is empowered to render penalties. This removed the very institutional structures that facilitated the level of corruption in the past, involving government ministers and cabinet, and even the Prime Minister at one point (he was later exonerated by a court, not for his innocence, but because the Integrity Commission seemed to have unfairly targeted him, according to the local Judge).

The Act brought under the supervision of the OPR all contracts undertaken by SPCs, including government to government (G2G) contracts, and contracting of foreign and local private entities. It brought transparency and fairness to the procurement process. And it allowed for whistleblowers to come forward to the OPR with information of corruption and bid rigging. The Act No. 1 of 2015 was not proclaimed because the OPR had to be established and guidelines issued and passed by Parliament before proclamation. The Act No. 1 of 2015 was not proclaimed because the OPR had to be established and guidelines issued and passed by Parliament before proclamation. According to the Chairman of the OPR, proper procurement practices could save this country conservative $5.2 billion a year (US$776 million: a large complex mangrove system spanning 130 hectares which are essential to marine life there acting as a feeding ground and a nursery. At this Ramsar site alone, there are more than 240 species of plants and animals that depend on this wetland. Conservation groups and watchdogs of the government in civil society challenged this proposed project and succeeded in shutting it down.

However, there is now a reversal of this progress. The party that voted the Act into being lost the election later that year and the opposition was returned to government (the same party that refused to entertain the procurement bill in 2010). This government took the opportunity to amend the Act since it was awaiting proclamation. The government introduced an Amendment to the Act No. 1 of 2015 which removed Section 7, the provisions on G2G and PPP contracts, and excluded procurement of medical, auditing, and legal services, and returned these tendering and contract awards to oversight by the line minister and cabinet, reinstating the very institutional framework that facilitated wanton corruption and bid rigging. (The legal services arena is alive with controversy from the allegations of billion-dollar fraud, now before the Courts, in which former AG Anand Ramlogan SC and Gerald Ramdeen are charged). The finance minister, in presenting the Amendment to the Act No. 1 of 2015, argued that many governments reserved oversight of G2G and PPP contracts to elected members and not to unelected officials. This was necessary for government to have flexibility in negotiating such contracts. The Amendment to the Act No. 1 of 2015 was passed in parliament in December 2020 and awaits proclamation. Civil society is still trying to prevent the proclamation of the Amendment to Act No. 1 of 2015. The OPR is only empowered to investigate within the confines of the Act, and so the amendment will remove the most important contracts exposed to the biggest corruption from its jurisdiction.

In short, what we are seeing is the government, insist on transparency, and challenge any projects that are not transparent and does not meet the requirements of needs assessment and environmental planning approval. An example of such opposition by civil society groups is protests against the proposed Sandals Hotel in Tobago. Civil society demanded access to the Memorandum of Understanding between Sandals and the government, and a leading member of civil society took the government to court to gain access to documentation under the Freedom of Information Act and won the case. Civil society’s protests were so insistent that Sandals abandoned the project, citing negative publicity. The area that was proposed for the hotel site, The Buccoo Reef Bon Accord Lagoon Complex, is a Ramsar site which was established in 2006 since it was recognized as a wetland of international importance. This area has the largest population of seagrass in Trinidad and Tobago (approximately 50 hectares) and a large complex mangrove system spanning 130 hectares which are essential to marine life.