

**Directorate for Financial and Enterprise Affairs
COMPETITION COMMITTEE**

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ANNUAL REPORTS ON COMPETITION POLICY DEVELOPMENTS IN PERU

-- 2014 --

27-28 October 2015

This report is submitted by Peru to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 27-28 October 2015.

JT03399494

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ANNUAL REPORT ON COMPETITION POLICY 2014

- PERU -

Executive Summary

1. 2014 was an important year for the consolidation of the activities of the Free Competition Commission of Indecopi and its Technical Secretariat, not only in relation to their regular activities of monitoring markets and prosecuting infringements to the Competition Act (Legislative Decree 1034), but also in terms of activities to promote competition, publishing “advocacy reports” and starting to develop a Leniency Program. The goal of these activities has been to enhance the authority response in fighting against cartels and to abrogate State barriers that unjustifiably deter competition.

2. Particularly, in 2014 Indecopi has almost doubled the number of dawn raids performed in comparison to 2013 and has taken its first steps to develop a Leniency Program. It has also started several proceedings in very important markets (transport, hydrocarbons and health).

3. As for concluded cases, the Commission has fined cartels in the engineering and transport sectors. Its decisions in the cement and car insurance markets have been confirmed by the Tribunal. Overall fines have held higher than previous years. Mergers in the electricity sector (the only where a merger control system exists) have also been unconditionally approved.

4. Also worth noting are the advocacy efforts of the Technical Secretariat in the notary services and driving tests markets. These represent a shift in the activities of the competition authority, through 2013 almost exclusively committed to enforcement efforts.

5. Though the budget and personnel have been increased only slightly, the Technical Secretariat and the Commission are notwithstanding strengthening their efforts to fight against cartels and to promote competition through advocacy reports.

1. Enforcement of competition laws and policies

6. Antitrust authorities in Peru are the Defense of Free Competition Commission (the Commission) and its Technical Secretariat. The Technical Secretariat is in charge of carrying out preliminary investigations against undertakings suspected to have committed an infringement to Peruvian Competition Act (Legislative Decree 1034) and, when enough evidence is gathered from these investigations, initiating administrative procedures against such undertakings. To fulfill these tasks, the Technical Secretariat can request to the Commission to issue provisional injunctive reliefs. Additionally, it can conduct dawn raids within the premises of undertakings in order to gather evidence of anticompetitive conducts.

7. The Commission is an autonomous legal body whose primary duty is the identification and sanction of anticompetitive conducts. The Commission can also issue injunctive measures in order to restore competition in affected markets. Following the recommendations of the Technical Secretariat, the Commission can suggest other public authorities regarding the implementation of measures to promote free competition, such as the elimination of entry barriers or the application of pro-competitive regulations (*advocacy efforts*).

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

1.1.1 *Summary of activities of competition authority*

a) Dawn raids

8. An important tool used by the Technical Secretariat to fight cartels is dawn raids. The goal of such raids is to avoid companies from destroying important evidence about cartel agreements. It is important to mention that the Technical Secretariat will only perform dawn raids if it already has some preliminary evidence of an irregular behavior in the market.

9. In 2014, Technical Secretariat increased the number of dawn raids performed. Indeed, in 2011 and 2012 only six (6) companies were raided, while twenty-seven (27) businesses were subject to dawn raids in 2013 and forty nine (49) were raided in 2014. This can be seen in the chart below.

Chart 1
Dawn raids [2011 – 2014]

| | 2011 | 2012 | 2013 | 2014 |
|--|----------|-----------------------------|---|--|
| City and number of companies raided | Lima (6) | Lima (1) Chachapoyas (5) | Lima (17) Huancayo (3) Piura (5) Tacna (2) | Lima (13) Chiclayo (10) Chimbote (8) Piura (7) Trujillo (11) |
| Total number of companies | 6 | 6 | 27 | 49 |

Source: Indecopi

b) Leniency Program

10. The most important example of the commitment of Indecopi to strengthen its system to promote and protect the competition is the recent efforts taken towards the establishment of a simple, transparent and effective Leniency Program. As known, Leniency programs around the world (Immunity Program, Effective Collaboration) allow cartel members to request the competition authority a total exemption from the fine that would have been imposed, as long as he is the first to apply for this benefit and cooperate actively during the prosecution of other offenders until completion of the administrative procedure. Such tool has demonstrated significant efficacy in different jurisdictions, and so is under implementation by the Technical Secretariat and the Commission. Accordingly, Leniency Guidelines are being developed, with support of the World Bank, to provide better guidance to individuals or companies that are potential applicants to this program.

1.1.2 *Description of significant cases*

a) Initiated cases

11. The starting of administrative procedures is a direct demonstration of the investigation activities undertaken by the Technical Secretariat. The procedures are initiated when there is enough evidence to support a case against the infractors. Indeed, the Technical Secretariat will initiate a procedure only when there is a reasonable evidence to support an anti-competitive hypothesis.

12. The relevance of the procedure started could be appreciated by considering the important markets involved. Accordingly, it is important to mention that the evidence found in dawn raids has allowed the Technical Secretariat to initiate the following administrative procedures:

- International public transport Tacna Arica

13. In relation with the administrative procedure regarding public transport between border cities of Tacna (Peru) and Arica (Chile), evidence showed that Peruvian and Chilean drivers of public transports known as “*colectivos*” have possibly engaged in anticompetitive conducts in order to fix the price of their services (transportation of passengers between Tacna and Arica) and to restrict the number of *colectivos*’ services. The evidence also showed that one hundred and thirty two (132) drivers, Peruvians and Chileans, might have participated in this infringement, which could have harmed 5 million people who mobilize annually among these two cities.

- LPG for vehicles

14. In May 2014, the Technical Secretariat initiated an administrative procedure against nineteen (19) distributors of Liquefied Petroleum Gas (LPG) for vehicle use, for and alleged cartel to increase the price of that product in Chiclayo and Chimbote. The period investigated in these case goes from June 2012 to February 2014. In the regions of La Libertad and Ancash, to which the cities mentioned above belong to, LPG vehicular consumption accounted for 17.52% of domestic national consumption in 2014, according to information of Osinergmin, the Peruvian gas regulator.

- Hemodialysis

15. In September 2014, the Technical Secretariat initiated an administrative procedure against thirty nine (39) private hemodialysis centers for an alleged price-fixing agreement to increase the value of hemodialysis service in public tenders issued by EsSalud, the Peruvian Social Security Service. EsSalud provides hemodialysis services to kidney failure patients through their care networks. It also provides these services through private hemodialysis centers. To do so, it opens public tenders to hire these private centers every year, thus ensuring timely treatment of patients with chronic kidney disease (in an advanced phase). Public tenders involving private hemodialysis centers account for US\$ 29 million per year approximately. The practice investigated is mainly about two types of anticompetitive conducts by the private hemodialysis centers: the alleged agreement on the value of the service and the concerted abstentions to participate in public tenders, as a mechanism to increase the price of each treatment of hemodialysis.

b) Concluded cases

16. Regarding the cases of anti-competitive behavior concluded by the Commission in 2014, the following can be mentioned:

- Anticompetitive Recommendations in Engineering services:

17. In 2014, the Commission fined the Association of Professional Engineers of Peru (Colegio de Ingenieros del Perú - CIP) and the Peruvian Association of Consulting (Asociación Peruana de Consultoría - APC) with approx. US\$ 2,533,333 for performing anticompetitive recommendations affecting the costs of the works executed by Provías Nacional (a bureau of the Ministry of Transport and Communications) on major highways.

18. The Commission determined that CIP and APC issued anticompetitive recommendations to its members in order to require Provías Nacional to increase staff and management rates, in the procurement

of services for the development of definitive studies and supervision of works. In public procurements concerning road projects, the definitive studies are aimed at establishing the main features that will be developed in such projects. Through supervision, the bureau in charge ensures that the development of the project is done according to contractual terms.

19. The staff rates (salaries of engineers) and management rates (indirect costs of engineering consultancy services) are two components that collectively represent 50% of the reference values of hiring engineering services. The Commission also ordered CIP and APC to refrain from disseminating documents establishing anticompetitive recommendations. It also ordered CIP to abrogate any provisions set forth in its Code of Ethics and its Statute that may distort free pricing by the consultants and engineering professionals.

20. This case is an example of the application of the Competition Act to actions implemented by professional associations which, as consequence of their importance in the market, can distort competition between its members. It also denotes the interest of the Commission to analyze the conditions of competition in professional services markets, on which it has been conducting further studies and research.

- Cartels in land transportation of passengers

21. Land transportation services are among the most important for Peruvian population. Permanently, the Technical Secretariat oversees how these services are offered in major cities. As a consequence of this work, in 2014 the Commission has sanctioned price fixing cartels in land transportation services in Puno and Ancash.

22. In Puno, two cartels were discovered. The first one involved an agreement between four companies from 2007 to 2010, to raise fares on the route between Juliaca, Pucara and José Domingo Choquehuanca (cities in region of Puno). These companies were sanctioned with fines of US\$ 14,250, approximately.

23. The second cartel involved an agreement between six companies in 2011, and an anticompetitive recommendation issued by two representatives of transport associations, in order to increase transport prices in the Puno-Juliaca route. These companies were sanctioned with fines of US\$ 103,183, approximately.

24. In the city of Huaraz, in the region of Ancash, a cartel between two companies to increase prices in the Taricá-Huaraz-Puente Bedoya route was detected in 2012. These companies were fined with US\$ 57,659, approximately.

- Confirmed cases

25. The activity of the Commission can be measured according to various criteria such as the number of confirmed cases by the second administrative instance. Following, the cases confirmed by the Tribunal are a reference of the activity of the Commission in defense of free competition:

- Cement

26. In February 2013, the Commission fined several firms for agreeing a vertical restriction in the cement market. As a result of a successful dawn raid, the Technical Secretariat obtained evidence of a vertical agreement among a quasi-monopolist cement company (dominant in the central region of Peru) and its three only distributors, aimed at obstructing the entrance of a new competitor in that market by closing the distribution channel downstream. The obstruction (boycott) was implemented through refusals

to deal and refusals to concede commercial benefits to all distributors who sold the competitor’s cement. The Commission imposed total fines for more than USD \$ 2 million to the companies and its directives involved in the infringement. These fines were confirmed by the Tribunal in 2014.

- Car insurance

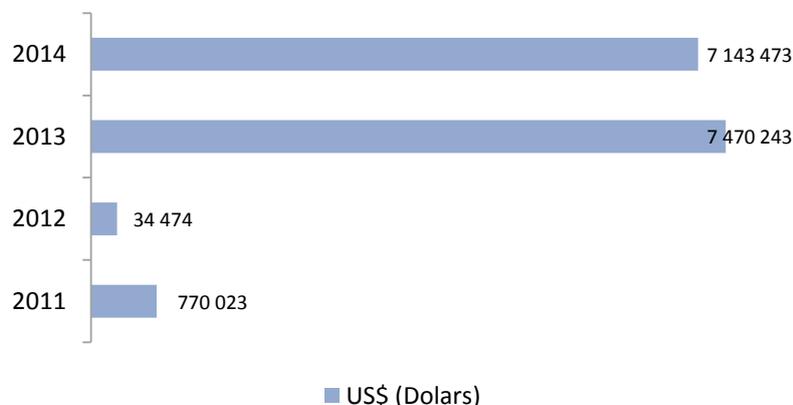
27. The Commission sanctioned an association, eight insurance companies and fifteen individuals for incurring in concerted practices for setting minimum insurance premiums corresponding to segments of basic and complete insurance of private vehicles. The Tribunal confirmed that the Commission, through circumstantial evidence, had clearly established the existence of an illegal conduct and, therefore, decided to confirm the liability of all the sanctioned parties. The fines imposed by the Tribunal rose to US\$ 2,616,705, approximately.

c) Fines imposed

28. The administrative efficiency has been complemented with greater fines imposed by anticompetitive conduct penalties. For this reason it is essential for the Technical Secretariat to identify and properly calculate the profits obtained by infractors and to recommend the Commission to impose a fine equal to or greater than those benefits.

29. Under these assumptions, the amount of the fines imposed by the Commission or those confirmed by the Tribunal has risen steadily in recent years, as can be seen in the following chart:

Chart 2
Evolution of fines imposed by the Commission and Tribunal



Source: Indecopi

1.2 Mergers and acquisitions

1.2.1 Approved mergers

30. In 2014, two requests for merger authorization were approved, after identifying that such mergers would not facilitate the exercise of market power or the cartelization of the applicant companies in the analyzed markets. In the first case, the Commission approved without conditions Kallpa’s Generation application for the acquisition of “Las Flores” power plant owned by Duke Energy Egenor. The value of the transaction amounted to US\$ 114 million. In the second case, the Commission approved without

conditions the application of Enersis S.A. for the acquisition of 100 % of the shares of Inkia Holdings (Acter) Limited. The value of this transaction amounted to US\$ 413 million.

1.2.2 *Observed merger*

31. The Commission rejected a request for authorization of the acquisition of a hydroelectric power plant, since the applicant did not specify the mode of operation whereby the acquisition of this power plant would be made, that is, if it would be done through a purchase of productive assets or a merger with another company. According to the Commission, prior to the notification of the transaction companies must decide the operating type sought to be executed. The goal of this requirement is to have clear and specific information about the act of concentration to be carried out, in order to determine if the transaction meets the thresholds required by the law, if there is any notification exception, and also possible effects on related markets.

2. Resources of competition authorities

2.1 *Resources overall*

2.1.1 *Annual budget*

32. The following table presents the total budget of the Competition Commission and its Technical Secretariat. It also shows the total budget of the branch of the Tribunal of Indecopi in charge of reviewing appeals to decisions of the Commission, though it is worth to mention that the Tribunal also reviews appeals in proceedings on advertisement, bureaucratic barriers and antidumping.

33. Finally, this table 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).

Table 1. Annual budget of branches of Indecopi related to competition activities
Table 1. [2013 – 2014]

| Branches | 2013 | 2014 |
|--------------------------------------|--|--|
| Technical Secretariat and CLC | 2 056 955 PEN 734 626 USD | 2 368 675 PEN 789 558 USD |
| Tribunal (Competition branch) | 2 076 510 PEN 741,610 USD | 2 335 556 PEN 778 518 USD |
| Office of the Chief Economist | 1 243 433 PEN 444 083 USD | 1 832 221 PEN 610 740 USD |
| Indecopi Total | 5 376 898 PEN 1 920 319 USD | 6 536 453 PEN 2 178 817 USD |

PEN = Peruvian Nuevos Soles (local currency)

Source: Indecopi

2.1.2 *Number of employees (person-years)*

34. The following table includes information of employees from the Technical Secretariat and the Commission, the Office of the Chief Economist, the Legal Department and the Tribunal of Indecopi (Competition branch). It also includes personnel that work partial-time for the authority, such as Commissioners and Members of the Tribunal.

**Table 2. Employees of Indecopi related to competition activities
[2013-2014]**

| Employees | 2013 | 2014 |
|-----------------------|------|------|
| Economists | 22 | 23 |
| Lawyers | 19 | 20 |
| Support staff | 3 | 4 |
| Indecopi Total | 44 | 47 |

Source: Indecopi

2.2 *Human resources applied*

35. Considering that in Peru, a merger control system for markets doesn't exist, except for the electricity sector, the human resources are not differentiated by the type of enforcement (*ex ante* or *ex post*) they are applied to.

**Table 3. Employees of Indecopi related to competition activities by application
[2013 – 2014]**

| Employees | 2013 | 2014 |
|---------------------------------|------|------|
| Enforcement and Advocacy | 36 | 38 |
| Market assessment | 5 | 5 |
| Indecopi Total | 41 | 43 |

Source: Indecopi

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

3.1 *Competition Advocacies*

36. Comparative experience has shown that competition advocacy is an important instrument to promote competitive markets. Through advocacies, the competition agency issues recommendations to other public entities aimed at improving the competitive environment of markets, seeking to eliminate those factors that limit competition. Therefore, in 2014, the Commission and its Technical Secretariat have undertaken efforts to introduce advocacy activities on the agenda of Indecopi. The following efforts could be highlighted:

- Notary services¹

37. The study identifies opportunities to enhance competition in notary services. Among other measures, it is proposed to incorporate additional criteria other than population density for the creation of notarial slots, such as commercial traffic or economic activity of the locality. It also proposes to abrogate provisions allowing notaries to control the process of admission to the notarial function and restrictions in advertisement. For the Commission, some of these measures should be considered as temporary, because it is necessary to promote a free access system to the notarial function and allow the market to determine the admission of new notaries by itself, through the interaction of supply and demand.

¹ Available at:
http://www.indecopi.gob.pe/RepositorioAPS/0/2/par/ABOG_001_2014_ST_CLC/ABOG_001_2014_ST_CLC.pdf

- Driving tests in Lima²

38. This second advocacy effort identifies those restrictions or requirements that limit the entry of new competitors into the driving test service market in the Lima region. The driving test service is one of the main requirements to obtain a driving license and the number of vehicles in Lima has increased significantly in the last 2 decades. However, since 1991, the Peruvian Touring Automobile Club (a private enterprise) is the only provider of such service. For these reasons, the Technical Secretariat and the Commission have performed an assessment of the applicable regulation and have issued recommendations to promote greater competition in this sector.

3.2 Opinions on Congress Bills

39. As part of its efforts to promote competition, the Technical Secretariat has issued in 2014, individually or in collaboration with other areas of Indecopi, several reports regarding legislative proposals that could affect -positively or negatively- the competitive development of various sectors of the Peruvian economy.

40. For example, through Technical Report 010-2014/ST-CLC-INDECOPI, the Technical Secretariat issued an opinion concerning Bill 1061/2011-CR, aimed at imposing jail to individuals involved in anti-competitive vertical restrictions. The Technical Secretariat was against this measure, as such practices are not considered among the most harmful anti-competitive infringements. Moreover, they are subject to a relative prohibition (due to the efficiencies they can bring to the market). This does not mean that the Technical Secretariat is against the criminalization of the most harmful anti-competitive behavior such as horizontal cartels for price fixing or market allocation (subject to an absolute prohibition), as is indicated in the report.

41. Also, through Technical Report 029-2014/ST-CLC-INDECOPI, issued jointly with others areas of Indecopi, the Technical Secretariat disagreed with Bill 2848/2013-CR, which proposed the creation of a regulatory organism to fix prices of drugs. The Bill lacked to establish an appropriate balance between an onerous and restrictive measure such as price controls and the potential benefits of the proposal to the health system. It also failed to consider that such measure could generate drug shortages and discouragement for the entry of new competitors to the sector.

3.3 Competition condition reports in port services

42. In addition to the activities explained in this report, the Commission and its Technical Secretariat have also assessed the competition conditions of services provided at the Callao Port Terminal. The opinion of Indecopi is a determinant input for the regulator Ositran (Peruvian Port Regulator) when evaluating the need to fix prices for several port services. The prerogative of the Commission is included in the concession contract signed by the Peruvian government and APM Terminals (the company in charge of the administration of the Multipurpose North Terminal at Callao Port).

43. As this type of analysis requires a coordinated action between Ositran and Indecopi, both public entities have signed an inter-institutional cooperation agreement on June 16, 2014 in order to simplify the processing of requests submitted by APM Terminals.

² Available at: http://www.indecopi.gob.pe/RepositorioAPS/0/2/par/ABOG_002_2014_ST_CLC/ABOG_002_2014_ST_CLC.pdf