

Unclassified

DAF/COMP/AR(2016)48

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

18-Oct-2016

English - Or. English

Directorate for Financial and Enterprise Affairs
COMPETITION COMMITTEE

DAF/COMP/AR(2016)48
Unclassified

ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN PERU

-- 2015 --

29-30 November 2016

This report is submitted by Peru to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 29-30 November 2016.

JT03403030

Complete document available on OLIS in its original format

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

English - Or. English

TABLE OF CONTENTS

Executive Summary.....	3
1. Changes to Competition Law	4
1.1 Summary of new legal provisions of competition law	4
2. Enforcement of Competition Law	5
2.1 Action against anticompetitive practices, including agreements and abuses of dominant positions	5
3. Resources of Competition Authorities.....	8
3.1 Resources overall.....	8
3.2 Human resources applied.....	9
4. Summaries of or References to New Reports and Studies on Competition Policy Issues.....	9
4.1 Competition Advocacies.....	9
4.2 Competition condition reports in port services.....	11

Tables

Table 1. Annual budget of branches of Indecopi related to competition activities [2013-2015]	8
Table 2. Employees of Indecopi related to competition activities.....	9
Table 3. Employees of Indecopi related to competition activities by application	9

Figures

Figure 1. Dawn raids [2011-2015].....	6
---------------------------------------	---

EXECUTIVE SUMMARY¹

1. The year 2015 was particularly important for the defence of free competition in Peru. In fact, it will be remembered not only by the Amendments introduced to the Legislative Decree 1034, the Peruvian Competition Act (hereinafter, the Act), in order to strengthen the faculties of the Peruvian agency for investigating cases of collusion, but also by the launch of important sanctioning proceedings in relevant markets and the diffusion of the benefits of the Leniency Program in the country.

2. All these changes occurred in a context where the Peruvian agency decided to vary the focus of its activities. Now, the priority is to persecute cartels and our resources are addressed to accomplish this goal. Complementarily, we select the investigated markets according to their relevance for consumers, that are those that could have a national impact and markets whose products are part of the national basket of goods, due to the important number of consumers affected.

1 The Annual Report was elaborated by the Technical Secretariat of the Commission for the Defense of Free Competition (hereinafter, the Technical Secretariat).

1. Changes to Competition Law

1.1 Summary of new legal provisions of competition law

3. The Legislative Decree 1205, published on September 23rd 2015, approved a set of amendments and additions to the Act. At the request of Indecopi, the law's focus is to strengthen and promote the effectiveness of the system of defence of competition system in Peru.

4. Thereby, the amendments introduced aimed the following main objectives: (i) To improve the legal framework in order to combat cartels and (ii) To enforce the rules and powers given to the Commission for the Defence of Free Competition to promote the free development of the competitive process in markets (through the 'competition advocacies').

5. It must be remembered that cartels, as agreements between competitors to fix prices, quantities or other trading conditions, are behaviours that seriously harm consumers and economy in general, because it deprives them from the ability of choosing, holding them into unfavourable trading conditions. Consequently, Legislative Decree 1205 introduced some improvements in the Act for the prosecution of these behaviours, among which we can highlight the following:

- **Extended power to punish "facilitators"**: The Act allows Indecopi to initiate procedures against companies that made up a cartel in addition with the amendment, Indecopi can also initiate procedures against those whose participation in its planning or execution was decisive. For example, Indecopi could fine the company that guarantees the exchange of information and, simultaneously, those who have been monitoring compliance with cartel agreements to punish deviant behaviour. This provision is also applicable to public officials when, exceeding their powers, unfairly promote or facilitate cartels.
- **Strengthened coordination between Indecopi and the Judicial Courts**: It is important to mention that the Technical Secretariat (independent body responsible for carrying out investigations) has the power to access corporate e-mails without a judicial warrant. The Amendment allows Indecopi to seek approval from an administrative judge, instead of a penal one, when Indecopi requires a judicial warrant - for example, to obtain copies of personal e-mails during inspections without warning or to use other ways to lift the secrecy of communications. This change allows for more expediency and effectiveness in the application of the competition law.
- **Commitment to cease**: The mechanism on commitments to a cease has been modified in order to establish a true system of early termination of the procedure. With this amendment, this mechanism is no longer limited to lesser anticompetitive behaviours as it was in the original Act (Legislative Decree 1034). However, each applicant should provide concrete measures to ensure restoration of the competitive process and to revert the negative effects of the infringement. Therefore, these measures will impact positively on consumers.
- **Leniency Program**: The article about the exoneration penalty has been modified. In this regard, according to other countries (Brazil, Mexico, United States, etc.) or the European Union, leniency programs have shown substantial efficacy by allowing the competition authorities to detect and collect evidence of the existence of cartels with effective collaboration of offenders in exchange for granting of benefits in the fines. In Peru, however, the lack of clarity in regulation has limited the success of this mechanism. With this amendment, several of the Leniency Program's features are properly defined, such as the scope of the program, its requirements, stages and deadlines, and the powers of the offices in Indecopi to manage this program.

- **Fines for obstruction:** The experience of the Technical Secretariat and the Commission for the Defence of Free Competition has shown that economic agents believe that fines for noncompliance with reporting requirements or obstruction of the research activities are not sufficiently dissuasive. In this regard, it is preferable and necessary that economic agents comply with the law instead of breaking it. So, with this amendment the fines have increased significantly (up to US\$ 1,166,666, approximately) for unjustified noncompliance with reporting requirements and obstructing the procedures of the Technical Secretariat and the Commission for the Defence of Free Competition, that were before regulated by Article 5 of the Legislative Decree 807.
- **Class action:** The Act allows Indecopi to impose fines but with the amendment, Indecopi can also establish corrective measures to repair the direct and immediate effects resulting from the infringement. This amendment aims to contribute to a competition system whose effects can be reflected on those affected, who would have had to wait for the final resolution of the judicial process to demand compensation for damages (there have not been suits filed to repair consumers nowadays). The amendment gives Indecopi the possibility to sue on behalf of consumers for the reparation of damages caused by a cartel.
- **Advocacies:** Advocacies are recommendations issued by Indecopi to public authorities and its aim is to eliminate barriers or obstacles to the competitive development. In recent years, these efforts have taken on special importance among the functions of the Commission for the Defence of Free Competition. Therefore, according to OECD's recommendations, the amendment establish that the entities, whom the recommendations are addressed, must respond to Indecopi within a period of ninety (90) labour days.

6. Finally, considering the importance of the publicity of the final decisions in a sanctioning proceeding or an investigation, it has been introduced a provision that allows the publicity of the Technical Reports of the Technical Secretariat and the Final Decisions of the Commission for the Defence of Free Competition, once these documents have been notified to the parties.

2. ENFORCEMENT OF COMPETITION LAW

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

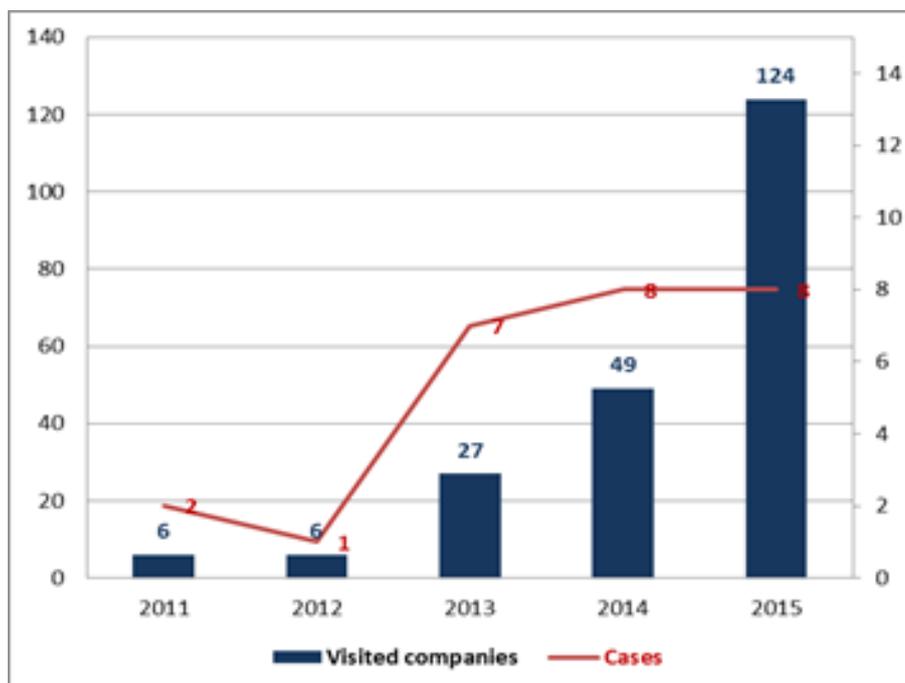
2.1.1 *Summary of activities of competition authority*

- Dawn raids

7. Due to the secrecy of how cartels are planned and the permanent risk that the evidence can be destroyed, inspections without notice to the investigated companies became an important tool to detect such violations.

8. In recent years, the number of dawn raids has significantly increased in Lima (capital city) and in many other cities along the country. In particular, in 2015, the number of dawn raids has increased by 153% compared to 2014 (in 2015, Indecopi performed 124 dawn raids and in 2014 only 49 dawn raids). This increasing was also applicable to the number of cases (preliminary investigation or administrative proceedings). For instance, in 2015, Indecopi visited 124 companies as part of 8 cases, compared to the 6 visited companies of 1 case in 2012 (in 2015, increasing cases represented 700% in comparison with 2012).

Figure 1. Dawn raids [2011-2015]



Source: Indecopi

- Obstruction of activities of competition authorities

9. As part of its activities, the Technical Secretariat and the Commission for the Defence of Free Competition can issue markets studies and advocacies, in order to promote competition in different markets of the economy. In the same way, the Technical Secretariat has the faculty to request information to the investigated parties, under warning of imposing fines for not accomplishing the requirement without justification.

10. In 2014, through the Decision 029-2014/ST-CLC-INDECOPI, the Technical Secretariat has initiated a sanctioning administrative proceeding of anticompetitive conducts against the Chamber of Notaries of Lambayeque and six of its members for the alleged commission of horizontal collusive practices in the notary services market. As part of the proceeding, the Technical Secretariat requested information to other professionals of notary services, in order to gather more evidence about the assessed anticompetitive conduct but ten of all the agents did not accomplish the requirements.

11. As a consequence of that, the Commission for the Defence of Free Competition started proceedings against ten notaries for the alleged unjustified denial to present information required by the Technical Secretariat. At the end of 2015, all those proceedings were opened.

2.1.2 Description of significant cases

2.1.2.1 Initiated cases

12. Performing dawn raids when the authority has the suspicion of collusion supported by using IT forensic tool for the collection and processing evidence is useful to initiate sanctioning proceedings in relevant sectors with convincing evidence of collusion, for example:

- **Liquefied Petroleum Gas (LPG).**- In July 2015, the Technical Secretariat initiated a sanctioning administrative proceeding against the four main enterprises that trade LPG, for an alleged nationwide agreement to fix the price in its bulk and packaged presentations. The agreement would have been developed between 2005 and 2011. The four investigated parties represent 63% of sales nationwide. LPG is used for transport and by industries and households, representing energy source of the 80% of households.

The investigated conduct also included an agreement for not transferring to consumers the reduction of the tax as a benefit established by the government in 2011. The evidence are in emails collected during the performance of dawn raids.

- **International liner shipping market.**- In October 2015, the Technical Secretariat initiated a sanctioning administrative proceeding against eleven liners and six maritime agencies for an alleged agreement to fix rates for international shipping of containerised cargo to or from Peru. The evidence founded is related to a system of coordination between the investigated companies to set rates and surcharges to be applied to transport into routes that connect Asian ports with Peruvian ports. The evidence gathered by the authority comes from meetings, communications and electronic files obtained during dawn raids, as well as requests made during the investigation.

It is important to mention that during the period 2009-2012, maritime transport represented 99% of international trade in Peru (According to the information of the National Customs and Tax Administration). Also, only in 2009, Peru exported more than 300 million US dollars in traditional charge and the amount has gradually increasing.

- **Toilet paper and other products of tissue paper** (paper towels, napkins, handkerchiefs and facials).- In December 2015, the Technical Secretariat initiated a sanctioning administrative proceeding against two main companies in the sector, for alleged price-fixing agreement and other trading conditions from 2005 to 2014. The manufactures of tissue paper products had grown significantly in recent years. The production of toilet paper, paper towels and napkins in 2014 has increased by 36.71%, compared to 2013. The evidence obtained by the Technical Secretariat proceeded from emails and electronic files obtained in inspection, testimonies of individuals, physical agendas, and hotel bills, among others. The investigated parties, Kimberly Clark and Protisa, together hold approximately 88% of the market for tissue products in Peru. These companies operate in several countries in the region.

A fundamental principle of the Peruvian legislation is to protect the identity of the Collaborator and of the information submitted with his application. Despite of this, it should be noted that this is the first case where an applicant of leniency program makes public its identity.

2.1.2.2 Concluded cases

13. The activities of the Commission for the Defence of Free Competition can be measured according to different criteria such as the number of solved cases, the number of confirmed cases and the importance of the assessed markets, among other. Regarding the cases of anti-competitive behaviour concluded by the Commission in 2015, the following can be mentioned:

- **Agreement in bread market in Piura.** In August 2015, the Commission for the Defence of Free Competition decided to sanction to seven individual traders and an enterprise for increasing the price of the bread in the cities of Piura, Catacaos and Castilla from March 2011 to November 2013. This proceeding is relevant due to the bread is a product included in the basket of goods. It is important to mention that this decision is on appeal before the Tribunal of Indecopi.

- **Public Passenger Transportation in the cities of Trujillo and Maynas.** In 2015, the Commission for the Defence of Free Competition decided to impose fines on two association leaders for having incurred in horizontal agreements in the form of anticompetitive recommendation to increase the rates of public passenger transportation in Trujillo and in Maynas. These decisions were not appealed.
- **Cartel in the Notary Services.** In December 2015, the Commission for the Defence of Free Competition fined the College of Notaries of Lambayeque and six members with fines of about 25 thousand US dollars, due to establishing an agreement for not providing notary services, using a template elaborated by the National Institute for Public Registration in Peru. It should be noted that alternative services provided by notaries generally had higher prices than those established in the mentioned template. This decision is on appeal before the Tribunal of Indecopi.

2.1.2.3 Confirmed cases by Judiciary

14. On 15 November 2015, the First Instance of the Judiciary dismissed the allegations of Messer Gases del Peru S.A., Praxair Peru S.A. Linde Gas and Peru S.A. (Formerly Aga SA) against Indecopi for annulling the decision of the Tribunal of Indecopi, which upheld the sanction imposed on these companies by the existence of an agreement to share the Peruvian market in the public procurement issued by Essalud (Peruvian National Health Authority) from January 1999 to June 2004. The confirmed fine is the highest in the history of Indecopi. The offending companies were sanctioned with payment of more than 6 million and a half dollars, approximately. This decision has been appealed before the second instance of the Judiciary.

3. RESOURCES OF COMPETITION AUTHORITIES

3.1 *Resources overall*

3.1.1 *Annual budget*

15. The following table presents the total budget of the Commission for the Defence of Free Competition 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, unfair competition, bureaucratic barriers, non-tariff barriers and antidumping.

16. Finally, this table presents the total budget of the Economic Studies Management, though only a part of its resources are focused of market assessment activities (other activities include supporting to other areas of Indecopi).

Table 1. Annual budget of branches of Indecopi related to competition activities [2013-2015]

Branches	2013	2014	2015
Technical Secretariat and CLC	2 056 955 PEN	2 368 675 PEN	3 207 991.31 PEN
Tribunal (Competition branch)	734 626 USD	789 558 USD	943 526.85 USD
Economic Studies Management	2 076 510 PEN	2 335 556 PEN	3 111 573.42 PEN
	741,610 USD	778 518 USD	915 168.65 USD
	1 243 433 PEN	1 832 221 PEN	1 596 719.80 PEN
	444 083 USD	610 740 USD	469 623.47 USD
Indecopi Total	5 376 898 PEN	6 536 453 PEN	7 916 284.53 PEN
	1 920 319 USD	2 178 817 USD	2 328 318.97 USD

PEN = Peruvian Nuevos Soles (local currency)

Source: Indecopi

3.1.2 Number of employees (person-years)

17. The following table includes information of employees from the Technical Secretariat, the Commission for the Defence of Free Competition, the Tribunal and the Economic Studies Management dedicated on competition issues:

Table 2. Employees of Indecopi related to competition activities

Employees	2015
Economists	21
Lawyers	18
Support staff	3
Indecopi Total	42 ²

Source: Indecopi

18. It is worth to mention that the members of the Tribunal and its Technical Secretariat also review appeals in proceedings on advertisement, unfair competition, bureaucratic barriers, non-tariff barriers and antidumping and not only on free competition proceedings. On the other hand, the Economic Studies Management provides support to other areas in Indecopi, as intellectual property, consumer and competition areas.

3.2 Human resources applied

19. Considering that in Peru, a merger control system for markets does not 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

Employees	2015
Enforcement and Advocacy	37
Market assessment	5
Indecopi Total	42

Source: Indecopi

4. SUMMARIES OF OR REFERENCES TO NEW REPORTS AND STUDIES ON COMPETITION POLICY ISSUES

4.1 Competition Advocacies

20. Promoting competitive markets through the improvement of regulatory framework is one of the lines of the work of the Commission for the Defence of Free Competition.

21. It is important to mention that some recommendations of the advocacy of notary services issued in 2014 were included in the Peruvian legislation. Thus, in 2015, it was included the recommendation to expand the number of notaries by province, in order to consider the criteria of economic traffic in the

2 It is important to mention that the total of employees of Indecopi (42 members) includes personnel working part-time, as Commissioners and Members of the Tribunal (in total: 8 members).
Following is the total of employees of Indecopi divided by areas:
Personnel of the Technical Secretariat and the Commission for the Defense of Free Competition: 26 members.
Personnel of the Economic Studies Management: 5 members.
Personnel of the Tribunal: 11 members.

determination of the number of notarial positions offered in the public tenders and not only the criteria of the population density in the province. This is because there are areas with a small number of citizens, but with intense commercial traffic and thus with a high demand for notary services.

22. In this way, with the issuance of Legislative Decree 1232 on 26 September 2015, the Government incorporated the economic traffic as one of the criteria for determining the number of Notaries. However, it should be noted that there are still unjustified barriers to competition identified by the Commission, such as those that allow notaries to exert a dominant influence on the competition and the selection of new notaries (competitors), or prohibiting advertising in notary services.

23. Finally, as part of its policy of transparency Indecopi has decided to make public the responses to its recommendations through its official website. This will enable the society to know the reasons why it is maintained the status quo by some Entities³.

24. It is worth to mention that Indecopi issued the following two advocacies in 2015: (i) the tender system of routes for mass passenger transport (known as "corridors") and (ii) private health insurance. These recommendations have already shown favourable results for competition.

- Corridors⁴

25. The Commission for the Defence of Free Competition identified that the rules established in the public tender issued by the Metropolitan Municipality of Lima privileged the participation of companies operating on the routes and also facilitated the exchange of information among bidders with the consequent risk of collusion. Therefore, the Commission recommended eliminating such rules in future similar processes.

26. It is important to mention that in May 2016, the Metropolitan Municipality of Lima expressed to the Commission to be willing of eliminating the advantages for future public tenders of corridors and maintaining the secrecy and confidentiality of information on the content of the proposal of the bidders, considering the current regulations.

- Private Health Insurance⁵

27. The last of the advocacies issued by the Commission for the Defence of Free Competition in 2015 has been in the regulated market of health insurance in the private sector. Through this study, the Commission identified several elements in the selection process of the Health Care Providers (EPS, for its acronym in Spanish) that hinder competition.

28. In particular, it is recommended that in every process, employers have to invite to all EPS to participate in the process and also establish measures to facilitate the assessment of health plans by the workers.

3 Available at: <https://www.indecopi.gob.pe/web/defensa-de-la-libre-competencia/abogacias>

4 Available at: <https://www.indecopi.gob.pe/ind-abogacia-portlet/ver-documento?id=7>

5 Available at: <https://www.indecopi.gob.pe/ind-abogacia-portlet/ver-documento?id=8>

4.2 *Competition condition reports in port services*

29. In May 2011, the Peruvian Government granted concession to APM Terminals S.A. (APM) for the operation of the Multi-Purpose Terminal located at the Port Terminal of Callao and to Puerto Amazonas S.A. (Copam) for the operation of the Port Terminal of Yurimaguas-Nueva Reforma.

30. The classifications of the port services, provided by the concessionaire, are established in the Concession Agreement. The classification is made according to the nature of the services in two groups of services: (a) standard services which are basic services to be provided to the ship and cargo and (b) special services which are additional services to be provided to the ship and cargo. Potentially, both can be regulated.

31. The Concession Agreement provides that, prior to the provision of a non-regulated service that, likewise, is not included in the Concession Agreement, the concessionaire is required to obtain the opinion of Indecopi regarding the competitive conditions of that specific service.

32. Before Indecopi examines the case, the Peruvian Regulatory Agency of Transport and Infrastructure (Ositran, for its acronym in Spanish) determines whether a service qualifies as regulated or is included in the Concession Agreement.

33. If Indecopi determines that the evaluated service would be provided under competitive conditions, the concessionaire is entitled to establish prices in a competition-based system; by contrast, if Indecopi determines that the evaluated service would not be provided under competitive conditions, Ositran will set regulated prices for the evaluated service.

34. During 2015 the Commission for the Defence of Free Competition assessed the conditions of competition conditions in the port services requested. In this regard, the Commission determined the following port services would be provided under competitive conditions: refrigerated storage breakbulk, cleaning and/or washing ship's warehouses, waste management, connecting and disconnecting of reefer containers on board the ship, transshipment of breakbulk, and preparation, modification and provision of stowage plans to ship. On the other hand, the Commission determined the port service retirement/placement of artificial separators in the holds of ships would not be provided under competitive conditions.

35. With regards to Copam, due to the fact that it is a new port, all of its services were considered new by Indecopi⁶. The competitive conditions of the standard services (services to the ship, cargo services and passenger service) that would be provided in the Yurimaguas Port Terminal were assessed. According to the analysis, it was determined that such services would not be provided under competitive conditions.

6 The assessment of Copam services was made when the Yurimaguas Port Terminal was not in full functioning which is not usual in this type of analysis; on the contrary, analysis is carried when firms are commercially operating. For such reason, the Commission made an analysis based on the information available.